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### The Moral Ambiguity of Public Prosecution

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GABRIEL S. MENDLOW

## The Moral Ambiguity of Public Prosecution

**ABSTRACT.** Classic crimes like theft and assault are in the first instance wrongs against individuals, not against the state or the polity that it represents. Yet our legal system denies crime victims the right to initiate or intervene in the criminal process, relegating them to the roles of witness or bystander—even as the system treats prosecution as an institutional analog of the interpersonal processes of moral blame and accountability, which give pride of place to those most directly wronged. Public prosecution reigns supreme, with the state claiming primary and exclusive moral standing to call offenders to account for their wrongs. Although likely justified all things considered, this legal arrangement upends the structures of accountability familiar from ordinary life, where the victims of wrongdoing enjoy moral standing of a caliber greater than that of most if not all third parties. By inverting these structures of accountability, the state that acts as exclusive public prosecutor exceeds its moral standing and incurs a debt to the crime victim, who retains a persisting moral complaint, even against a state that justifiably monopolizes the prosecution function. The victim's persisting moral complaint is different from the well-known grievance that a criminal legal system that marginalizes or excludes crime victims risks injuring their dignity and impairing their prospects for vindication and reconciliation. If the state showed crime victims greater solicitude and accommodated their interests and considered preferences more deliberately, the criminal process might dignify victims and enhance their wellbeing. But the state still would exceed its moral standing if it accommodated the victim as a matter of benevolent grace, rather than in recognition of the victim's moral prerogative.



The victim's prerogative to call a wrongdoer to account is a widely acknowledged but little examined aspect of relational morality. This Essay argues that the victim's prerogative shares a foundation with other more theoretically familiar norms of partiality, self-preference, and exclusion, all of which reflect our status as individual persons, rather than as vectors for the promotion of impartial value. Grounded in the victim's status as an individual human person, the victim's moral prerogative continues to exert normative force even when justifiably supplanted by the myriad considerations of equity and efficacy that favor public prosecution on the whole. The moral interests undergirding the victim's prerogative may survive specifically in the form of reasons for us to consider ceding the crime victim a degree of procedural control, much the way many civilian jurisdictions do. The Essay concludes by weighing this procedural innovation against other possible responses to the moral ambiguity of public prosecution, such as dramatically reducing the severity of state punishment or replacing our existing criminal legal system with a bifurcated procedure that divides adjudication sharply from sanctioning, restricting moral blame and accountability to the adjudicatory stage and treating the sanctioning stage as a clinical exercise in crime reduction. If no such innovation is ultimately feasible and morally attractive, then the argument of this Essay is perhaps a partial *reductio ad absurdum* of a system of exclusive public prosecution in which the criminal process is an institutional analog of interpersonal moral blame, a demonstration of the moral deficiency of a criminal legal system that holds interpersonal wrongdoers morally accountable to the polity rather than to their direct victims.

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## INTRODUCTION

Even the shortest term of incarceration causes hardship and deprivation of a kind impossible to justify in almost any nonpenal context. Perhaps for this reason, when we examine the moral foundations of state punishment, we tend to focus more on the punished than on the punisher—more on what makes someone liable to sanctions than on what entitles the state to inflict them.<sup>1</sup> We focus still less on what entitles the state to *seek* them, that is, to serve as criminal prosecutor. Yet the last question is just as important as the others, and it is just as difficult. For even if we grant that justice permits certain people to be punished by the state, it remains an open question whether the state, rather than another party, should enjoy the sole legal right to instigate the process that decides guilt and innocence.

Because that process involves an element of blaming and holding morally accountable, the question of what entitles the state to serve as prosecutor is in part a question about the state's moral standing to call supposed wrongdoers to account. An entity has the moral standing to call another to account when it has a presumptive moral entitlement to accuse the other of wrongdoing and to demand that the other answer the accusation by admitting or denying responsibility. This presumptive entitlement is not an indefeasible right: an entity with the standing to call another to account is not justified in doing so when the consequences would be very bad. At the same time, an entity need not have standing to call another to account in order to be justified in doing so. Although an entity that lacks standing is presumptively disentitled to call another to account, it may do so anyway if the consequences would be very good or the consequences of silence very bad. I will argue that this moral predicament is roughly that of the contemporary state.

In terms of efficacy and fairness, public prosecution is unquestionably superior to private prosecution. Yet the state may lack moral standing to call criminals to account for their interpersonal wrongs in a setting that excludes their human victims from formal participation. Classic crimes like theft and assault are in the first instance wrongs against individuals, not against the state or the polity that it represents. But our legal system denies crime victims the

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1. See A. John Simmons, *Locke and the Right to Punish*, 20 PHIL. & PUB. AFF. 311, 311 (1991) (noting that discussions of the justification of punishment tend to approach the issue as being “a question about the *kind or amount* of punishment that is just in response to various offenses, or a question about *who* can be justly punished, or a question about *when* (if) punishment is the proper response to crime or wrongdoing at all,” rather than as being a question about “[w]hat makes it just for a particular person or group to punish us, instead of some other person or group”).

right to initiate or intervene in the criminal process, relegating victims to the roles of witness or bystander—even as the system treats prosecution as an institutional analog of the interpersonal processes of moral blame and accountability, which give pride of place to those most directly wronged. Public prosecution reigns supreme, with the state claiming primary and exclusive moral standing to call offenders to account for their interpersonal criminal wrongdoing. Although likely justified, all things considered, this legal arrangement upends the structures of accountability familiar from ordinary life, where the victims of wrongdoing enjoy moral standing of a caliber greater than that of most if not all third parties. By inverting these structures of accountability, the state that acts as exclusive public prosecutor exceeds its moral standing and incurs a debt to the crime victim, who retains a persisting moral complaint, even against a state that justifiably monopolizes the prosecution function.

The victim's persisting moral complaint is different from (although not entirely unrelated to) the familiar grievance that a criminal legal system that marginalizes or excludes crime victims risks injuring their dignity and impairing their prospects for vindication and reconciliation.<sup>2</sup> If the state showed crime victims greater solicitude and accommodated their interests and considered preferences more deliberately, the criminal process would dignify victims and enhance their wellbeing. But the state still would exceed its moral standing if it accommodated the victim as a matter of benevolent grace, rather than in recognition of the victim's moral prerogative.

The victim's prerogative to call a wrongdoer to account is a widely acknowledged but little examined aspect of relational morality. I will argue that it shares a foundation with other more theoretically familiar norms of partiality, self-preference, and exclusion, all of which reflect our status as individual persons, rather than as vectors for the promotion of impartial value. Grounded in the victim's status as an individual human person, the victim's moral prerogative continues to exert normative force even when justifiably supplanted by the considerations of equity and efficacy that favor public prosecution.

Like the victim's moral prerogative, the question whether the state has exclusive moral standing to call interpersonal criminal wrongdoers to account is a topic few theorists have acknowledged, let alone sought to address. In the first place, few theorists have devoted sustained attention to the ways our criminal legal system gives institutional form to the interpersonal processes of blame and moral accountability. Everyone recognizes the moral character of criminal *punishment*—that the state in a criminal case imposes morally condemnatory

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2. See Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1, 4 (1977) (arguing that the conventional criminal process “steal[s] conflicts” from victims).

sanctions on a defendant it judges guilty of culpable wrongdoing. But only a few theorists have reflected at length on the nature and implications of the moral character of the criminal *process*. The most significant of these theorists is R.A. Duff, who has argued compellingly that the judgment of guilt in a criminal case comes only after the state has engaged the defendant in what the law represents (and the participants tend to understand) as a relational moral transaction. It is a transaction in which the state claims the moral standing to accuse the defendant of wrongdoing and to demand that the defendant answer the accusation by admitting or denying moral responsibility. Theorists who pay little heed to these relational aspects of the criminal process can be expected to neglect the question why the state has moral standing to bring that process fully under its control—why the state has standing to demand that criminals answer to *it* for wrongs they have perpetrated on others. If Duff has done more than other theorists to expound a relational model of the criminal process,<sup>3</sup> it is no coincidence that Duff also has done more than most other theorists to explain why calling interpersonal wrongdoers to account is properly the business of the state.<sup>4</sup> Duff nevertheless leaves a critical question unresolved, a question I will call *the problem of criminal standing*—namely, whether the state’s moral standing to call interpersonal criminal wrongdoers to account is truly exclusive.<sup>5</sup>

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3. See, e.g., R.A. DUFF, *THE REALM OF CRIMINAL LAW* 30-36 (2018) [hereinafter DUFF, *REALM OF CRIMINAL LAW*]; R.A. DUFF, *TRIALS AND PUNISHMENTS* 99-143 (1986) [hereinafter DUFF, *TRIALS AND PUNISHMENTS*]; 3 THE TRIAL ON TRIAL: TOWARDS A NORMATIVE THEORY OF THE CRIMINAL TRIAL 55-161 (Antony Duff, Lindsay Farmer, Sandra Marshall & Victor Tadros eds., 2007).
  4. Why the state has moral standing to call perpetrators of serious interpersonal wrongdoing to account is a question central to Duff’s *The Realm of Criminal Law*, *supra* note 3, an exhaustive discussion of the problem of criminalization. For other discussions of criminalization that approach the issue by considering what kind of wrongdoing the state has moral standing to censure or what kind of wrongdoer is appropriately answerable to the state, see Michelle Madden Dempsey, *Public Wrongs and the “Criminal Law’s Business”: When Victims Won’t Share*, in *CRIME, PUNISHMENT AND RESPONSIBILITY: THE JURISPRUDENCE OF ANTONY DUFF* 254 (Rowan Cruft, Matthew H. Kramer & Mark R. Reiff eds., 2011); James Edwards & Andrew Simester, *What’s Public About Crime?*, 37 *OXFORD J. LEGAL STUD.* 105 (2017); S.E. Marshall & R.A. Duff, *Criminalization and Sharing Wrongs*, 11 *CANADIAN J.L. & JURIS.* 7 (1998); and Gerald J. Postema, *Politics Is About Grievance: Feinberg on the Legal Enforcement of Morals*, 11 *LEGAL THEORY* 293 (2005).
  5. In *The Realm of Criminal Law*, Duff treats exclusive public prosecution as a necessary concomitant of criminalization. See DUFF, *REALM OF CRIMINAL LAW*, *supra* note 3, at 294 (“For the time being, . . . we can take the public ownership of a case as a hallmark of criminal as distinct from tort (public as distinct from private) law: we will then see reason to criminalize a type of wrong, rather than making it a matter of tort law, to the extent that we think it

The immediate task ahead<sup>6</sup> will be to formulate the problem of criminal standing to a first approximation—to elucidate the concept of moral standing in general, to explain in broad terms why exclusive moral standing to call interpersonal wrongdoers to account may elude the state, and to emphasize how standing differs from all-things-considered justification. From this preliminary discussion, it will emerge that the problem of criminal standing flows primarily from two sources: one institutional, the other moral. The institutional source<sup>7</sup> is a legal system built on the relational model of the criminal process, which gives legal form to the interpersonal processes of blame and accountability. The moral source<sup>8</sup> is the victim-centered normative structure familiar from everyday life that subordinates the standing of third parties to the standing of victims. The state flouts this structure and frustrates victims' superordinate moral standing when it combines a relational model of the criminal process with a system of exclusive public prosecution. This legal practice leaves the victim with an unsatisfied moral claim.

As we will see,<sup>9</sup> the victim's unsatisfied claim cries out for partial satisfaction, even though the overall balance of reasons weighs decisively against vindicating the claim in full. Although reasons of efficacy and fairness justify the state in arrogating an exclusive legal right to call interpersonal criminal wrongdoers to account, the countervailing considerations that undergird a victim's superordinate moral standing continue to exert normative force even when overridden. They survive as reasons for us to surrender a degree of procedural control to crime victims within a system of public prosecution, much the way many civilian jurisdictions do. Near the end, we will briefly weigh these institutional innovations against several other responses to the moral ambiguity of public prosecution available to a society committed both to a victim-centered conception of moral standing and to a criminal process that calls offenders to account for their interpersonal wrongs.<sup>10</sup> One theoretical possibility is to punish all offenders much less severely than our system currently does, meting out punishments no harsher than that which a third party like the state has standing to seek. Another theoretical possibility is to replace our existing criminal legal system with a bifurcated procedure that divides adjudication sharply from

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important that the case be owned by the polity in this way—and that the defendant answer to the polity.”).

6. See *infra* Part I.

7. See *infra* Part II.

8. See *infra* Part III.

9. See *infra* Part IV.

10. See *infra* Part V.



sanctioning, restricting moral blame and accountability to the adjudicatory stage and treating the sanctioning stage as a clinical exercise in crime reduction.

The purpose of this Essay is not to set forth a brief for a particular policy, however. It is to explain a neglected problem about the moral foundations of prosecution and to identify institutional changes that would solve or mitigate that problem. If none of these changes is ultimately feasible and morally attractive as an actual policy, then the argument of this Essay is perhaps a partial *reductio ad absurdum* of a system of exclusive public prosecution built on the relational model of the criminal process, a demonstration of the moral deficiency of a criminal legal system in which prosecution is a means of holding offenders morally accountable to the polity rather than to their direct victims. Alternatively, the argument of this Essay is perhaps a partial *reductio ad absurdum* of the victim-centered normative ideal that drives the problem of criminal standing, an ideal that subordinates the moral standing of all third parties to that of a wrongdoer's direct victim. If this conception of moral standing is unsound—if a collective third party like a political community enjoys a caliber of moral standing that rivals or surpasses that of a victim—then the argument of this Essay does not demonstrate the moral deficiency of a criminal legal system in which prosecution is a means of holding offenders morally accountable to the polity. Instead, it may help demonstrate the moral necessity of the state, the moral necessity of a norm-bound, formal entity authorized to censure and sanction serious wrongdoing on behalf of the polity. If a polity enjoys moral standing par excellence, but no such collective entity can sanction serious wrongdoing fairly and moderately unless bound by law and formal process, then true moral accountability may require nothing less than public prosecution.

## I. THE PROBLEM OF CRIMINAL STANDING

Although born of law,<sup>11</sup> the term “standing” now figures prominently in the language of interpersonal morality. It denotes a kind of positional moral entitlement—an entitlement to hold certain others morally accountable for

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11. On the uncertain origins of the legal concept of standing, see JOSEPH VINING, *LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW* 55 (1978); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 *STAN. L. REV.* 1371, 1378 (1988); and Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 *MICH. L. REV.* 689, 691-92 (2004).

their apparent wrongdoing.<sup>12</sup> I have standing to call you to account for some apparently wrongful act if I have the (presumptive but defeasible) right to criticize you for that act and to demand that you answer my criticism with an appropriate response, such as a denial, justification, excuse, plea in mitigation, apology, or plea for mercy. My right to demand an answer is also a normative power: by exercising the right, I put you under a duty to answer me.<sup>13</sup> Standing is thus the mirror image of interpersonal responsibility: I have standing to call you to account for a given act if and only if you are responsible to me for that act, that is, you are duty-bound to answer my demand for an accounting.

Standing is a kind of *positional* moral entitlement in that it depends on how and where a blamer stands in relation to the target of moral criticism. We are said to lack standing to criticize others for their wrongdoing when we are too far removed from it (their wrongdoing is none of our business), when we are too close to it (we are complicit), and when we are in a moral position similar or identical to that of the wrongdoer (our blame is hypocritical).<sup>14</sup> These circumstances undermine our entitlement to criticize not by establishing that the targets of our criticism are in fact blameless, but by establishing that we ourselves are in a bad position to criticize them. If we criticize them anyway, we will ordinarily fail to put them under a duty to answer us. Wrongdoers generally are not morally obligated to answer to us (they are not *responsible to us*) if we are complicit in their wrongdoing, if we criticize them hypocritically, or if our criticism is meddlesome or officious, targeting wrongdoing that is none of our business or is less properly our business than the business of another. Wrongdoers whom we criticize without standing are thus entitled to deflect our criticism even if it is sound.

Wrongdoers whom we criticize without standing also may be entitled to criticize us in return. If you owe me no answer for your supposed wrongdoing,

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12. On the nature of moral standing in general, see James Edwards, *Standing to Hold Responsible*, 16 J. MORAL PHIL. 437, 437-40 (2019); and Ori J. Herstein, *Understanding Standing: Permission to Deflect Reasons*, 174 PHIL. STUD. 3109, 3110-11 (2017).

13. We should distinguish (i) the *responsive* duties that spring from my calling you to account from (ii) the *ameliorative* duties that spring directly from your wronging me (duties to apologize, repair, compensate). The ameliorative duties arise regardless of whether I have called you to account, provided you actually wronged me. The responsive duties arise regardless of whether you actually wronged me, provided I called you to account on reasonable grounds and had standing to do so.

14. For a general discussion of how meddling, complicity, and hypocrisy can undermine a person's standing to blame, see D. Justin Coates & Neal A. Tognazzini, *The Nature and Ethics of Blame*, 7 PHIL. COMPASS 197, 203-4 (2012).

then, all else equal, I will wrong you if I demand one.<sup>15</sup> What's more, if the particular reason why I lack standing is that my intervention is meddling— if your wrongdoing is not properly my concern or is more properly the concern of another— then my intervention will also wrong your victim, whose prerogative to call you to account is supplanted by my meddling intervention. Although meddling is often a personal vice<sup>16</sup> (a moral blemish on the blamer), if it were only a personal vice, meddling blame might be morally undesirable, but it would not be a wrong to the person we blame or to that person's victim. Undesirable or vicious actions do not necessarily wrong the people they affect. If I refuse to donate to your museum because I am stingy and selfish, then I exhibit vice (and do something I shouldn't do) but I do not thereby wrong you or your museum. I do not wrong you because you have no relevant claim on me—no claim to a charitable donation, and no claim that I exhibit the virtue of generosity. By contrast, you do have a claim that I not blame you for something that is none of my business. So does your victim, who may justly complain about my meddling interference.<sup>17</sup> Standing is thus a *protected* entitlement: your victim's standing to call you to account is not only a

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15. See Herstein, *supra* note 12, at 3113 (“[I]ntervening under conditions of meddling, lack of status or hypocrisy involves some sort of wronging against the intervention’s target. We can detect this wrongness in the critical reactions of addressees to those who, for example, direct them hypocritically or officiously. For instance, ‘who the hell are you to demand that of me!’; ‘you stay out of it!’; or ‘mind your own business!’ are responses we tend to bark rather than say. And we view such reactions as appropriate, even though they involve negative, aggressive and even hurtful emotions and behavior, such as annoyance, criticism, indignation and anger. Most importantly, we ground the justification for such reactions in the intervener’s meddling, hypocrisy or lack of status.”); Linda Radzik, *On Minding Your Own Business: Differentiating Accountability Relations Within the Moral Community*, 37 *SOC. THEORY & PRAC.* 574, 575 (2011) (“[People] believe it is *wrong* to sanction people when it is not one’s place to do so. A failure to mind one’s own business is something for which one can be held accountable.”).
16. On the vice of nosiness, see Linda Radzik, *On the Virtue of Minding Our Own Business*, 46 *J. VALUE INQUIRY* 173, 173–74 (2012). On the vice of “judgmentalism,” see Caroline J. Simon, *Judgmentalism*, 6 *FAITH & PHIL.* 275, 275 (1989).
17. Similar considerations show that the norm against meddling is not simply a norm of epistemic rationality by another name. Although blaming someone without sufficient evidence can be morally inappropriate, doing so does not necessarily wrong the person blamed. If you are in fact blameworthy and your wrongdoing is my business, I do not wrong you when I blame you on a hunch. In any event, if meddling blame were objectionable primarily because it tends to lack a sufficient evidentiary basis—if the norm against meddling were at bottom a norm against intervening in affairs about which we lack evidence—the norm would do two things it does not in fact do: bar us from scrutinizing faults in an intimate who has successfully concealed them, and permit us to criticize a stranger for a private fault that she has accidentally exposed to public view. See Garrath Williams, *Sharing Responsibility and Holding Responsible*, 30 *J. APPLIED PHIL.* 351, 354–55 (2013).

right to accuse you and a power to put you under a duty to respond; it is also a defeasible right to bar others without standing (or with lesser standing) from frustrating your exercise of the former right or power.

Complicity, hypocrisy, and meddlesomeness are the most commonly discussed reasons why a blamer's standing might founder. But there are at least a few others. I may lack standing to criticize your conduct if I told you beforehand that it wasn't wrongful or that I wouldn't blame you for it. I may also lack standing if my criticism is inconsistent or unfair – if I criticize you for a fault I overlook in others, for example, or if I criticize you more strongly for that fault than I criticize others who exhibit the same fault to the same degree. My standing will be particularly in doubt if the reason for my inconsistency is that I am invidiously discriminating – if I am criticizing you for a fault I find objectionable only in people belonging to certain groups, or for a fault I find more objectionable in people belonging to those groups than in others. Similar circumstances can undermine a lawsuit.<sup>18</sup> A judge will dismiss a criminal charge if the prosecutor's charging decision was invidiously discriminatory<sup>19</sup> or if the government previously assured the defendant that the conduct in question was lawful.<sup>20</sup> A jury will acquit the defendant if it finds that the government has “hypocritically” sought to call her to account for a crime she committed only because of police “complicity” that rose to the level of entrapment. Comparable legal defenses apply in the civil arena, where plaintiffs guilty of hypocrisy or complicity lie vulnerable to the doctrines of equitable estoppel<sup>21</sup> and “clean hands.”<sup>22</sup> Even a virtuous plaintiff will come up short, will fall below the “irre-

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18. Like other writers, I find it illuminating to draw an analogy between the circumstances that undermine a person's presumptive moral entitlement to call another to account and the circumstances that ground several legal defenses. The argument that follows does not depend on the soundness of this analogy. Nor does it depend on the aptness of the term “standing” as a label for the presumptive moral entitlement or on there being any deeper unity among the circumstances that can undermine it.

19. See *United States v. Armstrong*, 517 U.S. 456, 464-65 (1996).

20. Many jurisdictions follow the Model Penal Code in granting a defense to people who reasonably rely on certain official misstatements of the law. See MODEL PENAL CODE § 2.04(3)(b)(iv) (AM. LAW INST. 1985); see also Jeffrey F. Ghent, Annotation, *Criminal Law: Official Statement Mistake of Law Defense*, 89 A.L.R.4th 1026 (1991) (collecting cases).

21. The doctrine of equitable estoppel bars your denying a proposition that you previously induced someone else to rely on when such denial would work to the other person's disadvantage. *Koval v. Koval*, 576 So. 2d 134, 137 (Miss. 1991).

22. The doctrine of “clean hands” bars you from obtaining an equitable remedy (such as a court order commanding someone to vacate your land or to perform the specific acts described in a contract) when you are “guilty of willful misconduct in the transaction at issue.” *Bailey v. Bailey*, 97-CA-00577-SCT (¶ 6), 724 So. 2d 335, 337 (Miss. 1998) (citing *Calcote v. Calcote*, 583 So.2d 197, 199-200 (Miss. 1991)).

ducible constitutional minimum of standing,” if the plaintiff has not suffered an “injury in fact” that is “fairly . . . trace[able] to the challenged action of the defendant,”<sup>23</sup> the defendant’s alleged wrongdoing thus being in effect none of the plaintiff’s business.

The last of these doctrines, which lawyers know as Article III standing, is evidently what brought the term “standing” into common usage. Article III standing emerged as a discrete legal requirement in the early twentieth century as progressive judges, intent on protecting agency decisionmaking from judicial interference, sought to block lawsuits filed by plaintiffs hostile to administrative regulation.<sup>24</sup> Since then, the doctrine of Article III standing has figured far more prominently in public law than in private law. In private law, the question of standing rarely serves as a locus of dispute. That is not because the concept of standing is unimportant to private claims. It is instead because a standing requirement inheres in the very structure of all private causes of action and is therefore satisfied whenever the elements of a cause of action are.<sup>25</sup> From negligence, to trespass, to breach of contract, private causes of action all require that the plaintiff have suffered an injury or violation of legal rights as a result of the defendant’s wrongful conduct—wrongful conduct that, by dint of such injury or violation, is appropriately the plaintiff’s business.

Despite the legal origin of the term, the *concept* of standing is as much moral as legal, which is why we can deploy the concept not only from within our legal practices (using the doctrines and defenses I described a moment ago), but also when evaluating those practices from the outside. When legal theorists deploy the concept of standing from an external vantage, they tend to inquire about the legitimacy of our legal practices under conditions of injustice, asking whether the state lacks moral standing to condemn someone whose criminality

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23. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (first quoting *Allen v. Wright*, 468 U. S. 737, 751 (1984); and then quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U. S. 26, 41-42 (1976)). The concept of “injury in fact” is open-ended and partly a function of legislative whim. See *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) (“Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.” (quoting *Lujan*, 504 U.S. at 580)).
24. Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1437 (1988).
25. See *id.* at 1434-35 (“[In] private law, . . . the issues of standing, cause of action, and the merits are closely intertwined. . . . For all three issues, the question is whether *A* has violated a duty it owes to *B*. *C*, an affected third party, generally may not bring suit when *A* injures *B*—even if *C* is materially affected. At private law, there is no need for a distinctive set of principles to govern standing.” (footnote omitted)); see also Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 4 (1998) (interpreting tort law as presupposing a rule of “substantive standing” according to which “[a] plaintiff cannot win unless the defendant’s conduct was a wrong relative to her, [that is], unless her right was violated”).

flows from injustices that the state has created or willfully failed to ameliorate.<sup>26</sup> This question is important and urgent. But it is not the question I pose in this Essay. My question is more basic: What could give even a perfectly just state the exclusive moral standing to hold people criminally accountable for their interpersonal wrongs? How could these wrongs be the business of the polity and the polity alone, rather than (also) the business of their direct victims?

In morality, a capable and uncompromised human victim typically gets both the first word and the last, enjoying moral standing of a caliber exceeding that of most if not all third parties. Victims generally have standing to express the harshest criticism, demand answers with the greatest urgency, and impose sanctions of the greatest severity—everything from a cold shoulder or a hot rebuke to a public shaming or an excommunication. What's more, how victims choose to exercise their powers to blame and forgive tends to determine how third parties should exercise their own powers. When a victim forgives, third parties generally should mute their blame; when a victim blames, third parties generally should withhold their forgiveness. The structures of accountability we find in ordinary life thus exhibit principles of *differential standing*: most third parties lack standing of any kind, a few possess standing of varying degrees of robustness, and the victim stands at the apex. In our criminal legal system, by contrast, a single third party stands alone. The state takes total charge of the moral transaction with perpetrators of interpersonal wrongs, denying effective legal standing to all other parties, including the victim. The state claims the prerogative to hold a wrongdoer criminally accountable regardless of whether the victim has chosen to condemn the wrong or to forgive it. When the state goes forward with a prosecution, it holds the wrongdoer accountable with a robustness that, in ordinary life, is the prerogative only of victims and their close associates. Criminal prosecution expresses the harshest moral criticism, demands answers with the greatest urgency, and imposes sanctions of the greatest severity. Judged by conventional moral principles of differential standing, the practice of exclusive public prosecution comes off as a kind of meddling—not because interpersonal wrongdoing is altogether no business of the polity, but because it seems most properly the business of the victim. In a nutshell, that is the problem of criminal standing.

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26. See, e.g., David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 388 n.4 (1976) (“If . . . society itself were responsible for any deprivations or degradations that the actor had suffered, society might not be entitled to condemn that actor.”). See generally Gary Watson, *A Moral Predicament in the Criminal Law*, 58 INQUIRY 168 (2015) (considering whether the state lacks standing to punish offenders who are “victims of severe social injustice”).



The problem may fade from view if we attend with blinkered eyes to the injuries that interpersonal criminal wrongs inflict on the broader community. Venerable conceptions of crime deem the communal injury paramount. John Locke called every crime “a trespass against the whole species.”<sup>27</sup> About a century later, William Blackstone classified crimes as “public wrongs,”<sup>28</sup> where conduct constitutes a public wrong (as opposed to a “private . . . or civil injur[y]”) if it is a “breach and violation of the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity. . . . [T]reason, murder, and robbery are properly ranked among crimes; since, besides the injury done to individuals, they strike at the very being of society.”<sup>29</sup> In a similar spirit but a more contemporary idiom, Lawrence C. Becker argues that conduct is properly criminalized if it causes “social volatility”<sup>30</sup>; Robert Nozick, if it arouses general fear.<sup>31</sup> These ideas encourage us to conceive criminal wrongs as wrongs to the public, wrongs that are criminal because and to the extent the public is their victim. If crime’s essential feature is that it wrongs the polity, then the problem of criminal standing is no problem at all. We may readily agree with Douglas N. Husak that “[the polity’s] authority to punish [crime] is no more mysterious than the authority of any person or institution to deliberately impose a stigmatizing deprivation on those who commit wrongs against it.”<sup>32</sup>

The difficulty is that our criminal legal system does not punish all crimes *as* wrongs against the polity. Our system properly treats rape and murder and other traditional interpersonal crimes not (merely) as wrongs against the polity but also, primarily, as wrongs against their individual human victims. Conceiving of all crimes as wrongs against the polity thus resolves the problem of criminal standing at a prohibitive cost, a cost that Duff and S.E. Marshall explain in terms of a “distort[ion] [of] the criminally wrongful character”<sup>33</sup> of traditional interpersonal crimes. “What makes rape and murder criminal,” Duff and Mar-

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27. JOHN LOCKE, *The Second Treatise of Government*, in TWO TREATISES OF GOVERNMENT, 264, 272 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

28. 4 WILLIAM BLACKSTONE, COMMENTARIES \*5.

29. *Id.*

30. Lawrence C. Becker, *Criminal Attempts and the Theory of the Law of Crimes*, 3 PHIL. & PUB. AFF. 262, 274 (1974).

31. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 65-71 (1974).

32. Douglas N. Husak, *Does the State Have a Monopoly to Punish Crime?*, in THE NEW PHILOSOPHY OF CRIMINAL LAW 97, 104 (Chad Flanders & Zachary Hoskins eds., 2016).

33. R.A. Duff & S.E. Marshall, *Public and Private Wrongs*, in ESSAYS IN CRIMINAL LAW IN HONOUR OF SIR GERALD GORDON 70, 71 (James Chalmers, Fiona Leverick & Lindsay Farmer eds., 2010).

shall explain, “is not that the murderer or rapist harms or wrongs the public at large, but [rather] *what he does to his individual victim*.”<sup>34</sup> When the polity *qua* prosecutor calls murderers and rapists to account, it calls them to account not as their victim but as a third party. Our criminal legal system thus runs headlong into the problem of criminal standing, the question why exclusive standing to hold interpersonal criminal wrongdoers accountable belongs to a third party like the state.

We cannot answer this question just by listing the many evident advantages of a system of exclusive public prosecution. The problem of criminal standing simply is not a problem of justification. We will explore the difference between standing and justification more fully in Part IV. For now, it is enough to note the intuitive difference between judging that given wrongdoing is our business and judging that we are justified, all things considered, in calling the wrongdoer to account. If my calling you to account would be hurtful, gratuitous, counterproductive, mean-spirited, demeaning, uncharitable, self-aggrandizing, or petty, then, in the circumstances, I am unjustified in criticizing you even if your wrong is squarely my business.<sup>35</sup> Conversely, if by calling you to account I can produce a very good result or prevent a very bad one, then I might be justified in calling you to account for a wrong that is not properly my business or is more properly the business of another. What is true of interpersonal blame and condemnation seems equally true of their institutional analogs—prosecution and punishment. Even if the state has standing to prosecute and punish you for a given crime, it might not be justified in doing so: prosecuting you might cost too much, do too little good, or intrude too much on important personal interests, such as the interests you and your victim share in achieving reconciliation without the interference of a depersonalizing bureaucracy. Conversely, if the state lacks standing to call you to account—if it is presumptively disintitled to do so because it was an accomplice to your wrong or because your wrong is more properly the business of its direct victim than of the polity—the state might be justified in prosecuting you anyway if by doing so it can produce substantial good or prevent substantial harm.

Whether the state has exclusive standing to call interpersonal wrongdoers to account is therefore a separate question from whether exclusive public pros-

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34. *Id.* (emphasis added).

35. See, e.g., Margaret Gilbert, *Shared Intention and Personal Intentions*, 144 PHIL. STUD. 167, 177 (2009) (“[W]ere [someone] so sensitive to criticism that she would suffer a grave physical crisis if rebuked, in most circumstances it would be wrong to rebuke her even if one had the standing to do so.”); Williams, *supra* note 17, at 353 (“All sorts of considerations—especially in a personal relationship—might mean that it would be callous, overbearing or otherwise inappropriate to exercise my standing to rebuke.”).



ecution is justified. Still, we cannot answer these separate questions separately. We cannot answer them separately because we cannot justify the practice of exclusive public prosecution unless we account for all of its moral shortcomings, chief among them the possibility that a state that engages in exclusive public prosecution exceeds its moral standing by supplanting the prerogative of the victim.

## II. THE RELATIONAL MODEL OF THE CRIMINAL PROCESS

The practice of exclusive public prosecution calls the state's moral standing into question only in a legal system that exemplifies the relational model of the criminal process, a legal system that treats prosecution as a means of calling offenders to account for their moral wrongs. A legal system does not exemplify the relational model just because it criminalizes conduct that is morally wrongful, or just because it imposes punishment that is proportionate to the misconduct's seriousness, or even because the punishment the system imposes inflicts the amount of suffering deserved (assuming any suffering is ever deserved). A system that imposes proportionate and deserved punishment for morally wrongful conduct might do so through a means that is detached and clinical, that subjects offenders to moral evaluation but passes judgment on them from a height. A system that imposes retributive punishment after passing judgment from a clinical height does not exemplify the relational model—and therefore does not confront the problem of criminal standing—because it does not draw defendants into a moral transaction of accusation and answer. Our system *does* draw defendants into such a transaction, though, and this Part explains how.

The relational character of the Anglo-American system manifests itself both in the law of liability and in the structure of the trial. The law of liability is above all the law of what constitutes a crime. In our system, an accusation that the defendant has committed a crime is neither a neutral description of what the defendant has allegedly done nor a detached reference to the legal norm that the defendant has allegedly violated. It is a charge—a demand that purports to burden the defendant with a duty to respond.<sup>36</sup> Defendants must meet that demand as they would meet a moral one: either by accepting responsibility—by pleading guilty and submitting to a criminal sentence, the formal analogues of apologizing and making amends—or by denying responsibility and contesting some aspect of the accusation.<sup>37</sup>

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36. DUFF, TRIALS AND PUNISHMENTS, *supra* note 3, at 116.

37. *Id.*; 3 THE TRIAL ON TRIAL, *supra* note 3, at 154.

Besides defining crimes, the law of liability identifies various grounds on which defendants may contest a criminal charge. Many of them parallel the ways people may disclaim moral responsibility for an allegedly wrongful act.<sup>38</sup> Moral defenses of practically every sort conjure a legal analog. When accused of moral wrongdoing, I may deny that I performed the act (alibi, mistaken identity); I may admit that I performed the act but deny that acts of the relevant type are wrongful (“undisclosed self-dealing doesn’t constitute wire fraud”); or I may acknowledge that acts of the relevant type are wrongful but insist that my particular act was justified (self-defense, defense of others, necessity). If I cannot justify the act, I may deny that I was to blame for it, maintaining that I was excused (duress, mistake of fact), temporarily not in my right mind (intoxication, automatism, somnambulism), or altogether unfit to be blamed for anything (insanity, infancy). If I cannot credibly deny that I was to blame for my concededly wrongful act, I may turn the accusation against my accusers and deny that they have any right to call me to account. Perhaps they told me the act wasn’t wrongful (official misstatement of law); they enticed me to perform the act (entrapment); they’re making an accusation about the distant past (statute of limitations); they’re accusing me of bad conduct only because of the group I belong to (selective prosecution); or the conduct for which they’re criticizing me is not properly their business (“I performed the conduct in another jurisdiction”; “The conduct is constitutionally protected”).

When criminal defendants mount the parenthetically noted legal analogs of these moral defenses, they mount them in (or in anticipation of) a criminal trial that Anglo-American law structures as a reciprocal moral encounter, rather than as a morally neutral inquiry designed to “discover the facts about the defendant’s past conduct and present condition which are relevant to determining her future disposal.”<sup>39</sup> An inquiry with the sole aim of finding the truth would not grant defendants an ironclad right to appear in person, to testify if and only if they wish, to confront and cross-examine their accusers in open court, or to be tried only when “mentally competent” (i.e., able to understand the proceedings against them and to assist in their defense). An inquiry with the sole aim of finding the truth would address such matters on a case-by-case basis, guided

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38. 3 THE TRIAL ON TRIAL, *supra* note 3, at 154-56; *see also* R.A. Duff, “I Might Be Guilty, but You Can’t Try Me”: Estoppel and Other Bars to Trial, 1 OHIO ST. J. CRIM. L. 245, 246-47 (2003) (describing criminal “defenses” and “bars to trial”). *But see* Malcolm Thorburn, *Criminal Law as Public Law*, in THE PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 21, 23 (R.A. Duff & Stuart P. Green eds., 2011) (“[C]riminal wrongs and justifications in the common law world do not even approximately follow the contours of moral wrongdoing and justification.”).

39. DUFF, TRIALS AND PUNISHMENTS, *supra* note 3, at 34-35, 129; 2 THE TRIAL ON TRIAL: JUDGMENT AND CALLING TO ACCOUNT 1, 3 (Antony Duff, Lindsay Farmer, Sandra Marshall & Victor Tadros eds., 2006).

only by a concern for whether permitting or requiring the defendant's intelligent participation in the trial would make an accurate verdict more likely. Anglo-American law does not take a case-by-case approach to any of these matters. It treats the defendant's intelligent and autonomous participation as an indispensable component of the trial. A trial may not proceed against a mentally incompetent defendant under any circumstances,<sup>40</sup> and it may proceed without the defendant's presence or without the defendant's active and voluntary participation only when the defendant has waived or forfeited the relevant rights.<sup>41</sup> These features of the criminal process flow naturally and ineluctably from a conception of the trial as a site of moral reckoning,<sup>42</sup> in which the accuser communicates blame *to* and demands an answer *from* an alleged wrongdoer, drawing the accused into a moral relationship rather than passing judgment on the accused from a clinical distance.

To be sure, the participatory and communicative features of the Anglo-American trial draw ample additional support from values that are nonrelational.<sup>43</sup> For example, permitting defendants to testify and confront their accusers often serves the nonrelational value of accuracy: suspected wrongdoers have

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40. See *Drope v. Missouri*, 420 U.S. 162, 171 (1975) ("It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial").
41. See, e.g., FED. R. CRIM. P. 43 (explaining when defendants must be present during a federal criminal proceeding); *United States v. Teague*, 953 F.2d 1525, 1532-33 (11th Cir. 1992) (describing the defendant's right to testify at trial).
42. See DUFF, REALM OF CRIMINAL LAW, *supra* note 3, at 117 ("The point [of the right to be heard at trial] is not simply that a court which refuses to hear the defendant may reach an inaccurate verdict, but that it is refusing to recognize his status as a participant in the trial; it commits the same kind of injustice as one who criticises another for an alleged moral offence but refuses to listen to his response to that criticism."); DUFF, TRIALS AND PUNISHMENTS, *supra* note 3, at 34 ("[S]omeone who is called to answer to a charge of wrongdoing must be capable of answering to it, or else her trial becomes a travesty. It also matters that the defendant be present, and answer to the charge: we should not force her to answer, since she should retain the freedom to express her dissent from the process, by refusing to play any active part in it; but the trial seeks her participation." (footnotes omitted)); 3 THE TRIAL ON TRIAL, *supra* note 3, at 118 ("[I]f we think it important that . . . the accused should have to answer in person . . . to the charge that he faces; and if . . . this is because what he is charged with is a wrong for which he must answer to the polity as a whole . . . [then] it must also be important that other members of the polity with a role in the trial—as witnesses, as judges or as jurors—should face him in person. There would be a clear contradiction in calling on you to answer in person to us, but refusing to face you ourselves.").
43. See 3 THE TRIAL ON TRIAL, *supra* note 3, at 99-100 (discussing and criticizing nonrelational rationales for a defendant's right to testify, decline to testify, mount a defense, and be tried only if mentally fit).

strong incentives to subject the charges against them to vigorous factual scrutiny,<sup>44</sup> and they may have unique access to information about the circumstances surrounding their alleged wrongdoing even if they were not themselves the perpetrators. Permitting defendants to testify and confront their accusers also serves the nonrelational values of fairness and dignity. These values favor defendant participation not as aids to the truth-seeking process but as independent moral constraints on it. “[T]here is intrinsic value in the due process right to be heard,” asserts Laurence H. Tribe, “since it grants to the individuals or groups against whom government decisions operate the chance to participate in the processes by which those decisions are made, an opportunity that expresses their dignity as persons.”<sup>45</sup> Proper respect for personal dignity therefore might require that all high-stakes adjudicative procedures (not just criminal trials) be participatory and communicative, regardless of whether these relational elements promote truth-seeking, and even if they sometimes frustrate it. As Tribe suggests, “Both the right to be heard from, and the right to be told why . . . express the elementary idea that to be a person, rather than a thing, is at least to be consulted about what is done with one.”<sup>46</sup>

Not only does Anglo-American procedural law draw support from nonrelational values like fairness, dignity, and accuracy, but the Anglo-American criminal legal system as a whole pursues nonrelational *ends* like deterrence and incapacitation. These things do not make the system itself nonrelational; nor do they obviate the problem of criminal standing. Even if a criminal legal system pursues only nonrelational ends and its procedural law aspires to uphold only nonrelational values, the system is a relational one as long as criminal prosecution takes the form of a moral transaction in which one party communicates blame to and demands answers from another. If criminal prosecution takes this form—if it accuses defendants of moral wrongdoing and demands that they answer for it—then the system confronts the problem of criminal standing. The system cannot evade the question of standing by adverting to its deterrent and incapacitative ends, any more than I can deflect the question whether I have standing to criticize you by asserting that my sole purpose is to influence

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44. *Cf. id.* at 99 (“[I]t might be suggested that the defendant’s right to defend himself is required because the evidence provided by the prosecution can only be thought convincing if it can withstand the scrutiny of the defence.”).

45. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 502 (1978).

46. *Id.* at 503. Responding to Tribe, Duff distinguishes a participatory right grounded in dignity from one grounded in mutual accountability: “[A] defendant’s right to be heard at her trial is more than the right to have a say in a decision which will have a serious impact on her: it is the right to respond to charges which are laid *against* her; and this right is internal to the idea of a criminal trial as a process which calls a defendant to answer for her actions.” DUFF, *TRIALS AND PUNISHMENTS*, *supra* note 3, at 118.

your future behavior. No matter which ends people and collective agents pursue, they will confront the question of standing if they pursue their ends by calling others to account. The question of standing does not cease to apply just because the entity calling another to account has an ulterior motive.

### III. CRIMINAL LAW AS MORAL INVERSION

In our criminal legal system, the entity calling another to account is always the state. It is the state's role, not the victim's, to demand an answer from alleged wrongdoers, and it is *to* the state, not the victim, that alleged wrongdoers must tender their answer. The state might implore the victim to participate as a witness, and the victim's willingness to go along might affect the ultimate decision whether to proceed with a prosecution, but the decision is always the state's. The state's prerogative to serve as moral accuser is all but inalienable in the criminal arena,<sup>47</sup> and the state's potency as a litigant surpasses that of any private plaintiff. It is true that victims of blameworthy tortious wrongdoing sometimes can obtain punitive damages – extra-compensatory damages awarded in order to punish and deter wrongdoing that is “intentional and deliberate” and displays “the character of outrage frequently associated with crime.”<sup>48</sup> But an award of punitive damages stings far less than a prison sentence, and, like all tort remedies, it is available only to victims who have suffered some kind of injury. While punitive damages are available to victims of paradigmatic torts like assault, battery, and conversion, civil damages of all kinds are off limits to victims of deadly serious wrongdoing that causes no injury, such as many cases of attempted murder. With respect to serious interpersonal wrongdoing, the law overall subordinates human victims to the state, granting the state the right to sanction a broader category of interpersonal wrongs and to sanction them more severely. The resulting legal arrangement inverts the hierarchy between victims and third parties that characterizes ordinary life – a moral inversion that this Part displays by delineating the victim-centered conception of differential standing embedded in commonsense morality.

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47. American jurisdictions all but completely prohibit private prosecutions. See generally Darryl K. Brown, *Criminal Enforcement Redundancy: Oversight of Decisions Not to Prosecute*, 103 MINN. L. REV. 843, 867-73 (2018) (recounting the history of private prosecution in United States jurisdictions). Certain other Western countries permit private prosecution for minor offenses. See, e.g., DUFF, REALM OF CRIMINAL LAW, *supra* note 3, at 25 (discussing France and Germany).

48. W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 9 (5th ed. 1984) (student ed.).

In ordinary life, the victim of a given wrong typically possesses a caliber of moral standing more robust than that of any third party. The robustness of a person's standing vis-à-vis some wrong is a matter of what the person has standing to do when calling the wrongdoer to account. Relative to a third party, the victim typically has standing to express harsher moral criticism, demand answers with greater urgency (i.e., make demands that generate more stringent responsive duties), and impose interpersonal sanctions of greater severity. Victims also have standing to accept apologies and offer forgiveness, a kind of standing that third parties possess in diminished form or lack altogether.<sup>49</sup> Most third parties lack the right to do anything but form critical moral judgments and experience feelings of blame and indignation. Although many third parties may be quick to form a moral judgment, most are rightly slow to express it to a wrongdoer's face, especially when the wrongdoer and victim are strangers to the third party. "[W]hen [a] wrongdoer stands directly before us[,] . . . we are . . . rather circumspect about expressing indignation," observes Linda Radzik.<sup>50</sup> "[W]hen our indignation is boiling at the incompetent parent who spans her child in the grocery store, we really want to sanction but are uncertain whether it is permissible . . . [W]hat is lacking is often not courage but confidence in [our] entitlement to sanction."<sup>51</sup>

All else equal, confidence in our entitlement to intervene as a third party is weakest when the wrongdoer and victim are strangers to us. It is greater when we are acquainted with one or both of the parties, and greatest when one or the other is a close associate. Third parties with a relatively close connection to the wrongdoer or victim may possess standing not just to criticize the wrongdoer but to demand an answer—a denial, justification, excuse, apology, or the like. The demand for an answer will saddle a wrongdoer with a responsive duty of greater or lesser stringency depending not only on the gravity of the wrong but also on the relative distance of the party issuing the demand. Wrongdoers owe

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49. Theorists disagree about whether a third party ever has standing to forgive the wrong done to the victim, as opposed to the more or less attenuated wrong done to the third party as a consequence of the wrong done to the victim (e.g., the distress you caused me when you injured my friend). For a range of views on the possibility and propriety of third-party forgiveness, see MARGARET URBAN WALKER, *MORAL REPAIR: RECONSTRUCTING MORAL RELATIONS AFTER WRONGDOING* 178–79 (2006); Rosalind Chaplin, *Taking It Personally: Third-Party Forgiveness, Close Relationships, and the Standing to Forgive*, in 9 *OXFORD STUDIES IN NORMATIVE ETHICS* 73, 81 (Mark Timmons ed., 2019); Alice MacLachlan, *In Defense of Third-Party Forgiveness*, in *THE MORAL PSYCHOLOGY OF FORGIVENESS* 135, 150–51 (Kathryn J. Norlock ed., 2017); and Jeffrie G. Murphy, *Forgiveness and Resentment*, in JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 14, 21 (1988).

50. Radzik, *supra* note 15, at 583.

51. *Id.*

more stringent responsive duties to their close associates and to the close associates of their victims than to others. Wrongdoers owe the strongest responsive duties to their direct victims. Failing to explain yourself to the person you have wronged is a more serious moral breach than failing to explain yourself to a third party.

A victim's standing is not only more robust than that of a typical third party; it is also, and not coincidentally, less contingent. A victim's standing to hold a wrongdoer accountable is contingent on little beside the victim's prior conduct, specifically, on whether the victim is a hypocrite, was an accomplice to the wrong being criticized, promised not to criticize it, and so forth. By contrast, a third party's standing—or, more exactly, the *robustness* of a third party's standing—is contingent not only on the third party's prior conduct but also on myriad other considerations. As we just saw, one of them is the closeness of the third party's connection with the victim or wrongdoer. The remaining considerations are diverse, and they interact in ways that elude neat systematization. The question whether a third party's intervention constitutes a form of meddling is difficult not only for theorists but also for potential third-party blamers. As Radzik notes, when seeking to ascertain whether a stranger's wrongdoing “counts as our business,” such that we have standing to call the wrongdoer to account, “[w]e puzzle over the severity of the wrong, the setting of the wrong, the intimacy of our relations to victim and wrongdoer, whether other bystanders are more intimately related to the main parties, how motivated these others are to do the work of sanctioning, [and] how effective their sanctions are.”<sup>52</sup> Rarely does any such consideration operate categorically. For the most part, each is only a factor, a consideration tending to push a given wrong closer to or further away from the domain over which we have jurisdiction as third-party blamers.

One factor of uncertain significance is a wrong's severity. Although we might not hesitate to call Hitler or bin Laden to account for their atrocities, many of us might feel out of place taking a complete stranger to task for a string of armed robberies, serious though that sort of violent wrongdoing is. Hitler and bin Laden are moral extremes. The exceptional gravity of their wrongs seems to grant all moral beings standing to hold them accountable, irrespective of other factors. As regards most other wrongs, even many very serious ones, a wrong's severity alone usually seems insufficient to make it our business to criticize the wrongdoer to their face. When the wrongdoer and victim are both strangers to us, the wrong's sheer *proximity* often seems a more important factor than its severity. We are far likelier to feel entitled to reprimand

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52. *Id.* at 591.



mand a pickpocket we observe in action than to feel entitled to reprimand someone who we are told picked a pocket yesterday or last week. A stranger's wrong rarely becomes our business just because it is severe. The obverse seems false, however: if we have a close relationship with the wrongdoer or victim, that relationship seems to make even minor wrongs our business, granting us standing to hold our spouses accountable for being rude to a store clerk or to hold a stranger accountable for scratching our parents' car.

Another factor bearing on our standing to intervene as a third party is the moral or psychological status of the victim. When immaturity, incapacity, or subjugation renders a victim unable to hold a wrongdoer accountable, or when fear or lack of self-respect renders the victim unwilling, we might feel entitled to step in and call the wrongdoer to account for a wrong we otherwise would regard as none of our business. Here and elsewhere, it can be difficult to discern whether our feeling of entitlement stems from a conviction that the wrong has become our business, thanks to the victim's infirmity or timidity, or instead from a sense that the circumstances justify our intervention even though the wrong is *not* our business. This distinction will matter in Part IV. At this juncture, it suffices to observe that a third party's standing is rarely, if ever, more robust than that of a capable victim. Nor is a third party's standing usually more robust than that of other capable third parties who are positioned closer to the victim or wrongdoer. In ordinary life, a given third party's standing is thus contingent not only on the status of the victim but on the status of other third parties.

When we turn to the criminal law, however, we find a single third party with purported moral standing contingent on that of no other party, not even the victim. The state is by definition a third party to every interpersonal moral wrong, as is the polity that the state represents, yet the state's purported standing to call perpetrators of interpersonal criminal wrongdoing to account is maximally robust and minimally contingent—the opposite of a third party's standing in ordinary life. There, the principal complaint is the victim's. In law, the principal complaint is the polity's. The victim can sue in tort, if at all. In ordinary life, a victim's forgiveness or acceptance of an apology can transform a moral relationship, not only between the victim and the wrongdoer but also between the wrongdoer and third parties. Third parties generally should be slow to blame wrongdoers whose victims have forgiven them,<sup>53</sup> just as they should be slow to forgive wrongdoers whose victims have not.<sup>54</sup> In law, by contrast, if the victim chooses forgiveness over blame or accepts the wrongdoer's

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53. See DAVID OWENS, *SHAPING THE NORMATIVE LANDSCAPE* 56 (2012).

54. See Glen Pettigrove, *The Standing to Forgive*, 92 *MONIST* 583, 598 (2009).



apology, these choices have no formal legal effect on the polity *qua* accuser. They are but evidence for the polity to consider or ignore.

The problem is not simply that the polity *qua* accuser claims moral standing to hold its members accountable for wronging one another. Perhaps any community has moral standing to subject its members to a measure of third-party blame for certain serious interpersonal wrongs. The problem is rather that, when the polity holds its members accountable through the criminal law, the moral transaction takes on the character of second-party blame, both in its harshness and in its primacy. Consider in this connection James Edwards's observation that a party's standing to hold another responsible depends not only on (i) whom it is holding responsible and (ii) what it is holding them responsible for, but also on (iii) *how* it is holding them responsible—in particular, how harshly it is censuring and sanctioning them.<sup>55</sup> A third party's standing to mount a harsh response is difficult to establish under any circumstances. It is especially difficult to establish when parties more directly affected by the wrongdoing have ample capacity to mount a response of their own, as most crime victims would if afforded proper resources. A third party might have standing to mount a harsh response when it acts in support of and in solidarity with a willing victim, or when a victim is coerced into silence or unable to speak up. In such cases, the third party's response may properly be in the victim's name. Yet, in our criminal legal system, the state does not speak in the name of the victim. It speaks in the name of the public. The state calls offenders to account to *it* for wrongs they have perpetrated on others, and it does so harshly and in a manner that altogether displaces those who possess what appears to be a superior claim—those with true second-party standing. Second-party accountability (accountability demanded by victims) plays no formal role whatever in the law of crimes, and it plays at best a secondary role in law overall through the law of torts. The resulting arrangement clashes with conventional principles of differential moral standing, which place victims at the apex.

What kind of arrangement would a state enact if determined to respect principles of differential moral standing to the utmost, without regard to whether the resulting legal arrangement was justified overall? A state with this

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55. Edwards, *supra* note 12, at 442; *see id.* at 444 (“Compare two cases in which students might hold one another responsible for failing to prepare for class. In the first, they do so by refusing to share notes with those who fail to prepare, and who offer no satisfactory explanation for the failure. In the second they do so by barring those who fail to prepare from the classroom until a satisfactory explanation is forthcoming. It seems clear that there is something defective about the second holding: students, we might plausibly say, do not have standing to bar one another from class.”).

parochial commitment would enact a system of routine private prosecution,<sup>56</sup> based perhaps on the “civil model” of the criminal process described (but not endorsed) by Marshall and Duff:

A civil model puts the victim in charge. She is the complainant who initiates the proceedings against the person who (allegedly) wronged her; it is for her to carry the case through, or to drop it. This is not to say that the community has no role. . . . [I]t provides the institutional structure through which her case is decided, and the arbitrator or judge who will assist in resolving the case or produce an authoritative decision, as well as enforcement mechanisms to ensure that the alleged wrongdoer complies with the decision; it could also provide advice and resources to assist the complainant in pursuing her case. But she is still in charge: it is for her to decide whether the case is brought and pursued, and whether the decision is enforced . . . .<sup>57</sup>

If a state implemented Marshall and Duff’s civil model of the criminal process, it would cast itself in the role of a supporting player. Its chief function in the criminal arena would be to hear and adjudicate claims brought by victims, whom it might support by providing pro bono counsel and professional investigators. The state would serve as lead prosecutor only when the defendant’s misconduct did not (or did not merely) wrong individual human victims, but instead (or also) wronged the public, the state itself, or no one in particular—a miscellaneous category of offenses encompassing environmental crimes, possession offenses, reckless driving, and insider trading.<sup>58</sup> Consistent with principles of differential standing, the state might serve as co-prosecutor in a case of paradigmatically interpersonal wrongdoing where the crime caused indirect harm to the larger community<sup>59</sup> or constituted an attack on an individual *qua* member of an oppressed group, the equal moral status of which the state might help to vindicate by exercising its third-party moral standing.<sup>60</sup> As long as the state played a secondary role in these cases—seizing full control of the criminal process only if the victim (or victim’s proxy) was unavailable, incapable, com-

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56. Private prosecution was once routine in common-law jurisdictions but now exists only to a limited degree in a handful of them and is virtually nonexistent in the United States. See Brown, *supra* note 47, at 867-71.

57. Marshall & Duff, *supra* note 4, at 15-16.

58. For a discussion of similar schemes incorporating a civil model of the criminal process alongside a limited role for public prosecution, see Duff & Marshall, *supra* note 33, at 80-81.

59. For an account of these injuries, see sources cited *supra* notes 30-31.

60. See Stephanos Bibas, *Victims Versus the State’s Monopoly on Punishment?*, 130 YALE L.J.F. 852, 862 (2021) (observing that individual acts of sex trafficking harm “women in general”).

promised, coerced, or complacent—then the structure of standing in criminal law would mirror rather than invert the structure of standing in ordinary life.

#### IV. PUBLIC PROSECUTION AND MORAL REMAINDER

Considerations of differential moral standing evidently favor a civil model of the criminal process. But other more pressing considerations unquestionably oppose it. Suppose we actually entrusted prosecutorial control to crime victims. We would see the criminal process deployed far less often against offenders who prey on the poor, the unsophisticated, the overlenient, the easily intimidated, the readily bought off, the subjugated, the busy, and the distracted, than against offenders whose victims are well-resourced, savvy, unforgiving, implacable, or incorruptible—not to mention racist, oppressive, or sadistic.<sup>61</sup> The certain prospect of these inequities constitutes an all-but-decisive case against the civil model of the criminal process. Yet it does not establish the state's exclusive moral standing to call interpersonal wrongdoers to account. Whether the state has exclusive moral standing to call interpersonal wrongdoers to account is a separate question from whether the state is morally justified overall in enacting a system of exclusive public prosecution. If we conflate these questions, we will obscure the possibility that the overall balance of reasons favors a system of exclusive public prosecution even as that system intrudes on the moral prerogative of crime victims. And if we obscure this possibility, we will obscure a further one, which it is the aim of this Part to defend: that the considerations undergirding a victim's moral prerogative may survive in residual form as reasons to enact a criminal process that grants the victim a significant formal role.

Let us first acknowledge the obvious: a well-run state is a fairer and more effective prosecutor than any crime victim. This fact does not establish the state's exclusive moral standing to serve as criminal accuser, however. For, in general, the issue of whether an entity has standing to hold another accountable is not a matter of whether the entity can do so fairly or effectively, or can do so more fairly or more effectively than any other entity can. Imagine a casual acquaintance who is oversensitive, volatile, and inarticulate, and, as a result, downright bad at holding his spouse accountable for her occasional thoughtless remark or selfish decision. Your acquaintance is prone to lash out at his spouse without good reason and in ways that are pointless and counterproductive. Although you might be certain that you could hold the spouse accountable for

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61. For a nigh exhaustive list of the practical and principled considerations weighing against granting victims too influential a role in the criminal process, see James Edwards, *Criminal Law's Asymmetry*, 9 JURIS. 276, 293-95 (2018).

her intramarital wrongs far more judiciously and productively than your acquaintance can, that fact hardly makes it your business to intervene. One of life's many ironies is that when you stand at some distance from an intimate relationship, that very distance may enable you to offer measured and effective criticism even as it deprives you of the standing to criticize.

Now, as I acknowledged in Part III, the state's distance from interpersonal wrongdoing does not necessarily deprive the state of the standing to call interpersonal wrongdoers to account: certain kinds of serious interpersonal wrongdoing are undoubtedly of proper concern to the community in which they occur. But just as you cannot derive moral standing to hold your acquaintance's spouse accountable from your ability to do so more judiciously and productively than your acquaintance can, neither can the state derive *exclusive* standing to hold interpersonal wrongdoers accountable from its ability to do so more fairly, effectively, and efficiently than any victim can. The state cannot derive exclusive standing even from the fact (if it is one) that a just and livable society simply could not exist without a criminal legal system that grants the state exclusive legal authority to call interpersonal wrongdoers to account. This fact might show that the state is *justified* in exercising sole legal authority to blame, censure, and demand answers from criminals for their interpersonal wrongs. But it wouldn't establish that the state has moral standing to do any of these things, much less that it has *exclusive* moral standing to do them.<sup>62</sup> For the state might be justified in calling given wrongdoers to account even as it lacks (exclusive) standing to do so.<sup>63</sup>

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62. Edwards and Simester strike me as justifying public prosecution all things considered, rather than establishing the state's exclusive moral standing to call criminals to account, when they root the state's authority to prosecute and punish crime in its superior ability "to get answers from . . . wrongdoers." Edwards & Simester, *supra* note 4, at 132. Likewise Dempsey, who "delineat[es] the ambit of the 'criminal law's business' in terms of considerations based on epistemic privilege, efficiency, and the criminal law's displacement function [i.e., its propensity to displace potentially destructive private conflicts]." Dempsey, *supra* note 4, at 267. Whether an entity is good (or best) at calling a wrongdoer to account is one question; whether that entity has (exclusive) standing to call the wrongdoer to account is another.
63. Cf. Kyle G. Fritz, *Hypocrisy, Inconsistency, and the Moral Standing of the State*, 13 CRIM. L. & PHIL. 309, 324-25 (2019) ("Many times (though not always) [various] reasons in favor of punishing offenders (security, justice for the victims, positive consequences) will be weightier than the state's lack of standing, and so the state should, all things considered, punish them."). Cristina Roadevin argues that there are "clear case[s] of hypocritical blame where that blame is unfair, but it is nevertheless justified by its good consequences, which in turn could not be brought about in any other way. Indeed, if it is the case that the only way to prevent further wrongdoing is by blaming someone, despite the fact that the blame is unfair, then it is morally justified, all things considered." Cristina Roadevin, *Hypocritical Blame, Fairness, and Standing*, 49 METAPHILOSOPHY 137, 140 (2018). Similar reasoning supports the conclusion that even a wrongdoer's (or alleged wrongdoer's) lack of *blameworthiness* does

The general possibility of justification without standing is familiar and intuitive. If you admonish some strangers in the park for cruelly mocking their clumsy child, a companion might tell you—soundly—“That was none of your business, but I’m glad you said something: you did the right thing.”<sup>64</sup> You might wish to respond that it *was* your business; someone had to say something, and no one else would. As you might insist, the reasons for you to intervene were compelling. And you might be right: by hypothesis, you were justified. But the question is whether you had standing—whether you were minding your business or were meddling. One reason why we should not assimilate the issue of meddling into the broader question of justification is that we sometimes might want to say that a person is justified *in meddling*. Suppose that if you did not rebuke the thoughtless spouse for her minor intramarital wrongs, something very bad would happen: a neighborhood busybody would spread damaging lies or awkward truths about the couple’s marriage, greatly embarrassing both of them. Now you very likely would be justified in calling the spouse to account for her intramarital wrongs. But it still seems that your intervention would be a kind of meddling. If you intervened, you would do so with trepidation and regret and might even feel obliged to apologize to both parties for butting in. The thoughtless spouse would surely resent your intrusion. Your feckless acquaintance probably would resent it too, feeling as though you had stepped on his toes. If these feelings are morally appropriate—if you really should feel regret and an obligation to apologize, and if your acquaintance and his spouse really are entitled (even if not morally required) to resent your intrusion—then your lack of standing seems to have enduring moral consequences, notwithstanding that the circumstances justified your intervention.

A justified intervener’s apparent lack of standing seems to matter not just to how the intervener and those affected should *feel* but also to how they should act. Return to the case of the cruel parents mocking their clumsy child. Even if you are justified in intervening, you probably should preface your intervention by acknowledging (and perhaps even apologizing for) the fact that the matter really is none of your business.<sup>65</sup> The parents, for their part, may owe you no

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not always render blame unjustified. If you could avert great harm by blaming an innocent person, then you might be justified in blaming someone who is blameless.

64. See G.A. COHEN, *FINDING ONESELF IN THE OTHER* 120 n.9 (2013) (“[I]t is not . . . my view that it is always bad or wrong for someone who is not in a position to condemn to condemn. I could agree with a person who said: ‘I really wasn’t in a position to condemn him, but issuing that savage condemnation was the only way to rally others and/or to get him to stop, and that was more important than making sure that my speech-acts were in accord with my “standing.””).
65. Cf. Herstein, *supra* note 12, at 3113 (“[W]hen intervening under conditions [in which we lack standing] we tend to ask for permission, implicitly and even explicitly apologize and

answer or explanation. They may owe one instead only to their child. I am being somewhat tentative about the exact moral consequences of a “standingless” intervention because these matters beget controversy and depend on the details of a case. It is not much easier to generalize about the consequences of a “standingless” intervention than to generalize about the factors determining whether a person has standing to intervene in the first place. The important point—a point we cannot make if we assimilate the issue of meddling into the broader question of justification—is that a “standingless” intervention generates moral consequences even when the intervention is justified.

We can think of these consequences as the moral remainder left by the now-breached norm against meddling. Moral remainders arise when the reasons or interests underpinning a breached norm continue to exert moral force—continue to bear on how the relevant parties should feel and act.<sup>66</sup> A familiar example of moral remainder is the duty of repair or compensation. If you carelessly break my arm, your action might disable a part of my body, but it doesn’t disable or cancel the interests underpinning the norm against injuring me—interests in (at least) dignity, autonomy, bodily integrity, and freedom from pain. These interests were sources of reasons for you before the breach—they made it the case that you had a duty not to hurt me—and they continue to be sources of reasons for you afterward. It is now impossible for you to act on these reasons *by not injuring me*: you cannot go back in time and comply with your duty of noninjury. But you still can show regard for my interests in dignity, autonomy, bodily integrity, and freedom from pain. You can feel regret or remorse; you can apologize; you can comfort me; you can pay my medical bills; you can help me with tasks that I can no longer perform on my own. These gestures constitute *second-best conformity* to the reasons that grounded your now-breached duty of noninjury. All else equal, second-best conformity is worse than first-best conformity. But second-best conformity is still better than full nonconformity, and, in the circumstances I just described, second-best con-

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often even directly admit our wrongdoing. We say things such as ‘I know it’s none of my business, but . . .’; ‘I apologize for speaking out of place, yet . . .’; or ‘I will understand if you completely ignore what I have to say, however . . .’ These qualifications appear designed to preempt criticism and to mitigate or at least acknowledge the wrongness of the intervention.”).

66. My analysis and explanation of the phenomenon of moral remainder owes much to John Gardner’s theory of “primary” and “secondary” obligations and to his “continuity thesis.” See John Gardner, *What Is Tort Law for? Part 1. The Place of Corrective Justice*, 30 *LAW & PHIL.* 1, 33-44 (2011).



formity of one sort or another is morally required.<sup>67</sup> Having failed to achieve first-best conformity, you may not simply shrug your shoulders and walk away.

Crucially, second-best conformity to a given norm might be morally required even when first-best conformity is not. Suppose you rush a sick child to the hospital in my car and damage the suspension system when you make a fast turn. Your actions are justified. Does that mean you must do no more than return my car? No. You should repair the suspension or compensate me for the damage. These actions constitute second-best conformity to the reasons underlying the norm against damaging my property, reasons rooted in my interest in controlling and enjoying what is mine. Although you can no longer conform to these reasons perfectly – and although the emergency relieved you of the obligation to act on these reasons when you *could* conform perfectly – these reasons still apply to you now. In residual form, they give you duties of repair and compensation. Discharging these duties constitutes second-best conformity to the reasons underlying the norm against damaging my property.

What, then, constitutes second-best conformity to the reasons underlying the norm against meddling, and, in particular, the reasons underlying the victim's moral prerogative? The answer depends on a host of factors, including the nature and gravity of the wrong that we (as meddlers) are condemning, the maturity and independence of the victim, the nature and intensity of the intervention, and the reason why we are intervening in an affair that is not our business. But it depends most of all on the nature of the interests underlying the victim's moral prerogative, the norm against meddling, and all associated principles of differential standing. In approaching this issue, we should avoid taking a reductionist view that all but equates the reasons underlying the principles of differential standing with the broader set of reasons determining when a given act of calling to account is morally justified all things considered. A reductionist view will struggle to accommodate the sense we sometimes have that, though a particular act of wrongdoing is properly our concern, we shouldn't criticize it all things considered. A reductionist view also will struggle to accommodate the sense we sometimes (if less often) have that, though we are justified in intervening in a particular person's affairs, we incur a moral debt when we do (a debt evidenced, for example, by an obligation to apologize to the affected parties) – just as you incur a moral debt when you damage my car, even though justifiably. We can accommodate these moral sentiments more easily if we regard the principles of differential standing as resting on a narrow-

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67. On the imperative of second-best conformity to reasons, see Joseph Raz's discussion of the "conformity principle." Joseph Raz, *Personal Practical Conflicts*, in *PRACTICAL CONFLICTS: NEW PHILOSOPHICAL ESSAYS* 189 (Peter Baumann & Monika Betzler eds., 2004).

er foundation, on a particular set of interests that continue to exert moral force even when the overall balance of reasons justifies acting against them.

I suggest that the most pertinent of these interests, and perhaps also the most basic, is the interest we all share in having moral significance as persons. Together with associated principles of differential standing, the victim's moral prerogative and the norm against meddling serve our interests in human individuality and importance by elevating above all others a single individual (the victim) along with a small circle of third parties, and granting these individuals rights and powers that others either lack outright or possess only in a much diminished form. Because we are all potential victims, these principles guarantee that we each stand to acquire a unique set of moral powers vis-à-vis those who may wrong us, including not only the power to call our wrongdoers to account but also the power to demand that third parties refrain from intervening, at least until we have had our say.

Viewed as enabling conditions of human individuality and importance, the victim's moral prerogative and associated norms seem cut from the same cloth as other agent-centered norms of partiality and exclusion. Just as the norms of differential standing give victims and relevant third parties special rights and permissions, so too do familiar norms of self-preference and partiality permit and sometimes require us to favor our own good and that of our kith and kin over the good of others.<sup>68</sup> Like principles of differential standing, these familiar norms recognize, honor, and enhance our status as morally significant beings with innate tendencies toward affection, loyalty, love, and self-regard. Absent norms of self-preference and partiality, we could indulge these human tendencies morally only when, by happenstance, more good would come to the world if we cared for ourselves and our close associates than if we didn't. Permissible forms of self-preference and partiality would be hostage to sheer proximity, our place in the moral universe as insignificant as our place in the physical one. Norms of self-preference and partiality push us back toward the moral center, permitting us to assess the morality of an action not only from the point of view of the universe<sup>69</sup> but also from the point of view of (that is, relative to the perspectives, values, and commitments of) persons, conceived as something

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68. I take no firm position here on the precise content of these norms, on their comparative stringency, or on their ultimate foundations.

69. The phrase "the point of view of the universe" owes to the nineteenth-century utilitarian and radical impartialist Henry Sidgwick, who argued "that each one [of us] is morally bound to regard the good of any other individual as much as his own," because "the good of any one individual is of no more importance, from the point of view (if I may say so) of the Universe, than the good of any other." HENRY SIDGWICK, *THE METHODS OF ETHICS* 382 (7th ed. 1907).



more than vectors for the promotion of impartial value. Principles of differential standing serve a similar function, marking each of us as a transient center of the moral universe. Absent these principles, anyone would have standing to demand an accounting from anyone else for any act of wrongdoing. As potential agents of moral riposte, victims and relevant third parties would be situated no differently from people on the other side of the world, except in being better placed to grab a wrongdoer's attention. Thanks to principles of differential standing, as regards some moral transgression or other, each of us is or will be the most important being in existence.

This potential status is important in its own right. It becomes important in a further (but, I suggest, less fundamental) way when others respect our status by declining to intervene in affairs that are not properly their concern. When those around us abide by norms of differential standing, we enjoy distinctively human benefits—benefits that some theorists have deemed the true moral foundation of principles of differential standing. These benefits include the self-confidence we develop when allowed to experiment and make mistakes without fear of public reproach, the dignity we gain as victims of wrongdoing when allowed to hold our wrongdoers responsible without interference, and the joy and sustenance we derive from interpersonal relationships like friendships and romantic unions, which arguably depend for their very existence on it being the case that not everything is everyone's business.<sup>70</sup> Acknowledging these benefits should not lead us to regard principles of differential standing as valuable only in *consequentialist* terms, however. These principles enhance our lives through their very existence, whether or not people generally adhere to them. Merely being in a moral position to hold accountable those who wrong us (and to disentitle others who would do so without standing) enhances our moral significance as persons, even if circumstances constantly frustrate our efforts to exercise exclusive moral standing. Likewise, the norms of self-preference and partiality are boons to human individuality in their own right, even when circumstances prevent us from asserting our interests or from caring for our friends and family. The bare permission to harbor special regard for

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70. See Edwards, *supra* note 12, at 458 (“It is precisely because some things are *not* everyone’s business that we can make some things the business of our friends, colleagues, students, and teammates in particular, and thereby share our lives with them in ways we do not share them with others. . . . It is no overstatement to say that those relationships could not exist—at least as we know them—were it not possible to open our lives up to particular people, while gaining access to theirs . . . . We could not do this if meddlers did not lack standing.”); Radzik, *supra* note 15, at 597 (“[T]hree general considerations that can lead to a restriction of the standing to sanction [are] the importance of liberty in self-regarding behavior, the moral significance of special interpersonal relationships, and the interests victims have in asserting their own authority.”); *id.* at 593-97.

ourselves and those close to us makes us morally significant as persons, rather than merely as vectors of value promotion.

If principles of differential standing are valuable in the first instance as enabling conditions of human individuality and importance, then they are more significant to us as victims than as wrongdoers. As *victims*, we gain normative power over all or nearly all other human beings in the universe—power to burden our wrongdoers with a duty to respond to our blame and condemnation, and power to deprive all or nearly all others of the privilege to chime in. With respect to the wrong in question, we enjoy a presumptive normative status superior to that of everyone else in existence. As *wrongdoers*, we gain the right to deflect criticism levelled by all but a small set of appropriately situated parties. This right is undoubtedly important, but it does not place us at the center of the moral universe.

When assessed in consequentialist terms, principles of differential standing are again more significant to us as victims than as wrongdoers. Although general adherence to these principles enables potential victims and potential wrongdoers alike to enjoy exclusive personal relationships, it grants victims alone the dignity and sense of importance that flow from holding their wrongdoers responsible without interference or patronizing assistance—a benefit that victims would not receive to any degree were principles of differential standing roundly dishonored. General adherence to these principles confers a corresponding but inferior benefit on wrongdoers, in that it minimizes the number of people entitled to criticize wrongdoers to their faces and to oblige them to provide answers.<sup>71</sup> This benefit is inferior not only because wrongdoers are vulnerable to criticism whether or not others generally adhere to principles of differential standing (adherence merely lessens the potential amount of such criticism), but also because the benefit essentially amounts to less hassle. In all, if you are a wrongdoer being called to account by a party without standing, you have less to complain about than your victim does.

You may in fact have very little to complain about at all if your wrong is a serious interpersonal crime and the party calling you to account is the state. As the perpetrator of an interpersonal wrong, you cannot complain that *no one*

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71. See Edwards, *supra* note 12, at 457 (“Imagine a world in which all our actions were everyone’s business. All else being equal, *anyone* would be able to put us under a duty to justify or excuse *pro tanto* wrongs—whatever they may be—and to express remorse and/or repent where we cannot do so. Mere strangers would be able to give us these duties simply by holding us responsible . . . . It seems clear that in this world, social relations would be far more onerous. To interact with strangers would be to take an increased risk of having to expose parts of one’s life one would prefer to remain private, both because one would more often be duty-bound to explain oneself to others, and because others would more often lack a duty not to demand the explanation.”).

should have held you responsible. At most, you can complain that you should have been held responsible by someone else (your victim). And you cannot complain even of *this* if your serious interpersonal wrong is properly the business of the political community, as most or all traditional crimes likely are. (I argued in Part III that the state lacks *exclusive* moral standing to call interpersonal wrongdoers to account, not that it lacks any standing whatever.) If you fall back on the complaint that you are being called to account by a party with subordinate standing, your complaint will come off as petty if not disingenuous—all the more so if (as we are assuming) your wrong was so serious, and the surrounding stakes so high, that the state was justified in calling you to account despite lacking superordinate moral standing.

The complaint that I can lodge against the polity as your victim is more substantial. My complaint is that the state's intervention, although justified, thrust me from my place at the center of the moral universe and deprived me of the dignity and sense of importance I would have attained had I been able to force you to look me in the eye and explain yourself. Unlike your complaint as a wrongdoer, which seems pettier the graver your wrong, my complaint as a victim seems the more compelling: the graver your wrong, the more my dignity and sense of importance may suffer when a third party silences or upstages me.

The chief implication is that a system of exclusive public prosecution built on the relational model may owe little or nothing to interpersonal wrongdoers while owing a considerable amount to their victims, whose superordinate standing the state supplants.<sup>72</sup> At the end of Part III, I suggested that a criminal legal system achieves *first-best* conformity to the norm against meddling if it casts the state as a supporting player. As an example of what first-best conformity might look like, I described an augmented version of Marshall and Duff's civil model of the criminal process, in which victims prosecute most cases of interpersonal wrongdoing while the state serves as an occasional coprosecutor, seizing full control only when the victim is unavailable, incapable, compromised, coerced, or complacent. If first-best conformity to the norm against meddling gives victims near-complete control of most criminal prosecutions, then second-best conformity might give victims partial control of many.

The particular arrangement that qualifies as second best depends on several factors. The most important is the strength and urgency of the reasons under-

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72. The state also might owe various procedural concessions when its standing founders because it has failed to ameliorate criminogenic social conditions. But it will owe these concessions to defendants, not to their victims. See R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 200 (2001); R.A. Duff, *Blame, Moral Standing, and the Legitimacy of the Criminal Trial*, 23 *RATIO* 123, 139-40 (2010).

lying the principles of differential standing, reasons that the state contravenes when it arrogates exclusive authority to hold criminals morally accountable for their interpersonal wrongs. I argued a moment ago that these reasons are strong and urgent, grounded as they are in agent-centered structures of partiality and exclusion that (i) by their very existence enhance our moral significance as persons, rather than as fungible vectors of impartial value, and (ii) confer various consequential benefits when people generally adhere to them. If I have accorded these reasons more weight than they deserve—if, for example, my perception of their importance simply reflects the individualist culture<sup>73</sup> that has shaped my moral intuitions—then these reasons may leave (far) less of a moral remainder when contravened than I have suggested. In that case, the problem of criminal standing is easily addressed: we may owe the victim whose standing public prosecution supplants no more than an apology and a show of regret. The criminal-procedure equivalent of these courtesies might look something like the suite of modest concessions afforded by American statutes like the federal Crime Victims' Rights Act, which grants victims the right to be informed of hearing dates, to confer with prosecutors, to attend judicial proceedings, and to be "reasonably heard" at proceedings regarding release, plea, sentencing, or parole.<sup>74</sup>

If, however, the reasons underlying the principles of differential standing are as strong as I have suggested, then the modest courtesies that American law affords crime victims do not approach second-best conformity to principles of differential standing. A criminal legal system infringing these principles through public prosecution owes victims something more. It owes them procedural concessions that would enable them to participate robustly in the process of calling their wrongdoers to account, rather than merely looking on or chiming in from the sidelines as the state manages the moral transaction. Such concessions could include any of the following: the right to demand that prosecutors justify their charging decisions; the right to appeal such decisions to the

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73. Cross-cultural psychologists often distinguish between collectivist and individualist cultures. See HARRY C. TRIANDIS, *INDIVIDUALISM AND COLLECTIVISM* 2 (1995). Collectivist cultures exhibit "a social pattern consisting of closely linked individuals who see themselves as parts of one or more collectives (family, coworkers, tribe, nation); are primarily motivated by the norms of, and duties imposed by, those collectives; are willing to give priority to the goals of these collectives over their own personal goals; and emphasize their connectedness to members of these collectives," whereas individualist cultures exhibit "a social pattern that consists of loosely linked individuals who view themselves as independent of collectives; are primarily motivated by their own preferences, needs, rights, and the contracts they have established with others; give priority to their personal goals over the goals of others; and emphasize rational analyses of the advantages and disadvantages to associating with others." *Id.*

74. 18 U.S.C. § 3771 (2018).

court and potentially force or veto a prosecution; the right to appeal a final verdict; the right to compel certain lines of pretrial investigation; the right to testify at trials; the right to make objections, evidentiary requests, and arguments; the right to question witnesses; the right to question defendants and defense attorneys; the right to join criminal prosecutions as civil parties seeking damages or other kinds of nonpenal relief; the right to assist the court in determining the defendant's sentence; the right to have their lawyers participate in criminal litigation as auxiliary prosecutors; perhaps even the right to have their lawyers serve as fully fledged private prosecutors, subject to the power of the public authorities to step in and take over the case where necessary. Many of these participatory rights are available in civilian jurisdictions;<sup>75</sup> several (including limited access to private prosecution) are available in common-law jurisdictions as well.<sup>76</sup> In the aggregate, these rights and procedures give victims a substantial measure of control over the criminal process, going well beyond the "non-dispositive" participatory rights available in the American context.<sup>77</sup>

Whether the balance of reasons favors granting victims any or all of these procedural concessions depends not only on the strength of the residual reasons underlying the principles of differential standing, but also on the strength and nature of the reasons that justify the state in transgressing these principles in the first place. I alluded to several of these reasons earlier when I glossed the serious downside to embracing a civil model of the criminal process—the high likelihood that the burdens of prosecution and punishment would fall more heavily on criminals whose victims are well-resourced, savvy, unforgiving, or implacable, than on those whose victims are poor, unsophisticated, overlenient, or easily intimidated. These considerations weigh not only against private prosecution in its pure form but also, if to a lesser degree, against any system of public prosecution that grants victims significant control. In short, these considerations weigh against doing the very things that constitute second-best conformity to principles of differential standing. If what makes first-best conformity unachievable is that a system of exclusive private prosecution is unacceptably unfair or ineffective, then it is almost certainly the case that many *partial* systems of private prosecution are unacceptably unfair or ineffective as well. The more a suite of procedural concessions accommodates the prerogative of

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75. See generally Johanna Göhler, *Victim Rights in Civil Law Jurisdictions*, in *THE OXFORD HANDBOOK OF CRIMINAL PROCESS* 267, 272-80 (Darryl K. Brown, Jenia Turner & Bettina Weisser eds., 2019); Brown, *supra* note 47, at 865-67.

76. See Brown, *supra* note 47, at 865-67.

77. For an overview of how American jurisdictions include victims in the criminal process, see Michael E. Solimine & Kathryn Elvey, *Federalism, Federal Courts, and Victims' Rights*, 64 *CATH. U. L. REV.* 909, 912-16 (2015).

crime victims, the closer it will approach the line between systems that achieve second-best conformity to principles of differential standing and systems that are intolerably unfair or ineffective. We cannot know the precise location of that line in a given procedural context without first knowing the facts thanks to which the system threatens to veer into unfairness or ineffectiveness. This means that we cannot say in general which combination of victim-empowering devices constitutes second-best conformity to principles of differential moral standing.

### CONCLUSION: WAYS FORWARD AND WAYS OUT

Criminal theorists who interrogate the moral standing of the state typically attend to the urgent but nonfoundational question of whether the state lacks standing to punish crimes arising from conditions of social and economic injustice. The ensuing discussions tend to assume that, but for the state's alleged hypocrisy or complicity, its standing to prosecute and punish crime would be secure. This widely held assumption has been the chief target of my Essay. I have argued that the state engages in a kind of meddling when it calls individuals to account for their interpersonal wrongs through a criminal process that gives institutional form to moral accountability without sharing prosecutorial control with those most deeply aggrieved by the wrongs being punished. Principles of differential standing familiar from ordinary life imply that a victim's moral standing to call a wrongdoer to account is more robust and less contingent than that of any third party, including the state and the polity it represents. Doubts about the state's moral standing therefore should arise with particular vehemence with respect to a legal system like our own, which grants exclusive prosecutorial authority to the state while treating the criminal process as a way of calling people to account not only for wronging the public but also, paradigmatically, for wronging one another.

I acknowledge that these doubts might rebound on the ideas from which they flow. As I said at the outset, we can view the argument of this Essay as a partial *reductio ad absurdum*—either of the relational system of exclusive public prosecution or of the victim-centered conception of differential standing. If the latter leads us to doubt the state's standing to call people to account for paradigmatic crimes, then we might conclude that the error lies not in our embrace of the relational model but in our fidelity to a conception of standing that places the victim above the community as a whole. For the victim-centered conception might err in excluding the possibility that collective third parties like human communities enjoy moral standing of a robustness and noncontingency surpassing that of any victim. If this possibility is the way things really are, what follows? Consider the fact that no human community of the size and po-



tency of a polity can call individuals to account by informal means without risking unfairness and persecution. Perhaps any informal attempt by a large community to hold wrongdoers accountable will devolve into a transaction undertaken by a lone third party or mere aggregate of third parties, rather than one undertaken by the entity that actually possesses superordinate standing, the community as a whole. These facts do not yet demonstrate the moral necessity of the state, but they form the beginning of an argument for the moral necessity of a norm-bound system of accusation and answer – assuming of course that the victim-centered conception of differential standing is indeed unsound.

If it is not unsound, then the doubts it arouses about the state's standing to serve as prosecutor will persist unless we modify some aspect of the criminal process. Could we allay these doubts without discarding the relational model? As I argued in Part III, the problem of criminal standing does not arise from the bare fact that the polity *qua* accuser claims moral standing to hold its members accountable for their interpersonal wrongs. Rather, the problem arises from the fact that, when the polity holds its members accountable through our existing institution of criminal law, the polity's act takes on the character of a second-party (victim-driven) moral intervention, both in its harshness and in its primacy. A response to the problem of criminal standing therefore might seek to modify one or both of these aspects – the harshness of criminal punishment or the identity of the party that seeks and inflicts it.

We have already considered two responses that modify the second aspect, the primacy of the state. One relatively drastic response is to cast the victim as lead or sole prosecutor in most or all cases of interpersonal wrongdoing, adopting a civil model of the criminal process akin to an enhanced version of the system of routine private prosecutions that once prevailed throughout the Western world. The civil model would achieve first-best conformity to the norm against meddling, but at the cost of intolerable inequity in the allocation of criminal punishment. A less morally dangerous approach is to give victims *partial* control of the criminal process by adopting some or all of the victim-empowering procedures I canvassed in Part IV. In theory, the right combination of victim-empowering procedures could avoid inequity while achieving second-best conformity to principles of differential standing. If the balance of reasons weighs decisively against full conformity, then second-best conformity through partial victim control would be better overall. Whether partial victim control would be *best* overall is another question. It depends not just on whether partial victim control is better than more drastic approaches that fully supplant the primacy of the state. It depends also on whether partial victim control is better than an approach to the problem of criminal standing that targets the other aspect noted above, the harshness of punishment.

An approach that targets the harshness of punishment without upsetting the relational model or the primacy of the state might do one of two things: punish less, or not punish at all. By “punish less,” I mean reduce the severity of state punishment for interpersonal wrongdoing to a level where it conveys no more censure than the polity *qua* third party has moral standing to express. Given the communicative meaning of punishment in our culture, this approach could require us to punish far less harshly.<sup>78</sup> It could in fact require that we punish many low-level crimes mildly or not at all, leaving us to control these crimes through noncarceral means if a conviction conveys all the censure that the polity *qua* third party has standing to express. The ultimate feasibility of this approach depends on a question subject to numerous moral and empirical contingencies—whether the state can sanction mildly enough to avoid conveying more censure than it has standing to express while sanctioning severely enough to achieve the myriad other goals that the state generally pursues through punishment.<sup>79</sup>

If the state cannot thread this needle, a (still more) hypothetical alternative is to stop punishing altogether, but to continue holding trials and accepting guilty pleas, and to subject those thus convicted to a morally neutral regime of public safety-oriented confinement and supervision. Our existing criminal legal system blends two very different functions: moral accountability and social control. Suppose we separated these functions by bifurcating adjudication and

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78. Many seem to believe that only a substantial term of incarceration could express the degree of censure appropriate for the most serious crimes. For my part, I am unconvinced that physically confining someone for many years is the only way to convey a message that we all seem able to express just as easily (and, indeed, more articulately) through mere speech. To say this much is not to advocate an approach to punishment in which “[w]rongdoers who harm others could suffer [nothing more than] a public tongue-lashing.” Bibas, *supra* note 60, at 861. This consequence follows only if punishments harsher than a tongue-lashing necessarily convey more censure than the state has standing to express. Whether they do is a matter of how much censure given punishments convey in a particular cultural context, not a matter of whether the degree of censure thus conveyed could be expressed through other means.

79. Bibas objects, *id.*, that the “punish less” approach offends values of equity and proportionality by barring the state from sanctioning interpersonal wrongdoing as harshly relative to its seriousness as the state sanctions other varieties of wrongdoing relative to their seriousness. I disagree. The “punish less” approach doesn’t suppose that the *only* moral constraint on state punishment is that it may express no more censure than the state has standing to express. The “punish less” approach leaves room for other constraints, such as principles of proportionality and equity that demand that offenders of equivalent culpability receive equivalent punishment. In tandem with norms of differential standing, principles of proportionality and equity might well require that the state punish violations of public order or risk creation *less* than fully (where punishing fully means imposing a sanction that conveys the maximum amount of censure that the state has standing to express).



disposition, with the further aim of cleaving censure from hard treatment. The result would be a quasi-criminal legal system in which the state holds offenders morally accountable through the adjudicatory process alone, sanctioning offenders through a subsequent procedure that adverts only to nonexpressive grounds for restricting people's liberty. Resembling a combination of probation and civil commitment, this morally neutral dispositional procedure could serve various nonrelational interests connected to crime control without expressing moral censure and thus without functioning as the upshot of a calling-to-account by the state. Of such a dispositional procedure, we might plausibly insist that what is especially harsh is the disposition's material aspect only, not the accountability relationship enacted by the adjudicative process that precedes it—not the accusation of wrongdoing, not the demand for an answer, and not the censure expressed by a criminal conviction. If the moral transaction between the state and a criminal offender truly ended with the judgment of conviction, criminal accountability would be no harsher than a jury verdict or a plea of guilty. With respect to its severity, third-party accountability in law would resemble third-party accountability in life.

As a philosophical ideal, this last approach is in some respects the most attractive: it mitigates the problem of criminal standing by combining moderateness in carceral treatment with bureaucratic rationality and evenhandedness in the selection and prosecution of cases. As a practical proposal, it is probably the least promising: it lacks close precedent and requires us to change the social meaning of incarceration. Yet, for all its grandiose ambition, the last approach leaves undisturbed our apparent commitment to treating the criminal process as a way for the state to call people to account for serious interpersonal moral wrongs. In theory, we could abandon this commitment too: we could give up altogether on punishing offenders for interpersonal moral wrongs, and punish them instead only for victimless wrongs or wrongs they commit against the public. In the extreme, we could give up on punishing offenders for moral wrongs of any kind, and replace our morally inflected criminal legal system with a regulatory regime that does not portray violations as wrongful.<sup>80</sup> Or we could leave everything else in place but abandon the idea that the state *qua* prosecutor acts on behalf of the polity—the “People”—and work instead to-

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80. Less extreme departures from our current approach might portray violations as wrongful while administering a non-relational criminal process—for example, by implementing what Nicola Lacey and Hanna Pickard call a “clinical model of ‘responsibility without blame.’” Nicola Lacey & Hanna Pickard, *Why Standing to Blame May Be Lost but Authority to Hold Accountable Retained: Criminal Law as a Regulative Public Institution*, 104 *MONIST* 265, 267 (2021). Their model places fundamental importance on rehabilitation, reintegration, and forgiveness, where “the basic rationale of the system is that of public regulation in the pursuit of distinctive civic goods, including, crucially, harm reduction.” *Id.* at 271.

ward a system in which the state acts in the name of the victim. Adherents of this quasi-Lockean<sup>81</sup> approach would immediately confront the philosophical challenge of justifying the state's claim to act in the name of many individuals who have not consented to the arrangement, a challenge not unlike one that will be familiar to all who have wrestled with the notion that citizens' "hypothetical" consent underpins the authority of the state.<sup>82</sup> This considerable philosophical difficulty is perhaps secondary to a more practical one: in our actual system, and in the idealized systems that relational theorists seek to justify, the state claims prosecutorial and penal authority in the name of the polity. Although individual prosecutors sometimes seek to portray themselves (and the state) as the victim's champion, a champion is not an agent or a fiduciary—a party bound by law to act on the victim's behalf. Our existing legal order conceives the state *qua* prosecutor as demanding unequivocally that offenders answer to it and it alone for wrongs that they have done to others.

If our current trajectory resembles any of the paths described above, it resembles nothing more closely than an incipient and half-hearted attempt to bifurcate adjudication and disposition, albeit without denuding the latter of its moral content. The prevailing approach to criminal disposition is to fashion sentences based on every halfway plausible rationale for the practice of inflicting criminal sanctions. Under American federal law, for example, the "[f]actors to be considered in imposing a sentence" include not only considerations relating to the appropriate degree of moral censure ("the seriousness of the offense," its "nature and circumstances," "the history and characteristics of the defendant," and the need "to provide just punishment"), but also a variety of aims more or less extrinsic to achieving moral accountability, aims such as "promot[ing] respect for the law; . . . afford[ing] adequate deterrence to criminal conduct; . . . protect[ing] the public from further crimes of the defendant; . . . [and] provid[ing] restitution to . . . victims."<sup>83</sup> These considerations almost inevitably push a sentencing judge toward a penalty different from that which would convey the degree of moral censure that the polity *qua* third party has standing to express.

If our existing approach to sanctioning offenders exacerbates the problem of criminal standing, however, it is not just because sentences are based in part on considerations extrinsic to condemnation and accountability. It is also be-

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81. Locke argued that the state's right to punish criminals derives from our natural right to punish anyone who invades the rights of others, a natural right we transfer to the government when we leave the state of nature. See LOCKE, *supra* note 27, at 271-76.

82. On the difficulties faced by hypothetical social contract theory, see Ronald Dworkin, *The Original Position*, 40 U. CHI. L. REV. 500, 519-28 (1973).

83. 18 U.S.C. § 3553(a) (2018).

cause terms of incarceration are the output of a single procedure and imposed ultimately on the basis of a single legal ground: the criminal conviction. Imagine an alternative regime with no sentencing process as such, but instead an independent dispositional mechanism authorized to impose terms of confinement and other forms of supervision based on rigorous proof of their efficacy in achieving aims other than moral condemnation and accountability. If implemented in good faith, this approach might solve the problem of criminal standing in the long term, despite the presumably recalcitrant social meaning of state-imposed confinement and supervision. This approach also might produce terms of confinement more reasonable and more rationally grounded than the criminal sentences our legal system now routinely imposes. Nonpenal terms of confinement and supervision would answer to independent standards and could take no moral cover from the fact of a criminal conviction.

As long as state-imposed confinement and supervision are the upshot of a process of calling to account, all of us who are committed to the victim-centered conception of moral standing should doubt the state's purported standing to serve as exclusive criminal accuser. This doubt should lead us to rethink our legal practices and possibly to change them—to punish less harshly, to require the state to share prosecutorial authority with crime victims, to work toward lessening incarceration's expressive significance by cleaving it in whole or part from the process of adjudication, or to do something more radical still: to stop treating the criminal process as a means of holding offenders accountable to the polity for interpersonal wrongdoing. If we cannot make these changes, or cannot justify them in light of their practical and moral costs, then perhaps we should view our existing arrangement as a regrettable necessity. What we should not do is carry on as before, treating the criminal process as a site of moral reckoning while ignoring the possibility that the state's sweeping assertion of exclusive moral standing is ultimately unfounded.