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## Faultless Guilt: Toward a Relationship-Based Account of Criminal Liability

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## Faultless Guilt: Toward a Relationship-Based Account of Criminal Liability

### Abstract

There is in the criminal law perhaps no principle more canonical than the fault principle, which holds that one may be punished only where one is blameworthy, and one is blameworthy only where one is at fault. Courts, criminal law scholars, moral philosophers, and textbook authors all take the fault principle to be the foundational requirement for a just criminal law. Indeed, perceived threats to the fault principle in the midtwentieth century yielded no less an achievement than the drafting of the Model Penal Code, which had as its guiding purpose an effort to safeguard faultless conduct from criminal condemnation.

Yet notwithstanding its pedigree and predominance, I believe that the fault principle is false: Fault is not in fact necessary for one to deserve blame and punishment. Instead, and as made plain by the broader account of guilt I shall articulate here, one can be blameworthy, and so deserve punishment, even if one committed no element of the crime, and merely because one bears a particular kind of relationship to the criminal. Just when and why relationships, rather than fault, ought to ground criminal liability is what I seek to elucidate here.

To that end, the Article first interrogates the (very few) arguments made on behalf of the fault principle and finds these wanting. The Article then presents cases and examples that illustrate how it is that one could be blameworthy even though one is not at fault. Finally, the Article considers the criminal law implications for individuals who are blameworthy without fault, and it concludes that at least some of these individuals deserve prosecution and punishment.

This conclusion should not only shift our thinking about the conceptual relationships between blame, fault, guilt, culpability, and criminal liability. It should also awaken us to salutary practical possibilities. For the Article's account, we shall see, ultimately provides a way to prosecute individuals who are widely regarded as deserving criminal punishment (e.g., executives at banks responsible for the financial crisis) but whom the fault principle currently places outside of the criminal law's reach.

### Disciplines

Criminal Law | Criminology and Criminal Justice | Law | Legal Theory

## FAULTLESS GUILT: TOWARD A RELATIONSHIP-BASED ACCOUNT OF CRIMINAL LIABILITY

Amy J. Sepinwall\*

### ABSTRACT

There is in the criminal law perhaps no principle more canonical than the fault principle, which holds that one may be punished only where one is blameworthy, and one is blameworthy only where one is at fault. Courts, criminal law scholars, moral philosophers, and textbook authors all take the fault principle to be the foundational requirement for a just criminal law. Indeed, perceived threats to the fault principle in the mid-twentieth century yielded no less an achievement than the drafting of the Model Penal Code, which had as its guiding purpose an effort to safeguard faultless conduct from criminal condemnation.

Yet notwithstanding its pedigree and predominance, I believe that the fault principle is false: Fault is not in fact necessary for one to deserve blame and punishment. Instead, and as made plain by the broader account of guilt I shall articulate here, one can be blameworthy, and so deserve punishment, even if one committed no element of the crime, and merely because one bears a particular kind of relationship to the criminal. Just when and why relationships, rather than fault, ought to ground criminal liability is what I seek to elucidate here.

To that end, the Article first interrogates the (very few) arguments made on behalf of the fault principle and finds these wanting. The Article then presents cases and examples that illustrate how it is that one could be blameworthy even though one is not at fault. Finally, the Article considers the criminal law implications for individuals who are blameworthy without fault, and it concludes that at least some of these individuals *deserve* prosecution and punishment.

This conclusion should not only shift our thinking about the conceptual relationships between blame, fault, guilt, culpability, and criminal liability. It should also awaken us to salutary practical possibilities. For the Article's account, we shall see, ultimately provides a way to prosecute individuals who are widely regarded as deserving criminal punishment (e.g., executives at banks responsible for the financial crisis) but whom the fault principle currently places outside of the criminal law's reach.

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[Note to reader: *The Article's positive account begins in Part IV. Readers pressed for time might read the Introduction and then skip the arguments and preliminaries set forth in Parts I-III.*]

## INTRODUCTION

### A. *The False Fault Principle*

Among the orthodoxies pervading criminal law doctrine and theory perhaps none is so well entrenched as the *fault principle*, which holds that one may be punished only where one is blameworthy,<sup>1</sup> and one is blameworthy only where one is at fault.<sup>2</sup> Courts have deemed the fault

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<sup>1</sup> See, e.g., Stephen J. Schulhofer, *Just Punishment in an Imperfect World*, 87 MICH. L. REV. 1263, 1265 (1989) (reviewing DAVID L. BAZELON, *QUESTIONING AUTHORITY: JUSTICE AND CRIMINAL LAW* (1988) and attributing to Bazelon the view that, in “mainstream academic thinking: “Our collective conscience does not allow punishment where it cannot impose blame.” (quoting BAZELON, *supra* note 1, at 8)).

<sup>2</sup> See, e.g., Stephen J. Morse, *The Moral Metaphysics of Causation and Results*, 88 CALIF. L. REV. 879, 879 (2000) (“[V]irtually all criminal law theorists agree that moral fault is at least a necessary condition of blame and punishment . . . .”); Schulhofer, *supra* note 1, at 1265 (citing Bazelon for the claim that “blame attaches only when the defendant can be found at fault according to prevailing community standards”); James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces That Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429, 1448 (1994) (“Modern scholarly and judicial thought considers fault for every element of an offense to be an essential predicate for blame, responsibility, and punishment.”); cf. Sanford H. Kadish, *Excusing Crime*, 75 CALIF. L. REV. 257, 264 (1985) (“[C]riminal conviction charges a moral fault . . . .”); Antony Duff, *Theories of Criminal Law*, STAN. ENCYCLOPEDIA PHIL. (May 14, 2013), <http://plato.stanford.edu/entries/criminal-law/> (attributing to H.L.A. Hart the view that “those who lack fault should not be liable to criminal punishment”).

The locus of fault in the criminal law has traditionally been in the mens rea or mental state requirement. See, e.g., 2 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* \*20–22 (“[T]o constitute a crime against human laws, there must be, first, a vitious will; and, secondly, an unlawful act consequent upon such vitious will.”); 1 JOEL PRENTISS BISHOP, *A TREATISE ON CRIMINAL LAW* (John M. Zane & Carl Zollman eds., 9th ed. 1923) § 287 (“[T]here can be no crime, large or small, without an evil mind”); Edwin R. Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75, 81 (1908) (“It is a fundamental principle of the criminal law, for which no authorities need be cited, that the doer of a criminal act shall not be punished unless he has a criminal mind.”); *Williamson v. Norris* [1898] 1 QB 7 [14] (Lord Russell, CJ) (UK) (“The general rule of English law is, that no crime can be committed unless there is mens rea.”); *Morissette v. United States*, 342 U.S. 246, 274 (1952) (““It is alike the general rule of law, and the dictate of natural justice that to constitute guilt there must be not only a wrongful act, but a criminal intention.” (quoting *People v. Flack*, 26 N.E. 267, 270 (N.Y. 1891))); Richard Singer & Douglas Husak, *Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer*, 2 BUFF. CRIM. L. REV. 859, 860 (1999) (“This concern with whether the conduct of the defendant

principle the foundational principle in criminal law,<sup>3</sup> and it is a standard fixture in criminal law textbooks and scholarship.<sup>4</sup> Much moral theory

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manifested an evil mind reflects a basic and fundamental principle of justice: Only the blameworthy (guilty), and not the blameless (innocent), should be punished.”).

<sup>3</sup> Prosecutor v. Tadić, Case No. IT-94-1-A, Judgement, ¶ 186, (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999); cf. United States v. Dotterweich, 320 U.S. 277, 286 (1943) (Stewart, J., dissenting) (“It is a fundamental principle of Anglo-Saxon jurisprudence that guilt is personal and that it ought not lightly to be imputed to a citizen who . . . has no evil intention or consciousness of wrongdoing.”). *But cf.* Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511, 1513 n.2 (1992) (“The United States Constitution generally does not require the legislature to incorporate moral culpability principles into its definitions of crimes.”). *See generally* Richard H.S. Tur, *Justifications of Reverse Discrimination*, in LAW, MORALITY AND RIGHTS 259, 274 (M.A. Stewart ed., 1983) (“[T]he ‘fault principle’ is the basis . . . of the criminal law of at least the western world.”); James G. Stewart, *The Accomplice Liability of Arms Vendors* 18 & n.42 (July 11, 2014) (unpublished manuscript) (on file with author) (“If there is anything approaching universal agreement in criminal theory, it might be that only the guilty should be punished.”). By way of evidence, Arenella goes on to cite strict liability crimes. Arenella, *supra* note 3, at 1513 n.2. I distinguish strict liability crimes from the ground of criminal liability. *See infra* text accompanying notes 20–21. At any rate, even Arenella recognizes that the “criminal law does, however, tie legal to moral blame for serious *mala in se* crimes punishable by prolonged confinement or death.” *Id.* at 1513 (footnote omitted).

<sup>4</sup> For textbook articulations of the fault principle, see, for example, WAYNE R. LAFAYE, *PRINCIPLES OF CRIMINAL LAW: CASES, COMMENTS AND QUESTIONS* 100 (1978); JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 325–59 (2d ed. 1960) (claiming that faultless criminal liability is incompatible with any civilized, rational, and moral system of penal law).

For criminal law scholarship insisting upon the fault principle, see, for example, Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 109 (arguing vigorously against strict liability crimes); cf. Singer & Husak, *supra* note 2 (reviewing recent Supreme Court jurisprudence and finding an almost unwavering commitment to a mens rea requirement, which the authors endorse). Other theorists acknowledge, but decry, departures from the fault principle. *See, e.g.*, Phillip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CALIF. L. REV. 1137 (1973); Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91 (1985) (objecting to treating accomplices as no less culpable than principals even when the accomplice makes no causal contribution to the offense); Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751, 1772 (2005) (objecting to the doctrine of joint criminal enterprise because it ensnares innocents along with the guilty); Chantal Meloni, *Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offense of the Superior?*, 5 J. INT’L CRIM. JUST. 619, 633 (2007) (railing against the practice of holding commanders responsible for a crime of their subordinates on the ground that “no one, in fact, can be punished for a wrongful act unless the act is attributable to him”).

One can find the occasional defense of the few criminal law doctrines that depart from the fault principle, but these defenses tend to proceed on deterrence or prudential grounds, and not on grounds of desert. *See, e.g.*, Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 658 (1984) (noting situations like strict criminal liability and *Pinkerton* liability “in which furtherance of the utilitarian goal of deterrence

embraces the fault principle as well.<sup>5</sup> So sacrosanct is the fault principle that apparent threats to it prompted the drafting of the Model Penal Code, whose guiding purpose was to “safeguard conduct that is without fault from condemnation as criminal.”<sup>6</sup> Recent efforts at federal criminal law reform also aim to buttress the fault principle. These have garnered support from both Houses,<sup>7</sup> and both sides of the political aisle,<sup>8</sup> on the unifying thought that, as Gideon Yaffe puts it in his own endorsement of the bills, “[n]o one should be convicted of a crime . . . without evidence of a criminal state of mind.”<sup>9</sup>

Notwithstanding the fault principle’s pedigree and predominance, however, this article contends that the fault principle is false. Now, there is one sense in which this contention is trivially true: our criminal law includes strict liability crimes.<sup>10</sup> The getaway driver for a bank robbery

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disregards principles of culpability”); *cf.* Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307 (2003) (advancing a prudential theory to defend *Pinkerton* liability). *But see* Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965 (2008) (offering a retributive defense of felony-murder).

Further, even those who advance an economic analysis of the criminal law nonetheless recognize the connection between fault and wrong. *See, e.g.*, Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 973 (2001) (“[I]t is, after all, wrongs that give rise to the need for retribution . . .”). Finally, strict liability—or liability without fault—has been decried in the civil context, too. *See, e.g.*, Alan Schwartz, *The Case Against Strict Liability*, 60 FORDHAM L. REV. 819, 821 & n.4 (1992) (arguing that most of the key assumptions of strict liability should be rejected).

<sup>5</sup> *See, e.g.*, Susan Wolf, *The Moral of Moral Luck*, 31 PHILOSOPHIC EXCHANGE 5, 16 (2001) (arguing blameworthiness to be solely a function of faultiness); *cf.* Miranda Fricker, *What’s the Point of Blame? A Paradigm Based Explanation*, 50 NOÛS 165, 170 (2016) (“[A] minimal definition of blame [would] essentially incorporat[e] a kind of judgment: a finding fault with someone for their (inward or outward) conduct.”). *See generally* Arenella, *supra* note 3, at 1518–20 (listing conditions that must be satisfied before an individual deserves moral blame for conduct).

<sup>6</sup> MODEL PENAL CODE § 1.02(1)(c) (AM. LAW INST. 2015); *see also* Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828, 831–32 (1999) (describing the Model Penal Code’s attitude here as a “‘frontal assault’ on strict liability, [and so] requiring culpability for all crimes in the Code”). *See generally* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319 (2007) (discussing the history, influence, and innovations of the Model Penal Code).

<sup>7</sup> *See* Mens Rea Reform Act of 2015, S. 2298, 114th Cong. (2015); Criminal Code Improvement Act of 2015, H.R. 4002, 114th Cong. (2015).

<sup>8</sup> *See, e.g.*, Russell Berman, *Can the Senate Reform Criminal Justice?*, ATLANTIC (Oct. 2, 2015), <http://www.theatlantic.com/politics/archive/2015/10/will-criminal-justice-actually-be-reformed/408538/> (“[T]he introduction of Senate legislation . . . has the backing of key leaders in both parties.”).

<sup>9</sup> Gideon Yaffe, *A Republican Crime Proposal That Democrats Should Back*, N.Y. TIMES (Feb. 12, 2016), <http://www.nytimes.com/2016/02/12/opinion/a-republican-crime-proposal-that-democrats-should-back.html>. *But see* Rena Steinzor, *Dangerous Bedfellows*, AM. PROSPECT (May 11, 2016), <http://prospect.org/article/dangerous-bedfellows>.

<sup>10</sup> For prominent texts describing and critiquing strict criminal liability, *see, for*

can be convicted of murder if one of his co-felons accidentally fires his gun and kills in the course of the robbery.<sup>11</sup> A man can be convicted of mail fraud, even if he was in prison at the time the fraud occurred, so long as it was part of an ongoing conspiracy in which he is involved.<sup>12</sup> A CEO can be convicted of a rodent infestation at one of the company warehouses even if he has taken all reasonable measures to address the infestation.<sup>13</sup> So it is obvious that the fault principle, at least as a positive claim, is mistaken: contrary to the fault principle, one can be criminally liable even if one is not at fault. Moreover, the strict liability these cases evidence is no new feature of the modern regulatory state; instead, it is a fixture of the Ancients' responsibility practice.<sup>14</sup> The problem is that the fault principle has come to so dominate our conception of responsibility that we have lost sight of the rationale for this more expansive responsibility practice.

This Article aims to unseat the fault principle as the exclusive source of guilt and to recover the rationale for non-fault-based liability to blame. Contrary to the fault principle, one can be *blameworthy* even if one is not at fault. Further, one can sometimes deserve prosecution and punishment because one is blameworthy, even though one is not at fault.

On the account to be advanced here, it is *relationships*, rather than fault, that ground blame.<sup>15</sup> Thus, for example, a parent should sometimes

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example, Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731 (1960); Richard G. Singer, *The Resurgence of Mens Rea: The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337 (1989).

<sup>11</sup> See, e.g., *The California Felony-Murder Rule*, Shouse Cal. L. Group, <http://www.shouselaw.com/felony-murder.html> (last visited July 11, 2016).

<sup>12</sup> See *Pinkerton v. United States*, 328 U.S. 640, 646–47 (1946).

<sup>13</sup> See *United States v. Park*, 421 U.S. 658, 673–74 (1975).

<sup>14</sup> See, e.g., WILLIAM J. TALBOTT, HUMAN RIGHTS AND HUMAN WELL-BEING 147–49 (2010) (discussing examples of strict liability from ancient Greece, the Bible, and Japanese culture); cf. GEORGE P. FLETCHER, ROMANTICS AT WAR: GLORY AND GUILT IN THE AGE OF TERRORISM 181–87, 205 (2002) (commenting on ancient notions of pollution, or guilt by association, which are forms of strict liability).

<sup>15</sup> A handful of other scholars have offered non-fault based accounts of guilt. See, e.g., Herbert Morris, *Nonmoral Guilt*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 220, 237–40 (Ferdinand Schoeman ed., 1987) (describing vicarious guilt); KARL JASPERS, THE QUESTION OF GERMAN GUILT 65 (E.B. Ashton trans., 2001) (describing “metaphysical guilt”); Scott A. Anderson, *Rationalizing Indirect Guilt*, 33 VT. L. REV. 519, 521 (2009) (describing survivor guilt). These accounts differ from the one here, however, in part because they do not depend on family or family-like relationships and, more significantly still, because whether one experiences the emotion these authors describe is entirely at one’s discretion. See Amy J. Sepinwall, *Citizen Responsibility and the Reactive Attitudes: Blaming Americans for War Crimes in Iraq*, in ACCOUNTABILITY FOR COLLECTIVE WRONGDOING 231 (Tracy Isaacs & Richard Vernon eds., 2011). By contrast, faultless guilt, as I conceive of it, is normative: it is the emotion one ought to experience in light of one’s relationship to the wrong or the wrongdoer.

be blamed for the wrongs of her child,<sup>16</sup> even if she is not culpable for these wrongs and even if she has parented well.<sup>17</sup> Furthermore, a corporate executive should sometimes be blamed and perhaps even punished for the crimes of his corporation, even if he did not participate in these crimes, and even if he too could not have prevented them.<sup>18</sup> Further, the reasons justifying blame and punishment in these relationship-based cases are not—or not purely—instrumental: instead, in blaming and punishing we give these individuals what they deserve.<sup>19</sup>

Relationship-based criminal liability shares some of the features of strict and vicarious criminal liability but is nevertheless distinct from them.<sup>20</sup> The justification for strict criminal liability lies in concerns for public welfare;<sup>21</sup> the justification for vicarious criminal liability lies in

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<sup>16</sup> For an explanation of the use of gendered pronouns in this Article, see *infra* note 91.

<sup>17</sup> I note here that my position is just the opposite of David Enoch's take on parents' responsibility for crimes of their children. Enoch writes: "I am an individualist about moral responsibility—I believe that you cannot be morally responsible for something simply in virtue of being in a certain relationship with someone else who is morally responsible for that thing . . . ." David Enoch, *Being Responsible, Taking Responsibility, and Penumbral Agency*, in LUCK, VALUE & COMMITMENT: THEMES FROM THE ETHICS OF BERNARD WILLIAMS 95, 97–98 (Ulrike Heuer & Gerald Lang eds., 2012). I address Enoch's account *infra* note 161–62.

<sup>18</sup> The Responsible Corporate Officer ("RCO") doctrine already allows for the prosecution and punishment of an executive for a crime of his corporation to which the executive did not contribute. See *United States v. Dotterweich*, 320 U.S. 277, 279–81 (1943). Still, the doctrine is much reviled. See Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1376–77 (2009) (comparing the RCO doctrine to the ancient legal practice of frankpledge). And, as I have argued elsewhere, attempts to defend the RCO doctrine turn on public policy, and not desert-based grounds. See Amy J. Sepinwall, *Crossing the Fault Line in Corporate Criminal Law*, 40 J. CORP. L. 439 (2015) [hereinafter Sepinwall, *Crossing the Fault Line*]; Amy J. Sepinwall, *Responsible Shares and Shared Responsibility: In Defense of Responsible Corporate Officer Liability*, 2014 COLUM. BUS. L. REV. 371.

<sup>19</sup> Paul Robinson also invokes cases involving parents and corporate executives in his erudite and incisive treatment of vicarious criminal liability. Robinson, *supra* note 4, at 618 & nn.26–27. While Robinson thus studies the kinds of cases discussed here, his interest is analytic, not critical or justificatory. See *id.* at 613.

<sup>20</sup> Strict criminal liability typically requires that the defendant have satisfied the act element of the crime. See, e.g., Steven S. Nemerson, Note, *Criminal Liability Without Fault: A Philosophical Perspective*, 75 COLUM. L. REV. 1517, 1529 (1975); cf. *Robinson v. California*, 370 U.S. 660, 667 (1962) (holding that some willed act is a necessary condition for criminal liability). Liability is strict just insofar as the defendant need not have had, or did not have, a culpable mental state. See Douglas Husak, *Strict Liability, Justice and Proportionality*, in THE PHILOSOPHY OF CRIMINAL LAW: SELECTED ESSAYS 152, 154 (2010). The individuals I contemplate need not have participated in the criminal act at all; in fact, in none of the cases I discuss will the defendant have taken any part in the crime. Criminal liability is for these defendants nonetheless strict because neither their mental state nor the impossibility of their having done anything to prevent the crime is relevant in determining their susceptibility to prosecution and punishment.

<sup>21</sup> The paradigmatic case here is *Dotterweich*. See 320 U.S. 277; see also Francis Bowes



the defendant's own wrongdoing.<sup>22</sup> By contrast, the justification for assigning criminal liability on the account here arises from the nature of the relationship between the defendant and the wrongdoer. More specifically, I shall argue that imputed criminal liability is—in circumstances to be delineated here—conceptually and normatively required by the relationships at issue.

Moreover, it is not just that the individuals in these relationships have reason to think themselves blameworthy. We, impartial members of the moral community, also sometimes have reason to see these individuals as blameworthy, and so too join these individuals in blaming themselves. And sometimes we have reason to treat their blameworthiness as a ground of criminal liability. The work of this Article lies in spelling out when and why, contra the fault principle, this is so.

One might think that the effort to provide grounds for blame independent of fault is worse than worthless, nefarious even. If anything, the criminal justice system is rife with too many prosecutions, too many convictions, and too many people in jail—to say nothing of the problem of over-criminalization more generally.<sup>23</sup> My aim is not to add to this

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Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 68–70 (1933) (discussing public welfare offenses that do not need proof of individual blameworthiness); Francis Bowes Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 720 (1930) (discussing two conflicting interests: first, the important social interest in well-being and security; and second, individual liberty interest of a defendant in not being punished if not morally blameworthy); JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 176 (5th ed. 2009) (describing the view that mens rea may be foregone for public welfare offenses if the penalty is light and does not include imprisonment); Paul H. Robinson, *Moral Credibility and Crime*, ATLANTIC MONTHLY, Mar. 1995, at 72 (discussing how moral authority in a criminal justice system could help reduce violent crime); Stuart P. Green, *Why It's a Crime To Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1610 (1997) (discussing how violation of minor regulatory laws can be socially harmful); Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 779 (2005) (noting that evidence shows more states enacting strict liability and public welfare offenses).

<sup>22</sup> Vicarious criminal liability arises only in cases where the defendant is already engaged in some crime with the others whose additional criminal acts are then imputed to him. *See, e.g.*, *Ferguson v. Estelle*, 718 F.2d 730, 735–36 (5th Cir. 1983) (“[S]hared purpose to achieve jointly held illegal aims is the common thread among the diverse doctrines of vicarious criminal responsibility.”). In the cases under consideration here, the defendant need not be involved in the wrongdoer's crime at all.

<sup>23</sup> *See, e.g.*, DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 3–45 (2008); SANFORD H. KADISH, *The Crisis of Overcriminalization*, in *BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW* 21 (1987); SANFORD H. KADISH, *More on Overcriminalization*, in *BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW* 36 (1987); SANFORD H. KADISH, *The Use of Criminal Sanctions in Enforcing Economic Regulations*, in *BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW* 40 (1987).

state of affairs, which I along with many others deplore.<sup>24</sup> But curiously, the rampant prosecution and punishment does not extend from the street to the suite.<sup>25</sup> For example, we now know that widespread bank fraud underlay the financial crisis of 2008, and yet only a handful of banking executives were prosecuted and not a single one went to jail.<sup>26</sup> And while the U.S. Department of Justice (“DOJ”) announced its new strategy of targeting high-level executives in addressing corporate crime in Fall 2015,<sup>27</sup> it has no desert-based justification to support its “crackdown,”<sup>28</sup> and it has been accused of being “impractical” and out of touch with reality.<sup>29</sup> The Article has its ultimate payoff, then, in an account that would justify the very strategy the DOJ has identified as crucial to redressing organizational crime.

The Article proceeds as follows. In Part I, I clarify some of the key terminology the Article employs. Part II seeks to motivate the claim that fault is not a necessary condition for warranted blame by interrogating

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<sup>24</sup> See, e.g., HUSAK, *supra* note 23; Kadish, *The Crisis of Overcriminalization*, *supra* note 23, at 33.

<sup>25</sup> See, e.g., Robert Kuttner, *America Should Send More People to Prison*, HUFFINGTON POST (Apr. 3, 2015), [http://www.huffingtonpost.com/robert-kuttner/america-should-send-more-\\_b\\_6591730.html](http://www.huffingtonpost.com/robert-kuttner/america-should-send-more-_b_6591730.html) (“The multiple frauds that produced the financial collapse, and cost ordinary people trillions of dollars in lost savings, lost homes and lost jobs, did not result in a single banking executive going to prison.”); Joe Nocera, Opinion, *How to Prevent Oil Spills*, N.Y. TIMES (Apr. 13, 2012), <http://www.nytimes.com/2012/04/14/opinion/nocera-how-to-prevent-oil-spills.html> (suggesting that jail time would be more effective than fines to prevent corporate crimes); 155 CONG. REC. S2315–16 (daily ed. Feb. 13, 2009).

Other commentators have argued for the obverse claim—namely, that prosecutions for street crime should be more like those for white-collar crimes. For example, Sara Sun Beale argues that defendants accused of street crimes should enjoy more of the protections afforded to white-collar criminals. Sara Sun Beale, *Is Corporate Criminal Liability Unique?*, 44 AM. CRIM. L. REV. 1503 (2007). *But see* Samuel W. Buell, *Is the White Collar Offender Privileged?*, 63 DUKE L.J. 823 (2014) (arguing that in fact it is easier to prosecute and convict white-collar defendants).

In a similar vein, Darryl Brown contends that the pluralist aims of white-collar prosecutions should apply as well in prosecutions for street crimes. Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1345–60 (2001). These commentators are pursuing worthy agendas but the ambition here is more far-reaching, since I seek to enlarge the set of individuals appropriately liable to white-collar prosecutions in the first place.

<sup>26</sup> Matt Taibbi, *Why Isn't Wall Street in Jail?*, ROLLING STONE (Feb. 16, 2011), <http://www.rollingstone.com/politics/news/why-isnt-wall-street-in-jail-20110216>.

<sup>27</sup> Memorandum from Sally Quillian Yates, Deputy Attorney Gen., on Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), <https://www.justice.gov/dag/file/769036/download>.

<sup>28</sup> *Former Deputy AG James Cole Says DOJ's New White-Collar Crime Policy is 'Impractical'*, A.B.A. NEWS (Nov. 24, 2015), [http://www.americanbar.org/news/abanews/aba-news-archives/2015/11/former\\_deputy\\_agjam.html](http://www.americanbar.org/news/abanews/aba-news-archives/2015/11/former_deputy_agjam.html).

<sup>29</sup> *Id.*

the fault principle. The fault principle is so entrenched that virtually no one bothers to argue for it anymore. The arguments instead attack departures from the principle—none of which are convincing. Part III begins the Article’s positive theoretical work. There, I refine the notions of blame, accepting blame, and being blameworthy that I use here. I then turn in Part IV to a lengthy examination of cases in which, progressively, the connection between fault and blame comes apart. Much of the discussion in this Part concerns moral psychology; almost none of it concerns punishment. Nonetheless, this lengthy excursion into our moral emotional reactions is warranted since the criminal law’s conception of desert depends on a moral conception of desert.<sup>30</sup> Thus a defendant would not deserve punishment if he did not satisfy the conditions necessary for moral blame.<sup>31</sup> If we are to determine whether one may deserve punishment even if one is not at fault, we must then first determine whether one may be morally to blame even if one is not at fault. This is the task of Part IV. The Article’s Conclusion seeks to draw out the implications of the cases in Part IV for punishment.

Before turning to the Article’s arguments it will be useful to clarify terminology.

## I. SOME PRELIMINARY GROUND CLEARING

The notions of fault and blame are so intertwined in criminal law doctrine and theory that the central claim of this Article—that one can be blameworthy even if one is not at fault—may well come across as

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<sup>30</sup> See, e.g., *Old Chief v. United States*, 519 U.S. 172, 187–88 (1997) (noting that a criminal prosecutor must not only prove facts, but must do so in a way sufficient “to implicate the law’s moral underpinnings and a juror’s obligation to sit in judgment” and [t]hus, the prosecutor may fairly seek to place its evidence before the jurors . . . to convince the jurors that a guilty verdict would be morally reasonable”); *Tison v. Arizona*, 481 U.S. 137, 171 (1987) (Brennan, J., dissenting) (noting “‘the relation between criminal liability and moral culpability’ on which criminal justice depends” (quoting *People v. Washington*, 62 Cal. 2d 777, 783 (1965))). For discussions noting the ascendancy of retributivist justifications for punishment, see Russell L. Christopher, *Deterring Retributivism: The Injustice of “Just” Punishment*, 96 NW. U. L. REV. 843, 846–47 (2002) (“The U.S. Supreme Court, state courts, state legislatures, philosophers, and legal scholars alike are increasingly acknowledging retributivism as the dominant theory of punishment.” (footnotes omitted)); Robert Weisberg, *Reality-Challenged Philosophies of Punishment*, 95 MARQ. L. REV. 1203, 1204 (2012) (noting “a robust revival of retributivism”).

<sup>31</sup> This is not of course to say that it would be illegal to punish him. *Malum prohibitum* offenses involve precisely the punishment of one who is (or at least who may be) blameless; the same can be said for strict criminal liability. *But cf.* Husak, *supra* note 20, at 158 (distinguishing between formal and substantive strict criminal liability, and arguing that in a case of formal strict criminal liability, the defendant might well have possessed a culpable mental state; it is just that the state does not require that this be proven in order to obtain a conviction).

incoherent. But it is not. Establishing that it is not will require that we get clear on definitions.

In criminal law, to be at fault is to have committed a wrong without justification or excuse.<sup>32</sup> Depending on the jurist or theorist, fault is either a necessary condition for blameworthiness,<sup>33</sup> or fault and blameworthiness are interchangeable, or one and the same thing.<sup>34</sup> Either way, the claim that one can be blameworthy even though one is not at fault will seem, to these jurists and theorists, nonsensical. But if one allows that a person can be blameworthy even if he or she is not at fault then the standard assertion that criminal liability requires fault will seem to do no more than beg the question.<sup>35</sup>

Here is a starting definition of blameworthiness that neither implies nor denies that fault is necessary for blame: an individual is morally blameworthy if we have good moral reasons to blame her. Being at fault

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<sup>32</sup> See, e.g., MODEL PENAL CODE § 1.02(1)(a) (AM. LAW INST. 2015) (defining faulty conduct as “conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests”); John Gardner, *Wrongs and Faults*, in APPRAISING STRICT LIABILITY 51, 63 (A.P. Simester ed., 2005) (defining fault as “a shortfall of virtue that consists in the performance of actions that are both unjustified and unexcused”).

<sup>33</sup> See *supra* note 2 (collecting cites reporting that the criminal law does and should impose blame only where the defendant is at fault).

<sup>34</sup> See, e.g., Kyron Huigens, *The Dead End of Deterrence, and Beyond*, 41 WM. & MARY L. REV. 943, 945 (2000) (“Fault—also known as desert, culpability, or blameworthiness—is the distinctive feature of the criminal law.” (footnote omitted)); Husak, *supra* note 20, at 162–63 (“Any acceptable justification of punishment presupposes desert, which requires blame or fault in the defendant.”). To say that fault and blameworthiness are interchangeable is to say that there is complete overlap between conduct that is faulty and conduct that is blameworthy (i.e., the two have identical extensions); to say that fault and blameworthiness are one and the same thing is to say that they have the same definition (i.e., identical intensions).

<sup>35</sup> Consider, for example, Herbert Packer’s contention that “moral blameworthiness should be the indispensable condition precedent to [the] application [of the criminal law].” Herbert Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 147–48. One can agree and yet still hold that one can be morally blameworthy in the absence of fault. Or, for an especially vitriolic example, consider F. H. Bradley’s argument:

Punishment is punishment, only where it is deserved. We pay the penalty, because we owe it, and for no other reason; and if punishment is inflicted for any other reason whatever than because it is merited by wrong, it is a gross immorality, a crying injustice, an abominable crime, and not what it pretends to be.

F.H. BRADLEY, *ETHICAL STUDIES* 26–27 (2d ed. 1927). One who holds my view can assent to the first two propositions—that punishments and penalties should be imposed only on those who deserve or owe them—but deny that only those who have done wrong can deserve punishment or owe penalties.

is certainly one set of such reasons—indeed, the paradigmatic one.<sup>36</sup> But it is not the only one.

A necessary innovation for getting the argument off the ground will be the construction of a vocabulary that does not simply conflate fault with blameworthiness. I stipulate that one must be *blameworthy* if one is to be appropriately subject to criminal liability. So far so good, as far as the fault principle goes. But, against that principle, I will argue that there are *two* broad grounds of blameworthiness, and *only one* is necessary to ground blame. First and familiarly, one will be presumptively blameworthy if one is at *fault*; second, one will be presumptively blameworthy if one stands in the right kind of relationship to a wrong or wrongdoer, even if one is not at fault. (The reason for which blame is presumptive rather than conclusive will be made clear in what follows.)<sup>37</sup> I shall refer to blame arising in the first way as *fault-based* and to blame arising in the second as *relational*. To keep these two grounds of blame distinct, I will reserve the terms “wrongdoing” and “culpable” (and their associated adjectives, adverbs, etc.) for those cases where blame turns on fault.<sup>38</sup> The person who is blameworthy on relational grounds will then be “non-culpable.” Finally, the term “guilt” here refers to the moral and psychological concept, not to eligibility for conviction for a crime (unless otherwise indicated). More specifically, “guilt” and “blameworthy” are correlates: one bears appropriate guilt if and only if one is blameworthy.<sup>39</sup> It follows then that one can be guilty on my account because one is at fault or because one stands in a blame-grounding relationship.

## II. W(H)ITHER DEFENSES OF THE FAULT PRINCIPLE?

Given the sanctity of the fault principle, one might think it beyond inquiry. Yet it is precisely because the fault principle has risen to the

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<sup>36</sup> Cf. Christopher Kutz, *Causeless Complicity*, 1 CRIM. L. & PHIL. 289, 294 (2007) (arguing that the requirement that one make a causal difference to a crime is merely the paradigmatic, but not the only, case of blameworthy complicity).

<sup>37</sup> See *infra* Section IV.A.3 and Section IV.B.

<sup>38</sup> Culpability is typically associated with fault in criminal law doctrine. See, e.g., MODEL PENAL CODE & COMMENTARIES § 2.05, cmt. 1 (AM. LAW INST., Official Draft and Revised Comments 1985) (“Crime does and should mean condemnation and no court should have to pass that judgment unless it can declare that the defendant’s act was culpable.” (footnote omitted)). Under section 2.02(1), culpable means minimally that the defendant “acted purposely, knowingly, recklessly or negligently . . . with respect to each material element of the offense.” MODEL PENAL CODE § 2.02(1) (AM. LAW INST. 2015).

<sup>39</sup> Bernard Williams describes the appropriate emotional response for the person who faultlessly causes harm as “agent-regret.” BERNARD WILLIAMS, MORAL LUCK 30 (1981). I discuss the relationship between faultless guilt and agent-regret *infra*, see Section IV.A.2.

level of established dogma that the justification for it no longer accompanies its appearance,<sup>40</sup> and one who dares to wonder about its foundations is left wanting.

There is of course an account frequently given to explain why the *state* ought to be bound by the fault principle: the state is the entity exclusively empowered to punish, punishments are things citizens want to avoid,<sup>41</sup> so the elements licensing punishment should be of the kind citizens have the opportunity to avoid.<sup>42</sup> The fault principle (along with the voluntary act requirement)<sup>43</sup> ensures that individuals will not be punished for acts they could *not* avoid—those that the agent does not will (e.g., those performed while she is unconscious),<sup>44</sup> or performed in innocent ignorance of the risk they impose,<sup>45</sup> or under circumstances that compel or coerce the agent's criminal conduct.<sup>46</sup> In this way, individuals can protect themselves from the threat of state punishment, because they

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<sup>40</sup> Cf. Kaplow & Shavell, *supra* note 4, at 1232–33 (“The rationale for the retributive conception of fairness has proved difficult to identify. . . . [W]e do note that, to us (and to many others), the justifications usually offered [for the claim that wrongdoing deserves punishment] seem virtually indistinguishable from restatements of the definition of the notion of retribution.” (footnote omitted)).

<sup>41</sup> See, e.g., Peter Cane, *Responsibility and Fault: A Relational and Functional Approach to Responsibility*, in *RELATING TO RESPONSIBILITY: ESSAYS FOR TONY HONORÉ ON HIS EIGHTIETH BIRTHDAY* 81, 108 (Peter Cane & John Gardner eds., 2001) (“As agents, we have an interest in freedom of action, in being able to act without incurring the serious penalties and blame that attach to criminal responsibility.”).

<sup>42</sup> The view is most famously associated with H.L.A. Hart. See H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 181 (1968) (“[U]nless a man has the capacity and a fair opportunity or chance to adjust his behaviour to the law its penalties ought not be applied to him.”); see also NICOLA LACEY, *STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES* 146 (1988) (“Both rationality and the capacity for responsible action are thus for liberalism at once factual features of human nature and sources of normative limits on the ways in which human beings may be treated, particularly by political and other public institutions.”).

<sup>43</sup> See, e.g., MODEL PENAL CODE § 2.01(1) (“A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act . . . .”); Gideon Yaffe, *The Voluntary Act Requirement*, in *THE ROUTLEDGE COMPANION TO THE PHILOSOPHY OF LAW* 174, 174 (Andrei Marmor ed., 2012).

<sup>44</sup> For a volitional account of the act requirement, see, for example, MICHAEL S. MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW* (1993). For an argument against this view, and urging that we restrict criminal liability not to the (narrower set) of voluntary acts but instead to the (broader set) of acts reflecting our practical agency, see Vincent Chiao, *Action and Agency in the Criminal Law*, 15 *LEGAL THEORY* 1 (2009).

<sup>45</sup> See, e.g., Rollin M. Perkins, *Ignorance and Mistake in Criminal Law*, 88 *U. PA. L. REV.* 35, 35 (1939) (“[M]istake of fact is sufficient for exculpation if what was done would have been lawful had the facts been as they were reasonably supposed to be.”).

<sup>46</sup> See, e.g., Monu Bedi, *Excusing Behavior: Reclassifying the Federal Common Law Defenses of Duress and Necessity Relying on the Victim's Role*, 101 *J. CRIM. L. & CRIMINOLOGY* 575, 577 (2011) (describing the role that compulsion and coercion play in protecting the defendant from criminal liability).

can be assured that the circumstances warranting punishment are within their control.<sup>47</sup>

Whatever the merits of the argument that fault is necessary for the state to punish, the argument cannot justify the fault principle as it is generally construed because that principle is invoked not merely as a limit on state action. Instead, it is taken to enshrine a fundamental moral commitment about desert. To take one emblematic statement: “[a]ny acceptable justification of punishment presupposes desert, which requires blame or fault in the defendant.”<sup>48</sup> To question the fault principle on its face, rather than its use as a constraint on state action, is then to ask why only those who are at fault—that is, only those who commit a wrong without justification or excuse<sup>49</sup>—deserve blame.

The answer, such as it is, proceeds not by way of a positive defense of the fault principle so much as a series of arguments against blame or punishment without fault. I address each of these in turn and, finding none of them compelling, reflect on why the fault principle has nonetheless managed to grip us so tenaciously.

#### A. *Voluntarism*

Those with voluntarist commitments hold that we should be blamed only where we have *chosen* to engage in conduct that we know or should know is wrong.<sup>50</sup> To impose blame where we could not have done other than what we did, or for the acts of someone whom we cannot control or have no duty to control, is to hold us responsible for something outside of our agency,<sup>51</sup> and so to treat us more harshly than we deserve.

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<sup>47</sup> I go on to challenge the criminal law’s voluntarist commitment below. *See infra* Section II.A.

<sup>48</sup> Husak, *supra* note 20, 162–63; *see also* Douglas N. Husak, *Why Punish the Deserving?*, 26 *NOÛS* 447, 447–48 (1992) (suggesting that voluntary commission of a crime is necessary to deserve punishment by stating “[t]he voluntary choice of the agent to commit a crime he knows is subject to punishment is crucial in establishing his desert”); *cf.* ANDREW VON HIRSH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 51 (1976) (“The offender may justly be subjected to certain deprivations because he deserves it; and he deserves it because he has engaged in wrongful conduct—conduct that does or threatens injury and that is prohibited by law.”).

<sup>49</sup> *See supra* note 31.

<sup>50</sup> *See, e.g.*, HART, *supra* note 41, at 181; LACEY, *supra* note 41, at 146.

<sup>51</sup> Those who subscribe to voluntarism believe, contrary to “hard determinists,” *see, e.g.*, Luis E. Chiesa, *Punishing Without Free Will*, 2011 *UTAH L. REV.* 1403, 1408 n.41 (2011), that there is a meaningful distinction between actions we choose to undertake and those that are forced upon us. Since our criminal law either presupposes free will, *see* BLACKSTONE, *supra* note 2, at \*27–28 (“[P]unishments are . . . only inflicted for the abuse of that free will, which God has given to man . . . .”); *State v. Jones*, 577 P.2d 357, 361 (Kan. Ct. App. 1978), or is committed to bracketing the question, *see, e.g.*, Michael S. Moore, *Causation and the Excuses*, 73 *CALIF. L. REV.* 1091, 1144–45 (1985); Stephen J. Morse, *Criminal Responsibility and the Disappearing Person*, 28

Voluntarism rules out clear-cut cases of compulsion—the gun-to-your-head type case, for example. But it does not necessarily rule out relationship-based cases (where one member of an intimate or employment relationship is blamed, and perhaps also punished, for the wrong of another). Many of these relationships are entered into voluntarily.<sup>52</sup> Voluntarism, if it is to be compelling, has to allow that we are responsible not only for the immediate consequences of our decisions but also for *some* of their downstream consequences too. The question then becomes whether the consequences—again, the wrongs committed by one with whom one has chosen to stand in a particular relationship—are so far downstream as to escape the voluntarist’s sense of the appropriate scope of our agency. I argue in Part IV that they are not.

### B. Status

Perhaps the problem with relationship-based culpability is not so much that it is unavoidable but that it punishes on the basis of status, rather than conduct, and thereby runs afoul of settled constitutional doctrine.<sup>53</sup> But the reasons for rejecting status crimes do not impugn the

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CARDOZO L. REV. 2545 (2007), I do not pursue this aspect of the metaphysics of agency here.

<sup>52</sup> This is the justification Markel, Collins, and Leib offer for parental responsibility laws. DAN MARKEL, JENNIFER M. COLLINS & ETHAN J. LEIB, PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES 85–96 (2009). For the claim that this view fails to take account of background inequalities that can undermine the voluntary assumption of parental duties, see Naomi Cahn, *Protect and Preserve?*, 13 NEW CRIM. L. REV. 127, 129–30 (2010).

The relationships I have in mind—that of a parent to her child, or a military commander or executive to her subordinates—are all normally entered into voluntarily. I note however that we come to owe obligations even in virtue of relationships we enter non-voluntarily. Filial obligations are paradigmatic here. See, e.g., Samuel Scheffler, *Relationships and Responsibility*, 26 PHIL. & PUB. AFF. 189, 191–92 (1997). I allow that there may be cases where children should take on guilt for their parents’ transgressions, but I do not pursue that line of thought here.

<sup>53</sup> *Robinson v. California*, 370 U.S. 660, 666 (1962); cf. *United States v. Scales*, 367 U.S. 203, 224–25 (1961) (“In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity . . . , that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.”). But cf. *Powell v. Texas*, 392 U.S. 514, 533 (1968) (holding that the states may punish acts that are attendant on status such as the state may punish sleeping in public places, even if it may not punish homelessness); Herbert Fingarette, *Addiction and Criminal Responsibility*, 84 YALE L.J. 413, 417 (1975) (“Certainly [*Robinson*] cannot be read to do away with all crimes of status. These have a long history in the common law and in statutory law; they have not been fundamentally challenged by the Court.”). See generally Edward J. Walters, *No Way Out: Eighth Amendment Protection for Do-or-Die Acts of the Homeless*, 62 U. CHI. L. REV. 1619, 1620 (1995) (discussing the plight



cases discussed here for two reasons. First, part of the opposition to status crimes is just a species of voluntarism. The basic idea is that a status is something over which one has no control and no one should be found guilty on the basis of characteristics over which they have no control.<sup>54</sup> In response, we should note that the voluntarist worry does not necessarily obtain: we have seen that voluntarism does not necessarily rule out relationship-based culpability.<sup>55</sup>

Second, in the cases to be considered here, warranted blame follows not from the status of being in a particular relationship as from the norms governing the relationship in question. Thus, for example, the parents who should take themselves to be blameworthy for their children's crimes owe this obligation because of their role and not their status; the obligation would not obtain if, say, the individual in question were a biological parent who had given the child-turned-criminal up for adoption many years before. And there is nothing mysterious, let alone nefarious, about legally enforceable role-based obligations—think here of the obligations parents bear to take adequate care of their minor children, breach of which is in some places criminal.<sup>56</sup>

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of the homeless in the face of laws that require them to “follow the law and die, or stay alive and risk arrest” and proposing “that courts must invalidate statutes that offer people no lawful choice but death.” (emphasis omitted)).

<sup>54</sup> See, e.g., Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1242 (1996) (noting the argument that status-based crimes are unfair because “having a condition one cannot alter should not by itself make one guilty of a crime”). Closely related to the notion that status crimes are in tension with voluntarism is the claim that status crimes run afoul of the act requirement. See, e.g., Douglas Husak, *Lifting the Cloak: Preventive Detention as Punishment*, 48 SAN DIEGO L. REV. 1173, 1184 (2011) (noting that commentators and jurists decry status crimes because they violate “the supposed ‘act requirement’ of criminal law”); Yaffe, *supra* note 43, at 174–75 (decrying the crime of appearing drunk in public because it would punish status and not an act); cf. Ian P. Farrell & Justin F. Marceau, *Taking Voluntariness Seriously*, 54 B.C. L. REV. 1545, 1607 (2013) (noting that there are two problems with status crimes: (1) they eschew the act requirement, and (2) they assign criminal liability for a status the defendant bears involuntarily). *But cf.* Louis Henkin, Foreword, *On Drawing Lines*, 82 HARV. L. REV. 63, 69 (1968) (challenging the supposed distinction between status and act).

<sup>55</sup> See *supra* text accompanying note 51 (noting that we enter into some relationships voluntarily).

<sup>56</sup> See, e.g., *Child Neglect & Abandonment State Statutes*, NAT'L DIST. ATT'YS ASS'N (Mar. 13, 2007), [http://www.ndaa.org/pdf/ncpca\\_statute\\_child\\_neglect\\_abandonment\\_3\\_07.pdf](http://www.ndaa.org/pdf/ncpca_statute_child_neglect_abandonment_3_07.pdf). So-called parental responsibility laws are, however, controversial. See, e.g., Jennifer M. Collins, *Crime and Parenthood: The Uneasy Case for Prosecuting Negligent Parents* (Wake Forest Univ. Legal Studies Paper No. 05-08, 2005), <http://ssrn.com/abstract=673451> (discussing cases where parents are prosecuted for negligent homicide where they leave their children in hot, parked cars and the children die as a result). I discuss parental responsibility laws *infra* Section IV.B.

Of course, nothing so far entails that the parenting role does include an obligation to take responsibility for the crimes of one's child. But if that obligation does not obtain it will not be because no one should be held responsible on the mere basis of status.

### C. Taint

Group membership is one kind of status that commentators and courts have found particularly dubious as a ground of culpability. The idea here is that one group member's crime should not taint the other members unless<sup>57</sup> (or perhaps even if)<sup>58</sup> there is reason to believe that the group as a whole authorized or ratified or at the very least tolerated the crime in question. In the absence of these elements, we have nothing but guilt by association, which commentators decry as an unworthy relic of the Ancients,<sup>59</sup> one that is too primitive for enlightened folk like us.<sup>60</sup>

Some of this is right, and some of it overblown. To be sure, blaming and perhaps also punishing one person for another's crime simply because the two share membership in the same group is a grave injustice, rightly condemned as invidious discrimination (racism, sexism, etc.) where the group is identity-based, especially where the identifying characteristic is ascriptive.<sup>61</sup> *Mere* membership in a group should not

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<sup>57</sup> See, e.g., LARRY MAY, *THE MORALITY OF GROUPS* 3–4 (1987); cf. JANNA THOMPSON, *TAKING RESPONSIBILITY FOR THE PAST: REPARATIONS AND HISTORICAL INJUSTICE* 6 (2002) (justifying imposing national treaty obligations, or reparations for their breach, on the current generation even though the treaty was entered into by an earlier generation because the individual signatories to the treaty acted on behalf of the nation, which ratified the treaty and continues to exist to this day).

<sup>58</sup> See, e.g., Joel Feinberg, *Collective Responsibility*, 65 J. PHIL. 674, 686 (1968) (arguing that those who opposed the group wrong should not bear responsibility or liability for it); Howard McGary, *Morality and Collective Liability*, 20 J. VALUE INQUIRY 157, 157 (1986) (same); Michele Moody-Adams, *Culture, Responsibility and Affected Ignorance*, 104 ETHICS 291 (1994) (same).

<sup>59</sup> See, e.g., Statute of Winchester 1285, 13 Edw. 1 c. 2 (containing a provision for frankpledge, whereby groups of 100 men would be answerable for the crime of any of them); cf. Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1203–04 (1985) (describing an analogous Ancient practice involving collective liability for tort damages). See generally George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499, 1509, 1566 (2002) (describing the Ancients' attachment to collective responsibility); M. Stuart Madden, *Paths of Western Law After Justinian*, 22 WIDENER L.J. 757, 772 (2013) ("In the customary law of Germanic tribes, the victim's kinship group would be permitted to wreak retribution upon the slayer himself or his family."); Thomas J. Miceli & Kathleen Segerson, *Punishing the Innocent Along with the Guilty: The Economics of Individual Versus Group Punishment*, 36 J. LEGAL STUD. 81, 84 (2007) ("One of the defining characteristics of primitive law enforcement is its reliance on collective or group responsibility . . .").

<sup>60</sup> See, e.g., Alschuler, *supra* note 17 (railing against frankpledge).

<sup>61</sup> Cf. Geneva Convention Relative to the Protection of Civilian Persons in Time of

entail that members share responsibility for one another's transgressions. But membership in some groups does license our transmitting blame from some members to others, independent of the latter's participation in the transgression. In particular, membership in some groups comes with expectations that the member will shoulder blame for other members' wrongs. This is common knowledge among members and outsiders, and it is not the product of a "barbaric"<sup>62</sup> mentality but instead a valuable element constituting group bonds. I elaborate on the grounds for the transmission of responsibility among group members in the next Part, but we can already see that the idea is commonplace and not undue if we consider the response citizens owe when their nation-state has transgressed. In those cases, it will be appropriate for the nation-state to apologize and offer repair,<sup>63</sup> and for its members to display contrition.<sup>64</sup> This is so not only when large swaths of the citizenry participated in or supported the transgression at the time of its occurrence. It is also true where many opposed the transgression as it occurred, and as forcefully as they could.<sup>65</sup> These people owe an apology and their share of the appropriate restitution not because they happen to be the compatriots of others who participated in the transgression but because the transgression is their nation-state's, and so it belongs to the wrongdoers as well as the would-be dissidents. There are then cases where some members'

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War, art. 33, Aug. 12, 1949, 6 U.S.T. 3516 ("No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.").

<sup>62</sup> *Contra* H.D. Lewis, *The Non-Moral Notion of Collective Responsibility*, in *INDIVIDUAL AND COLLECTIVE RESPONSIBILITY: MASSACRE AT MY LAI* 119, 121 (Peter A. French ed., 1972); *see* NICK SMITH, *I WAS WRONG: THE MEANINGS OF APOLOGIES* 188 (2008) (referring to this practice as "tribal").

<sup>63</sup> *See generally* Richard M. Buxbaum, *A Legal History of International Reparations*, 23 *BERKELEY J. INT'L L.* 314, 316–19 (2005) (discussing World War II reparations and the rise of an offending state's moral responsibility to harmed states).

<sup>64</sup> *See, e.g.*, Brian Weiner, *National Apologies: Extraordinary Politics Within Ordinary Times* 1 (Oct. 27–29, 2005) (unpublished manuscript presented at *Repairing the Past: Confronting the Legacies of Slavery, Genocide, & Caste*, Yale University), <http://glc.yale.edu/sites/default/files/files/justice/weiner.pdf> (recognizing the distinction between apologies and contrition and analyzing the modern trend of nation state apologies as compared to the traditionally private realm of apologies).

<sup>65</sup> For example, some opponents of George W. Bush voted against him in the 2004 election, and yet posted photos of themselves holding signs saying, "I'm sorry," after he won. *See Gallery, SORRY EVERYBODY*, [http://www.sorryeverybody.com/index\\_old.shtml](http://www.sorryeverybody.com/index_old.shtml) (last visited Nov. 16, 2016). The phenomenon of apologizing for a wrong in which one did not participate arises for corporations too. Consider, for example, Wachovia Bank's apology to "all Americans, and especially to African-Americans and people of African descent," issued after Wachovia learned that its predecessor owned slaves and accepted slaves as collateral. Associated Press, *Wachovia Apologizes to Black Americans*, *NBC NEWS* (June 2, 2005) [http://www.nbcnews.com/id/8076165/ns/business-us\\_business/t/wachovia-apologizes-black-americans/#.WCUoGeErKRs](http://www.nbcnews.com/id/8076165/ns/business-us_business/t/wachovia-apologizes-black-americans/#.WCUoGeErKRs).

transgression subjects others to blame but the transmission of responsibility is not illicit.

#### *D. A Natural History of the Fault Principle*

If none of the proffered objections to deviations from the fault principle rule out the kind of shared blame at issue here, why then has the fault principle so completely held us in its sway? Given my skepticism, I am not in a position to defend the claim that fault is necessary for warranted blame and punishment. But I will venture to offer some quick thoughts about why we might have come to *believe* that one is blameworthy only where one is at fault. First, there is something doubtlessly true about the fault principle—namely, that fault is a *sufficient* condition for one to warrant blame.<sup>66</sup> Second, faulty wrongs have a special sting, and so a special salience.<sup>67</sup> This is just the thought underpinning Justice Holmes’s famous edict that “even a dog distinguishes between being stumbled over and being kicked.”<sup>68</sup> Further, blame and sanction have regulative consequences: they aim—successfully for the most part—to deter the blamed party from repeating the conduct prompting our censure.<sup>69</sup> We are, then, likely most primed to activate blame’s deterrent potential where the wrong is one that the agent

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<sup>66</sup> This describes the situation of many of those who have participated in the “I’m Sorry” campaign. See *Gallery*, *supra* note 65. It is also very nearly the case anytime contemporary citizens are held responsible for a historic injustice. See Amy J. Sepinwall, *Responsibility for Historical Injustices: Reconceiving the Case for Reparations*, 22 J.L. & POL. 183 (2006).

<sup>67</sup> For example, on a Strawsonian conception—so called because of Peter Strawson’s seminal account—moral responsibility is at least partly constituted by the reactive attitudes, which are responsive to treatment that manifests “ill will or indifferent disregard.” Peter Strawson, *Freedom and Resentment*, in PERSPECTIVES ON MORAL RESPONSIBILITY 45, 57 (John Martin Fischer & Mark Ravizza eds., 1993). In other words, our moral emotional reactions are keyed to instances of wrongdoing.

<sup>68</sup> OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 5 (Harvard Univ. Press 2009) (1881). While Holmes had in mind intentional wrongs, it is clear that there are other guilty mental states—recklessness and gross negligence, for example—even if these mark out crimes of less “serious culpability.” See Michael S. Moore, *Intention, Responsibility, and the Challenges of Recent Neuroscience 1* (unpublished manuscript), [http://www.jura.uni-freiburg.de/institute/rphil/stawi/de/downloads/Intention,\\_Responsibility,\\_and\\_the\\_Challenges\\_of\\_Recent\\_Neuroscience.pdf](http://www.jura.uni-freiburg.de/institute/rphil/stawi/de/downloads/Intention,_Responsibility,_and_the_Challenges_of_Recent_Neuroscience.pdf). For the view that negligent harm is just as culpable as intentional harm, see Seana Shiffrin, *The Moral Neglect of Negligence*, in OXFORD STUDIES IN POLITICAL PHILOSOPHY (David Sobel, Peter Vallentyne, & Steve Wall, eds., forthcoming).

<sup>69</sup> Cf. HERBERT MORRIS, *ON GUILT AND INNOCENCE* 89, 106–07 (1976) (identifying the pain of guilt as part of its function); JOSEPH BUTLER, *Sermon VIII: Upon Resentment*, in FIFTEEN SERMONS 92, 100 (Ibis Publ’g 1987) (1860) (arguing that, where virtue fails, individuals may nonetheless be deterred from pursuing wrongdoing by the anticipated unpleasantness of the resentment their wrongdoing would elicit).

can avoid in the future. But faultless wrongs are just those wrongs that the agent cannot reasonably avoid. So, rebuking faultless wrongs seems not to serve any deterrent ends. Finally, it may well be that not only our most painful but also our most common experiences of blame arise where the blamed party is at fault.<sup>70</sup> As such, fault is a familiar feature of blame for us.

All of this suggests that our experience of blame does typically and prominently involve fault and so we might naturally have come to take fault to be a prerequisite for blame.<sup>71</sup> The story one might tell about the relationship between blame and fault is then of the Humean fallacy genre.<sup>72</sup> On Hume's account, we believe that *A* causes *B* (e.g., dark clouds cause rain) but the belief is unwarranted. The only thing we really know is that *B* generally occurs soon after *A*. But nature is not always uniform; for all we know, the next time *B* occurs, *A* may not have preceded it. We have no way of proving that *A* is a necessary cause of *B*, and so no reason to think that we cannot have *B* without *A*.

Applying the argument to the fault principle: we see that fault commonly attends blame. As a result, we have come to believe—mistakenly—that fault is necessary for warranted blame. We cannot prove that fault is necessary for blame, and so we in fact have no reason to think that we cannot have blame without fault. The fault principle is then the result of our having come to mistake common associations with necessary connections.<sup>73</sup> What we need to upend the story that links fault and blame by necessity is a counter-narrative—or, as here, a series of stories (real and fiction) involving warranted blame without fault.

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<sup>70</sup> See Kutz, *supra* note 36, at 300.

<sup>71</sup> Cf. Kaplow & Shavell, *supra* note 4, at 1283–84 (offering an evolutionary account of retribution and discussing the historical underpinnings for why punishment should be limited to the severity of the transgression); Herbert Morris, *Nonmoral Guilt*, in *RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY* 220, 221–22 (Ferdinand Schoeman ed., 1987) (noting that the view that guilt is appropriate only if one is at fault provides a “‘hegemony’ of moral guilt over the whole sphere of guilt”); Richard A. Posner, *A Theory of Primitive Society, with Special Reference to Law*, 23 *J.L. & ECON.* 1, 43–44 (1980) (explaining the role of retribution in primitive societies along economic lines).

<sup>72</sup> See DAVID HUME, *ENQUIRIES CONCERNING HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS* 76–77 (L.A. Selby-Bigge & P. H. Nidditch, eds., rev. 3d ed. 1975).

<sup>73</sup> The insight is not unlike one that Bernard Williams proffered. See WILLIAMS, *supra* note 39, at 29–30. Williams noted that much standard moral and criminal theory takes the case of fault to be central, and the case of responsibility without fault to be peripheral, and so in need of special explanation. See *id.* But Williams argued that things are just the other way around; responsibility just in virtue of what one has done, or what one has brought about, and independent of fault, is primary, and fault just takes us from the primary, foundational case to a special class of cases in which one's responsibility is heightened. See *id.*

### III. BLAME WITHOUT FAULT: SOME PRELIMINARIES

To begin, it will be helpful to say more about the function of blame and blaming, and what the relationship between a person's accepting blame and our blaming her is.

#### A. *The Function of Blame*

Typically, theorists argue that blame serves one or more of the following three functions: Blame (1) registers a demerit in one's moral "ledger";<sup>74</sup> (2) causes the victim to experience the good of having her injury recognized,<sup>75</sup> and her anger expiated in the act of blaming (or in witnessing others blame on her behalf);<sup>76</sup> and (3) provides occasion for the wider community to enforce or affirm certain norms and values.<sup>77</sup>

To elaborate: the ledger view, as it is typically expressed, sees in blame the formation of a judgment that the blamed party has done something morally wrong and a resulting assessment (or re-assessment) of the agent's character as having some defect.<sup>78</sup> Blame could arise in virtue of one's relationships on the thought that one had poorly chosen one's intimates. But one need not have been at fault in choosing one's intimates to bear blame here. In the latter kind of case, the demerit or negative assessment goes not to one's character but to one's person. The thought is not that one ought to work to have more moral virtue but

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<sup>74</sup> See generally JOHN MARTIN FISCHER & MARK RAVIZZA, *RESPONSIBILITY AND CONTROL: A THEORY OF MORAL RESPONSIBILITY* 8 n.12 (1998) (surveying different "ledger" views).

<sup>75</sup> See, e.g., Jean Hampton, *The Retributive Idea*, in *FORGIVENESS AND MERCY* 111, 125–26 (Jeffrie G. Murphy & Jean Hampton eds., 1988) (explaining that punishment is a way of reaffirming the victim's worth).

<sup>76</sup> See, e.g., Susan Wolf, *Blame, Italian Style*, in *REASONS AND RECOGNITION: ESSAYS ON THE PHILOSOPHY OF T.M. SCANLON* 332, 335–43 (R. Jay Wallace, Rahul Kumar & Samuel Freeman eds., 2011).

<sup>77</sup> This is a kind of Durkheimian insight, see EMILE DURKHEIM, *THE DIVISION OF LABOUR IN SOCIETY* (60–64) (W.D. Halls transl., Macmillan Press 1984) (1893); David Garland, *Sociological Perspectives on Punishment*, 14 *CRIME & JUST.* 115, 123 (1991) (describing the Durkheimian take on punishment), applied not to the institution of punishment but to the social function of blaming.

<sup>78</sup> See, e.g., FISCHER & RAVIZZA, *supra* note 74, at 8 n.12 (quoting Gary Watson's reconstruction of a ledger view to this effect). The ledger view of blame can come off as petty, making it sound as if we all carry around moral report cards, scrutinize one another's behavior, and keep fastidious track of how each of us scores. But I think one can adopt a ledger view without committing oneself to this petty conception. The view Watson describes, for example, which conceives of the "demerit" as a shorthand for a judgment about a character defect, does not in itself strike me as a petty way of relating to people. Instead, pettiness arises only if we are overly zealous or overly exacting in evaluating others' conduct. But those tendencies might arise whether we understand the function of blame on the ledger view or instead on some other view.

instead that one is marked by one's relationships—marked in a way that is meaningful and made appropriate by the meaning and value in those relationships. All of that should become clearer in what follows.

While the “demerit” component describes blame's effect on the blamed party, the second and third functions of blame describe the role blame plays for the victim of the wrong, and sometimes for bystanders too. Blame's role in recognizing the victim's injury foregrounds blame's therapeutic or restorative function.<sup>79</sup> As we will see in the cases that follow, tragedies can leave their victims, or their victims' loved ones, with a surfeit of anguish. Cosmic tragedies—those for which no one is to blame—may be the worst of all because there is no outlet in anger for the pain they cause. Where we can find a target of blame, then, our blaming him or her provides us with a means for discharging some of that pain. To be sure, blame's therapeutic value must be weighed carefully against the pain that blame inflicts.<sup>80</sup> Precisely because it involves a transfer of pain from victim to the target of blame, we should not undertake this transfer unless the target of blame deserves it. But, again, I leave open for now the question of whether the target of blame can deserve it only if she is at fault. And so long as she does deserve it, blame's therapeutic function gives us a reason to think blame appropriate—again, not a decisive one, but not an inconsiderable one either.

Blame also offers us an opportunity to enforce norms or obligations that flow from certain relationships, which is what (3) denotes. As we shall see in Part IV, when one party to a relationship takes on blame for the wrong of the other party, the first expresses her recognition that her agency is bound up with the wrongdoer's. Where these relationships are good in and of themselves, and where intertwining of agency is partly constitutive of the relationship, we have reason to value this intertwining, and the taking on of blame that it mandates. We preserve and promote these relationships by affirming the taking on of blame; or, where a person has not taken on blame when she should, we enforce norms that make these relationships valuable by imposing upon her the blame she should have assumed herself, by blaming her.

Given these multiple functions, the conception of blame at issue here is clearly a pluralist one,<sup>81</sup> pulling together several understandings of blame's function that often appear separately.<sup>82</sup> I think this is right but,

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<sup>79</sup> See, e.g., R.A. Duff, *Restorative Punishment and Punitive Restoration*, in *RESTORATIVE JUSTICE AND THE LAW* 82, 87–89 (Lode Walgrave ed., 2002).

<sup>80</sup> Cf. D. Justin Coates and Neal A. Tognazzini, *The Nature and Ethics of Blame*, 7 *PHIL. COMPASS* 197, 198 (2012) (evaluating the possibility that the function of blame is in part punitive).

<sup>81</sup> Cf. FISCHER & RAVIZZA, *supra* note 73, at 8 n.12 (noting that one could hold both a ledger view and a Strawsonian view, as a result of which one would conceive of responsibility assignments as both judgments and reactive attitudes).

<sup>82</sup> I do not pretend that the three elements I adduce constitute an exhaustive list of

for strategic reasons, it is also important to operate with this pluralist conception. After all, it would be far easier to argue that one may be blamed without fault if I had instead adopted an anemic conception of what it meant to blame someone—if blaming someone wasn't something that one had multiple reasons to want to avoid. To avoid being charged with having stacked the deck unduly in my favor, then, I operate with this fuller conception here.

With that said, blame need not fulfill each of the three functions on every occasion when it is appropriate. Of particular relevance here, cases of faultless blame likely won't function as an outlet for anger so much as an opportunity to affirm certain ways of relating to one another. Anger is occasioned by conduct that reflects the agent's ill will or disregard of others<sup>83</sup>—anger, in other words, might be the unique or at least the special province of faulty conduct. But a person might have reason to take herself to be blameworthy even if she has not acted with disregard toward others. And where she does have such reason, others might have reason to take her to be blameworthy too, because taking on blame is what her relationship to the victim or the wrongdoer requires, and we affirm the obligation and so the relationship itself when we endorse her blaming herself, as we can do by blaming her too.

### *B. Accepting Blame and Blaming*

The account to be advanced is normative: it privileges the perspective that the agent *should* adopt in determining whether she should take herself to be blameworthy. Here, I seek to describe (1) why we should privilege the perspective the agent should adopt, rather than the one she does adopt; (2) the difference between “accepting blame” and “taking oneself to be blameworthy,” and (3) when and why a person's taking herself to be blameworthy makes it the case that others have license to blame her.

#### *1. The Ideal Agent's Perspective*

In the following cases, I will be relying on the norms and obligations that obtain within the relationships in question. These norms and obligations, we shall see, sometimes make it the case that one should

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blame's functions. Tim Scanlon, for example, conceives of blaming as a way of registering that someone has displayed attitudes that impair your relationship with her, and make it appropriate for you to revise your relationship with her. T.M. SCANLON, *MORAL DIMENSIONS* 157 (2008). I do not focus on this function of blame since I think it best as an account of blame between intimates or, more tenuously, members of a tight-knit community, but poorly suited to tracking the kind of blame that underpins criminal law.

<sup>83</sup> See, e.g., Strawson, *supra* note 67, at 57.



judge herself to be blameworthy even if one's conduct would not be deemed faulty under the fault principle. Given that it is norms and obligations that underpin the determination that one should (or should not) judge herself to be blameworthy, we need not take the agent's self-assessment as authoritative. Instead we may judge whether an agent's belief about her blameworthiness is correct, and we would do so in light of various standards. The fault principle is one such standard but not the only one. Other standards flow, we shall see, from the norms and obligations that obtain in the relationship under consideration.

## 2. *Accepting Blame Versus Taking Oneself to Be Blameworthy*

It will be important to distinguish between (1) cases in which someone accedes to act *as if* she is to blame, all the while hewing privately to the belief that she does not deserve blame; and (2) cases in which someone agrees to take herself to *warrant* blame. I refer to the former as *accepting blame* and to the latter as *taking oneself to be blameworthy*. Both entail a willingness to accept the material consequences of being blameworthy—a strike in one's moral ledger, words of reproach from others, perhaps other social sanctions still, etc. But only (2), taking oneself to be blameworthy, mandates a change in one's beliefs about whether one *deserves blame*.<sup>84</sup> Thus, one who merely accepts blame does not recognize the legitimacy of the victim's grievance, or the community's indignation, and so there can be no real remorse on her part. She offers herself up as a target of anger as an act of kindness, but not as an act of contrition. On the other hand, when a person takes himself to be blameworthy, he incurs an obligation to recognize that he deserves to be treated as a target of anger, and this recognition mandates that he come to feel contrite too. In some cases, when a person takes himself to be blameworthy, he is then required to come to believe, if he does not already believe, that he is at fault.<sup>85</sup> But not all cases in which one ought to take oneself to be blameworthy are like this, we shall see.<sup>86</sup>

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<sup>84</sup> For a third-personal analog to the distinction I articulate between acting as if one is to blame and taking oneself to be blameworthy, see David Miller, *Holding Nations Responsible*, 114 *ETHICS* 240, 244–46 (2004) (describing “outcome responsibility”, which arises where an individual deserves to incur the material consequences of her acts, but not moral sanction); Richard Vernon, *Punishing Collectives: States or Nations?*, in *ACCOUNTABILITY FOR COLLECTIVE WRONGDOING* 287, 301–02 (Tracy Isaacs & Richard Vernon eds., 2011) (analyzing the appropriateness of exacting punishment on individuals for the political actions of a nation or state).

<sup>85</sup> This dynamic is illustrated in the example of Sue Klebold, mother of one of the Columbine killers. See *infra* Section IV.B.

<sup>86</sup> See *infra* Section IV.C (discussing the grounds upon which an executive who is innocent of his corporation's crime ought nonetheless to take himself to be blameworthy for it).

### 3. *Taking Oneself to Be Blameworthy and Blaming*

Suppose that a person does have an obligation to take herself to be blameworthy. Why would this entail that others are permitted to blame her?

Sometimes the act or outcome rendering someone blameworthy is one about which we, the public, may complain, even if we are not its most immediate victims. We can see this when we consider our response to malum in se wrongs, which we view as wrongs committed against all persons, and not just their victims.<sup>87</sup> So if an individual *A* recognizes that she has offended against us, and that she must take herself to be blameworthy for her offense, then she must recognize that we have license to blame her. What it is for her to take herself to be blameworthy is for her to hold herself out as a target of reproach, and invite at least some others—in particular, those who are licensed to complain—to join her in finding her blameworthy and treating her as such. All else being equal, we do her no wrong in taking up the invitation, though I shall argue that sometimes other considerations make it the case that we should decline it.<sup>88</sup>

But if the act or outcome for which *A* takes herself to be blameworthy is not one that concerns us, then bystanders have no license to blame her.<sup>89</sup> The situation is no different from the garden-variety case where one is at fault for having wronged an intimate and the wrong in question is one we deem to be a private matter. In that case, it is improper for impartial third parties to blame. But the fault principle plays no role in our determination that third parties should refrain from blaming. Instead it is norms of privacy that do so. These same norms

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<sup>87</sup> Cf. R.A. DUFF, ANSWERING FOR CRIME 141–42 (2007) (“A public wrong is . . . a wrong against the polity as a whole, not just against the individual victim: given our identification with the victim as a fellow citizen, and our shared commitment to the values that the [offender] violates, we must see the victim’s wrong as also being our wrong.”); GEORGE P. FLETCHER, BASIC CONCEPTS IN CRIMINAL LAW 77 (1998) (“Crimes are public wrongs, for in addition to the particular victim the public as a whole is injured in its sense of security and well-being.”); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 121 (7th ed. 2015) (“Crimes are public wrongs. The implication of a guilty verdict is that the convicted party wronged the community as a whole.”).

<sup>88</sup> See *infra* Sections IV.A.3, IV.B.

<sup>89</sup> See, e.g., DUFF, *supra* note 87, at 141–42; Lindsay Farmer, *Criminal Law As an Institution: Rethinking Theoretical Approaches to Criminalization*, in CRIMINALIZATION: THE POLITICAL MORALITY OF THE CRIMINAL LAW 80, 85 (R.A. Duff et al. eds., 2014); Cf. Leo Katz, *The Prerequisites of Responsibility: Comments on Antony Duff*, 2 OHIO ST. J. CRIM. L. 463, 468–69 (2005) (affirming Duff’s position that the criminal law should concern itself only with public wrongs, but doubting that that position can illuminate the question of what it would take to count as responsible).

should militate against blaming where the obligation to take oneself to be blameworthy is not fault-based, but the underlying grievance is also a private matter. We will see this norm against intervention played out in what follows.

#### IV. CASES OF FAULTLESS BLAME

I turn now to a series of cases aimed at illustrating that blame can be warranted solely in light of the functions of blame adduced in Part II, and even in cases where the target of blame is not at fault. Together, the cases offer a critical phenomenology of blame: I seek to describe the emotional reactions likely to be experienced in each of the situations and to comment on whether they are fitting (are they prompted by an accurate evaluation of their object?), as well as whether they ought to be endorsed (would it be good all things considered to experience them?). I begin with relationships between friends and family, because these are familiar and because taking on blame within these relationships need not, and typically does not, eventuate in any kind of social or institutional response (the state will not heap punishment upon the parent who takes himself to be blameworthy for an accident of his child of which the parent is in fact innocent). Without the worry that admitting blameworthiness will render us liable to social sanction or state punishment, we might well be more inclined to take on blame. So, the intimate context is one where we will most readily see blame and fault coming apart.<sup>90</sup>

I then move from the family context to the corporate context, and consider cases where a CEO should take himself to be blameworthy for a crime of his corporation for which he is not at fault.<sup>91</sup> In the last Section

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<sup>90</sup> I note also that the history of vicarious liability begins with the family context, as Oliver Wendell Holmes, Jr. argued in his detailed study of the doctrine. See Oliver Wendell Holmes, Jr., *Agency*, 4 HARV. L. REV. 345, 364 (1891); *id.* at 353 (“The wife was said to be in the nature of a servant, and husband and wife were only one person in law.” (footnote omitted)); *id.* at 355–56 (noting that “in some counties a man [was] held to answer for the members of his family.”).

<sup>91</sup> A word about gendered pronouns: Except where the context demands otherwise, I use female pronouns for the parent protagonist and male pronouns for the CEO. The choice is deliberate: When it comes to mass shootings—the crime at issue in the parental context—virtually all offenders are male. See, e.g., Jeffrey Kluger, *Why Mass Killers Are Always Male*, TIME (May 25, 2014), <http://time.com/114128/elliott-rodders-ucsb-santa-barbara-shooter/> (reporting that males make up over 98% of mass killers). Since the child is male, I contemplate a female parent, just to make it easier for the reader to discern whether I am referring to parent or child. Gender disparity is almost equally pronounced when it comes to corporate executive positions: Among the Fortune 500, only 14.6% of executives are female, and females comprise only 4.6% of CEOs. See Judith Warner, *Fact Sheet: The Women’s Leadership Gap*, CTR. FOR AM. PROGRESS (Mar. 7, 2014), <https://www.americanprogress.org/issues/women/report/2014/03/07/85457/fact-sheet->

of this Part, I consider possible objections. The work of this Part concerns only the circumstances grounding blame; I defer to the next Part the criminal law implications of the conclusions reached here.

*A. Disentangling Blame and Fault in Intimate Contexts: A Tragic Accident*

This Section reaches conclusions that the adherent of the fault principle should find surprising: First, the standards governing what counts as faulty conduct vary according to the perspective from which one judges: Thus, parents, for example, should judge themselves more harshly than outsiders judge them. That is not the same as saying that parents should hold themselves to higher standards when their conduct affects their children. Both the adherent of the fault principle and I can allow that parents owe their children a heightened standard of care. But here is where we diverge: The adherent of the fault principle will think that the amount of blame someone deserves varies only according to the magnitude or severity of one's fault. By contrast, I aim to show that the amount of deserved blame can also turn on the nature of the relationship between the wrongdoer and the victim. Thus, a parent can correctly take herself to be more blameworthy when her wrong results in an injury to her child rather than a stranger even if she is, and she knows that she is, equally at fault with respect to each of them. Further, I seek to establish that one can be blameworthy even if one is not at fault at all, and solely by virtue of one's having caused harm to a loved one. The first two subsections here contain illustrations of these phenomena.

Second, and more surprising, where both the parent's and our conclusions about warranted blame diverge, but both are correct from the perspective from which these conclusions are formed, we should sometimes adopt the parent's conclusion. Whether we should replace our conclusion with the parent's will depend, on the one hand, on whether blaming her will satisfy the functions of blame adduced above and, on the other hand, on whether there are countervailing reasons that militate against our blaming (e.g., that she is grieving and her grief is suffering enough). These considerations are aired in sub-section 3, below.

*1. Lots of Blame with Only Minor Fault*

I begin here by contemplating a case in which a child is killed in a car accident for which no one is at fault and yet some of the individuals involved take themselves to be blameworthy—as they should, we will see. Bernard Williams offers a famous example involving something like

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the-womens-leadership-gap/. I use male pronouns to refer to the CEO in light of this (lamentable) reality.

faultless self-blame. He describes a lorry driver who, although driving impeccably, kills a young child who has darted unexpectedly into the road.<sup>92</sup> Williams contends that the driver will react differently to the death than would a mere bystander, and with good reason, since the driver's agency has been implicated in the death in a way that the bystander's has not. Who we are, Williams says, depends on what we have done and what consequences our actions bring about, and this is so for faulty and faultless actions alike.<sup>93</sup> Thus the driver's biography has been punctuated by this tragic event—it figures in the narrative of his life in a way different from the way it will figure in the life of a mere bystander to the event. That we have reason to feel ourselves more implicated where some harm arose as a result of our actions, faultless though they may be, is for Williams not merely understandable but the mark of a decent character.<sup>94</sup> Thus, he contends that “some doubt would be felt about a driver who too blandly or readily moved to th[e] position” of a mere spectator after being reminded that the accident was not his fault.<sup>95</sup>

There is much puzzlement over what features of the driver's situation give rise, or should give rise, to his distinctive experience.<sup>96</sup> If what the driver regrets is the fact of his own involvement, then there seems little reason to affirm his reaction; after all, the tragedy in the event overwhelmingly resides in the child's death, and not in the driver's now-altered biography. On this understanding, then, the driver seems to exhibit an unseemly narcissism. But what else about the driver's involvement would give him reason to experience the tragedy differently from a bystander? The details of the lorry driver case are quite sparse, so it is hard to know just what beliefs underpin the driver's reaction and so just what shape the driver's emotions take.<sup>97</sup> But we can make progress

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<sup>92</sup> See WILLIAMS, *supra* note 39, at 27–30.

<sup>93</sup> *Id.* at 29–30.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 28. See also Wolf, *supra* note 5 at 12 (explaining why it would be untoward for the lorry driver to feel no differently from the spectator thus: “What is problematic is [the lorry driver's] failure to take the consequences of his faultiness to have consequences for him, to be a significant part of his personal history, in a way in which witnessing, much less reading about an accident would not be.”).

<sup>96</sup> For a recent example, see R. JAY WALLACE, *THE VIEW FROM HERE: ON AFFIRMATION, ATTACHMENT, AND THE LIMITS OF REGRET* 32–45 (2013); *cf.* David Sussman, *Is Agent-Regret Rational?* (2013) (unpublished manuscript presented at 47th Chapel Hill Colloquium in Philosophy, University of North Carolina), [http://philosophy.unc.edu/files/2014/07/Sussman\\_colloquium-.pdf](http://philosophy.unc.edu/files/2014/07/Sussman_colloquium-.pdf) (“There is, after all, something very paradoxical about the claim that the driver really should blame himself if others with exactly the same beliefs about the situation should not similarly blame or resent him as well.”).

<sup>97</sup> Julie Tannenbaum is one philosopher who aims to elucidate the appropriate grounds for agent-regret. See Julie Tannenbaum, *Emotional Expressions of Moral Value*, 132 *PHIL. STUD.* 43 (2007).

if we turn to a case that bears a great deal of similarity to that of the lorry driver, with one twist: The agent in question is no mere stranger to the child-victim; she is instead the child's mother.

The example comes from the Pulitzer-prize winning play, *Rabbit Hole*,<sup>98</sup> and the central event of the play, which has taken place even before the play begins, involves a woman, Becca, who is in her front yard with her four-year-old son, Danny, when the family dog runs into the street. Danny follows and he is hit by a car coming down the street. The driver is a high school student who has just earned his license but there is no reason to think the driver is at fault. Danny dies and Becca is wracked by guilt.

It would not be difficult to massage the elements of the plot such that they fit within the contours of the fault principle, and to therefore arrive at a conventional understanding of Becca's guilt. Becca might believe that Danny was able to run off only because she let her attention lapse, her having done so was at least negligent, and so she rightly experiences guilt over his death. On the other hand, some of us might be disinclined to find fault even here. Full-time parenting is exhausting, unfailing rapt attention is too much to ask of any parent, most of us have moments when we are distracted, and most of us, thankfully, are never made to pay for these distractions in the way that Becca has been. Becca is not a worse parent than we are—she is not even a substandard parent on this way of viewing the matter. She is just the victim of bad luck. Should we then take her guilt to be unreasonable?

In thinking about Becca's guilt it will be useful to invoke a distinction advanced by Justin D'Arms and Daniel Jacobson, between an emotion's fittingness and its all-things-considered propriety.<sup>99</sup> For D'Arms and Jacobson, an emotion is fitting if "it accurately presents its object as having certain evaluative features."<sup>100</sup> To take an example of theirs, envy is the fitting response of an untenured professor to a colleague who receives tenure because envy is the emotion that "portrays a rival as having a desirable possession that one lacks, and it casts this circumstance in a specific negative light."<sup>101</sup> But even if envy fits, it might nonetheless be all-things-considered improper. If one's newly tenured colleague deserves her promotion, if she has been a good friend, if she would experience nothing but unadulterated happiness were the tables turned, then one should recognize that envy, fitting as it is, is not the emotion one *ought* to experience.<sup>102</sup>

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<sup>98</sup> DAVID LINDSAY-ABAIRE, *RABBIT HOLE* (2005).

<sup>99</sup> See Justin D'Arms & Daniel Jacobson, *The Moralistic Fallacy: On the 'Appropriateness' of Emotions*, 61 *PHIL. & PHENOMENOLOGICAL RES.* 65 (2000).

<sup>100</sup> *Id.* at 65.

<sup>101</sup> *Id.* at 66.

<sup>102</sup> Angela Smith raises a related distinction that pertains specifically to blame: She argues that the question of whether one is culpable is conceptually prior to the question

Now, the claim about propriety presupposes that one's emotions are appropriately subject to moral judgment. Insofar as one thinks of one's emotional responses as beyond one's control, one might think the claim odd, if not altogether wrong. Yet those who defend the idea that emotions are proper subjects of moral evaluation acknowledge that emotions often come upon us unbidden. They contend, however, that when one judges the propriety of an emotion, one seeks to evaluate not the emotion just as it has risen to consciousness, but instead what might be called one's considered emotions: We often feel things we know we should not—jealousy or schadenfreude, for example. We should blame ourselves for having these feelings if, but only if, we allow them to take hold rather than trying to extinguish them.<sup>103</sup> In this and the next subsection, I consider only the fittingness and propriety of the first-person emotion—i.e., Becca's guilt. In Section IV.A.3, I turn to whether we, impartial observers of Becca's situation, should blame Becca as she blames herself.

Returning now to Becca, what might make her guilt fitting? Here is one explanation, but not one that ultimately works. Suppose that Becca agrees that she did do all she could to prevent Danny's death. In more reflective moments, she acknowledges that she is without fault. But she nonetheless takes refuge in a kind of imagined culpability given that guilt can function as a diversion: Guilt sustains a sensible narrative about the tragedy. It allows Becca to tell a story about what made it the case that Danny died, and it is a story with a villain—Becca—onto whom she can expiate some of her anguish in the form of self-directed indignation. Painful as this is, it is perhaps less devastating than the brute accident, the cosmic injustice, that purveyor of senseless tragedy that provides no target for any of the agony that it inflicts.<sup>104</sup>

Now, while this account can explain the etiology of Becca's guilt, it

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of whether one should be blamed, and that the latter is "sensitive to a host of considerations that appear to have little or nothing to do with an agent's responsibility or culpability for her attitudes or behavior." Angela M. Smith, *On Being Responsible and Holding Responsible*, 11 J. ETHICS 465, 466 (2007).

<sup>103</sup> See, e.g., Nancy Sherman, *Taking Responsibility for Our Emotions*, SOC. PHIL. & POL'Y, July 1999, at 294.

<sup>104</sup> Of course, if Becca is to seek refuge in imagined fault, one might think the more plausible way in which this would play itself out would involve her imagining that the driver was at fault, rather than taking herself to be at fault. But I think this strategy less optimal and less faithful to what is at stake: Earlier I adduced the therapeutic power of expiating one's anger. On that basis, let us assume, blaming the driver and blaming herself are equally effective and so equally desirable. But in blaming herself, Becca affirms her role as parent—after all (as I go on to argue), the normative ideal of parenting involves seeing oneself as more responsible for what happens to one's child. Blaming the driver would not have this effect, and this effect is therapeutic in its own right. So, self-directed blame seems to be the more desirable strategy for coping with the pain of her loss.

does not show her guilt to be fitting. On D'Arms and Jacobson's account, guilt is fitting if Becca *accurately* sees herself as bearing blame for Danny's death.<sup>105</sup> But on the explanation just proffered, Becca does not accurately see herself as bearing blame; she would acknowledge, if pressed, that she merely imagines herself to have been at fault. She does not truly believe that she was.

But there are multiple scenarios that would make Becca's guilt fitting. I explore two of them here.

a. Cases of uncertainty about the facts

Becca's guilt might be fitting if, from her perspective, it reasonably appears that she was at fault. We expect parents to go above and beyond the call of duty; when a child's life is at stake, we expect parents to do everything in their power to prevent their child's death. We, impassive observers of Becca's case, might well be willing to grant that she did everything she could to prevent Danny's death, and so think her entirely free of omission liability. But she is beset by the crushing doubt that she could have done still more—reacted sooner, run faster, reached Danny in time—and that her failure to have done more constitutes her fault. Insofar as Becca *truly and not unreasonably* believes that she is at fault (as opposed to her indulging a comforting fiction), she has reason to feel guilty. Her guilt is then fitting since it is responsive to her expanded but not irrational sense of her own agency. Becca's guilt accurately presents her as having culpably caused Danny's death—culpably because, by her not unreasonable lights, she did less than she could and should have to have prevented his death, and so she is at fault.<sup>106</sup>

Importantly, Becca's guilt, on this scenario, is not unreasonable because it does not defy the truth about whether she was at fault, even if we impartial observers have reason to believe that it was more likely than not that she was *not* at fault. Put differently, Becca's judgment that she was at fault trades on a general causal indeterminacy, and it trades on that indeterminacy in just the direction it should, given her role as

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<sup>105</sup> See D'Arms and Jacobson, *supra* note 99, at 69–75.

<sup>106</sup> D'Arms and Jacobson note that which emotions we experience can depend on perspective, though they accord perspective a different role:

[A] fact we've noticed about anger: what you actually feel depends very strongly on where you're placed. Most of us don't often find ourselves getting angry at injustices that are unrelated to our own concerns, even when we grant them to be worse, morally, than the local transgressions that sometimes so enrage us.



Danny's parent. We are not always in a position to be clear about the causal facts.<sup>107</sup> As such, there is some room to fudge the causal metaphysics when it comes to determining what should count as the true scope of a person's causal agency. And where there is this room, moral values may, and indeed sometimes should, decide the issue. This is just the rationale for giving someone—especially someone with whom we are in a trusting relationship—the benefit of the doubt. When we do so, we do not suspend judgment. Instead, we overcome our doubts by deferring to their version of the facts, and endeavoring to come to believe it to be true. In this way, norms of loyalty or solidarity decide what we will take to be true.

We can understand that someone in Becca's position might overcome her doubts about her causal role in a similar way. On this thought, Becca's anguishing suspicion that she might have made a difference would then not be a delusion born of a perverse sense of grandeur. Just the opposite: it would reflect a clear-eyed humility about our ability to make causal determinations with anywhere near complete certainty, and a choice to err on the more unforgiving side, the side that implicates rather than exculpates. Given this choice, Becca's guilt would be responsive to a not inaccurate picture of the world, and so it is fitting.

Now it is important to note that Becca's guilt would fit the scenario only if there were room to question whether she could reasonably have done more than she did. There comes a point where it is too far-fetched to believe that one could have made a difference. Perhaps parents, contemplating their interactions with their kids, should be expansive when it comes to identifying just where that point is. But that does not mean that the boundary between the plausible and the completely improbable disappears.<sup>108</sup> The account here allows for guilt in circumstances well beyond what the fault principle contemplates, but it is not completely insensitive to the bounds of causation.<sup>109</sup>

But why should a parent be so keen to conclude that she was at fault and thus is worthy of blame? Or to put the question in D'Arms and Jacobson's terms, is parental guilt in these cases proper? Answering that

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<sup>107</sup> Cf. Morse, *supra* note 2, at 880 (“[T]he legal doctrines of causation are unlikely to map dependably the prelegal metaphysics of causation, that is, the universe's ontology of physical cause and effect.”); *id.* at 880–81 (“the rampant and unavoidable complexity and vagueness of causation doctrine . . . was created to solve legal liability problems, not to specify the metaphysics of actual physical causation.”); Wex S. Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60 (1956) (arguing that even determinations of but-for causation, which are supposed to turn on objective facts, inevitably smuggle in normative considerations).

<sup>108</sup> Or, if we adopt a more scalar approach, see Michael S. Moore, *Causation and Responsibility*, SOC. PHIL. & POL'Y, July 1999, at 1, we must recognize that at some point the degree of causation peters out.

<sup>109</sup> For other sources of non-causal guilt, see *supra* note 15.

question requires that we arrive at an all-things-considered determination of whether it is good that a parent experience guilt, where goodness might be cashed out in terms of guilt's instrumental utility, its meaning, its costs to the sufferer, and so on. I will not endeavor a full-blown account of what makes it good for one to experience some emotion rather than not. But I will say that I think that Becca's guilt is good, all-things-considered, for it is consistent with, and indeed it affirms, a normative ideal of parenting: At least before her child reaches the age of moral maturity, a parent ought to have an enlarged sense of her own causal agency—the responsibility of raising a vulnerable, dependent being should make it the case that parents think themselves capable of controlling more of their child's environment than would be reasonable if we were assessing the extent of control one stranger ought to think he can exercise over the environment of another. Thus, it is not a sign of narcissistic dysfunction for a parent to see herself in her child's acts (though it may be when a parent continues to incorporate her child's agency into her own once her child reaches adulthood). It is instead the appropriate way to understand one's role and place in the parent-child relationship. Thus, the parent ought to take on some of the agency that her child lacks. And the parent ought to assess her parenting in light of this enlarged sense of agency. Where some harm befalls her child and it is not unreasonable for the parent to identify some salient causal connection between the harm and her own action or inaction, guilt would seem the proper response.

At the same time, impartial observers should see the matter differently. Faced with the same causal indeterminacy that Becca encounters, we bear obligations to be *chary*, not expansive, in our conception of the role she played in Danny's death. It is good that each of us operate with a capacious sense of our own agency, but also good that others think us not quite so powerful. Significant freedom would be lost were others to take us to be responsible in all of the situations where we should hold ourselves responsible.<sup>110</sup>

If that is right, then Becca can correctly judge herself to be at fault while we can correctly judge her not to be at fault. The interesting implication of this divergence, which we shall see in Section IV.A.2,<sup>111</sup> is that we sometimes have reason to think Becca blameworthy even though she is not, by our lights, at fault.

#### b. Fault and Relationally-Informed Guilt

In the scenario just described—where Becca reasonably concludes that she was at fault, and so experiences guilt—the fault principle is not

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<sup>110</sup> See *supra* text accompanying note 93.

<sup>111</sup> See *infra* text accompanying notes 126–27.

directly under attack. Causal indeterminacy combined with her parental role compels Becca to conclude that she must have been at fault. That is, her relationship serves to resolve the uncertainty around the causal facts, and it does so in light of a norm making it appropriate to conclude that she was at fault. But it is only in virtue of that conclusion that she takes herself to be guilty. So, consistent with the fault principle, fault precedes guilt; she is blameworthy only because she was at fault.

We can however begin to see the first evidence of the fissure between blame and fault if we compare Becca's perspective to that of the lorry driver. Like Becca, the driver holds himself, and should hold himself, to a standard higher than that to which bystanders do and should hold him. Accidents seem to involve one or more counterfactuals of indeterminate plausibility. There is always the thought that, like in Becca's case, greater attention, faster reflexes, *something*, might have allowed one to avert disaster. And why shouldn't the driver—or Becca—be more afflicted by this set of thoughts than the onlooker whose agency is not implicated in the accident?<sup>112</sup> It is good that each of us operates with a heightened sense of her causal agency; after all, exercising our causal agency is not without risks.<sup>113</sup> And it is also good that others judge us less harshly than we judge ourselves; life would be oppressive otherwise. By the light of his own sense of what he could and should have done, the lorry driver has reason to feel guilt; by the light of a more generous sense of what he could and should have done, onlookers have reason to judge him not to be at fault.

At the same time, we might expect the magnitude of Becca's guilt to be greater than that of the lorry driver. Imagine two further versions of the lorry driver case, each involving an equal, but small, quantum of negligence. In particular, suppose that the driver in question was overdue to have the car's brakes checked and it was the brakes' poor condition that made the car unable to stop before hitting Danny.<sup>114</sup> Now consider two variants on this scenario: In the first, the car is driven by Williams's driver; in the second, it is driven by Becca. Danny, Becca's son, is the victim in both cases. Do Becca and the lorry driver take themselves to be equally blameworthy? Note that both are equally at fault: While Becca has reason to exercise heightened care when she interacts with her child, neither Becca nor the lorry driver had any reason to think that any child,

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<sup>112</sup> David Sussman considers this possibility but he thinks it is either a species of garden-variety remorse or, if the driver thinks the possibility of his fault exceedingly remote, then the driver should accept blame, but not take himself to be blameworthy. See Sussman, *supra* note 96, at 8–10.

<sup>113</sup> Cf. WILLIAMS, *supra* note 39, at 29 (“[I]t would be an insane concept of rationality which insisted that . . . we might, if we conducted ourselves clear-headedly enough, entirely detach ourselves from the unintentional aspects of our actions . . . and yet still retain our identity and character as agents.”).

<sup>114</sup> Susan Wolf developed this example. Wolf, *supra* note 5, at 8.

let alone hers, might dart out into the road. As such, she would not have had reason—even from her own perspective—to have hewed to heightened standards of care. So, she would not have reason to think that she was more at fault, that her performance fell shorter of the mark than the lorry driver's. In other words, Becca and the lorry driver would hold themselves to the same standards, and take themselves to be equally delinquent in light of these standards. But there is a difference in the way each views their role, for the delinquency is less tolerable in the parent-child context than in the stranger context. As such, even though Becca is not, and does not take herself to be, more at fault than the lorry driver, she has reason to view her fault as more blameworthy.

This thought suggests a wedge between blame and fault. In particular, it shows that the magnitude of warranted blame can turn on factors additional to whether one is at fault. Again, the idea is not that Becca is subject to more demanding standards than the lorry driver, such that she misses the mark of what it would have been to act properly by a greater margin than he does (i.e., that she falls shorter, so to speak, than he does). It is instead that it is more significant when one falls short in a way that affects a loved one, rather than a stranger, and this is true even if one falls just as short in both cases. The fact that one has failed a loved one thus heightens the warrant for blame on its own terms. This suggests that the amount of blame one deserves turns in part on the extent of one's fault and in part on the meaning of that fault for those whom it affects; in particular, the amount of blame two equally faulty actors deserve may well depend on whether the victim who is harmed through their faulty action is a stranger or a loved one, with more blame being warranted in the latter case. So, blame is not responsive only to fault.<sup>115</sup>

Now, one might think that the fault principle could accommodate this insight. After all, adherents of the fault principle acknowledge that where two people are equally at fault but only one produces harm, the one who produces harm is to blame *for more than the other*.<sup>116</sup> But that acknowledgment is not equivalent to saying that the one who produces harm is *more blameworthy than the other*. Instead, on the traditional conception, blame is calibrated solely in light of the magnitude of one's fault (although of course one's "outcome responsibility"<sup>117</sup> will depend on the amount of harm one has caused). But the point here is that, given equal fault and equal amounts of harm caused—a child's death, in the case where either Becca or the lorry driver has caused the accident—one

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<sup>115</sup> Thomas Scanlon incorporates something like this feature in his account of blame, holding that a person will conceive of the meaning of a slight by his friend differently than an onlooker would conceive of the slight, though each would judge the slight to be equally wrong. Scanlon, though, has a very different view of blame from the one here. See SCANLON, *supra* note 82, at 136–37.

<sup>116</sup> See, e.g., Wolf, *supra* note 5; Feinberg, *supra* note 58, at 681–84.

<sup>117</sup> TONY HONORÉ, RESPONSIBILITY AND FAULT 7 (1999).

agent can nonetheless warrant more blame than the other, and this additional blame results from the relationship of the agent to the victim.

In sum, there are two ways in which relationships inform assessments of blameworthiness. First, one's relationship to one's own acts matters. Thus, Becca and the lorry driver are at fault by their own lights, but not by ours, because they apply more demanding standards to their own conduct than we do and should apply to it. Second, the extent to which one is blameworthy depends on one's relationship with the victim, and this is a ground of blame completely independent of fault. As such, there is some amount of blame one can deserve that has nothing to do with how much fault one bears. We have, then, arrived at a departure from the fault principle, even if only a modest one.

## 2. *Faultless Guilt*

Let us now return to the case as Williams had constructed it—importantly, an accident where the lorry driver bore no fault at all, and where the driver knows he is without fault. And let us compare the faultless lorry driver to a faultless Becca, again with Danny as the victim, with the important element that each driver knows that he or she is faultless. Williams is clear that the driver's agent-regret is fitting, but he would also think that guilt is not. For Williams, guilt fits only if the agent is at fault.<sup>118</sup> So Williams is not one who rejects the fault principle; he is just one who thinks it should be supplemented by non-moral, but no less weighty, considerations. Williams is led to distinguish between guilt and agent-regret precisely because of his larger project, involving a critique of the "morality system."<sup>119</sup> I do not seek to intervene in that debate here, and so I am prepared to punt on the question of whether the lorry driver's reaction is moral or non-moral—that is, whether we should, along with Williams, understand the driver's reaction as a species of agent-regret, rather than guilt.

The important claim to be defended here is that *Becca's* reaction, even in the case where she knows she is not at fault, *is* a species of guilt. Or, more accurately, Becca's is a case where the fittingness of guilt can elide considerations of fault altogether. A parent has killed her child. What business does she even have investigating the facts to see if she is

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<sup>118</sup> Williams uses the term "remorse" rather than guilt, and he contrasts remorse with agent-regret on the ground that remorse applies only to the "voluntary." Williams, *supra* note 39, at 30. It is reasonable to interpret Williams's use of "voluntary" here such that it, and the remorse it engenders, track fault. See, e.g., Sussman, *supra* note 96, at 1 (restating Williams's understanding remorse, regret, and agent-regret in this way: "Like remorse, agent-regret is only properly felt by the person who performed the bad act; but like mere regret, agent-regret involves no presumption of fault.").

<sup>119</sup> BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 174–96 (1985); see also WILLIAMS, *supra* note 39, at 20–39.

at fault? What moral difference could it make from her perspective for the way she should feel about the death?

This is not to say that Becca's having been at fault would make no difference to her self-assessment. The point is rather that her attention would be misdirected—wrongfully—if she were to worry about her culpability. Her profound distress over having caused her son's death should short-circuit the typical inquiry into fault that precedes one's determination that one ought to experience guilt. Given her causal agency, and given her relationship to her victim, guilt should be her lot whether or not she is at fault.<sup>120</sup>

Another way to put the point is to say that, in this case, there is no meaningful difference between agent-regret and guilt. For one thing, one certainly could not rely on phenomenology to distinguish the two reactions. I doubt that our emotional receptors are sensitive enough to register the fine-grained differences in the way that agent-regret and guilt will *feel*, especially when the reaction in question is as all-consuming as it will be for the decent parent. But suppose that the key distinction between guilt and agent-regret is that only the former is accompanied or underpinned by the belief that the agent was at fault. In that case, third parties might have a reason to characterize Becca's felt reaction as agent-regret, rather than guilt. But Becca is not, and should not be, in a position to register this distinction—again, because it is not for her to be forming beliefs about fault in the circumstance.<sup>121</sup>

In the variant of the case where the lorry driver or Becca bore a small measure of fault for the car accident that killed Danny, I argued that Becca would feel more guilt than the lorry driver, not because she was more at fault—ex hypothesi, they were equally at fault—but because the fault was more consequential for Becca. Perhaps the set of beliefs underpinning Becca's greater guilt there will occur to some parents in a situation like the horrific one that Becca faced. But we are now in a

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<sup>120</sup> Becca's causal role is important here, in much the way that Williams describes. Becca's agency, and so ultimately her identity, is marked by consequences she did not choose but that flow from an activity—driving—that she did choose. *See* Williams, *supra* note 39, at 29 (“One's history as an agent is a web in which anything that is the product of the will is surrounded and held up and partly formed by things that are not . . .”). Killing Danny is Becca's act independent of her fault, but not independent of her agency. For that reason, had Becca been hypnotized and then made to drive the car, or had Danny been dropped by an evil villain from an overpass at just the moment when Becca would hit him as she was driving by, she would not have reason to think she killed Danny. Here, I think it would not be inappropriate for others to urge her to see that she was not causally responsible, and for her to take some solace in the fact that she was not. But that just seems to underscore the power of one's agency in one's sense of one's responsibility.

<sup>121</sup> The idea might be captured in an aphorism Bernard Williams expresses in a different context: The thought, “I am [not] at fault for Danny's death” is in the circumstance, and to use Williams's words, “one thought too many.” *See* Williams, *supra* note 39, at 18.

position to see that that set of beliefs is unnecessary to ground Becca's guilt. We need only advert to Becca's relationship to Danny—and not to a consideration of whether she is at fault at all—to explain why she would and should be beset by a guilt significantly greater than the driver's.

This is not to say that fault must forever remain irrelevant for Becca. As the tragedy recedes into the past, there will perhaps come a time when it is not unseemly for Becca to contemplate whether she was at fault in Danny's death. Again, this inquiry will be relevant to her assessment of her culpability. But it is not clear that any other morally meaningful practical consequence follows.<sup>122</sup> Will it then become appropriate for Becca to withdraw or disavow the contrition she displayed to her husband? To reclaim, say, the money for a scholarship fund the couple had established in Danny's memory? To recast her anguish as the deeply irrational reaction of a parent in the haze of tragedy? It seems to me like none of these responses would be appropriate, because her initial reactions were not inappropriate. The question of whether Becca was or was not at fault is of very minor significance. There is a response that Becca owes simply in virtue of her causal and relational roles: Becca should experience guilt, and she should take herself to be blameworthy.

By way of summary, notice just how far from the fault principle we have come: First, we have seen that one should take oneself to be blameworthy not only in proportion to the magnitude of one's fault, but also in proportion to the strength of the relationship between the victim and oneself. Thus, Becca has reason to feel more guilt if it is she, rather than the lorry driver, who hits and kills Danny, even if neither knew that it was Danny who darted out into the road and both were driving with equally worn brakes. So the magnitude of warranted blame can vary in virtue of factors other than fault. Second, in judging whether one is blameworthy, one should operate with a sense of one's agency responsive to the relationship between the victim and oneself. And where that relationship is especially central to one's identity and one's agency is especially implicated in the act that prompts the judgment—as was true in the case where Becca innocently kills Danny—the importance of fault can recede dramatically, perhaps even to the point of irrelevance. That is, the power of a particular relationship can provide all the warrant for self-blame that is required.

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<sup>122</sup> Imagine that, in a bid to redress her role, Becca had gone to the DMV and insisted that they remove her driver's license. Having now come to terms with the fact that she was not at fault, Becca might seek to have her license reinstated. That is a practical consequence that follows from her having assessed her culpability. But it is not a morally meaningful one.

### 3. *Self-Blame and Others' Censure*

This Article thus far has focused on the first-person reactions of individuals who cause harm with little or no fault. Here, I consider whether third parties should countenance the reactions of the first parties or instead seek to correct them. And even if third parties conclude that the first parties are correct in seeing things the way they do, must third parties adopt the first parties' perception in determining their own reactions? To put the matter concretely, if Becca concludes that she is liable to blame for causing Danny's death because she is his mother, are we then licensed in blaming her even if she is not at fault by our lights? Even if she is not at fault even by her own lights? I address these questions here.

To begin, I think that third parties should find it proper for Becca to experience guilt in the three variants discussed here—minor fault, uncertain fault, and no-fault scenarios. Given parental norms, the parent should feel guilty in the cases under discussion. Further, the parental role not only renders guilt appropriate from the first-person perspective that the parent inhabits; it is also a perspective that we ought to endorse her inhabiting. A reaction of parental guilt stemming from the parent's enlarged conception of her own agency constitutes and reinforces the parent-child bond, and we have reason to value the parent-child bond. As such, we have reason to value the features of the relationship that compel its members to see their agencies as intertwined. We should, then, recognize that guilt is proper for Becca, and we should allow her to indulge it even if we do not believe her to be at fault.<sup>123</sup>

Finally, it is not just that it would be good for Becca to experience guilt; it is also that it would be bad for her not to. Thus, for example, had Danny's death been caused by a reckless driver, we would think it not only appropriate for the driver to experience guilt; we would also be licensed in judging him badly were he not to experience it. Similarly, since Becca's guilt is fitting and it is proper, it is the emotion she ought to feel in response to her role in Danny's death,<sup>124</sup> on pain of disapproval by others, or at least those others who are close enough to her to express disapproval without being taken to be meddlesome.<sup>125</sup>

Now, not everyone agrees that it would be proper to countenance first-personal guilt if the person who judges herself guilty would not be found to be at fault from a third-person perspective. To see this, consider

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<sup>123</sup> The considerations adduced here are given an ampler airing *supra* Section III.A.

<sup>124</sup> To be sure, Becca's grief might so overwhelm her guilt that the latter is not the emotion ready to hand. What matters is that Becca should be primed to feel guilt where her attention is turned to the moment of Danny's death rather than the fact of it.

<sup>125</sup> See *supra* note 93 and accompanying text (discussing the ways in which norms of privacy can foreclose reproach).



Nancy Sherman's searing descriptions of military commanders who lose members of their unit in battle where, at least from a third-party's perspective, the soldiers' deaths cannot be traced to any fault on the part of the commander.<sup>126</sup> Oftentimes a commander in this situation will respond to these losses with profound guilt—guilt not unlike that of the parent who loses a child. While Sherman thinks the reaction understandable, she does not think it fitting, and so she thinks that the commander's loved ones ought to help him move to a more detached perspective from which to judge himself.<sup>127</sup> Once there, he can and should relinquish his guilt. Williams seems to have a similar take on whether we should countenance the lorry driver's regret: While he acknowledges that the driver's regret is called for, he also contends that others should nonetheless seek “to move the driver from this state of feeling.”<sup>128</sup>

The problem with Sherman's position is that it denies the meaning of the relationship in question. For the commander to seek to move to a more detached position is for him to betray his soldiers, and to offend against the expectations inherent in the commander's role. So too for Becca to seek to move to this more detached position would be for her to repudiate her parental role, and to do violence to the bonds of affection that allow her to inhabit the first-person perspective in the first place. The features of the relationship that cause the commander, or Becca, to judge themselves blameworthy are part and parcel of what make these relationships valuable. Neither can abandon the perspective from which he or she judges himself or herself blameworthy without disavowing the relationship itself. No doubt the commander or Becca would experience far less pain if he or she were to “move on,” or “get over it.” But their present pain is of a piece with being in the relationship; because the relationship is itself valuable to each, each must affirm the pain it occasions in loss too. And because these are in general valuable relationships, we should affirm the features of the relationships that cause this pain too.<sup>129</sup> Thus, in the case where Becca kills Danny through no fault of her own, we might nonetheless forbear from insisting too

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<sup>126</sup> See, e.g., NANCY SHERMAN, *AFTERWAR: HEALING THE MORAL WOUNDS OF OUR SOLDIERS* 57–75 (2015).

<sup>127</sup> Nancy Sherman, *Self-Empathy and Moral Repair*, in *EMOTION AND VALUE* 183 (Sabine Roeser and Cain Todd eds., 2014) (prescribing self-empathy as an antidote to what she deems the commanders' “overbearing self-judgment,” *id.* at 191).

<sup>128</sup> WILLIAMS, *supra* note 39, at 28. Cf. Scott A. Anderson, *Rationalizing Indirect Guilt*, 33 VT. L. REV. 519, 543 (2009) (stating that institutions and laws should be used for this purpose, but to a lesser extent of trying to “assuage feelings of indirect guilt directly”).

<sup>129</sup> Cf. Holmes, Jr., *supra* note 90, at 357 (drawing a connection in the history of the doctrine of agency law between a commander's liability for his “under-officers” and assignment of responsibility to the head of the family for other family members' wrongs).

heavily on her moral innocence in a bid to make her feel better. To be sure, we shouldn't conceal that information; it just isn't the right note to be hitting hard if we care about making Becca feel better. One can imagine Becca's responding to the plea, "but it wasn't your fault," with incomprehension, as if it were no more than a non-sequitur, as it is from her perspective. And as indeed it should be.

Should we also, then, blame Becca, as she blames herself? In other words, is indignation, which is the emotional correlate of blame for third parties to a wrong, <sup>130</sup> *proper* for us?<sup>131</sup> There are undoubtedly reasons to think indignation improper, not least of all the fact that Becca is already suffering enough. But even if, at the end of the day, we should renounce indignation and so not blame Becca, it is nonetheless important to note that there is a reason to blame her (though, again, a reason that gets defeated in light of Becca's anguish).

That reason flows from one of the functions of blame adduced in Part III—viz., the way in which blaming allows us to enforce norms constitutive of relationships we care about. I shall have more to say about this when we move to cases in which grief does not so readily outweigh the warrant for blame.<sup>132</sup>

#### *B. Disentangling Blame and Fault in Intimate Contexts: Parental Responsibility for Juvenile Crime*

What if one's child is not victim but instead offender? Should one take on blame for a wrong one's child commits on something like the reasons that prompt Becca to take on blame for accidental harm?<sup>133</sup>

The adherent of the fault principle could answer that question in the affirmative: After all, the thought would go, doesn't a child's wrongdoing--*a fortiori*, his criminality--necessarily bespeak parental delinquency?<sup>134</sup> But that thought is mistaken. As others have noted, good

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<sup>130</sup> See, e.g., Strawson, *supra* note 67.

<sup>131</sup> We might put the difference between whether indignation is fitting and whether it is proper as a difference between whether the judged individual is blameworthy and whether we should blame her (whether or not we express that blame). For the latter distinction, see R. Jay Wallace, *Dispassionate Opprobrium: On Blame and the Reactive Sentiments*, in REASONS AND RECOGNITION: ESSAYS ON THE PHILOSOPHY OF T. M. SCANLON 348 (R. Jay Wallace, Rahul Kumar & Samuel Freeman eds., 2011).

<sup>132</sup> See *infra* Section IV.C.

<sup>133</sup> I focus here on the parents of killers who have not yet reached adulthood because part of the rationale for parental guilt that I adduce goes to the overlap of agency between parents and children that is appropriate before one's child has fully matured, but likely not appropriate thereafter. Still it is possible that other considerations ground parental guilt for the criminal acts of their adult children. I do not consider those cases here.

<sup>134</sup> Comments in the popular press certainly evince this line of thinking. For example, reactions to James Holmes's mass killing in a Colorado movie theater included: "Where

apples sometimes give rise to bad seeds.<sup>135</sup> The question for our purposes is whether these good apples might nonetheless have convincing reasons to take themselves to be blameworthy for their children's transgressions. My focus will thus be on those parents whose parenting practices have been at least acceptable, perhaps even unassailable, and who nonetheless should and sometimes do take themselves to be responsible for their children's crimes. I note that some states permit the prosecution and punishment of parents whose adolescent children commit crimes, on the presumption that the crime entails some fault on the part of parents—in particular, inadequate supervision.<sup>136</sup> While I ultimately conclude that it

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were YOU Mother why didn't you take care of him," and "To me it sounds like a bad mother." *Tragedy Compounded: Killers' Parents Become Instant Pariahs*, NBC NEWS (July 25, 2012), [http://vitals.nbcnews.com/\\_news/2012/07/25/12933951-tragedy-compounded-killers-parents-become-instant-pariahs?lite](http://vitals.nbcnews.com/_news/2012/07/25/12933951-tragedy-compounded-killers-parents-become-instant-pariahs?lite).

<sup>135</sup> Andrew Solomon, who has interviewed the parents of teenage mass killers, argues that, in the typical case, it is wrong to think that these parents are at fault. "We often rush to blame parents in situations such as this one, but that is a grave mistake. Parents do not cause mental illness, and they are not responsible for the acts of their children." Andrew Solomon, *An Avoidable Tragedy: Aaron Alexis and Mental Illness*, NEW YORKER, (Sept. 20, 2013), <http://www.newyorker.com/online/blogs/newsdesk/2013/09/psychiatry-mass-shootings-aaron-alexis-mental-illness.html>.

<sup>136</sup> See generally Fern L. Kletter, Annotation, *Validity of Parental Responsibility Statutes and Ordinances Holding Parents Liable for Criminal Acts of Their Children*, 74 A.L.R.6th 181 (2012) (collecting and discussing cases that have considered the validity of parental responsibility statutes and ordinances holding parents liable for the criminal acts of their children); Tami Scarola, *Creating Problems Rather Than Solving Them: Why Criminal Parental Responsibility Laws Do Not Fit Within Our Understanding of Justice*, 66 FORDHAM L. REV. 1029, 1041–45 (1997) (discussing different jurisdictional variances "in criminal parental responsibility laws").

These laws are then justified because, as one commentator puts it, "parents are largely to blame for the delinquent acts of their children." Courtney L. Zolman, Comment, *Parental Responsibility Acts: Medicine for Ailing Families and Hope for the Future*, 27 CAP. U. L. REV. 217, 219 (1998). For the view that parents should be criminally liable *only* where they culpably cause their children's crimes, see, for example, S. Randall Humm, Comment, *Criminalizing Poor Parenting Skills as a Means to Contain Violence by and Against Children*, 139 U. PA. L. REV. 1123, 1126 (1991).

But the notion of blanket parental culpability for crimes of their children is hardly uncontroversial. Historically, parents could not even be held civilly liable for their children's acts unless they were found to have been at fault. See, e.g., James Herbie DiFonzo, *Parental Responsibility for Juvenile Crime*, 80 OR. L. REV. 1, 52 (2001) ("No matter how heinous the behavior of the child, unless the case fit within one of the specified exceptions [of authorization, ratification, provision of a dangerous instrument, or negligence proximately causing child's act], the heart of the common law rule precluded parental liability without fault."). But see Pamela K. Graham, Note, *Parental Responsibility Laws: Let the Punishment Fit the Crime*, 33 LOY. L.A. L. REV. 1719, 1725–26 (2000) (stating that all fifty states impose vicarious tort liability on parents for damages resulting from their children's acts). And, indeed, resistance to visiting the sins of children upon their parents dates back to biblical times. See *Deuteronomy* 24:16

would be inappropriate to prosecute faultless parents for crimes of their

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(“The fathers shall not be put to death for the children, neither shall the children be put to death for the fathers: every man shall be put to death for his own sin.”); George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499, 1548 (2002) (citing a similar verse from *Ezekiel*). For the view that the *Deuteronomy* verse pertains to giving incriminating testimony against one’s family member (or oneself) rather than incurring punishment on the basis of one’s relationship, see Irene Merker Rosenberg & Yale L. Rosenberg, *In the Beginning: The Talmudic Rule Against Self-Incrimination*, 63 N.Y.U. L. REV. 955, 976–77, 976 n.77 (1988). For contemporary doctrinal and scholarly statements eschewing the visitation of the sins of the father on his sons, see Amy L. Wax, *The Two-Parent Family in the Liberal State: The Case for Selective Subsidies*, 1 MICH. J. RACE & L. 491, 525–27 (1996) (reviewing case law that refuses to treat illegitimacy as a bar to receiving statutory entitlements that a legitimate child would receive).

For general scholarly commentary on parental responsibility laws, see Jennifer M. Collins, Ethan J. Leib, and Dan Markel, *Punishing Family Status*, 88 B.U. L. REV. 1327, 1338–43 (2009) (collecting cites on parental responsibility). The authors offer their own critique, based on considerations of desert. *See id.* at 1384–89; *see also* Brian Neill, Comment, *A Retributivist Approach to Parental Responsibility Laws*, 27 OHIO N.U. L. REV. 119, 120 (2000) (arguing that parents should bear criminal responsibility for their children’s crimes only when parents have done wrong); Lisa Lockwood, Comment, *Where Are the Parents? Parental Criminal Responsibility for the Acts of Children*, 30 GOLDEN GATE U. L. REV. 497 (2000). Other arguments against parental responsibility laws express concern that they interfere with parental liberty, *see, e.g.*, Leslie J. Harris, *Making Parents Pay: Understanding Parental Responsibility Laws*, FAM. ADVOC., Winter 2009, at 38; Kathryn J. Parsley, Note, *Constitutional Limitations on State Power to Hold Parents Criminally Liable for the Delinquent Acts of Their Children*, 44 VAND. L. REV. 441, 446 (1991), or will be used to go after disfavored individuals, especially single mothers of color, *see, e.g.*, Leslie J. Harris, *An Empirical Study of Parental Responsibility Laws: Sending Messages, But What Kind and to Whom?*, 2006 UTAH L. REV. 5, 10–11, 32; Naomi R. Cahn, *Pragmatic Questions About Parental Liability Statutes*, 1996 WIS. L. REV. 399, 418–23. (Ironically, the issue of teen violence seems to have garnered the appropriate level of national attention only in cases where the killers and their victims were white. *See* Michael Romano, *No One Seems to Recognize Urban Violence: Minority Students See Double Standard After Columbine*, ROCKY MOUNTAIN NEWS, July 16, 1999, at 32A, 1999 WLNR 807035.)

Courts have diverged on the constitutionality of parental responsibility laws. *Compare* *Williams v. Garcetti*, 853 P.2d 507 (Cal. 1993) (upholding law over constitutional challenge) *with* *Maple Heights v. Ephraim*, 898 N.E.2d 974 (Ohio Ct. App., 2008) (overturning ordinance, even though it had permitted affirmative defense of doing everything in one’s control, because there can be no culpability without fault under Ohio law).

For commentary on the rationale behind these laws, *see, for example*, DiFonzo, *supra* note 136, at 6 (the “premise [of parental responsibility laws] is the empirically unsubstantiated assumption that juvenile delinquency results primarily from improper parental supervision”); *id.* at 41–49 (surveying research showing that the relationship between parenting and child criminality is far more complex than the simple causal story would indicate); *cf.* Cahn, *supra* note 136, at 414–15 (arguing that the laws in question are not status-based but instead turn on the omission of a legal duty that the parent owes his child). *But see* Collins, Leib & Markel, *supra* note 136, at 1339–40 (identifying parental responsibility laws that do not require a showing of fault).

children, that issue is not my concern in this Section.<sup>137</sup> Here I seek to inquire into the moral emotional reactions these parents should experience, and the reaction victims' families, as well as impartial parties, should have to them.

The agonizing reflections of Sue Klebold are revealing here.<sup>138</sup> Sue was the mother of Dylan Klebold, one of the two adolescent Columbine killers who shot and killed thirteen people before taking their own lives.<sup>139</sup> Sue could not reasonably be found at fault for Dylan's massacre. By all accounts, Sue and Tom Klebold were model parents.<sup>140</sup> Theirs was described as a June and Ward Cleaver-ish household,<sup>141</sup> and Sue describes Dylan as "this kind, goofy kid."<sup>142</sup> She maintains further that she and Tom were just as shocked as anyone else to learn that their child could embark upon a killing spree.<sup>143</sup> And a Colorado commission

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<sup>137</sup> I address parental criminal liability in the Conclusion. I contend that the compassion we owe the parents of an adolescent killer will almost surely outweigh the blameworthiness arising from the parental relationship. As such, I conclude that criminal liability is inappropriate.

<sup>138</sup> I focus here on Sue's reactions, and not those of Dylan's father, only because Sue has been much more vocal in interviews. It should not be inferred that the phenomena I mean to describe are peculiar to, or more strongly felt, by mothers. My larger interest is in *parental* guilt and blame.

I note also that Sue's reactions do not appear to be idiosyncratic. Other parents of adolescent killers voice sentiments of guilt similar to hers. *See, e.g.*, TALHOTBLOND (Answers Productions 2009) (quoting the killer's father saying that he felt guilt for his role in his son's murderous act, even though the father's involvement amounted to no more than providing his son with the computer the son used to find his prey—hardly grounds for fault). Still, it is difficult to find parents who are as open and eloquent as Sue Klebold; many parents in these cases decline to engage with the media at all. *See, e.g.*, Sandhya Somashekhar & Sari Horwitz, *A Year After Massacre, Family Lives 'in Darkness,'* WASH. POST (April 12, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/11/AR2008041104103.html> (reporting that the family of the Virginia Tech killer has refused the opportunity to be interviewed by reporters many times).

<sup>139</sup> *See, e.g.*, DAVE CULLEN, COLUMBINE 126 (2009). Eric Harris was the other killer. *E.g., id.* His parents have refused media interviews. *See* Dave Cullen, *The Last Columbine Mystery*, DAILY BEAST (Feb. 24, 2010), <http://www.thedailybeast.com/articles/2010/02/24/the-last-columbine-mystery.html>.

<sup>140</sup> ANDREW SOLOMON, FAR FROM THE TREE: PARENTS, CHILDREN AND THE SEARCH FOR IDENTITY, 587–98 (2012).

<sup>141</sup> *Id.* at 592.

<sup>142</sup> Larry McShane, *Sue Klebold, Mother of Columbine High School Shooter Dylan Klebold, Reveals She Prayed for Son's Death in New Book 'A Mother's Reckoning,'* N.Y. DAILY NEWS, (Feb. 13, 2016.), <http://www.nydailynews.com/news/national/mother-columbine-shooter-prayed-son-death-article-1.2530656>.

<sup>143</sup> Matthew Lysiak, *This Child Will Bring Me a Terrible Sorrow*, SLATE, (Mar. 9, 2016), [http://www.slate.com/articles/arts/books/2016/03/a\\_mother\\_s\\_reckoning\\_by\\_sue\\_klebold\\_reviewed.html](http://www.slate.com/articles/arts/books/2016/03/a_mother_s_reckoning_by_sue_klebold_reviewed.html).

convened to study the Columbine killings concluded that no one could have anticipated the massacre, not even the killers' parents.<sup>144</sup> Finally, the killers themselves acknowledged that their parents bore no fault. In a video Dylan and Eric created in the days leading up to the shootings, Dylan predicted that his parents would say something in the aftermath like, "[i]f only we could have reached them sooner or found this tape,"<sup>145</sup> and he insisted that they were "great parents."<sup>146</sup> Eric apologizes to his parents and then goes on to exonerate them explicitly: "[t]here's nothing you guys could've done to prevent this."<sup>147</sup> Borrowing language from Shakespeare, he reminds them that "[g]ood wombs hath borne bad sons."<sup>148</sup>

Notwithstanding the overwhelming evidence that Sue Klebold and her husband were not at fault, she does not seek to disclaim. In interviews, she unflinchingly asserts, "I was the person who had raised 'a monster.'"<sup>149</sup> To be sure, she denies that she could have known of Dylan's plans for his schoolmates, and so she does not believe that she could have done anything to stop him on the fateful day of his killing spree.<sup>150</sup> But she is nonetheless gripped by the anguishing thought that at some level she and her husband could have done things differently and that, had they done things differently, the Columbine massacre would

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<sup>144</sup> WILLIAM H. ERICKSON, THE REPORT OF GOVERNOR BILL OWENS' COLUMBINE REVIEW COMMISSION 19 (2001), <https://schoolshooters.info/sites/default/files/Columbine%20-%20Governor's%20Commission%20Report.pdf> ("[T]here were indications that the pair had suicidal and violent tendencies. However, they managed successfully to mask their true intentions from their parents and school administrators and perhaps from the bulk of their fellow students . . . ."); cf. Lynn Bartels, *Klebolds Never Knew, Friend Says*, ROCKY MOUNTAIN NEWS, Apr. 26, 1999, at 5A, 1996 WLNR 823388 (stating that the parents did not know before the shooting of their son's problems). Investigators also concluded that both sets of parents were "normal people who seem to care for their children and were involved in their life," and they too "were fooled like everyone else." Nancy Gibbs & Timothy Roche, *The Columbine Tapes*, TIME (Dec. 20, 1999), <http://content.time.com/time/magazine/article/0,9171,992873,00.html>. Finally, it may be worth noting that Eric Harris's parents enlisted a therapist for him, to help him with his anger issues. See *Eric David Harris*, A COLUMBINE SITE, <http://www.acolumbinesite.com/eric.html> (last visited Jan. 8, 2017). Thus, to the extent that the Harrises were aware that their son was troubled, they appear to have been addressing the situation responsibly.

<sup>145</sup> See Gibbs & Roche, *supra* note 144. At another point in the video, Klebold contends that his parents were the only ones who accepted him, while his extended family "treated him like the runt of the litter." *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Susan Klebold, *I Will Never Know Why*, O, THE OPRAH MAG. (Nov. 2009), <http://www.oprah.com/omagazine/susan-klebolds-o-magazine-essay-i-will-never-know-why>.

<sup>150</sup> *Id.*

never have occurred.<sup>151</sup> Some of these what-ifs include what moral philosophers refer to as “circumstantial luck.”<sup>152</sup> (What if we had bought the house in California, rather than the one in Littleton, Colorado, all those years ago? Or, what if I had never met and married Dylan’s father?).<sup>153</sup> But other what-ifs contemplate steps she and her husband might have taken that would perhaps have brought Dylan’s misery to light, and provided him with a way of coping that would have averted the disaster.<sup>154</sup> This second source of anguish might be nothing other than wishful thinking, or “resultant luck”;<sup>155</sup> at the very least, in the case of minimally decent parenting, onlookers would have no reason to judge that failing to have undertaken the imagined steps constitutes fault on the part of the Klebolds. And yet Sue is not prepared to see her lot as mere bad luck. Instead, parental guilt is tenacious for her, just as it was for Becca, and just as it should be. Again, parents have, and should have, an enlarged conception of their own agency at least in part because their children’s agency is reduced. Guilt is then fitting for Sue Klebold because she conceives of her agency, as manifested through Dylan, in *appropriately* expansive terms.

For Sue, there are two possible objects of guilt—Dylan’s killings and his own death. Sue is unabashed about expressing her guilt over Dylan’s suicide. She says that if she could say one last thing to Dylan, “I would ask him to forgive me, for being his mother and never knowing what was going on inside his head, for not being able to help him, for not being the person he could confide in.”<sup>156</sup>

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<sup>151</sup> Chillingly, though notably for the argument here, Dylan’s older brother, Byron, also expressed remorse for Dylan’s killings. Interview by Charles Gibson with Nathan Dykeman, on Good Morning Am. (Apr. 30, 1999), <http://www.acolumbinesite.com/dylan/aboutdylan.html>. Byron had moved away from home a few months before the shootings and, as a close family friend reported, “he kind of—there was a gap in the friendship, and he kind of felt really guilty.” *Id.* It would be a stretch to infer that Byron’s departure, or even his withdrawal from the relationship (if indeed he did withdraw) culpably contributed to Dylan’s killings. So, the fact of Byron’s guilt speaks to our tendency to want to shoulder blame on behalf of our loved ones, even where we bear no obligation to see ourselves in their acts.

<sup>152</sup> Although the idea of circumstantial moral luck originates with Thomas Nagel, THOMAS NAGEL, MORTAL QUESTIONS 34 (1979), the term itself was introduced by Daniel Statman. See Daniel Statman, *Introduction* to MORAL LUCK 1, 11 (Daniel Statman ed., 1993).

<sup>153</sup> See SOLOMON, *supra* note 140, at 597.

<sup>154</sup> See Klebold, *supra* note 149.

<sup>155</sup> See NAGEL, *supra* note 152, at 28–29; Michael J. Zimmerman, *Luck and Moral Responsibility*, in MORAL LUCK 217, 219 (Daniel Statman ed., 1993). The thought here is that other parents likely carried out their parenting roles no better than Sue did, but they had the good fortune to have well-adjusted kids, while she had the misfortune of having a child whose depression turned into a murderous rage. See McShane, *supra* note 142.

<sup>156</sup> Jessica Ferri, *Columbine Shooter Dylan Klebold’s Parents Speak Out*, YAHOO!

By contrast, Sue's guilt over Dylan's killings is not as raw or as readily expressed as is her anguish over Dylan and the others' deaths. Sue is caught in a position of dissonance: On the one hand, fighting to preserve her conception of herself as a good parent in the face of a public that is all too keen to blame and ostracize her,<sup>157</sup> she has reason to insist that she is not at fault. Dylan's acts were committed, Sue has said, "in contradiction to the way he was raised."<sup>158</sup> But notwithstanding her efforts to cast herself as faultless with respect to the killings, her comments sometimes betray her. Thus, for example, she states, "Dylan was a product of my life's work, but his final actions implied that he had never been taught the fundamentals of right and wrong. There was no way to atone for my son's behavior."<sup>159</sup> Elsewhere, she puts the point more succinctly: "We perceived his actions to be our failure."<sup>160</sup>

Reconciling her guilt with the thought that she was a good parent seems to require that she abandon either her guilt or her positive assessment of her parenting. As a good parent, and consistent with the fault principle, she dispenses with the latter. Sue feels guilt over, and believes she is guilty for, Dylan's killings; she has been led to believe that guilt is appropriate only for those who are at fault; so she infers that she must be at fault. But even as she tries desperately to figure out where she went wrong, she comes up empty-handed.

The better way for Sue to retain both her sense of blameworthiness and her belief in her good parenting is for her to recognize that hers is a case where the fault principle does not obtain. Sue is blameworthy simply because she is Dylan's parent. The buck *must* stop with her. (So too for Dylan's father.) She shares ownership of Dylan's acts with Dylan simply in light of the enlarged sense of agency that, as we saw with Becca, parenting entails.<sup>161</sup> And it is because Dylan's acts are in some

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STYLE (Nov. 14, 2012), <https://ca.style.yahoo.com/blogs/parenting/columbine-shooter-dylan-klebold-8217-parents-speak-191300537.html>.

<sup>157</sup> See, e.g., Lisa Belkin, *Parents Blaming Parents*, N.Y. TIMES MAG. (Oct. 31, 1999), <http://www.nytimes.com/1999/10/31/magazine/parents-blaming-parents.html>. One parent of a Columbine victim remarks, "They ask us if we blame the parents? . . . Who else do we blame? I taught my son right from wrong. My son wasn't shooting people up. My son was in the library doing what he was supposed to do." *Id.*

<sup>158</sup> David Brooks, *Columbine: Parents of a Killer*, N.Y. TIMES (May 15, 2004), <http://www.nytimes.com/2004/05/15/opinion/columbine-parents-of-a-killer.html>.

<sup>159</sup> Sarah LeTrent, *A Killer in the Family*, CNN, (Mar. 31, 2013), <http://www.cnn.com/2013/03/31/living/a-killer-in-the-family/>.

<sup>160</sup> Klebold, *supra* note 149.

<sup>161</sup> David Enoch argues that a parent has a moral obligation to take responsibility and, if she does, she *then* becomes responsible for her son's act. But if she declines to take responsibility, he continues, she is off the hook for her child's murders, although not completely in the clear, because she remains culpable for breaching her obligation to take responsibility. See Enoch, *supra* note 17, at 102–03, 107. I think it problematic that Enoch's account leaves it to the parent to choose whether she will be blameworthy for her child's wrong or instead for failing to take responsibility for her child's wrong. For



sense hers, and not because she was a bad parent (again, she was not) that Sue should take herself to be blameworthy.

In short, guilt is fitting for Sue not because she was at fault but simply because, as Dylan's mother, she should see herself as implicated in his killings. Is Sue's guilt proper? Is it the emotion she should experience, all things considered? Having found Becca's guilt proper, there is no reason not to arrive at the same conclusion for Sue. In Becca's case, we saw that grief was not a counterweight to guilt; instead, both arose from the same bonds. Here the same is true, and there is more for which Sue can feel guilty. But if it is fitting and proper for Sue to feel guilty, and so to take herself to be blameworthy, what does that entail for the way we should think about her?

We have no reason to take Sue to be at fault. We should nonetheless acknowledge that it is fitting and proper for Sue to feel guilt, in light of the same considerations that underpin Sue's guilt—namely, that this is the appropriate way to express the significance of her relationship with Dylan.<sup>162</sup> As such, we should not try to encourage Sue to overcome her

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one thing, the account thus has the implausible consequence of making all failures to take responsibility equally culpable, independent of the egregiousness of the act for which one declines to take responsibility. Thus, his account overlooks any reason we might have to think the parent's failure to take responsibility for her son's killing worse than her failure to take responsibility, say, for her son's elbowing an opponent in basketball.

Further, I believe that Enoch mischaracterizes the nature of the wrong involved in failing to take responsibility for the wrongs of one's child. He writes:

[T]he mere fact that these *are* actions of your children does not suffice for your being responsible. But if you do not incorporate them into your agency by taking responsibility for them, you are not thinking of yourself as a parent (in the normatively rich way needed here). And—being a parent—you *should* think of yourself as a parent.

*Id.* at 126. In this way, the central wrong in declining to take responsibility, as Enoch sees it, seems to amount to no more than a failure of authenticity, or a failure to be true to what parenting requires. It is as if one were to reproach the parent who willfully starves her child to death for failing to live up to the standards of minimally decent parenting, but not for having caused the child's death by starvation. Putting the point that way might do no more than underscore the difference between Enoch's account and mine—namely, that he thinks the parent is not responsible until she takes responsibility, whereas I think of her responsibility as something that is already hers for the taking. But that is because I think the proper way to honor the parent-child relationship is not simply to reproach the parent who disclaims but also to impose upon her the responsibility she fails to take on herself. I make the case for imposing relationally-based responsibility on one who shirks it when I turn to the example of the CEO. *See infra* note 177.

<sup>162</sup> Enoch and I are closer on this point. He writes: “without the power—and sometimes also the duty—to take responsibility for one's children's actions, the nature of parenthood would have been significantly different, and not, it seems to me, for the better.” Enoch, *supra* note 161, at 124.

guilt, as we would in the case of someone who had unreasonably taken on blame. Further, there is a reason for us to blame Sue: among other possible goods, blaming Sue affirms the good of the parent-child bond. But, importantly, that reason is defeasible. Whether we should *all things considered*, blame Sue will turn, as it did with Becca, on a calculus about how the good of blame here fares against whatever reasons we have to withhold blame—compassion, in particular.<sup>163</sup> I do not endeavor to work out which way the scales should tip at the end of the day, for Sue or for other parents of adolescent killers. The important point is that there is warrant for blaming Sue independent of her being at fault. Extending the analysis, we can see that it is at least theoretically possible that the reason to blame the faultless parent of an adolescent killer will outweigh the reason we have to withhold blame. For example, if the killer survives his massacre and if his parents fail to demonstrate remorse, we might enforce the norm of taking on blame for the wrong of one's child by imposing upon the parents the blame they have so far refused to shoulder. And we would do this by blaming them.

With that said, one might still wonder why censure is the appropriate way to affirm the parental bond. In response, I note that the claim here is not that censure is the *only* way to affirm the parental bond, just as guilt is not the only response appropriate for the parent of the adolescent murderer. In addition to guilt, the parent should adopt the perhaps heroic stance of persisting in her love and support for her child notwithstanding his monstrous acts. And she should display loyalty to her child; she should zealously voice any considerations that might mitigate his guilt. Each of these responses is appropriate in the circumstance as each expresses the proper appreciation of the values at issue. For that reason, we should support the parent in all of this. We should recognize the propriety in her responses if she offers them, and apply normative pressure if she does not. And, again, we should blame her if the countervailing reasons for withholding blame do not rule it out.<sup>164</sup>

Still, one might wonder why blame should even be a candidate response among the options we have. Blame's connection to bloodlust might cause the more compassionate among us to recoil from the notion of heaping blame upon a parent as bewildered and broken-hearted as Sue Klebold.<sup>165</sup> Surely there are more productive responses. Columbine itself provides an example: the school library, where a majority of the students were killed, was walled off in the aftermath of the shootings, and parents engaged in an effort to raise funds to build a new library—one that

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<sup>163</sup> The fact that Sue lost a child in the killings too might be thought reason to withhold blame.

<sup>164</sup> See *supra* text accompanying note 146.

<sup>165</sup> See, e.g., Christopher, *supra* note 29.

would not loom as so bloody a reminder of the massacre.<sup>166</sup> Should the Klebolds and HARRISES have sought to take part in this effort, perhaps even donating more than any other family? Why wouldn't that have been a more appropriate way for them to take responsibility? Why need they instead hold themselves out as targets of blame?

The answer to these questions is something like the thought that arose in response to the lorry driver who took himself to be no differently situated from an onlooker.<sup>167</sup> The lorry driver killed the child, however innocently, whereas the onlooker did not. That he did so changes the "normative landscape" for him.<sup>168</sup> He can come to owe duties of apology and repair to the victim's family that a mere bystander does not owe. Moreover, this would be true even if his own child, sitting in the cab next to him, died as a result of the accident as well. His loss, that is, would not undercut the fact of his obligations to the victim's family.

By the same token, the Klebolds' loss does not put them in the same boat as the other grieving parents. They owe something in virtue of their relationship to the killer. Other cases involving adolescent killers bear this out. For example, it is not uncommon for the parents of these killers to experience remorse. Thus, statements released by the parents of James Cho, the Virginia Tech killer, and Jared Loughner, the man who shot Gabrielle Giffords, each express contrition for their son's acts.<sup>169</sup> In a similar vein, Peter Lanza, estranged father of Sandy Hook killer, Adam Lanza, was described as "wracked by guilt, confusion[,] and grief" a year after his son's massacre.<sup>170</sup> Further, many families in this situation try to make amends. For example, Peter Rodger, whose son, Elliot Rodger,

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<sup>166</sup> The fundraising effort was successful. The old library was completely removed, and replaced with an airy atrium. An addition was then built onto the west side of the school to house a new library. That library was ready in time for the start of the next school year. It is called the "HOPE Columbine Memorial Library" and it is dedicated to the memories of those who were killed in the shootings. See *HOPE Columbine Memorial Library*, A COLUMBINE SITE, <http://www.acolumbinesite.com/library.html> (last visited Nov. 15, 2016).

<sup>167</sup> See *supra* note 92–95 and accompanying text.

<sup>168</sup> See DAVID OWENS, *SHAPING THE NORMATIVE LANDSCAPE* 238 n.13 (2012)

<sup>169</sup> See John Esterbrook, *Virginia Tech Gunman: Background*, CBS NEWS (Apr. 18, 2007), <http://www.cbsnews.com/news/virginia-tech-gunman-background/> (reproducing Cho family statement); Susan Gembrowski, Marisol Bello & Trevor Hughes, *A Closer Look at Aurora Shooting Suspect James Holmes*, USA TODAY (July 21, 2012), <http://usatoday30.usatoday.com/news/nation/story/2012-07-20/colorado-shooting-holmes/56373668/1> (reproducing Holmes family statement).

<sup>170</sup> Daniel Bates, *Exclusive - Adam Lanza's Father is a 'Broken Man' Wracked by Guilt Since Sandy Hook Massacre: Family Reveal What It's Like to Live with One of the Most Hated Names in America*, DAILY MAIL (Dec. 2, 2013), <http://www.dailymail.co.uk/news/article-2515675/Adam-Lanzas-father-broken-man-Sandy-Hook-murder-spree-family-reveal-like-live-hated-names-America.html#ixzz2rz3BZ1MG>.

shot and killed six people in Santa Barbara, developed “a small website with resources on mental illness and a place to share stories” in an effort to help families identify and address mental illness in one of their loved ones.<sup>171</sup> In 2016, Sue Klebold published a memoir of her experience of the Columbine massacre, and she directed all proceeds from the book to charities focusing on mental health issues.<sup>172</sup> All of this suggests that, even when these parents lose their own child as a result of his killings, they do not conceive of themselves as mere victims. Instead, they take on some responsibility for their children’s crimes. The foregoing has endeavored to explain why they are right to have done so.

### C. *Blame and Fault for Corporate Wrongs*

We have been surveying cases involving intimates, and governed by the messy and sometimes discordant norms that reign in the intimate sphere. I turn now to what may seem a quite different context—that of the corporation—to determine how the dynamics already described might play out there.

Suppose that a corporation has committed a crime—for example, in one of its many factory plants, the foreman has failed to supply workers with adequate safety gear that he knows they need, and one of them has died as a result. The corporation is convicted of involuntary manslaughter,<sup>173</sup> and it is time to assign responsibility for the crime to the corporation’s members. The crime’s individual perpetrators are, of course, the most likely and deserving candidates. But perhaps others in the corporation deserve blame too.<sup>174</sup> Consider here the responsibility of the CEO, for he is situated most similarly to the parent or the military commander whom we have already contemplated: Like each of these other characters, the CEO has a reason to see his agency as overlapping with the agency of those with whom he is in a particular relationship—in his case, with those in his employ—as regards the acts they undertake in the course of their employment. The cause of the overlap is not, of

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<sup>171</sup> Peter Rodger, *Santa Barbara Shooter’s Father’s Open Letter: ‘We Have to Stop This,’* ABC NEWS (June 27, 2014), <http://abcnews.go.com/US/santa-barbara-shooters-fathers-open-letter-stop/story?id=24319895>.

<sup>172</sup> McShane, *supra* note 142.

<sup>173</sup> The facts here reflect those in *People v. O’Neil*, 550 N.E.2d 1090 (Ill. App. Ct. 1990); *see also* Jay C. Magnuson & Gareth C. Leviton, *Policy Considerations in Corporate Criminal Prosecutions After People v. Film Recovery Systems, Inc.*, 62 NOTRE DAME L. REV. 913, 914 (1987) (describing further details from *O’Neill*).

<sup>174</sup> Desert is the crucial notion here. Others urge for the prosecutions of executives on deterrence grounds. *See, e.g.*, Rena Steinzor, *Kill a Worker? You’re Not a Criminal. Steal a Worker’s Pay? You Are One.*, HUFFINGTON POST (July 20, 2016), [http://www.huffingtonpost.com/rena-steinzor/kill-a-worker-youre-not-a-criminal-steal-a-workers-pay-you-are-one\\_b\\_7813966.html](http://www.huffingtonpost.com/rena-steinzor/kill-a-worker-youre-not-a-criminal-steal-a-workers-pay-you-are-one_b_7813966.html) (“[J]ail time for their senior managers will get their attention, even if the sentences are only for a few months.”).

course, the moral immaturity of his subordinates, as it is for the parent; it is instead the fact that he, in a sense similar to the commander, guides what his employees do while they are on the job. This is not to suggest that he authorizes, or indeed that he is even aware of, their day-to-day activities. Nonetheless, they act under his authority—he could explicitly alter their activities if he so chose, and they act to carry out a vision and mission for the corporation of which he is, during his tenure as CEO, principal author.<sup>175</sup>

Now, none of that establishes anything more than a tenuous causal connection between the CEO and his employee's acts. And this tenuous connection may be all that we, outsiders to the corporation, can discern about the CEO's role in the crime, given the complex network of interactions within the corporate web. But suppose we *could* see just what the nature of the relationship was between what the CEO had done (or not done) and the crime that was committed. We would then have learned something useful about the responsibility he bears *qua* individual (was he a perpetrator? facilitator? authorizer? etc.). But, importantly, we would not have learned anything useful about the responsibility he bears *qua* chief officer of the corporation. Indeed, to treat him as he deserves in virtue of his role in this context is to *refrain* from seeking to arrive at an individualized assessment of his responsibility.

Group membership is valuable; participating with others in a shared endeavor, under the aegis of an entity that subsumes the identities of each individual into a unified whole, provides value and meaning. This kind of group experience requires members to recognize that the group acts on their behalf; that its acts are theirs. Corporations are one such group, at least for a core set of members who are positioned to form or inform the group's identity—executives in particular.

The CEO, like the parent or military commander, ought to act with an enlarged conception of his agency, such that he sees those acts of his employees that are attributable to the corporation as his own. This enlargement of agency flows from the authority he enjoys over his employees. But there is a second reason for him to conceive of his agency in expanded terms, and it is one that applies to all group members who are expected to harbor a commitment to the corporation. These members ought to view themselves in the corporation's acts because doing so affirms the solidarity and loyalty that makes group membership,

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<sup>175</sup> This is true even if the CEO inherits the corporate mission from his predecessor and changes it not one whit. Because the CEO is empowered to change the mission, his retention of it as-is is akin to his having adopted it as his own. I note also that this way of construing the CEO's authority aligns with the one that the Supreme Court adopts when it contemplates the responsible corporate officer doctrine, a doctrine permitting prosecution or punishment of corporate officers for crimes of the corporation these officers neither participated in nor culpably failed to prevent. *See, e.g.,* United States v. Park, 421 U.S. 658, 671 (1975).

including membership in a corporation, valuable.<sup>176</sup> And if all this is true of the generic group member, it should hold even more so for the leader of a group, like the CEO, from whom the expected commitment to the shared project is probably strongest.<sup>177</sup>

Further, given the value in these relationships, we have reason to honor them. In this case, that means viewing the CEO *qua* group member, rather than judging him as an isolated individual, on the basis of what he himself did or did not do. We should affirm the CEO's forsaking his entitlement to an individual assessment, and we should do so by going along with it—by judging him alongside his fellows. So it is that we may praise or blame the CEO in virtue of what the corporation has done, and without regard to what he has or has not done.

Of course, all of this presumes that the CEO willingly accepts blame, and we defer to his judgment as a matter of aligning ourselves with the values that prompt him to do so. But the CEO might not do what he ought. What then?

This is a situation where it is perfectly appropriate to enforce his obligation to take on blame, and to do so by blaming him. Here, unlike in the family contexts already discussed, we need not worry about overstepping intimate boundaries. Moreover, we do not occupy the stance of mere disinterested observers. The CEO owes it to his fellow members to accept blame; by doing so he affirms his conception of the corporation as a team, whose members stand or fall together. But his fellow members are not the ones with a grievance—instead, the family members of the victim are the ones most immediately in need of the CEO's taking on blame. And, as with other cases in which a grave wrong has been committed, the community at large is entitled to hold those responsible for it to account.<sup>178</sup> It is then not only that the CEO ought to take on blame; it is that he owes it to *us* to do so. This changes our position vis-à-vis enforcing his obligation.

Will *our* blaming him be effective in putting him in the position he should occupy, and would have occupied had he recognized that he was blameworthy? I think it will. In refusing to take on blame, the CEO has more than he deserves, and we, as those whom the corporation's crime has offended, have less. Enforcing his obligation to take on blame by blaming him thus has three positive effects for us. First, it entails that he loses some moral credit. Second, blaming him entails that we have our injury (that of the offense against our shared moral prohibitions, if not also our criminal laws) recognized. Finally, blaming the CEO gives us an

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<sup>176</sup> See Sepinwall, *Crossing the Fault Line*, *supra* note 18, at 467–69.

<sup>177</sup> I elaborate on this point in *Crossing the Fault Line*. *Id.* The argument in the paragraph following the text accompanying this note largely tracks a similar argument there.

<sup>178</sup> See *supra* note 92 and accompanying text.

opportunity to affirm the importance of the bonds of solidarity that ought to have compelled the CEO to take on blame in the first place.

In short, given that the CEO ought to see himself in the acts of his employees carried out in the scope of the business, he ought to take himself to be blameworthy for the crime they carried out on the corporation's behalf. And given that the norms underpinning his taking on blame are ones we have reason to value, we should take his blameworthiness at his word. Or, if he shirks the blame he should shoulder, we should blame him nonetheless (or, better still, all the more).

Further, the CEO's judgment should elide considerations of fault altogether. In taking himself to be blameworthy, the CEO does not adopt the belief, or even commit himself to coming to adopt the belief, that he is at fault. The situation is unlike the Becca variant who, faced with the question of whether she could have prevented Danny's death, errs on the side of treating her agency expansively, not because the evidence points clearly in that direction but because, for a parent, that is the correct direction in which to err. Becca thus *chooses* to believe that she is at fault. But the CEO's taking on blame should not be a matter of choice in this way; it should not be responsive to facts that go to the CEO's contribution to the crime. Instead, as CEO, he should automatically take himself to be blameworthy, even if he could not have done anything to prevent the corporation's crime. He is situated differently from Becca because he represents a group, and the stance of solidarity he owes to the other group members entails that he should take on responsibility independent of his fault. The crime is his regardless. When it comes to the acts of those with whom he shares agency, the buck stops with him.

This is not to suggest that whether the CEO contributed wrongly to the corporation's crime is of no moment. To the contrary, facts about his personal culpability are deeply relevant to an inquiry into the blame he deserves *qua* individual. If he is personally culpable, so much the worse for our assessment of him.<sup>179</sup> And he should seek to assess his own culpability, as a matter of seeking to prevent a like crime in the future. But the important point for present purposes is that independent of (or over and above) whatever blame he deserves in light of his own wrongdoing, the CEO must take himself to deserve blame for the corporation's crimes because he must see that his agency is reflected in the corporation's acts, and he must see this not because he wrongly contributed to the corporation's crime but just because his seeing this is what the norms and obligations of his role require. It is in this way that the CEO is blameworthy independent of whether he is at fault.

Much of this might seem foreign, perhaps given the ease with which

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<sup>179</sup> This point is consonant with a theme in HONORÉ, *supra* note 117, at 31 (“[I]t is a myth that fault and desert are essential to responsibility. They serve rather to increase the credit or discredit for the outcome of our behaviour that we incur in any event.”).

corporate CEOs apologize on behalf of their corporations while carefully avoiding statements suggesting that they themselves are guilty.<sup>180</sup> But it is a commonplace in other cultures, captured most notably, perhaps, in the Japanese ritual of *shintai ukagai*, in which corporate officials bow in apology, and sometimes even submit letters of resignation, in response to corporate wrongdoing, independent of their participation in that wrongdoing.<sup>181</sup> The foregoing makes clear the moral stance underpinning the recognition that one owes an apology for the crime of one's corporation, and it allows us to see the good in that stance.

#### D. The Tenacity of Fault

In all of these examples, the temptation to shoehorn the facts such that they fit within the bounds of the fault principle is tantalizing, perhaps even inescapable. One way to do so involves adopting an ever more expansive conception of fault. Thus, an adherent of the fault principle might agree that the occupant of certain relationships or roles, like the CEO, or parent, or military commander, is subject to more-stringent-than-normal standards. But he will then argue that the corporation's (or the child's or one's soldiers') wrong just is evidence that the CEO (or the parent or commander) must have fallen short of these standards. Further, his having fallen short just is what constitutes his fault. He is blameworthy, but blameworthy in just the way the garden-variety wrongdoer is—because he is at fault.

Before addressing this effort to resist the idea of faultless liability to blame, I note its polar opposite, which is nonetheless its soul sister—namely, the claim that none of the characters under discussion is in fact blameworthy *or* at fault: on this line of argument, the characters suffer from a kind of neuroticism. All of them might think themselves subject to peculiarly high standards that they have failed to meet, but *we* have no reason to affirm these enhanced standards, and so no reason to think these characters either at fault or to blame.

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<sup>180</sup> See, e.g., Darryl Koehn, *Why Saying "I'm Sorry" Isn't Good Enough: The Ethics of Corporate Apologies*, 23 BUS. ETHICS Q. 239 (2013) (finding it crucial to point out that "[a]ccepting blame is part of what it means to be held accountable.").

<sup>181</sup> See, e.g., Jeff Kingston, *Toyota Bows and the Japanese Art of Apology*, BBC NEWS (Feb. 10, 2010), <http://news.bbc.co.uk/go/pr/fr/-/2/hi/asia-pacific/8508531.stm> (describing the various cultural meanings of bowing, and noting that Toyota President Akio Toyoda was criticized for failing to demonstrate sufficient humility in the press conference he gave apologizing for Toyota's brake problems); see also JON P. ALSTON & ISAO TAKEI, *JAPANESE BUSINESS CULTURE AND PRACTICES: A GUIDE TO TWENTY-FIRST CENTURY JAPANESE BUSINESS* 40 (2005); BOYE LAFAYETTE DEMENTE, *JAPANESE ETIQUETTE & ETHICS IN BUSINESS* 181 (6th ed. 1994). See generally Amy J. Sepinwall, *Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime*, 63 HASTINGS L.J. 411, 433 (2012) (describing practices of corporate apology).



These twin efforts to escape the notion of faultless blame—again, the first recasting fault so that it applies to the protagonists in the scenarios here and the second diagnosing our protagonists with a paranoia that falsifies their judgments of blame—reflect the remarkable tenacity of the fault principle. The first strategy sees fault as so essential to warranted blame that it stretches the notion of fault beyond recognition. And yet the devotee of the fault principle who is willing to stretch the notion of fault this far has essentially adopted the view I have articulated, albeit without abandoning the terminology of the traditional account. Still, I doubt that most adherents of the fault principle would so readily agree that fault is as broad as it must be in order to find it within the scenarios examined here.

The critic who denies that there is fault in these scenarios and instead sees only neuroticism is not so easily appeased. It is not clear what more can be said to convince this critic that Becca, Sue, the military commander, the CEO, and so on are not merely self-aggrandizing narcissists who take on responsibility that is not in fact theirs. I have endeavored to show that their judgments of blame constitute appropriate responses given the norms and values that underpin the relationships in which they happen to find themselves. The critic who disagrees cannot dismiss these cases simply by assigning a psychological pathology to one who would judge themselves as Becca, the CEO, and the others should. This critic must instead take on the conception of the relationships and their governing norms that I have advanced, and demonstrate that these are in some way mistaken. If nothing else, then, the argument here should at least shift the burden of persuasion to the person who would deny that, at least in the cases under discussion, one can be blameworthy even without fault. It is perhaps not overly modest to content oneself with having done no more than burden shifting when the burden one has shifted lay so entirely on one's side at the outset.

#### CONCLUSION

The foregoing has involved an extended inquiry into whether fault and blame can come apart. I have endeavored to show that they can and do. This leaves us with four characters (Becca, Sue, the commander, and the CEO) who are blameworthy even though none of them would be deemed at fault under the fault principle. Of course, the fault principle is not first and foremost a principle about just blame; it is instead a principle about just punishment. Which if any of the four characters should we look to punish?

The answer, I believe, is straightforward albeit anticlimactic for that very reason. As the fault principle says, we should punish only those who are blameworthy. I have shown how each of the protagonists here

can be blameworthy. But being blameworthy is but a necessary condition for being appropriately subject to punishment. Having seen that this necessary condition can be satisfied in the cases involving our four characters, we must then turn to the other considerations that govern whether some blameworthy species of conduct ought to receive the response of the criminal law. There is nothing unique to be said here, notwithstanding the fact that the genesis of the warrant for blame lies partly or entirely outside of the realm of fault. Instead, whether or not blame should result in criminal liability in these cases is determined by whatever garden variety considerations we bring to bear in determining the scope of the criminal law more generally—by assessing the magnitude of harm involved, the effectiveness of addressing this harm through criminalization,<sup>182</sup> application of other rationales for punishment, the implications for individual liberty of criminalization, and so on.

I do not undertake to work out these considerations here, but I will venture my best guesses as to the results: I think it unsurprising that we are loath to enforce the norms of parenting through criminal law, at least where we outsiders have no reason to think that parents are at fault. We view these spheres as intimate spaces, we are right to do so, and so government intervention would both be unwelcome and perhaps also ineffective, because the meaning of the bonds we seek to enforce would be undercut through the enforcement.

But these considerations might well go the other way when it comes to executive criminal liability. The wrongs for which CEOs ought to accept blame sometimes involve massive harm—one need only look at the acts of fraud that partly precipitated the financial crisis to see this.<sup>183</sup>

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<sup>182</sup> There is of course a famous debate between H.L.A. Hart and Patrick Devlin about whether the criminal law should be used to enforce moral or social norms. Compare H.L.A. HART, *LAW, LIBERTY AND MORALITY* 57 (1963) (arguing that criminal law should not be used to police morality, especially as regards acts that create no harm to others) with PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 2–3 (1965) (defending the use of criminal law for the enforcement of moral norms). Given that affirmation or enforcement of relationship norms provides a key rationale for faultless blame here, the debate is obvious relevance. But again, the debate is independent of the question of whether one can be blameworthy without fault. I note as well that, assuming that at least some moral norms are appropriately safeguarded or promoted through criminal law, there is still a question as to which moral norms we should safeguard or promote. Other scholars have critiqued the Devlin approach on the ground that the criminal law has historically sought to uphold norms that reflect a heteronormative, conservative perspective on sex, see, e.g., Melissa Murray, *Griswold's Criminal Law*, 47 *CONN. L. REV.* 1045 (2015), and the family, see, e.g., Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 *YALE L. J.* 1236 (2010). I wholeheartedly agree with the critiques these scholars offer. The claim that the criminal law should promote some relational norms does not commit me to the claim that the relational norms the criminal law currently promotes are the right ones.

<sup>183</sup> See generally Sepinwall, *Crossing the Fault Line*, *supra* note 18, at 478.

Prosecuting and punishing CEOs would have undeniable deterrent effects.<sup>184</sup> Relative to punishing the corporation itself, which, famously has “no soul to be damned, and no body to be kicked,”<sup>185</sup> punishing the CEO would provide a far more meaningful and satisfying target for the anger that the corporate crime has elicited. And liberty considerations would not decisively cut against criminal liability, especially because CEO convictions need not entail jail time, and especially given that CEOs are already subject to civil sanctions for many of the offenses for which they would be prosecuted under the account I have advanced. All of this to say that these considerations amount to at least a colorable argument in favor of punishing CEOs who are to blame without fault.

As a society, we have not explored these considerations in thinking about the response to corporate crime because we have taken the fault principle to act as a side-constraint on the permissibility of punishment. But one way to understand the efforts here would be to see them as an argument in favor of replacing the fault principle with what might be called the blame principle. Like the fault principle, the blame principle would stand as a side-constraint on permissible punishment. But it would hold not that one may be punished only if one is at fault but instead that one may be punished only if one is to blame. One can be to blame (i.e., blameworthy) even if one is not at fault. A CEO, in particular, can be to blame even if he is not at fault. And if he is, and if other considerations militate in favor of our responding to him through the criminal law, then we would do him no injustice by punishing him, and we would do much justice for everyone else as a result.

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<sup>184</sup> See, e.g., Nocera, *supra* note 25 (finding criminal convictions do not have much of an effect on companies because no individual is punished); 155 CONG. REC. S2315–16 (daily ed. Feb. 13, 2009) (statement of Sen. Kaufman) (describing the statement of Neil Barofsky, former federal prosecutor and inspector general of the financial bailout funds, who “suggested the best way to clean up mortgage fraud is to pursue licensed professionals in the industry, and make examples of them [as] ‘[t]hey have the most to lose, they’re the most likely to flip, and they make the best examples’”).

<sup>185</sup> See, e.g., John C. Coffee, Jr., “No Soul to Damn: No Body To Kick”: *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 386 (1981) (quoting Edward Thurlow, First Baron Thurlow).