

# Civil Blame?

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Attributions of civil fault are often highly suggestive of moral blame/blameworthiness.

- They employ everyday moral concepts – ‘negligence’, promise-breaking, dishonesty, deontic notions like ‘duty’.
- Judicial dicta often invoke morality and contain moral criticism of parties.
  - Consider: “[L]iability for negligence ... is no doubt based upon a *general public sentiment of moral wrongdoing* for which the offender must pay.”<sup>1</sup>
- Civil law often judges people against standards of behaviour that correspond to everyday normative expectations – e.g. reasonableness.
- Crimes such as homicide, arson, or rape are also civil wrongs, involving attributions of responsibility for conduct definitionally equivalent to crime.
- Civil law ranges over harms of great moral import—e.g. environmental damage, protection of children, workers rights, mismanagement of financial resources.

The civil/blame connection is treated inconsistently. One scholar claims no connection as the common ‘lay person’s view’, another that ‘conventional wisdom’ sees a close connection...<sup>2</sup>

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A close relationship between civil law and moral blame may have thorny consequences for some popular ideas in legal theory.

A common view: criminal law is distinctive because it invokes moral blame (e.g. Duff).

Substantive spin: moral blameworthiness is necessary—if not sufficient—for criminalisation and punishment (vs. restitution). ‘Legal moralism’.

**Procedural spin:** threat of moral blame etc. justifies the criminal standard (beyond reasonable doubt) over the civil standard (balance of probabilities), and associated protections.

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**X** ‘Heroic strategy’ – debunk idea of civil blame by scrutinising case-law and doctrinal details in every area of civil law to claim that appearance of blame is illusory.

**??** ‘Function strategy’ – claim that the *function* of civil law is not fundamentally about allocating blame, but something else.

Even if civil law is not teleologically blame-allocating, there are many cases where blame features nevertheless. Important questions still pertain to these cases.

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<sup>1</sup> *Donoghue v Stevenson* [1932] AC 562, 580.

<sup>2</sup> E.g. compare Goudkamp, James. “The spurious relationship between moral blameworthiness and liability for negligence.” *Melbourne University Law Review* 28 with Robinson, Paul H. “The Criminal-Civil Distinction and the Utility of Desert.” *Boston University Law Review* 76: 201–14.

Why do criminal defendants get the benefit of a high standard of proof?

*Hypothesis 1:* Broadly consequentialist reasons?

But we don't try to optimise SoPs to ensure best deterrent/incapacitative value.<sup>3</sup>

*Hypothesis 2:* Because punishment is especially aversive or unpleasant?

Civil damages can be worse; trivial crimes v (e.g.) serious torts.

*Hypothesis 3:* Because punishment takes away your rights?

Enforcing recovery of damages or injunctions also takes away rights.

*Hypothesis 4:* To protect the individual against state misuse of power?

States can sue private parties; much state power is realised by the civil law.

**Hypothesis 5:** Because criminal verdicts express and license moral blame, along with associated punitive actions.

Simple spin: high criminal standard is simply to 'protect defendants from undeserved blame'.

Hmm - why is erroneous blame so bad, compared to e.g. serious civil damages?

My spin: **high standard is required by the social blaming role of criminal verdicts...**

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Criminal trials serve communities by resolving disputes about criminal allegations, given that community-members cannot adjudicate every case personally.

An effective guilty verdict *signals* to the community that (1) the accused is guilty and (2) subsequent punitive treatment of the accused is justified.

Influential psychological/normative idea: 'Blame is a belief-normed practice.'<sup>4</sup>

Influential legal theory: criminal punishment itself is a vehicle for blame (+ repentance).<sup>5</sup>

= The high standard of proof, securing public belief in guilt, underpins *legitimacy*.<sup>6</sup> The community can accept the accused deserves blame-expressing punishment, given the verdict.

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Restitutive damages are often said not to express blame. So, legitimacy of civil sanctions may not require that civil verdicts underpin full belief in guilt.

Rather, restitution is thought to embody 'corrective justice', or justified on consequentialist or economic grounds or, less often, as redistributive.

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<sup>3</sup> Cf. various arguments by Larry Laudan. I discuss in Ross, Lewis. 'Criminal Proof: Fixed or Flexible?' *The Philosophical Quarterly*, 2023.

<sup>4</sup> Buchak, Lara. "Belief, Credence, and Norms." *Philosophical Studies* 169, 2, 2014: 285–311.

<sup>5</sup> Duff, Antony. *Punishment, Communication, and Community*. Oxford University Press, 2003; Bennett, Christopher. *The Apology Ritual: A Philosophical Theory of Punishment*. Cambridge University Press, 2008.

<sup>6</sup> Ross, Lewis. "The Foundations of Criminal Law Epistemology." *Ergo*, 2023. Many others, no doubt.

The community should nevertheless take an interest in the legitimacy of civil sanctions, as they involve coercive use of state power.

Legitimacy requires that responsibility for faults is established to an appropriate standard.

Civil verdicts specify only a confidence range in responsibility:  $>.5 - 1$ .

Some portions of this range are below the belief-supporting threshold, some are above!

(Criminal acquittals share this feature – an acquittal might be based on ‘name-clearing’ evidence but also is compatible with a substantial likelihood of guilt.)

*Question:* does some ‘sub-belief’ notion of responsibility (justifying restitution) appear in interpersonal contexts, or is the civil law creating some sui generis idea?

Sub-belief = confidence below that required to believe outright.

Interpersonal attributions of (restitutive) responsibility without full belief are quite uncommon, I think. But they strike me as intelligible.<sup>7</sup>

E.g. suppose you (A) and a friend (B) are so drunk you obliterate all memory. You are in a third party (C’s) house. All wake up and C’s TV is smashed to bits – whoever caused the TV to smash was negligent. A spent more time in the living room than B. Responsibility is attributed to A, even though the evidence doesn’t support full belief that A smashed the TV. A compensates C for the value of TV.

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It is hard to avoid concluding that many civil verdicts involve moral notions, where full belief in fault *could* imply moral blame/justified punitive treatment for the defendant.

Even if we accept this, restitutive liability found in civil law may only require a ‘sub-belief’ attribution of responsibility.

Civil verdicts are compatible with the community inferring either:

(a) full(-belief) moral responsibility (underpins blame, apologetic duty, punishment), *or*

(b) a sub-belief notion of responsibility (underpinning only a lesser restitutive responsibility).

Civil verdicts *merely* have to be viewed as necessarily signalling that (b) is justified.

This allows us to accept that moral notions often appear in civil law, without requiring that civil trials have the same strict protection against erroneous blame as criminal courts.

A ‘stronger’ BRD civil verdict may license (a), but not verdicts under the current BOP system.

= While it may seem like the weaker standard of civil proof is problematic—given the appearance of moral notions in civil law—the weaker standard in fact resolves part of the issue.

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Complication: people often *do* infer (a), full moral responsibility, from civil verdicts.

‘The court verdict proved that x is [a domestic abuser, corrupt...]’

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<sup>7</sup> Consider other examples of sub-belief responsibility – e.g. market share liability in *Sindell*, apportionment of damages by likelihood of having caused harm (e.g. litigation on asbestos-related illnesses).

Should the court care about the community inferring the stronger thing? And care about resultant social stigma and adverse consequences for the defendant?

Criminal justice institutions often exhibit indifference about social stigma for findings of *non-responsibility*, e.g. those acquitted of crime still may face social judgement, ostracism, etc.

It is a conscious choice not to implement a richer verdict-schema. I.e. third-verdicts ('not proven', etc).<sup>8</sup>

Is there injustice for civil defendants who are socially blamed *as if* the evidence supports full belief in 'guilt' when it merely supports .6 probability?

For the innocent civil defendant? They are certainly in a worse position if fully blamed by society than they would be if only held liable in a restitutive sense.

For the guilty civil defendant? I am uncertain if any injustice here. They cannot protest being blamed for their guilt, unless we thought the procedure was manifestly deficient.

The problem is remediable by greater public understanding of civil verdicts and their meaning.

Another option: richer set of civil verdicts. Many complications arise here.

It is fine for civil verdicts to *invite* observers to consult the evidence and form their own view, even if this eventual (private) conclusion involves full moral blame.

The public is always entitled to form a personal view, after consulting the evidence.

But, the verdict *itself* should not be viewed as conveying that blame is necessarily justified by the evidence. Nor does it need to convey this, for restitutive responsibility.

Final complication: any system involving 'punitive' damages.

I feel no urge to vindicate every aspect of current practice.

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<sup>8</sup> E.g. see Picinali, Federico. *Justice In-Between: A Study of Intermediate Criminal Verdicts*. Oxford University Press, 2022.