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## VOLUNTARISM, VULNERABILITY, AND CRIMINAL LAW: A RESPONSE TO PROFESSORS HILLS AND O'HEAR

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We are grateful to *Boston University Law Review* for publishing this mini-symposium on our work and to Professors Hills and O'Hear for their careful and subtle analysis of our recent scholarship.<sup>1</sup> In this Response, we clarify a few features of our argument that we think highlight how little disagreement with our interlocutors exists on three very central issues. While some differences persist, we hope our Response narrows the gap between our positions and those of Professors Hills and O'Hear.<sup>2</sup>

Before addressing specific criticisms, it is worth recapitulating what our bottom-line conclusions are so we can better see if there are any practical disagreements with our critics. Summarizing quickly: we support decriminalization in the cases of parental responsibility laws (based on strict and vicarious liability), bigamy, adultery, and nonpayment of parental support; we endorse decriminalizing incest between most adults, though we are divided on certain sub-issues in the incest context; and we are highly skeptical of criminalization in the nonpayment of child support context, but concede that more research needs to be done on just how effective criminalization is in achieving compliance. The only area in which we are largely unconflicted about criminalization is the omissions (failure to rescue) context – and that is where our critics primarily aim their critiques.

This Response focuses on three general points; most of the discussion of those general points comes up in the context of disagreement over the scope and rationale for omissions liability. We begin by explaining how Professors Hills and O'Hear tend to overstate our commitment to voluntariness as a basis

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<sup>1</sup> Jennifer M. Collins, Ethan J. Leib & Dan Markel, *Punishing Family Status*, 88 B.U. L. REV. 1327 (2008); Roderick M. Hills, Jr., *Do Families Need Special Rules of Criminal Law?: A Reply to Professors Collins, Leib, and Markel*, 88 B.U. L. REV. 1425 (2008); Michael M. O'Hear, *Yes to Nondiscrimination, No to New Forms of Criminal Liability: A Reply to Professors Collins, Leib, and Markel*, 88 B.U. L. REV. 1437 (2008).

<sup>2</sup> We will try to make these points more clear in our book based on this work. See generally DAN MARKEL, JENNIFER M. COLLINS & ETHAN J. LEIB, *PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES* (Oxford University Press, forthcoming Apr. 2009).

for allocating criminal law liability. Second, we address their concern regarding the criminal law's ability to shape people's caregiving choices. Third, we discuss what our commitment to criminal law minimalism requires when it comes to designing family status burdens.

### I. ON VOLUNTARINESS

In light of the replies of Professors Hills and O'Hear, we first wish to address the role performed by voluntariness in our arguments. Professor O'Hear suggests in his reply that we embrace the view that "the voluntary assumption of a duty . . . adds substantial support for the criminal enforcement of that duty."<sup>3</sup> Professor Hills likewise worries that we "root" criminal liability in "consent" to provide care.<sup>4</sup> Although we think that voluntariness is relevant in analyzing family ties burdens, the use of the phrase "substantial support" overstates our position because voluntariness is not in and of itself a sufficient reason to bring the criminal law to bear. Similarly, we resist the idea that we "root" liability in consent, since it is not itself the *reason* for liability; as we explained, it is only a necessary, not a sufficient, condition for criminal law liability.<sup>5</sup> In the omissions context, for example, it is the failure to perform some underlying caregiving duty that remains the *basis* for the liability. Voluntariness with respect to the assumption of that duty only plays a role in delineating whose acts or omissions may properly serve as a basis for criminal liability in a liberal state.

Professor O'Hear rightly emphasizes another role for voluntariness within the criminal law: that a defendant's *conduct* must be voluntary.<sup>6</sup> But he seems to conclude from this familiar principle of criminal law – in conjunction with the well-known principle that ignorance of a violated norm is no excuse – that voluntariness can serve no other role in allocating liability within the criminal law system.<sup>7</sup> We disagree.

So what is our account of voluntariness, and how is it different from the voluntariness associated with conduct or criminal acts that the criminal law routinely focuses upon? In deriving our "voluntariness" test – one that asks legislators to construct criminal law liability of the sort we see in "family ties burdens" only upon satisfaction that parties actually have taken upon themselves a voluntary duty in connection with a relationship of caregiving – we looked at the actual imposition of these burdens through the criminal law and saw the way in which criminal justice systems picked out familial relationships for burdening.<sup>8</sup> In five of the seven family ties burdens we explored – omissions liability, parental responsibility, bigamy, adultery, and

<sup>3</sup> O'Hear, *supra* note 1, at 1439.

<sup>4</sup> Hills, *supra* note 1, at 1427.

<sup>5</sup> Collins, Leib & Markel, *supra* note 1, at 1363-66.

<sup>6</sup> See O'Hear, *supra* note 1, at 1439.

<sup>7</sup> See *id.* at 1439-40.

<sup>8</sup> See Collins, Leib & Markel, *supra* note 1, at 1334-49.

nonpayment of child support – the liability only attached to a person who could plausibly be said to have voluntarily created the relationship of caregiving.<sup>9</sup> Moreover, with respect to filial responsibility laws, we were struck by the near complete lack of enforcement.<sup>10</sup>

To be sure, this casual empiricism did not decide the matter for us. But it did illuminate it for us. Professor Hills calls us Dworkinians for this theory-building approach.<sup>11</sup> But the other part of being a good Dworkinian is going beyond fit (which was admittedly imperfect and non-decisive for us, in any case) and finding a way to put the law in its best normative light. Once we reached this step of our argument, it became clear to us that voluntariness must play a central role in assessing the fairness of allocating criminal law liability in these contexts. That is, aside from fit, the pattern of voluntariness evidenced by the family ties burdens we discovered was consistent with what we thought a liberal state should do: give people some autonomy about entering relationships before using the relationship status as an element of a crime. This autonomy principle was being stifled by the use of traditional family status since the laws in question excluded from coverage many people who should be covered because of the nature of their caregiving roles in others' lives, for example, gays, polys, committed un-marrieds, etc.

It is worth pausing for a moment here to realize that although this conception of voluntariness does not have a large explicit role to play in most areas of the criminal law, when the criminal law seeks to burden a relationship with the use of a status-oriented approach, we think liberalism requires that burdens created are ones that have been voluntarily assumed. When the law requires that public officials provide the public their "honest services,"<sup>12</sup> that is, to act as quasi-fiduciaries to the public, it is fair to do so in part because they have not been forced into these jobs. Nonetheless, Professor O'Hear would be right to highlight just how much of the criminal law ignores voluntariness in the underlying norms of conduct and instead focuses on the conduct itself.<sup>13</sup> And Professor Hills would be right to highlight that voluntariness alone is not sufficient to trigger liability in a whole host of cases the law does not criminalize.<sup>14</sup> However, in the world of family status liabilities that we have found, most of which are predicated on a relationship, we think that being able to choose or reject the relationship is a necessary requirement to have the law comply with our basic commitments to autonomy specifically, and liberalism generally.<sup>15</sup>

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 1348-49.

<sup>11</sup> See Hills, *supra* note 1, at 1429.

<sup>12</sup> 18 U.S.C. §1346 (2006).

<sup>13</sup> O'Hear, *supra* note 1, at 1439.

<sup>14</sup> See Hills, *supra* note 1, at 1429.

<sup>15</sup> We do not disagree with Professors Hills and O'Hear that even paradigmatic cases of choice or consent in relationships – like the parent-child and spouse-spouse relationship –

Of course, nothing about our commitments in the article have anything to say about the constitution of moral life and the source of moral norms. We simply take a position about the institutional design of criminal justice practices in a liberal state. It may well be the case that our parents or siblings have legitimate moral claims that stem from their relationships to us, independent of choice. But the liberal state should avoid enforcing those claims through the criminal law for all the reasons we specify in the article. In short, voluntariness of the sort we have identified is a reasonable barrier for legislators to consider when they are designing the enforcement mechanisms of the criminal law to target relational obligations.

Spurning our embrace of a voluntariness requirement, Professor O'Hear offers an alternative basis of liability premised upon *vulnerability* and *proximity*.<sup>16</sup> Presumably, this would entail an obligation of an older sibling to rescue a younger sibling when possible, not to mention neighbors and co-workers.<sup>17</sup> Would the same preconditions for liability operate outside the context of duties to rescue? Professor O'Hear does not say. To our mind, vulnerability and proximity are aspects that matter insofar as they are parts of a voluntarily created relationship of caregiving.<sup>18</sup> But insofar as they serve to

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leave us with line drawing problems in some individual cases. *Id.* at 1430; O'Hear, *supra* note 1, at 1442. Since we think of our analysis as primarily targeted at legislators designing these types of liabilities, we think Professors Hills's and O'Hear's arguments trying to undermine the choice involved with being a parent are perfectly admissible to that audience. Still, we continue to think that, difficulties notwithstanding, we can impute voluntariness to the parent-child relationship in a world where access to birth control, abortion, and adoption exist. Professor Hills may be right that there are implicit "normative goals that lead us so easily to infer that consent exists" in these relationships, *see* Hills, *supra* note 1, at 1432, but that does not vitiate our understanding of them as voluntary, nor does it undermine our attribution of meaning and value to that voluntariness, complicated though that voluntariness may be. *See generally* Ethan J. Leib, *Responsibility and Social/Political Choices About Choice*, 25 LAW & PHIL. 453 (2006) (exploring the relationship between choice and other normative commitments in assessing the use of choice as a basis for ascribing responsibility). Moreover, whatever problems there are with imputing voluntariness to parenthood, three of the seven burdens – omissions liability, bigamy, and adultery – are implicated in the spousal context, where imputing voluntariness is generally less troublesome.

<sup>16</sup> O'Hear, *supra* note 1, at 1443.

<sup>17</sup> By rejecting unilateral voluntariness, it is unclear whether Professor O'Hear would also forbid bilateral exchanges that conventionally create omissions liability, such as when *X* hires *Y* to be his private nurse. There is also an irony here: O'Hear gives us a hard time for purportedly *expanding* criminal law liability, *see, e.g., id.* at 1438-39, but it is his alternative model of "vulnerability and proximity" without a voluntariness side-constraint that might very well expand liabilities even further than our model.

<sup>18</sup> For example, when children grow up, there might not be a basis for uncritically extending these duties anymore, at least according to Professor Markel. But to Professors Collins and Leib, there are some situations where the vulnerability persists, such as with

create liability where no one consented to that caregiving obligation, we find such status-based obligations problematic.<sup>19</sup> Under our view of these duties to rescue, without one party agreeing to perform some degree of caregiving, no liability ought to attach.<sup>20</sup> So we do not disagree that Professor O'Hear's normative foundations for these liabilities should also play a role in thinking about when to exact them and from whom; it is just that we remain convinced that the liberal state needs to assess some baseline voluntariness of the relationship in the first instance.<sup>21</sup>

Instead of voluntariness or proximate vulnerability, Professor Hills offers a different principle that, on his account, both fits and justifies a number of the family ties burdens we reveal in the article. Hills would reorganize family ties burdens to promote child-rearing.<sup>22</sup> We find that alternative deeply troublesome for the liberal state.

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incest. Yet, even in these cases, the voluntariness of the relationship still plays a role in assessing whether it makes sense to criminalize status-based obligations.

<sup>19</sup> Given the trade-offs, we seriously would entertain some open-mindedness toward a general duty to perform costless rescues. We recognize that would violate our voluntariness requirement, but a *general* duty to rescue would not use status-based characteristics to impose criminal liability, one of our principal concerns in this project.

<sup>20</sup> We put aside the standard cases in omissions liability where *X* creates the peril to *Y* or where *X* waves *Z* off from rescuing *Y*. But one standard case, that of contract, does warrant more emphasis. We were puzzled by Professor Hills's suggestion that the criminal law of omissions treats families differently from contractually bound "providers of caregiving services." Hills, *supra* note 1, at 1429. That is not a correct statement of the law, as we discussed in Part I of our article. Collins, Leib & Markel, *supra* note 1, at 1335-38. If someone hired a nurse or even a neighbor for the purpose of caregiving, that contract would in fact be a sufficient basis for criminal liability in many jurisdictions if that person failed to perform an easy rescue. *Id.* In some sense, that person is no different than *X* who waves *Z* off from rescuing *Y*.

<sup>21</sup> We acknowledge Professor O'Hear's concern that the opt-in registry discussed in the article is unlikely to be widely used, especially among the lower socio-economic strata of society. See O'Hear, *supra* note 1, at 1440 n.8, 1444. That, perhaps, shows a limit of the registry. But the fact that not all poor gay couples may enjoy the *ex ante* benefit of a duty to rescue via a registry is not itself a reason to deny that benefit to those poor gay couples who do (or, more importantly, their children). Thus, something like the registry is still necessary to avoid the facial discrimination and inequality that results without it. Moreover, we are somewhat puzzled at why the registry would not provide sufficient information to subscribing parties about their duties, as O'Hear laments. See *id.* at 1441. Signing up is actually quite likely to force that information and would furnish the state with the opportunity to instruct parties about their responsibilities. To be sure, O'Hear is more concerned that the class of omissions liabilities that signing up would trigger is vague. But that might just be another reason that a small number of people would sign up, and it would give the government another reason to be less vague in delineating the duties and more consistent in enforcing them.

<sup>22</sup> Hills, *supra* note 1, at 1429-30.

Professor Hills makes a good case for the child-rearing value as a plausible fit with some of the family ties burdens we discovered in the law.<sup>23</sup> Each burden in its own way can be part of a story in which the criminal justice system brings itself to bear on families because families are subcontracted for the task – without much oversight – of raising children for the state. As Professor Hills acknowledges, this story is not a perfect fit; it is under-inclusive in its failure to account for a whole host of primary caregivers who are ignored by the laws and over-inclusive in that it captures all sorts of relationships (spouse-spouse) even when there are no kids involved.<sup>24</sup> But then ours is also not a perfect fit.

Still, it is on the normative dimension that we are most skeptical of Professor Hills's alternative. It does not suffice to say, as Professor Hills does, that our society would be “deprived of the future value of humanity” without “properly raised children.”<sup>25</sup> That may or may not be true. Indeed, if children are a positive good, why do they become less valuable to society once they are less vulnerable as adults? Presumably what makes children valuable is also what makes adults valuable, in which case Professor Hills has a hard time explaining why we would not extend the reach of these family liabilities to all, or at least to those who still have procreative (and caregiving?) capacity. In sum, we think a liberal state may not use its criminal law to reinforce a very particular version of the right way to organize the institution of the family through the use of status-based liabilities that citizens have never had the opportunity to reject.

At times, it appears that Hills does not really disagree with us regarding the need for an antidiscrimination norm in the context of liabilities. He too pledges his commitment to the principles of nondiscrimination and would presumably solve under-inclusiveness problems by doing just what we recommend: expand liability to a larger class of caregivers for children (when criminalization is necessary at all).<sup>26</sup> Although Hills seems willing to come along for the ride in bringing same-sex couples who raise children within the definitions of “spouse” and “parent,” he seems more reticent about bringing in less traditionally organized (e.g., polyamorous) families or non-procreative domestic unions into the fold.<sup>27</sup> We have no such qualms of extending

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<sup>23</sup> *Id.*

<sup>24</sup> Hills's claim that adultery prosecutions are much more likely when there are kids in the picture, *id.* at 1433, was an interesting speculation, though we do not know of any evidence suggesting that is true. Likewise, his theory would expect to find spousal omissions prosecutions only in cases where there are kids to protect; but no evidence was offered on that score either. *Id.*

<sup>25</sup> *Id.* at 1431.

<sup>26</sup> *Id.* at 1432-33.

<sup>27</sup> See *id.* at 1428 n.14 (suggesting that one needs reliable data that polyamorous families can effectively raise children before deeming their exclusion from family ties burdens arbitrary). Here, we respectfully disagree with Professor Hills. So long as children in polyamorous homes are vulnerable to their guardians and the relationships of caregiving are

omissions liability to roommates or brothers, if they so choose. We are also mindful that child-rearing values are too often used in the service of discriminating against non-traditional groups and groupings.

Thus, at least two central differences with Hills are worth highlighting. First, we see family ties burdens as efforts to cope with and oversee relationships in which people often find themselves vulnerable in intimate contexts in which the state can perform little oversight, triggering the need, perhaps, for substantial sanctions. Thus, we would not have criminal liabilities contingent on whether anyone had kids, something that – the future of humanity, notwithstanding – seems morally arbitrary to us, at least as far as the criminal law is concerned. Second, even if we concede the view that the perpetuation of our species and the acculturation of our citizens through private resources is a central good that the state should pursue by propping up the family and subsidizing its activities (and we make just that concession in all our work),<sup>28</sup> we are still committed to the view that there are certain liberal norms that constrain *how* the state may choose to pursue such ends in the criminal law. Our normative framework is poised to highlight that through both our voluntariness inquiry as well as our minimalism inquiry. Without some compelling proof that the state needs to use the criminal law to forward its agenda of only allowing one man and/or one woman to raise a child, we remain convinced that our account is more consistent with basic liberal commitments, requiring only a minimal focus on whether the obligation of care was voluntarily assumed. It still might be a bad use of resources to criminalize this world of intimacy and inaction. Indeed, we are also more libertarian than Hills, it seems, for he is more comfortable using the state criminal law apparatus to promote child-rearing than we are to promote relationships of caregiving;<sup>29</sup> but that is a separate question from our threshold inquiry into whether a liberal state could create such crimes in the first place.

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established voluntarily by the adults in the house, it seems arbitrary to us not to protect the kids from the caregiving adults, once the criminal law is going to target this class of omissions in the first place.

Likewise, Hills's "Truman Show" example, *id.*, is misplaced. He might be right that a for-profit corporation is not well-suited to the tasks of child-rearing. Nonetheless, it stands in some tension with his toleration of traditional kibbutz-style child-rearing. *See id.* at 1433 n.31. Moreover, depending on the circumstances, we might very well vote for (or against) laws preventing communal or corporate caregiving. But regardless of our preferences on that matter, we see no problem in wanting to hold responsible that unit or its managing members for failures to protect the vulnerable child under its care.

<sup>28</sup> *See* Collins, Leib & Markel, *supra* note 1, at 1355-56; Dan Markel, Jennifer M. Collins & Ethan J. Leib, *Criminal Justice and the Challenge of Family Ties*, 2007 U. ILL. L. REV. 1147, 1187-88.

<sup>29</sup> Hills, *supra* note 1, at 1431.

## II. ON THE PURPOSES OF CLEANSING

A different objection to our project rests on the concern that we appear to premise the argument on the ability of the criminal law to structure people's conduct within their relationships effectively. If a parent does not feel sufficiently motivated to save his child in an easy rescue without criminal law liability, can it really be true that the criminal law is going to give the parent just the reason he needs to perform the rescue?<sup>30</sup>

We might ask the same question about virtually all *malum in se* criminal law rules. But these rules exist because it is thought that in fact some people forbear from misconduct because they do respond to these penalties and, in any event, the wrongdoing warrants punishment. For conduct on the margins of *malum in se*, however, we share some of Professors Hills's and O'Hear's instincts on this matter: that in most cases of the sort we examine, the criminal law is surely not the only or best way to engage in social engineering. For that reason, among others, we broadly urge decriminalization of the family ties burdens we found in all but one example (omissions liability). Can a criminal rule help some vulnerable people on the margins? Quite possibly. And that might be reason enough to create a criminal liability in a certain set of cases. Of course, one would need to weigh the very substantial costs as well, costs Professors Hills and O'Hear do an excellent job of specifying.

The notion that the criminal law is not a particularly effective deterrence mechanism surely cannot end the discussion. For example, we do think it is inevitable – and desirable – that legislators will continue to impose criminal liability on certain family members who fail to behave responsibly in caring for their relations. Assuming that premise to be true, we think there are a few important things that can be accomplished by “cleansing” the criminal law from relying exclusively on the status of the traditional family.<sup>31</sup>

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<sup>30</sup> See generally Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24 OXFORD J. LEGAL STUD. 173 (2004) (providing a set of reasons for skepticism toward the possibility of successful deterrence strategy through criminal law).

<sup>31</sup> We are hopeful that we do not get characterized in the future as desiring to “purg[e]” the criminal law entirely of all references to the categories of “parent” and “spouse.” See Hills, *supra* note 1, at 1427. Although Professor Hills makes that charge and suggests that we seek to “eliminate reference to these categories,” *id.* at 1428, in fact we use those categories to create presumptions of burdens in the omissions liability context. See Collins, Leib & Markel, *supra* note 1, at 1373-74. Our effort to “cleanse” the law is only a response to the unnecessary reliance upon these categories to exclude other relationships of voluntary caregiving. Hills suggests enlarging the definition of parent and spouse, see Hills, *supra* note 1, at 1428, whereas we suggest focusing on the underlying characteristics of the relationship in deciding whether liability is appropriate without regard to forcing those relationships into definitional pigeonholes. See Collins, Leib & Markel, *supra* note 1, at 1372-73. To our mind, it is the nature and quality of the relationship that matters, rather than the label we attach to it.



First, as we observed earlier, there are many non-traditional families that trigger the same vulnerabilities that present themselves within the traditional family structure.<sup>32</sup> To the extent the criminal law is designed to punish wrongdoing against the vulnerable, there is no special reason to limit the application of that retributive function only to those in traditional family relationships – and the wrongdoing is certainly no less wrong outside traditional families. Thus, expanding liability to those in non-traditional relationships of voluntary caregiving may both vindicate the interests of a wider class of vulnerable individuals and send the message that the persons in those non-traditional relationships are worthy of our respect and consideration.

After all, the purpose of the criminal law is not limited only to incentivizing individuals to behave appropriately and responsibly. Let us use the paradigmatic case of the parent-child relationship as an example. We would surely like to believe that all parents are primarily devoted to promoting their children's well-being and thus will "do right" by their children without the intervention of the criminal law. But the prevalence of child abuse and neglect in our society shows this assumption is untrue.<sup>33</sup> Some subset of parents will undoubtedly fail their children. In those cases where we impose punishment, we are grappling with whether the imposition of that punishment should be limited to those in traditional, most often biological, parent-child relationships. We conclude that it should not.

We concede, however, that if the criminal law's only function were deterrence, we are almost as skeptical as Professor O'Hear (and perhaps more skeptical than Professor Hills) that these laws could decisively structure *ex ante* behavior directly.<sup>34</sup> There is something else, however, that might be gleaned from Professor O'Hear's citation to the work of Professors Robinson and Darley.<sup>35</sup> Even if their conclusions are right that doctrinal manipulation does not really deter in quite the simplistic way some have presumed, their work might support a different sort of argument that could be useful to our positions: to the extent that we are aiming to capture a class of wrongdoers who appear to the public to *deserve* punishment rather than a more arbitrary

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We are content to accept Professor Hills's friendly amendment that we seek to "reform the concepts [of parent and spouse] in every part of the law rather than adopt the halfway measure of merely reforming the criminal code" in the future. Hills, *supra* note 1, at 1428. But we have not undertaken the ambitious task of reforming "every part of the law" here; we only seek to reform a very small class of crimes, which struck us as especially problematic because familial status is being used to allocate criminal liability.

<sup>32</sup> See *supra* Part I.

<sup>33</sup> See Jennifer M. Collins, *Crime and Parenthood: The Uneasy Case for Prosecuting Negligent Parents*, 100 NW. U. L. REV. 807, 808 (2006); Jennifer M. Collins, *Lady Madonna, Children at Your Feet: The Criminal Justice System's Romanticization of the Parent-Child Relationship*, 93 IOWA L. REV. 131, 133 (2007).

<sup>34</sup> Hills, *supra* note 1, at 1429; O'Hear, *supra* note 1, at 1446-47.

<sup>35</sup> O'Hear, *supra* note 1, at 1446 n.22 (citing Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 458-63 (1997)).

group drawn through status, our regime is more likely to inspire general compliance with the law.<sup>36</sup>

This inference actually ties into the view that there is an “expressive” interest in cleansing the criminal law of its focus on the state-sanctioned family.<sup>37</sup> Although we do not think it will be of great emotional benefit to same-sex partners or polyamorous groups that they may sign up on some odd registry to symbolize to the world they have taken on certain duties, we do think the criminal law has to be designed in a way that does not project that morally arbitrary status differences alone are a sufficient basis for criminal law liability. Professor O’Hear may be right (though we doubt it) that we can read the law’s failure to criminalize failures to rescue in same-sex contexts as a testimony to the law’s faith that same-sex partners will always save their dependents.<sup>38</sup> But without evidence that this distinction in treatment is rational or motivated by something other than discrimination, we think there is good reason to design a system that does not allow these distinctions in status. That could be accomplished by decriminalization or broadening the category of who can be held liable.

Professor O’Hear is right to focus on the consequences of broadening the categories of liability: we may achieve only a pyrrhic victory if we get the law to be more equal on its face only to discover that implementation practices of line prosecutors are discriminatory.<sup>39</sup> And then look what we would have accomplished: we would have used discrimination against gays as an excuse to create a new vehicle for discrimination against gays. This time, however, the discrimination will be much harder to spot, will be much tougher to oppose because the decisions made by prosecutors are essentially unreviewable, and may actually send gays to prison rather than just giving them a cause for dignitary harm. Some accomplishment indeed!

Professor O’Hear’s arguments on this point are hard to dispute. But that is in part because they rely on speculation about how things will proceed once our arguments are accepted.<sup>40</sup> Although we have no basis for speculation

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<sup>36</sup> See Robinson & Darley, *supra* note 35, at 497-98 (arguing that harmonizing law and social norms can help secure compliance – and that gaps between law and norms can breed resistance).

<sup>37</sup> Thus, *pace* Professor O’Hear, *supra* note 1, at 1446-47, we are not committed to the view that participation in the registry system itself will have meaningful positive expressive value (though it may); we are much more concerned about the negative expressive value of the system as it is.

<sup>38</sup> See *id.* at 1446 n.21.

<sup>39</sup> *Id.* at 1445.

<sup>40</sup> Some of the doomsday scenarios offered by the replies do have empirical support. Both Professors Hills and O’Hear cite the example of domestic violence “no-drop” policies, which might have the perverse consequence of making victims less likely to collaborate with law enforcement to stop the abuse, precisely because they do not really want the criminal law sanctions that would follow from reporting incidents of abuse. See Hills, *supra* note 1, at 1426; O’Hear, *supra* note 1, at 1447. The same dynamic might ensue in our

otherwise (other than a sense that the small contribution our program might make to nondiscrimination norms might usefully counterbalance the speculative costs associated therewith), we would hope that legislators would study evidence related to O'Hear's warnings if and when they revisit these laws to consider our views. States can experiment with the possible regimes we sketch for a short time to see how they play out; they can delay applying them until there is satisfaction that the new laws would be enforced in nondiscriminatory ways; they can create ways of overseeing enforcement; or they can opt for simple decriminalization owing to these practical concerns, a point we examine next.

### III. ON MINIMALISM

Finally, underlying at least Professor O'Hear's commentary is the suggestion that we are not libertarian enough for his tastes.<sup>41</sup> He notes that we talk big about "minimalism" but are ultimately sanguine about expanding the reach of the criminal law, identifying new potential defendants and scooping them up into the current laws, which presently target a much smaller class of offenders.<sup>42</sup> He tells us that civil law will be enough if it is necessary at all.<sup>43</sup>

To our mind, this critique seems off the mark. As stated at the outset of this Response, we generally endorse decriminalization in all but the omissions context; and, indeed, O'Hear does not seem highly motivated to decriminalize completely in that context either.<sup>44</sup> In light of his commitment to nondiscrimination, we hope he would agree to put aside his libertarian instincts for a moment to make sure the law treats all caregivers equally.

Accordingly, it seems that our ultimate conclusions on most of the family ties burdens are perfectly consistent with Professor O'Hear's preferences. Indeed, we are hopeful that our "speed-bumps" – as we call them in the article – will generally slow down the criminalization process. One should keep in mind our intended audience for the normative framework: legislators who may have quite different instincts on how libertarian they are willing to be but who are nonetheless committed to autonomy, nondiscrimination, and protection of the vulnerable.

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regime: the vulnerable will get no more protection because criminalization will deter the abused's cooperation with law enforcement. Surely, we agree with Professors Hills and O'Hear that legislators must make practical calculations about the likely consequences of any particular criminal law. *See Hills, supra* note 1, at 1434-35; O'Hear, *supra* note 1, at 1446-47. That is part of our minimalism inquiry, and their arguments on this issue are admissible to the legislators making these laws.

<sup>41</sup> *See* O'Hear, *supra* note 1, at 1439.

<sup>42</sup> *Id.*

<sup>43</sup> We note that Professor O'Hear did not much defend decriminalization in the contexts of incest, bigamy, or adultery, crimes that might follow from his suggested alternative reasons for liability based on vulnerability and proximity. *See id.* at 1443.

<sup>44</sup> *See id.*

In short, in many cases, we would prefer – and have stated our preference for – full-scale decriminalization. Yet we are willing to tolerate some expansion of criminal duties if legislators can meet the burden of extending them equally in good faith and explaining why lesser sanctions are inadequate to achieve the underlying good the law is intending to accomplish. We nevertheless hope those very same legislators also pay careful attention to the ideas and warnings Professors Hills and O’Hear have offered in this stimulating conversation.