

Criminal Wrongdoing, Restorative Justice, and the Moral Standing of Unjust States*

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I. INTRODUCTION

Social injustice can blight the lives of those it afflicts. Oppressed citizens can experience enormous suffering due to their lack of freedom, opportunity, and resources. Even if the oppression is not so pervasive as to entirely deprive the state of its legitimate authority, the relationship between victims of serious social injustice and their state is a morally fraught one. Some victims of social oppression are indifferent, or even hostile, to the authority of the state that has subjected them to abominable treatment. Some flout its laws. When they do that, they

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often face trial and punishment for their crimes. Does the state have the moral standing to hold oppressed offenders to account? May it try, convict, and punish them for what they have done?

Sometimes the answer to this question is, clearly, no. In some cases, this is because the laws that citizens have violated are heinously unjust. Consider, for example, violations of segregationist laws in the pre-civil rights era, such as those prohibiting mixed-race marriages, or those that legalized “whites only” spaces. The state had no right to criminalize this conduct, and accordingly lacked the standing to hold *anyone* accountable for violations of these laws. In other cases, as some scholars have suggested, the state lacks standing to hold offenders to account because they violated laws that it would be unfair to expect them to obey. Tommie Shelby, for example, argues that citizens’ civic obligations to obey the law bind only if they are treated fairly by the scheme of social cooperation. If this view is correct, it follows that the state lacks the moral standing to try, convict, and punish citizens who are the victims of serious social injustice for their civic violations—for example, tax evasion or welfare fraud—because these citizens have no obligation to comply with the demands of a system that is fundamentally unfair to them.¹

Our concern here is with a different set of cases. Even if oppressed citizens are exempt from complying with their civic obligations, they are still required to comply with their natural moral duties.² The crimes of murder, rape, assault and battery, and (at least in many cases) theft—among others—remain morally forbidden even in states that fail to meet the standard of fair social cooperation.

¹Tommie Shelby, “Justice, deviance, and the dark ghetto,” *Philosophy and Public Affairs*, 35 (2007), 126–60; Tommie Shelby, *Dark Ghettos: Injustice, Dissent, and Reform* (Cambridge, MA: Harvard University Press, 2016), p. 232.

²Shelby, *Dark Ghettos*, p. 213.

It is with respect to these crimes that the problem we confront here arises. No one should doubt that those who perpetrate these crimes do wrong, and ought to be held accountable for them by *somebody*. But does a state that subjects its citizens to gross social injustice have the moral standing to hold them accountable when they violate their natural moral duties?

An increasingly popular view in political and legal philosophy suggests that the answer to this question is negative. While there are different versions of this position, they share a core idea: when the state unaccountably subjects citizens to grievous wrongdoing, it can undermine its own standing to call those citizens to account when *they* engage in grievous wrongdoing. Put differently, an oppressed offender might fully accept that he has perpetrated a serious wrong without justification or excuse; and yet he may nevertheless deny that the state has the standing to call him to account for what he has done.³

However, as supporters of this view sometimes acknowledge, matters look different from the perspective of the *victims* of crime. When an innocent passerby is mugged by an impoverished citizen, he can rightly expect his attacker to be held to account. When a gang member opens fire on his rivals, and the stray bullets slay innocent children in a nearby playground, these children's families will rightly be unimpressed by the slogan, "the state can't blame me." This state of affairs thus presents us with a challenge. On the one hand, it seems

³This view is defended most influentially in the work of R. A. Duff; see his *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001), pp. 179-196; "I might be guilty, but you can't try me': estoppel and other bars to trial," *Ohio State Journal of Criminal Law*, 1 (2003), 245-59; and especially "Blame, moral standing, and the legitimacy of the criminal trial," *Ratio*, 23 (2010), 123-40. See also Victor Tadros, "Poverty and criminal responsibility," *Journal of Value Inquiry*, 43 (2009), 391-413; and Shelby, *Dark Ghettos*, pp. 244-8.

that the state's standing to hold to account victims of its own injustice is compromised. On the other hand, oppressed offenders still act wrongly when they commit many crimes, and intuitively they should be accountable to their victims in these cases. Can this dilemma be resolved?

Here we argue that, in a significant range of cases, it can. Our solution revolves around the burgeoning practice known as *restorative justice*. Restorative justice is an institutional strategy for responding to criminal wrongdoing. It brings together offenders and their victims to determine the appropriate course of response to the crime. As part of this process, victims of crime demand accountability for their offenders, and the offenders are given the opportunity to offer an apology for their actions. Both sides together determine the appropriate subsequent steps for the criminal offender (which can be conceived as a punishment), crafting a contract that the offender is tasked with completing. Typically, this involves some positive action—to pay restitution to the victim, to perform community service, and to take rehabilitative steps to reduce the likelihood of recidivism.

The literature that defends restorative justice (henceforth RJ) denotes many virtues. But it neglects a significant argument in its favor in the context of existing, far-from-fully just states. RJ, we argue, can constitute a more appropriate mode of calling oppressed wrongdoers to account in circumstances where the state's moral standing to do just that has been seriously compromised. For it empowers the *victims* of crime, rather than the state, to take the central role in holding wrongdoers accountable. Our proposal, then, is that RJ helps to avoid both horns of our dilemma: it enables oppressed criminals to be held accountable, but not by the entity that has oppressed them.

We proceed, in Section II, by clarifying the claim that the state's standing to hold oppressed offenders to account is compromised, reconstructing the most significant versions of this claim in the literature. Then, in Section III, we outline the dilemma that this claim

generates. In Section IV, we explain why victims of wrongful crime have the right to hold their perpetrators to account and defend a conception of restorative justice that enables victims to do precisely that, thus resolving the dilemma we identified. In Section V we address objections to our solution.

I. THE PROBLEM OF MORAL STANDING

We'll start with some definitions. First, when we refer to the state's standing to hold *oppressed offenders* to account, we are referring to criminal offenders who themselves have suffered oppression by the state. While there are different conceptions of oppression in contemporary political philosophy, we appeal to a familiar and widely held view. On this theory, citizens are oppressed if they are subjected to serious injustices that systematically inhibit the development and exercise of their capacity to frame, revise, and pursue a conception of the good life. Social injustices of this type are prevalent in many real-world democracies, where, despite overall levels of prosperity, parts of the population, and often minorities in particular, experience serious material deprivation, institutional discrimination, social and cultural exclusion, and political marginalization—all of which constitute violations of their entitlements under any minimally plausible theory of justice. Those who are subjected to these injustices lack secure access to a range of primary goods, including physical security, physical and mental health, decent education, gainful employment, and viable opportunities for political participation, all of which inhibit, or unjustly risk inhibiting, their ability to develop or pursue their conception of the good life.⁴ The lack of effective political participation is particularly pernicious; in

⁴This minimal sketch, which is sufficient for current purposes, expresses the central views defended in Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971) and *Political Liberalism* (New York: Columbia University Press, 1993). Rawls's views form a

addition to constituting an injustice in its own right, it is also instrumental in sustaining the accompanying injustices, as citizens are deprived of adequate opportunities to agitate against them. We assume that a considerable subset of individuals within the urban ghettos of the US, for example, fall within this group.⁵

Next, when we talk of *holding an agent accountable for criminal wrongdoing*, we mean more than punishment, which simply punctuates a larger moral process. Holding to account involves, first, formally accusing an individual of perpetrating a wrongful act. Second, it involves establishing that the agent has, in fact, perpetrated the act (as when a prosecution convinces a jury beyond a reasonable doubt). Third—and most significantly—it involves expressing condemnation, or blame, to the agent for what he or she has done. And fourth, it involves enforcing the duties that the agent has in virtue of his or her wrongdoing (which may include duties to submit to punishment).⁶

crucial basis of Shelby's approach in *Dark Ghettos*. It is also compatible with the basic picture in Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990), notwithstanding the differences (largely in emphasis) between Rawlsian and Youngian approaches to oppression.

⁵On this point, we follow Tommie Shelby, *Dark Ghettos*, ch. 1.

⁶These may involve undertaking a penance, as a way of expressing apology and regret to one's victims, as on Duff's communicative theory of punishment; see R. A. Duff *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001), ch. 3. They may also involve submitting to hard treatment as a way of contributing to the effectiveness of a system of general deterrence, as on Tadros's deontological deterrence theory; see *The Ends of Harm* (Oxford: Oxford University Press, 2011), ch. 12. Or they may involve pursuing rehabilitative measures to reduce one's own likelihood of

Finally, what does it mean for the state to possess or to lack the *standing* to hold an offender to account? While this is a difficult and undertheorized question, we take standing to refer to *the moral justification to call another to account*. This definition adequately captures the use of the term in the literature. Yet we propose a crucial distinction, which the prevailing scholarship overlooks, between two kinds of standing an entity might have. The first is what we call *untainted standing*. When X possesses untainted standing to hold Y to account, X does not pro tanto wrong Y in virtue of the sheer fact that *it* in particular is the entity holding Y to account. The second is what we call *tainted standing*. When X possesses *tainted standing*, X does indeed pro tanto wrong Y in virtue of the fact that *it* is holding Y to account—yet it nevertheless has an all-things-considered justification for doing so. So, for example, even if a state has oppressed a particular offender, the offender’s wrongdoing may be so grievous (for example, he is a serial rapist) that the state nevertheless should hold him accountable; yet (on the prevailing view) it commits a pro tanto wrong against him in the course of doing so.⁷

recidivism; see Jeffrey Howard, “Punishment as moral fortification,” *Law and Philosophy*, 36 (2017), 45–75.

⁷This distinction offers a reply to Matt Matravers’s rejection of Duff’s position. (See Matravers, “Who’s still standing? A comment on Antony Duff’s preconditions for criminal liability,” *Journal of Moral Philosophy*, 33 (2006), 320–30.) Matravers assumes that moral standing is “all or nothing” (p. 330), and for that reason, he argues that Duff’s account leads to the counterintuitive conclusion that states marred by gross distributive injustice cannot hold to account perpetrators of serious crimes. Our more nuanced articulation of the problem suggests that when a state commits a gross social injustice, its moral standing is tainted in the sense that it commits a pro tanto wrong. We accept

Having defined our key terms, we can turn to the substantive issue. What is the nature of the pro tanto wrong that the state commits when it holds oppressed offenders to account? As we noted in the introduction, that there is such a wrong is now a commonly held view in the literature—but what, exactly, is it?⁸ One possibility is that the criminal justice system *itself* is deeply unjust. If the criminal justice system is overwhelmingly unfair in its treatment of oppressed offenders, then clearly it commits a serious wrong against them when it subjects them to an unfair process of criminal accountability. In such cases, the state—refusing to act as an impartial judge—may well lose its standing to hold offenders to account. But, for the purposes of the discussion here, we focus on scenarios where the criminal justice system does comply with the basic demands of procedural justice. We assume that, at least in some real-world states, this is the case: the criminal justice system itself is sufficiently fair, yet it is part of a state that is involved in gross socio-economic injustices against some of its citizens. Does the state that presides over this system, and on whose behalf the criminal justice system speaks, commit a pro tanto wrong against oppressed offenders when it holds them accountable? If so, what is the wrong?

One initial answer to this question, which we reject, appeals to the wrong of *hypocrisy*. According to R. Jay Wallace’s influential account of hypocrisy, by holding others to account for wrongdoing while engaging in one’s own wrongdoing—especially when it is wrongdoing of the same sort or worse—the hypocrite sends a message that he is exempt from the standards to which he holds others.⁹ As Wallace explains, the hypocrite implicitly expresses a

that sometimes, all things considered, unjust states ought to hold oppressed offenders to account.

⁸See n. 4 above.

⁹Tadros, “Poverty and criminal responsibility,” p. 396.

comparative judgment about the weight of his interests as compared to the interests of those he blamed. It is a genuine burden to be held to moral standards, and to be held responsible when one violates them; yet hypocrites smugly believe that they are sufficiently important to be immunized from these burdens, while those they blame are not. In this way, Wallace argues, hypocrisy “offends against a presumption in favor of the equal standing of persons that [is] fundamental to moral thought.”¹⁰

However, when applied to the case of the state’s moral standing, the hypocrisy view is limited in two central ways. The first is that, while it is illuminating in the context of interpersonal morality—the context in which Wallace theorizes it—it does not easily transfer to citizen–state morality. The state is a complex group agent; it is not obvious that it is the moral equal of its citizens. So the idea that it acts wrongly by suggesting *it* isn’t citizens’ equal is mysterious. The second limitation is more significant. As Victor Tadros argues, the judgment that an agent is a hypocrite is *non-relational*: it is a fact about the agent, rather than a fact about the agent’s defective relationship with any particular person or group of people.¹¹ Accordingly, if a hypocritical state lacks the standing to hold others accountable, this will apply to *all* offenders, not simply oppressed offenders. So, for example, a state that perpetrates tax injustice will be unable to hold non-oppressed or “privileged” citizens (we use these terms interchangeably) to account for tax fraud. Yet the core intuition underlying this whole debate is that there is a *particular* problem with the state holding *those it oppresses* to account. A view focused on hypocrisy cannot easily explain this.

¹⁰R. Jay Wallace, “Hypocrisy, moral address, and the equal standing of persons,” *Philosophy and Public Affairs*, 38 (2010), 307–41, at p. 328.

¹¹Tadros, “Poverty and criminal responsibility,” p. 395.

A superior account appeals to the closely related notion of *reciprocity*.¹² The core idea here is that an agent may only call another to account if they have a *relationship of mutual accountability*, such that each is accountable to the other for the wrongs each perpetrates on the other. Unlike the hypocrisy view, this view is *relational*, such that loss of standing is not a property of a particular agent, but rather a function of the particular relationship that agent has with others. According to Duff, the state's standing to hold oppressed offenders to account is compromised precisely because it refuses to be held accountable for *its own* wrongdoing toward them, generating an impairment in their relationship.¹³ As we interpret it, this account hinges on the fact that oppressed citizens are *politically disempowered*; it is precisely because they lack sufficient opportunities to hold the state accountable for its injustices toward them that they have a right to complain when it nevertheless holds them accountable for their wrongs. (In contrast, unjust states are often highly responsive to the grievances of privileged citizens; this is part of what makes them privileged.)

Why is the lack of reciprocity disvaluable? While Duff does not expand on this point, we think there are several such reasons. First, there are instrumental reasons to insist upon the state own's accountability as a precondition of its full authority to hold others accountable;

¹²Duff views the reciprocity account as a clear alternative to the hypocrisy view; "Blame, moral standing," p. 128. Yet the two seem closely related; while Wallace does not use the term reciprocity, it is arguably implicit in his account of hypocrisy. We set this complication aside; the crucial difference rests in the hypocrisy account's (1) non-relational character and (2) focus on interpersonal moral equality, which make it differ from Duff's reciprocity view. For related discussion, see Duff, "Responsibility and reciprocity," *Ethical Theory and Moral Practice*, 27 (2018), 775–87.

¹³Duff, "Blame, moral standing," pp. 129, 138.

unaccountable states are more likely to engage in wrongdoing, including in criminal procedures (even if we are bracketing such procedural issues for present purposes).

Second, and perhaps more importantly, there are intrinsic reasons. We commonly think that those who wield political authority over us ought to be accountable to us in return. Any fully legitimate exercise of political authority over me—including the enforcement of my compliance with my natural duties—must be done by an agent who allows me to effectively contest their actions in return. A state that fails to provide processes of effective accountability fails to treat those under its authority as autonomous agents, who, by virtue of their autonomy and moral independence, have a right that a state wielding authority over them be subject to *their* scrutiny and judgement. It is intrinsically disrespectful to hold others to account without being held to account. It is disrespectful even when the state is correct in its judgment of the offender. Even the murderer has the right to be treated as an autonomous agent: to be judged by a system that gives him effective opportunity to judge it in return.

Finally, in societies marred by significant inequalities, where the privileged can successfully hold the state to account but the oppressed cannot, there is an additional intrinsic wrong of an expressive sort. When the state holds oppressed citizens to account while refusing to be held accountable for its oppression, it insultingly reaffirms its denial of their equal standing.¹⁴

¹⁴Tadros offers a more restricted account of the reciprocity view. On his view, the state's moral standing is tainted specifically when it is the case that its injustices *causally contribute* to the crimes of oppressed offenders, by making them more likely to break the law; Tadros, "Poverty and criminal responsibility." For the purposes of the discussion here we remain agnostic on the question of whether the problem of tainted

In the next section we will turn to the apparent dilemma generated by the state's compromised moral standing. But before doing so, let us briefly consider the most recent criticism of the claim that the state loses standing to call oppressed offenders to account for their crimes. Andrei Poama has raised two connected objections to this view. Poama's first objection is that, if unjust states lack the standing to hold oppressed offenders to account for crimes in virtue of their failure to achieve social justice, they must lack the standing to hold *anyone* to account.¹⁵ Yet, as we already saw, this targets only non-relational versions of the argument, such as the hypocrisy account. It does not apply to Duff's relational version of the argument. If the state maintains reciprocal relationships with some of its non-oppressed citizens, then, all else equal, it retains the standing to hold them to account.

Poama's next objection builds on the first. He argues that *if* the unjust state lacks standing to hold all wrongdoers to account, then it cannot coherently pursue the variety of social justice reforms that are required of it, since, in order to do so, it *needs* the power to hold wrongdoers to account. For example, it needs to be able to force non-oppressed citizens to pay more taxes to fund reforms.¹⁶ But, while we accept that this objection might apply to non-relational views, it does not apply to Duff's reciprocity view, as the state commits no pro tanto wrong when it holds to account citizens who are not oppressed by it. Poama might respond that social justice reforms will also require the state to use coercion to secure oppressed citizens'

standing arises only in cases of state complicity with wrongful crimes or with regard to all wrongful crimes committed by oppressed offenders.

¹⁵See Andrei Poama, "Social injustice, disadvantaged offenders, and the state's authority to punish," *Journal of Political Philosophy*, 29 (2020), 73–93, at pp. 78

¹⁶Poama, "Social injustice, disadvantaged offenders, and the state's authority to punish," pp. 82.

compliance. But even if that is the case, the state may still have an all-things-considered justification for holding wrongdoers to account (what we have called *tainted standing*). Accepting that does not deny our core claim, that doing so remains pro tanto wrong, thanks to the impairment in the state's relationship with the citizens it oppresses.¹⁷

In what follows we assume, then, that the increasingly popular loss-of-standing thesis is a plausible one. In this section we have offered an interpretation of this thesis according to which the unjust state commits a pro tanto wrong when it holds oppressed offenders to account. The severity of this pro tanto wrong is to be determined by the extent to which the relationship between the state and its subjects is impaired. This will be a function of, inter alia, the extent to which the state is morally responsible for the deprivation faced by offenders (through either its acts or omissions), the severity of the deprivation itself, and the extent to which the state is engaging in a genuine effort to undo its wrongdoing.¹⁸

II. THE CENTRAL PROBLEM

We have identified the pro tanto wrong that the state commits against oppressed offenders when it holds them to account. However, the problem is that the state also seems to act wrongly if it does *not* hold them to account. The person paradigmatically wronged is, of course, the

¹⁷Although notice that, according to Duff, if the state engages in a genuine effort to reform its institution, it begins to regain its moral standing to hold oppressed wrongdoers to account; Duff, "Blame, moral standing," p. 128. Tadros disagrees. On his view, full social justice is required before standing is restored; "Poverty and criminal responsibility," p. 411.

¹⁸On Tadros's view, another factor will be the extent to which the deprivation causally induces the crimes in question.

victim of the crime in question. As Duff notes, “We owe it to the victim of what is properly defined as a crime to recognize and vindicate the wrong he has suffered by calling the wrongdoer to account, i.e. by prosecuting him.”¹⁹ It is also plausible that some of the duties one incurs in the aftermath of criminal wrongdoing are owed not simply to the victim, but to the whole community. For example, one may have a duty to reform oneself, to reduce the likelihood that one will commit crime again.²⁰

This, then, is the standoff that we face. If the state holds victims of its own oppression to account, it *pro tanto* wrongs them. If the state refuses to hold them to account, it *pro tanto* wrongs victims, and possibly other members of the general public who will be consequently endangered.²¹

One potential way to diffuse this problem is to *disaggregate* the various components of criminal accountability. Earlier we stipulated that holding to account consists, first, in accusing a citizen of a criminal offence; second, proving that the citizen committed the offence; third, condemning the citizen for the offence by convicting him; and fourth, enforcing the duties that the citizen incurs in virtue of the offence (including duties to submit to any punishment). But why should these all hang together? It is tempting to think that even if the state lacks the standing to *condemn* victims of its own injustice who commit wrongful crimes, it retains the prerogative to pursue the other elements of accountability. This approach is explicitly defended by Shelby. He agrees with Duff that seriously unjust states lose their standing to condemn

¹⁹Duff, “I might be guilty,” p. 256.

²⁰See Howard, “Punishment as moral fortification.”

²¹Tadros recognizes this apparent dilemma in “Poverty and criminal responsibility,” p. 413. Duff recognizes it, as well, in “‘I might be guilty,’” p. 259; “Blame, moral standing,” p. 140; and *Punishment, Communication, and Community*, p. 199.

oppressed offenders, even some who commit wrongful crimes, but nevertheless argues that the condemnatory feature of holding others to account can be stripped out from its other features.²² On Shelby's view, even if the state shouldn't condemn, it can still punish for incapacitative and deterrent purposes, as these features are logically separable.

But even if this disaggregative strategy is logically possible, it may not be possible in practice, given that hard treatment directly inflicted by the state may inevitably carry at least some condemnatory meaning. And even setting that aside, wholly eliminating the role of condemnation is itself morally undesirable. A state of affairs where the process of holding to account is entirely devoid of condemnation is itself a moral loss. In cases of serious criminal wrongdoing, it can be a very serious moral loss. Vindicating victims' interests includes recognizing that something seriously wrongful has happened.²³ Shelby's approach denies the state the right to say that, even from the lips of a trial judge at the sentencing phase. Arguably the central feature of calling to account *is* the condemnatory moment, when someone looks the offender in the eye and pronounces: "How could you have done this? How could you have culpably violated the rights of an innocent person? You ought to feel guilty for the awful deed you have done. You should apologize, you should repent, you should reform." Shelby's approach removes all of this from the process of holding offenders criminally accountable. That is a serious cost. We want a way for *someone* to say this to the offender. We just don't want it to be the state who says it.

²²Shelby, *Dark Ghettos*, p. 248.

²³As Tadros notes, "A failure to condemn serious criminal wrongdoing, where the responsible person is known to us, constitutes a serious injustice: the injustice of failing to publicly recognize the moral significance of the victim and her interests"; "Poverty and criminal responsibility," p. 410.

Should we then accept that the state, through its injustice, has put itself in a position where the only available courses of action involve some pro tanto wrong? If so, the only remaining question will be which pro tanto wrong is less grievous. This may well differ case by case. In some cases, and especially those of more serious wrongful crimes, it may well be that the pro tanto wrong of holding someone to account, despite lack of standing to do so, is all-things-considered justified. In such cases, the wrong of failing to vindicate victims' claims, or to protect the public, will outweigh the wrong of holding the offender to account despite lack of standing.²⁴ As we later discuss, there will be cases in which this is the lamentable result: weighing the wrongs against one another. However, we think that—in a significant range of cases—it will be possible for oppressed offenders to be held accountable without them being substantially wronged in the process.

IV. RESTORATIVE JUSTICE

The starting point of our solution goes back to the very reason why the state gains the authority to hold criminals to account in the first place. The state acquires the moral standing to hold wrongdoers to account on behalf of those moral agents under its dominion. In the first instance, the state acts on behalf of victims of crime. When Arthur assaults Beatrice, Beatrice has the natural right to hold Arthur to account. More precisely, she has the right, first, to accuse Arthur of the moral wrong, demanding that he offer her some justification or excuse. If Beatrice forms the justified belief that Arthur has no such defense, she has the right, second, to *condemn* Arthur publicly for what he has done (assuming that she has not, through her own actions, compromised her moral standing to do so). Finally, and most controversially, Beatrice has the

²⁴See Tadros's discussion of this issue in "Poverty and criminal responsibility," pp. 410-

right to demand that Arthur fulfills whatever duties he has incurred by wronging her. This may include restitution, or a public apology, or hard treatment of some kind. However, for reasons made famous by Locke, it is highly inefficient, and dangerous, to allow agents in the state of nature to act as their own vigilante enforcers. Beatrice has moral reason, on Locke's view, to transfer her rights to hold Arthur to account to the state.²⁵ A state with the moral right to hold wrongdoers to account, then, should be conceived as inheriting this from its citizens.²⁶ This right, as John Simmons notes, "like all governmental rights, must be composed of the redistributed natural rights of citizens, rights that the citizens must therefore have been capable of possessing in a non-political state of nature."²⁷

The observation that the state derives its standing to hold to account from the victims of wrongful crimes points to a solution to the dilemma we identified, a solution that allows victims to hold perpetrators to account, without falling into the trap of vigilantism. This

²⁵For other social contract theorists, such as Kant, Beatrice has a moral *duty* to do so.

²⁶This position is compatible with the basic thought that crimes constitute "public wrongs" in that they constitute attacks on the values of our shared civil order, such that all citizens have reason to see them as their business. For his most elaborate and recent defense of this claim, see R. A. Duff, *The Realm of the Criminal Law* (Oxford: Oxford University Press, 2018), p. 183. For the most significant early defense of this claim, see Sir William Blackstone, *Commentaries on the Laws of England* (New York: Wallachia Publishers, 2015 (1769) bk IV, ch. 1.

²⁷A. John Simmons, "Locke and the right to punish," *Philosophy and Public Affairs*, 20 (1991), 311-49, at p. 314. See Locke, *Second Treatise on Government*, (Cambridge: Cambridge University Press, 1980) ch. 2, §8.)

solution lies in the practice of *restorative justice* (RJ). In what follows we first explain what RJ is; we then explore how RJ can offer a solution to the problem of standing in unjust states; and finally, we consider implications of this idea for the design of RJ practices.²⁸

Restorative justice is the popular term assigned to a burgeoning set of approaches to criminal justice that differ substantially from the traditional process of criminal trial, conviction, and punishment.²⁹ What counts as RJ is varied, but broadly speaking it refers to a process of criminal accountability which gives a prominent place to the victims of crime. Sometimes RJ simply involves indirect mediation between offenders and victims, a matter of so-called “shuttle diplomacy”; sometimes it involves direct conversation between offenders and victims; other times it involves larger conferences with offenders, victims, their friends and family, or even the broader public.³⁰ Sometimes the meetings take place after offenders

²⁸Since writing this article, we have been encouraged by the discovery that Duff himself briefly intimates that RJ could play a role in the solution to the dilemma at issue here: “[W]e must seek to develop more nuanced and complex legal procedures that could at least recognize ... the claims and complaints of both victims and offenders. Some aspects of restorative justice might help us here”; Duff, “Estoppel and other bars to trial,” p. 259. He does not develop this suggestion further.

²⁹For an extensive survey of numerous aspects of the practice, see Gerry Johnstone and Daniel W. Van Ness (eds), *Handbook of Restorative Justice* (Abingdon: Routledge, 2006).

³⁰Thom Brooks defends the claim that RJs should involve a wide array of “stakeholders” within the public; see Thom Brooks, “Punitive restoration: giving the public a say on sentencing,” Albert Dzur, Ian Loader and Richard Sparks (eds.), *Democratic Theory and*

have already been formally sentenced in the ordinary procedures of the criminal justice process; other times, RJ sessions serve as an alternative to these procedures.³¹

Our focus here is on this last option, in which a *restorative justice conference* (RJC) serves as an alternative forum, where a criminal offender is held to account for what he has done. RJC's work differently, of course, in different jurisdictions. In the UK they are typically used with young offenders, but they are, in principle, available for use with adult low-level offenders as well. Here we will focus on the practice as it works with adult offenders. In cases in which there is sufficient evidence to prosecute, and in which the offenders admit to their crimes, the Crown Prosecution Service (CPS) enjoys the discretionary power to propose an RJC as an alternative to ordinary prosecution.³² A typical model of the RJ process in the UK, as described by the government, functions as follows:

The victim and offender, guided by a facilitator, communicate with one another. Other people can also be involved in the process, such as supporters of the victims and

Mass Incarceration (Oxford: Oxford University Press, 2016), pp. 141–56; Thom Brooks, “Punitive restoration and restorative justice,” *Criminal Justice Ethics*, 36 (2017), 122–40.

³¹For exploration of the varieties of RJ, see, e.g., Roger Graef, *Why Restorative Justice? Repairing the Harm Caused by Crime* (London: Calouste Gulbenkian Foundation, 2001), chapter 7.

³²This discretionary power, granted to the CPS by statute, is called “Conditional Cautioning”; see Office for Criminal Justice Reform, *Revised Code of Practice for Conditional Cautions: Adults*, p. 1, <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228971/9789999098144.pdf>.

perpetrator, and also members of the wider community. This can take place through a direct face-to-face meeting, or, when several other people are involved, a conference; or indirectly with the facilitator acting as “go between” in “shuttle mediation”. An agreement is usually reached to decide how best to repair the harm caused and a rehabilitative programme may be agreed.³³

RJ has gained increased popularity in legal theory and practice.³⁴ The CPS offers three reasons in support of RJ, each of which is echoed throughout criminological and policy discussions of RJ. The first reason concerns victim satisfaction. The RJC can reduce the victim’s fear, thus facilitating their recovery from a traumatic experience. Moreover, by involving the victim in the process, the RJC helps to minimize their sense of exclusion and to ensure they feel that they have received “payback” for the harm that has been done to them.³⁵ The second reason concerns engagement with the perpetrator: RJ helps to ensure that perpetrators grasp the implications of what they have done. The offender has the opportunity to explain why he did what he did, to apologise, to agree to act to repair the damage and to a

³³http://www.cps.gov.uk/legal/p_to_r/restorative_justice/.

³⁴For example, following the 2011 summer of riots across the UK, the government-appointed Riots Commission Report recommended the use of RJ to deal with the offenses; see Department for Communities and Local Government, *Government Response to the Riots, Communities and Victims Panel’s Final Report*, <https://www.gov.uk/government/publications/government-response-to-the-riots-communities-and-victims-panels-final-report>, p. 26.

³⁵One need not be a retributivist to believe that one is *owed something* from one’s criminal offender; see Tadros, *The Ends of Harm*, ch. 3.

plan for their restoration in the community.³⁶ As such, RJ may be linked with better rehabilitation prospects than the standard criminal prosecution process³⁷—and accordingly may contribute to the state’s goal of reducing the overall crime rate. Finally, RJ has the potential to create community capital, increasing public confidence in the criminal justice system.³⁸

³⁶For related discussion, see Gerry Johnstone, *Restorative Justice: Ideas, Values, Debates* (Abbingdon: Routledge, 2011), p. 116.

³⁷See Jeff Latimer, Craig Dowden, and Danielle Muise, “The effectiveness of restorative justice practices: a meta-analysis,” *The Prison Journal*, 85 (2005), 127–44. This study finds that RJ tends to reduce reoffending; however, as the authors recognize, there is a self-selection bias that problematizes any strident assertions of causality. See also Heather Strang, Lawrence W Sherman, Evan Mayo-Wilson, Daniel Woods and Barak Ariel., “Restorative justice conferencing (RJC) using face-to-face meetings of offenders and victims: effects on offender recidivism and victim satisfaction: a systematic review,” *Campbell Systematic Reviews*, 9 (2013), 1–59.

³⁸The UK government invokes this rationale in its official documents; see <http://www.cps.gov.uk/legal/p_to_r/restorative_justice/>. It is also central to the argument in Brooks, “Punitive restoration.” However, there is little empirical evidence showing that RJ has this effect, since RJ isn’t sufficiently widespread for such evidence to be readily available. For further discussion of the instrumental benefits of RJ, see Lawrence Sherman and Heather Strang, *Restorative Justice: The Evidence* (London: Smith Institute, 2007).

These traditional arguments provide a plausible instrumental case for RJ. However, we believe that there is a further powerful argument for RJ: that *it constitutes a uniquely suitable mode of calling wrongdoers to account in conditions where the state's standing to do so is tainted*. That is because the RJC is an institutional arrangement in which the victim, rather than the state, assumes the central role of holding the perpetrator to account. In RJ, the state takes, at most, a backstage role. While it furnishes the resources for the encounter to transpire, it is no longer the principal demander of accountability.

To be sure, as currently practiced in the UK, the CPS has the authority to decide when to resort to RJ; and the prosecutor must confirm that the agreement reached in an RJC is compatible with existing rules (such as standards of proportionality).³⁹ However, and crucially, the CPS does not play the role of communicating with the offender on behalf of the state. Indeed, according to best practice of RJC's, the state is barred from even playing the role of a facilitator in the process, as the facilitator should be regarded as an impartial professional by all parties to the agreement.⁴⁰

Our contention is that when the state relinquishes its role as the principal agent of accountability in this way, it does not pro tanto wrong criminal offenders when it invites them to participate in an RJC to anywhere near the same degree as in a traditional criminal justice process. At the same time, the RJC allows the state to discharge its obligations to the victims of crime, because it is a process in which their perpetrator is held to account, and which

³⁹The prosecutor must ensure that “conditions are proportionate to the offending and meet the public interest requirements of the case”; Office for Criminal Justice Reform, *Revised Code of Practice*, p. 6.

⁴⁰For discussion, see Chris Cunneen and Carolyn Hoyle, *Debating Restorative Justice* (Oxford: Hart Publishing, 2010), p. 69.

determines the steps he should be expected to take. For example, the RJC may conclude that offenders pay restitution to their victims, undertake some measure that constitutes a communication of apology, perform community service, or pursue other measures that reduce offenders' likelihood of recidivism. These burdensome duties can plausibly be described as constituting the offender's punishment, as determined by the RJC.⁴¹

RJ thus offers a viable institutional model that allows for oppressed offenders to be held accountable for their violations of natural duty, in a way that does not involve pro tanto wronging them to nearly the same extent as in a traditional criminal justice process, but also avoids the dangers of vigilantism. Our view accordingly offers a distinctive argument for RJ. The prevailing arguments for RJ are wholly instrumental. As such, they are contingent on certain empirical claims regarding the impact of RJ, whose force might change across time or across societies. In contrast, our argument is non-instrumental. We show that RJ is an intrinsically appropriate way to hold certain offenders to account in the context of serious

⁴¹There is no reason to think that RJ should be seen (as it often is) as an alternative “non-penal” approach to criminal accountability. As we stipulated earlier, punishment simply refers to certain burdensome duties that wrongdoers incur in virtue of their wrongdoing; holding wrongdoers accountable inevitably involves insisting that they fulfil these duties. For related discussion, see R. A. Duff, “Restoration and retribution: competing or reconcilable paradigms?”, Andrew von Hirsch, Julian V. Roberts and Anthony E. Broom (eds), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Oxford: Hart Publishing, 2003); and Declan Roche, “Retribution and restorative justice,” Johnstone and Van Ness, *Handbook of Restorative Justice*, pp.75-90.

injustice: it simultaneously recognizes that the state's standing to hold socially deprived offenders to account is compromised, and that such offenders nevertheless must be held accountable to their victims. So even if the instrumental arguments turned out to be false, we would have a powerful reason to prefer RJ in the cases of oppressed offenders. That is the distinctive upshot of our approach.

This argument has clear normative implications for current practice. As we noted before, in current practice, RJ is used sparingly, and at the discretion of prosecutors. But if the state's standing to resort to standard criminal justice procedures is compromised, it follows that RJ ought to serve as a much more common mode of response for offenders from oppressed backgrounds. Provided the criminal offender and victim are willing, the RJC will then proceed.

Of course, offenders and victims will not always be willing. When the offender is not willing, the state must decide whether to revert to the traditional criminal prosecution (as occurs in the UK)—in which case, the dilemma returns, and the prosecutor must judge whether the pro tanto wrong of holding the oppressed offender accountable by his own oppressor is worse than the pro tanto wrong of letting him off the hook.⁴²As we saw earlier, the severity of *not holding* a perpetrator to account is indexed to the severity of his crime. The severity of *holding* him to account will be determined in light of the severity of the impairment in the relationship between the state and the oppressed offender—itsself is a function of the extent to which the state is responsible for the deprivation faced by offenders, through its acts or omissions, the

⁴²If the state does opt for prosecution to move forward, it should do so only after a concerted attempt to persuade the offender to engage in the RJC. This attempt may even involve requiring the offender to attend an initial discussion with victims.

severity of the deprivation itself, and the extent to which the state is engaging in a genuine effort to undo its wrongdoing.

What about if the victims of crime are reluctant to participate? In our view, victims have moral reasons and sometimes even moral duties to engage in RJC, since by doing so they can hold perpetrators to account without inflicting a pro tanto wrong on them. But acting on this moral duty cannot be unreasonably burdensome, lest it cease to be a duty. If the victim is likely to experience substantial emotional distress and trauma in virtue of participating, then she likely does not have a duty to do it.⁴³ It is no moral failure to refrain in such circumstances. (We suspect that it is infeasible to create a legal test for when victim participation is unreasonably burdensome; accordingly, victims should retain the legal right to decide for themselves whether to participate, and should never be forced.) It is thus obvious that RJ will

⁴³For relevant discussion, exploring the case of a family who sought to prevent the execution of the man who murdered their daughter, see Kristen F. Grunewald and Priya Nath, “Defense-based victim outreach: restorative justice in capital cases,” *Capital Defense Journal*, 15 (2003), 315–52. For the view that RJ can further traumatize victims, see Carolyn Hoyle’s contribution to Cunneen and Hoyle, *Debating Restorative Justice*, pp. 138–41. RJs are likely to be especially burdensome for victims of sexual offences. For one account of such concerns, see Michael Dolce, “Say no to restorative justice for sex offenders,” *The Hill*, 31 Jan. 2017, <<https://thehill.com/blogs/pundits-blog/crime/317111-say-no-to-restorative-justice-for-sex-offenders>>. For a more optimistic view, see Shirley Jülich and Natalie Thornburn, “Sexual violence and substantive equality: can restorative justice deliver?” *Journal of Human Rights and Social Work*, 2 (2017), 34–44.

not always work. Yet the mere fact that RJ sometimes will not achieve its objectives is not an objection to the institution as such, since this is also true for traditional criminal justice systems.⁴⁴

V. OBJECTIONS

We now turn to examine some substantive objections. The first objection can be dealt with quickly. How should the state determine the particular offenders who ought to be offered an RJC? As we suggested earlier, the extent to which the state's standing is tainted depends, *inter alia*, on the nature and scope of the injustices it perpetuates, a question on which there is bound to be considerable disagreement—leading to disagreement over who should be offered an RJC. But we do not think this poses a fatal worry for our proposed solution, for a simple reason: it is not a serious problem for RJ to be “overly” inclusive. When prosecutors are unsure as to whether a particular defendant qualifies as an oppressed offender, it is preferable for them to err on the side of caution and extend the RJ opportunity to offenders who may not be oppressed. For example, we might think that prosecutors should extend RJ to all offenders from socio-economically disadvantaged backgrounds; while this does not perfectly track the distinction between oppressed and non-oppressed offenders, it is a plausible heuristic. Including some non-oppressed offenders in RJ may be an unavoidable side-effect of implementing an effective

⁴⁴We thank a referee for emphasizing this point. Of course, if uptake is extremely low, at some point any particular RJ program must be judged a failure. But this is not a reason to refrain from *trying* to create a successful program.

RJ system for oppressed offenders. Moreover, as mentioned above, there are instrumental reasons to value RJ even in cases of non-oppressed offenders.⁴⁵

The second objection is this. Often the victims of wrongful crimes will also be victims of social oppression. But sometimes the victims of crime are privileged citizens, who may have even voted for the policies that lead to social oppression. Is it not the case that they are also morally complicit in the wrongs of oppression, such that they lose the moral standing to hold their perpetrator to account?

To answer this question, consider what it is to be complicit. Chiara Lepora and Robert Goodin define acts of complicity as acts that “contribute to the principal wrongdoing of others,” where the complicitous agents know that by acting, they will advance the intentions of a principal wrongdoer.⁴⁶ Importantly, Lepora and Goodin also suggest that the extent to which an agent is complicit in others’ wrongdoing is determined by various factors, including the centrality of the contribution, its proximity to the principal wrongdoing, and its irreversibility. Furthermore, the extent to which this contribution was culpable (thus compromising the moral standing of the agent to

⁴⁵Of course, these instrumental reasons rely on empirical claims that might end up falsified. In such a case, there would be no reason to prefer RJ to traditional criminal justice for non-oppressed offenders.

⁴⁶Chiara Lepora and Robert E. Goodin, *On Complicity and Compromise* (Oxford: Oxford University Press, 2013), pp. 77–8. Here we rely on this view, as it is the most prominent causal conception of complicity in the literature; however, those who hold other views about complicity may draw subtly different conclusions here about the standing privileged victims to hold their oppressed perpetrators to account.

hold others to account) will depend on her state of mind and her ability to act otherwise.⁴⁷

The implications of this basic framework for the complicity of ordinary privileged citizens in their state's wrongdoings is a disputed question. Some argue that, even in democracies, the vast majority of ordinary citizens are not contributing to their state policies in a meaningful enough manner to render them complicit, let alone blameworthy, in its actions.⁴⁸ Others argue that many privileged citizens do share the blame for their state's wrongful policies, even though it is impossible to trace the precise causal links between their actions and the policy outcome.⁴⁹ We lack the space here to comment on this debate in detail.⁵⁰ But notice that even if one accepts the more expansive view, it is clearly the case that the share of ordinary citizens' wrongful complicity in their state's wrongdoings will vary in degree, and in light of the centrality of these contributions, their distance from the principal wrongdoing, and their reversibility. These criteria clearly suggest that many ordinary citizens' level of wrongful complicity will be very low, given the marginality of their contributions and the lack of viable opting-out from contributing to their state's wrongdoings. For certain, it will be

⁴⁷Ibid., ch. 6.

⁴⁸Holly Lawford-Smith, *Not in Their Name: Are Citizens Culpable for Their States' Actions?* (Oxford: Oxford University Press, 2019), pp. 121–6.

⁴⁹Eric Beerbohm, *In Our Name: The Ethics of Democracy* (Princeton: Princeton University Press, 2012), pp. 67–72, 242–6.

⁵⁰See Avia Pasternak, *Responsible Citizens, Irresponsible States* (New York: Oxford University Press, 2021), ch. 2.

much lower than that of the state itself, which is the agent that instigates and orchestrates policy-making across its various branches. So while there may be some pro tanto wrong in privileged citizens holding oppressed offenders to account, even within an RJC, their relationship with oppressed offenders is likely to be far less impaired than that of the state and these offenders. In having to choose between the state holding to account, and privileged citizens holding to account, there is lesser wrong in choosing the latter over the former.

That said, we do not deny that in some cases, a privileged victim's standing to hold an oppressed perpetrator to account will be significantly tainted, given her direct and substantive support in an unjust basic structure. Under such circumstances, the oppressed perpetrator may rightly refuse to engage in a process of RJ with that victim, citing the latter's compromised status as a reason. We would then inevitably have to resort to the scenario of weighing the pro tanto wrong of not holding the perpetrator to account with the pro tanto wrong of holding him to account by an agent with tainted standing.

Yet even when there remains a pro tanto wrong in RJ, perpetrators have a reason to prefer RJ to the traditional criminal justice process. For RJ is a *deliberative* forum, which means that the compromised standing of the victim is an issue that can be recognized and considered in thinking about the appropriate way to restore this rupture in the relationship. For example, the victim might be expected to express regret for being part of an unjust structure.⁵¹

⁵¹Duff emphasizes the importance of providing oppressed offenders with the space in which to express their own grievances against the state, even as they are held

The third objection is this. A principal argument in favor of the state’s authority to hold criminals to account concerns victims’ lack of resources and competency to hold perpetrators to account—given their lack of training and expertise, and their cognitive and emotional biases. Indeed, when condemning vigilantism earlier, we appealed to the dangerousness of granting victims the right to decide themselves on the appropriate response to wrongdoing. Given that concern, how can the RJ process rely on victims to perform this role?

In answering this objection, we emphasize that RJ does not amount to a lawless justice system, where victims punish perpetrators in light of their own private interpretation of the fitness of punishment. Rather, the RJ process is designed in a way that enhances victims’ capacities to hold perpetrators to account, and which minimizes the moral risks of false accusations and disproportionate punishment. As we noted earlier, victims are not encumbered with role of determining whether a suspect has committed a criminal offence. The RJC happens only when the perpetrator agrees to participate. Further, the RJC is mediated by a neutral facilitator, which provides expert advice and guidance to the parties. And finally, the RJC conference is designed to be a truly deliberative forum, where both sides get the opportunity to express their emotions and views, and to hear and consider each other’s positions. This structure encourages more thoughtful and considered judgments, and minimizes the risk of knee-jerk inconsiderate reactions.⁵²

accountable, though he does not specify how this might work; see Duff, “Blame, moral standing,” p. 140. Our view is that RJ offers just such a solution.

⁵²For related discussion, supporting the idea that RJ encourages a certain even-handedness in their deliberations, see Jennifer Page, “Many men are good judges in their own case: restorative justice and the *nemo iudex* principle in Anglo-American law,” *Raisons Politiques*, 59, 3 (2015), 91–107. This clarifies that the reasons that make us

The last objection we will address applies not simply to our own version of RJ, but to RJ as such, and it concerns the appropriateness of RJC's in response to violent crime. Even assuming the participation of victims, we might worry about lenient, community-oriented penalties that are typically meted out during RJ sessions. Surely, the worry goes, such penalties are not sufficiently harsh when dealing with violent offenders.

In response to this objection, we point to the increasing sentiment among philosophers of punishment that community-oriented restitution and rehabilitation is preferable even when dealing with much violent crime. Indeed empirical scholars of criminal justice have shown that the orthodox assumption—that all violent criminals belong in prison—is itself largely responsible for mass incarceration in the US.⁵³ So we must take seriously the idea that, for at least many violent criminals, the kind of agreed community work that an RJC typically recommends could well be appropriate.

That said, even in a world where incarceration rates were reduced, there would likely be oppressed perpetrators for whom the community work framework will not be appropriate, for example because of the threat they continue to pose to the public. May incarceration be permitted in such cases? One argument which permits incarceration is suggested by Shelby, who, as we saw, endorses a *disaggregated model* of calling to account. On his view, even if the state lacks the standing to engage in the *condemnatory* phase of the process, it can be involved at other phases—such as the punishment phase. But we are skeptical that this solution can work. State imprisonment, at least as it is currently practiced, is a paradigmatic exercise of state authority, and inescapably carries a condemnatory connotation. Perhaps it is possible to

hesitant to make victims judges in their own case are attenuated in the context of RJ.

We are grateful to a referee for raising this issue.

⁵³John Pfaff, *Locked In* (New York: Basic Books, 2017).

envision prisons converted into non-condemnatory “rehabilitation centers,” which an RJC might agree the offender should attend to fulfil some rehabilitative aim; if so, Shelby’s reply would have greater force. But in the absence of such a reform, a more immediate reply is simply this: in unjust states, state imprisonment of oppressed offenders does indeed involve some pro tanto wrong. In some cases, this pro tanto wrong is justified, given the harms that would result if the state does not incarcerate the wrongdoer. But even in such cases, it will be less of a wrong because the vast majority of the accountability process (even if not the final phase) will have been undertaken by an agent whose moral standing to do so has not been compromised.⁵⁴

VI. CONCLUSIONS

When the state holds victims of its own oppression accountable for their wrongful crimes, it commits a further wrong against them. A promising way to mitigate that further wrong is for the state to step back from this role, and to open up an institutional avenue where victims of crime take center-stage in holding their perpetrators to account.

Some might worry that our proposal is bound to remain a mere aspiration. After all, if the state is engaged in social oppression, why would it be inclined to address the wrongdoing of holding oppressed offenders to account? But there are reasons to be hopeful. In the first instance, sometimes states are engaged at some level in the process of addressing social oppression, but the process of change is prolonged and difficult. Addressing the wrong we have discussed here is something they can do in the immediate term with relative ease. Moreover,

⁵⁴We should also remember that cases of outrageously serious wrongdoing, for which we intuitively think imprisonment is appropriate, are also likely to be those for which an RJC is unlikely. In this case, the ordinary mechanisms of criminal justice will be pursued, despite the pro tanto wrong they involve.

our argument has practical relevance even in cases where the state as a whole refuses to undo its unjust public policies. Individual policy-makers and practitioners within the criminal justice system may well recognize that while they seek to comply with the demands of justice, they are part of a larger whole that is not. Being part of this larger whole means that their standing to hold oppressed offenders to account on behalf of the state is compromised. They can act to address this failure, even if the state as a whole refuses to change. Expanding the use of RJ is one vital way they can achieve this aim.