

Why Standing to Blame May be Lost but Authority to Hold Accountable Retained: Criminal Law as a Regulative Public Institution

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Abstract

Moral and legal philosophy are too entangled: moral philosophy is prone to model interpersonal moral relationships on a juridical image, and legal philosophy often proceeds as if the criminal law is an institutional reflection of juridically imagined interpersonal moral relationships. This article challenges this alignment and in so doing argues that the function of the criminal law lies not fundamentally in moral blame, but in regulation of harmful conduct. The upshot is that, in contrast to interpersonal relationships, the criminal law cannot lose its standing to blame through institutional analogues of hypocrisy, complicity, and meddling. Rather, certain forms of structural and severe historical and contemporary injustice point to the question of the overall legitimacy of state authority.

Reading the contemporary moral philosophy literature, one could be forgiven for thinking that the core of our moral relationships with each other involves the identification of wrongdoing and a corresponding imperative to blame wrongdoers for wrongs done: to judge, to condemn, to demand that they answer to the charge, and to hold them to account. In other

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words, the guiding image is juridical—as Daniela Dover aptly notes (2019; 2020). We are cast in the roles of detective, judge, and executioner, walking the world rooting out wrongs, sitting on high and delivering judgment, meting out punishment as deserved. Reading the contemporary philosophy of criminal law literature, one could be forgiven for thinking that the core aim and justification of criminal law is to blame wrongdoers for moral offences: to censure wrongdoing of a severity judged to be worthy of criminalization, and to punish for crimes committed. In other words, the guiding image is an institutional reflection of what the contemporary moral philosophy literature holds out as the core of our moral relationships with each other. Our aim in this article is to explore how this simplistic, mutual entanglement of law and morality in philosophy and criminal justice theory is to the detriment of both. On the one hand, there is much more nuance to our moral relationships with each other than the guiding juridical image admits—attention to which can, indeed, creatively and helpfully inform the criminal law. On the other hand, the image of the law as a mirror to interpersonal moral blame both misrepresents the distinctive quality of criminal law as a social institution, and—as we have argued in earlier work (Lacey and Pickard 2013)—risks infusing legal processes with ‘affective’ blame (Pickard 2011; 2013; see below), an attitude and bearing which is inimical to the proper purposes of that institution.

We approach the task of revealing the flaws in the mutual entanglement of law and morality by focusing on the recent debate about so-called ‘standing to blame’, found in moral and in legal philosophy alike. In moral philosophy, the juridical image of moral judgment and blame has generated an interest in whether its conditions of legitimacy include not only a substantive moral basis with respect to the blamee—moral responsibility for wrongful conduct, or, in other words, *blameworthiness*—but also a distinctive (and, again, juridical in tone) quality of ‘standing’ in relation to the blamee on the part of the moral agent voicing the

criticism—that is, the blamer. In turn, legal philosophers have argued, on the basis of a supposed strong analogy between the case of moral judgment and that of criminal legal judgment, that in criminal justice, too, a state may lose its moral right to censure and punish not only where the criminal laws which it seeks to uphold are morally unjustified, but also where its own moral position *vis à vis* the alleged offender is compromised in a way which affects its standing to hold to account. A common argument for this conclusion appeals precisely to the state's *vicarious responsibility* for criminal conduct, in virtue of its failure to address certain forms of structural and severe historical and contemporary injustice which are known to be associated with heightened risk of individual offending. Criminal justice theorists have long viewed 'rotten social background' as harboring the potential to reduce the degree of blameworthiness and justify mitigation in relation to sentencing, in so far as this background bears on the question of whether the offender had a reasonable opportunity to conform their conduct to the law—or rather faced circumstances which, through no fault of their own, significantly impaired their ability to do so (Bazelon 1976; Delgado 1985; Morse 2000, 2011; Robinson 2011). Given that these circumstances—which include, e.g., poverty, oppression, and genuine lack of educational and employment opportunities—are not only unjust but also well-established to carry this risk, a state which systematically fails to rectify them is arguably implicated in—and so vicariously responsible for—any resulting misconduct committed by those who are victims of these circumstances (Duff 2001; Tadros 2009; Watson 2015). If vicarious responsibility for wrongdoing undermines standing to hold to account—as it naturally seems to undermine standing to blame in interpersonal contexts—then the state's own moral position in relation to offenders who find themselves in these circumstances throws into question its right to censure and punish them—a striking and highly substantive consequence for criminal justice as it exists in today's world.

In what follows, we seek to show that despite the intuitive appeal of this picture, the debate about ‘standing to blame’ in both moral and legal philosophy suffers serious flaws which flow from the entanglement of law and morality, and misrepresents the full nature of, respectively, moral relationships and criminal legal judgment. The moral debate oversimplifies the full range of practices of moral discourse, and marginalises non-judicial critical and regulatory practices which are of value in moral life; while the legal debate misrepresents the fundamental way in which certain forms of structural and severe historical and contemporary injustice may undermine the authority of criminal justice institutions. If the criminal law is to function at all, it must be possible for it to *regulate* conduct with moral and political credibility—it must have the authority to address crime. But this issue bears not on the discrete matter of the state’s moral standing to blame particular individuals who come before the courts, but rather on the question of the very legitimacy of the state of which the criminal justice system is but one organ. Or so we shall argue.

The article proceeds in three parts. In the first part, we briefly review some of the relevant philosophical literature on the moral standing to blame, identifying and discussing the ways in which the juridical image distorts the nature of interpersonal moral discourse. In the second part, we contrast the context of moral judgment and blame with that of criminal legal judgment, building on our own earlier work that employs a clinical model of ‘responsibility without blame’ to conceptualise the criminal process. In the third part, we turn to other work in legal theory which has also rejected ‘legal moralism’ and developed a different understanding of the criminal law’s distinctive social role and normative basis, more consonant with our own, as fundamentally *regulatory*. And we consider the upshot of this body of work for how standing should and should not be understood in criminal justice, and, in particular, how it relates to cognate concepts such as legitimacy and authority.

1. THE MORAL STANDING TO BLAME: INTERPERSONAL RELATIONSHIPS

Over the last couple of decades, there has been lively discussion within the moral philosophy literature about the nature of our standing to blame those who are blameworthy. Within interpersonal relationships, when a person stands accused of wrongdoing by another, one way to deflect the accusation is to defend against the charge of *blameworthiness*: perhaps they did it, but have a justification or excuse; perhaps they did not do it at all—the wrong person stands accused. But it is also possible for the blamee to sidestep the accusation by challenging the blamer’s *standing* to blame them. Certain facts about the blamer may undermine their right to make the accusation, allowing for the accusation to be deflected without it being denied. Such challenges include the charge of hypocrisy (“look who’s talking!”), complicity (“you’re just as much to blame for this as I am!”), and meddling (“it’s none of your business!”).² These challenges attempt to rebuff the accusation by levying an accusation in turn, namely, that, in virtue of these facts about *them*, the blamer does something *wrong* in blaming, which undermines their right to censure the wrongdoing and demand the wrongdoer answer to the charge. In other words, the tables are turned: the person who stood in judgement now stands before judgment. Challenging a blamer’s standing on grounds of hypocrisy, complicity, and meddling may therefore sometimes succeed in getting the blamee temporarily off the hook—even though, given the background assumption that they are indeed blameworthy, they are not off the hook *tout court*, e.g., if confronted by a blamer in better standing.

² Recent work exploring the contours of and basis for this view includes Bell (2012), Cohen (2006), Dover (2019; 2020), Duff (2001; 2007; 2019), Edwards (2019), Herstein (2017), Todd (2019), Wallace (2010; 2019), Watson (2012; 2015).

Turning the tables may sometimes succeed in deflecting an accusation; but it is important to note that it is hardly the last word in many if not most interpersonal contexts. The reasons for this are many. First, even if it is agreed that the blamer lacks standing to blame, this does not entail that, all things considered, they should take back their accusation and refrain from any further pursuit of the matter: there may be something important at stake in ensuring that this wrongdoer is made to answer and held to account, and no one else is currently better placed (Cohen 2006; Edwards 2019). Second, as Daniela Dover (2019, 2020; see also Bell 2012) has insightfully argued, even if meddling, hypocrisy, and complicity reveal the blamer to be less than perfect, two wrongs don't make a right, and it is perfectly open to the blamer to *continue the conversation* and, e.g., concede their part in the affair or their past mistakes, but suggest that nonetheless both parties ought to sit down together and hash it out. As Dover emphasizes, accusations of wrongdoing and demands for accountability in interpersonal contexts are rarely isolated from the history and ongoing nature of the relationship—which is surely not juridical in the majority of interpersonal cases, and, moreover, rarely so black-and-white as this image pretends. Rather, they often involve working through what the rights and wrongs of the situation really are, whether or not either party is genuinely blameworthy, and, if blameworthy, figuring out why this happened between them and what it means to them both about and for the relationship—now and in future. In other words, *moral criticism*, as Dover calls it, is often part of ongoing, rich, complicated conversation which fundamentally involves moral discovery on the part of both parties, who are in it together. Third, with respect to hypocrisy and complicity—albeit not quite for meddling, for more on which see our discussion of *jurisdiction*, in Section 3 below—standing to *blame* may be undermined while the appropriateness of holding the wrongdoer *responsible* and to account is maintained. This will be so when the relationship between the parties is not modelled on a juridical image but is substantially—to use a concept that one of us has argued offers a more appropriate

guiding function for criminal law than does morality (Lacey 2004; 2016a; 2016b)—
regulatory.

To illustrate this last point, consider the following hypothetical example. A parent goes out, leaving their older son in charge of their younger daughter, with clear instructions to send the younger to her room if she misbehaves. Suppose the older son then winds up the younger as only older children know how to do. The younger duly acts up—throwing objects, overturning furniture, in general expressing her anger and frustration in a violent if entirely predictable tantrum—and the older duly sends her to her room. Is it really plausible that his complicity in his younger sister’s misbehavior—that he wound her up in full knowledge of the likely consequences—undermines his authority to do so? If, as a parent, you came home and found that not only had the older wound up the younger, but then when the younger started to destroy the house, the older let it happen as they had ‘lost their standing’, the older would surely be in double trouble. Of course, the older has an obligation not to wind up the younger, which he breached. This is why the trouble would be double. Equally, if he didn’t simply send her to her room, but taunted her, condemning her behavior and character, then the younger could fairly deflect this accusation by retorting “You made me do it!” Indeed, her rebuttal could be taken as a claim about the older child’s vicarious responsibility for the damage—in line with how the state may be seen as vicariously responsible for criminal conduct when it fails to address forms of structural and severe historical and contemporary injustice known to be associated with heightened risk of individual offending. But the older brother nonetheless retains the authority to send his younger sister to her room, as instructed, to *regulate* her behavior; and he would be wrong not to exercise that authority even if his role in her *misbehavior* was non-negligible and hence he was, to that extent, implicated. This is, of course, a morally trivial example as compared with questions of the criminal justice’s

system's standing to convict and sanction—or, as we shall suggest, the legitimacy of state authority—when conditions of injustice prevail. But it serves, we believe, to illustrate how the authority to hold responsible and to account can be retained in certain interpersonal contexts—putting aside, for the moment, legal ones—even when the standing to blame is lost. Namely, it is retained in contexts where the authority exists to serve a *regulatory* function, as opposed to being exercised for the sake of moral censure and punishment.

There are three morals to draw from this admittedly brief discussion, to which we will return over the course of this article. The first is that modelling our moral relationships with others exclusively on a juridical image obscures the way we often approach interpersonal wrongdoing on the one hand in a more even-handed, open-minded, and exploratory way, and on the other, in a more regulatory manner. The second, connected point, is that facts about a person that undermine their standing to blame—understood broadly speaking as involving practices such as accusation, condemnation, and the infliction of supposedly deserved punishment—may not undermine their authority to hold responsible and to account—understood as a regulatory practice. The third moral, following on from the second, is that there is therefore an independent question about what grounds the legitimate authority to regulate conduct within a relationship or with respect to an institution—apart from the question of an individual's or institution's moral standing to blame. In our hypothetical example, the background assumption is that the parent can legitimately grant the older son a kind of regulatory authority over his younger sister. In many contexts, this assumption is perfectly correct; but there certainly are contexts in which it could be undermined, e.g., perhaps the boy is unfit to hold the authority (he is too young); or perhaps the parent is unfit to parent and hence lacks authority themselves, and so cannot bestow it on another (they are

abusive).³ This raises—and arguably puts the moral burden on—the question of what grounds the authority of a person in a relationship or, more importantly for our purposes, the authority of an institution like the criminal justice system, to regulate conduct via practices of responsibility and accountability. Crucially, this question is, on the one hand, essential to understanding the significance of any vicarious responsibility the state may bear for individual criminal misconduct, while, on the other, impossible to adequately answer simply by adverting to the conditions whereby standing to blame is compromised.

2. THE DISANALOGY BETWEEN MORAL BLAME AND CRIMINAL JUSTICE

The juridical image of interpersonal moral judgment and blame maps, then, only part of the terrain of critical moral discourse and responsibility and accountability practices; and the associated proposition that moral defects such as hypocrisy, complicity, or meddling in ‘someone else’s business’ undermine the relevant agent’s ‘standing to blame’ have less decisive force in relation to the dialogic and exploratory forms of moral communication and the regulatory forms of moral practice. Yet it is increasingly often argued that, by analogy with the juridical image of moral discourse, criminal legal judgment is a species of blaming oriented to censure and punishment (Gardner 2020), and that in this discursive and institutional context, too, the state’s right to hold to account rests not merely on the substantive justification of the criminal law and the accuracy of a criminal charge, but on the state’s moral standing, *vis à vis* the offender, to blame. Key writers here include Antony Duff (2001, 2007, 2019), Victor Tadros (2009) and Gary Watson (2012; 2015).⁴ As in the moral

³ In these instances, we might even regard the parent, rather than the older child, as the potential candidate for vicarious responsibility.

⁴ Darwall and Darwall (2018) reach a similar conclusion but via a somewhat different route, by modelling criminal law on a framework of mutual accountability.

philosophy literature, the debate has on the whole focused on how standing can be lost, rather than on the positive conditions which have to hold for it to exist (Edwards 2019)—a striking emphasis given that, as we shall see, the positive elaboration of conditions of legitimate state authority is in fact an institutional keystone for all systems of criminal law, for reasons which shed considerable light on the distinctive quality of criminal law and criminalization as social practices.

These arguments about standing to blame in criminal justice carry not only considerable intuitive plausibility but, also, genuine moral urgency—in a world where there is pervasive evidence of the bearing of profound structural injustices and institutional biases on many states’ use of their power to criminalise and punish, and on the (un)fair distribution of genuine opportunity to comply with criminal prohibitions. In the wake of widespread moral horror at the killing of George Floyd by police officers in Minneapolis on May 25th 2020—itself part of a relentless procession of police violence towards Black Americans—there has recently been particular outrage and debate about structural racial injustice and systemic racial bias in the US criminal justice system (on which see Alexander 2010; Western 2006; Lerman and Weaver 2014). But the impact of social injustice on the very possibility of a criminal *justice* system is, of course, a far more geographically widespread concern. To take one of the most sophisticated exponents of this concern, Antony Duff (2018) has argued that, even though the scope of criminal law may range well beyond that of morality, the distinctive civic goods which it underwrites imply that the upholding of criminal legal standards carries the force of moral obligation. On this view, criminal judgment is accordingly centrally concerned with the business of moral blame and censure. And if criminal justice power amounts to an institutionalised system of moral blame and censure, then, so the argument goes, states can plausibly be thought of as losing their standing to punish when they

hypocritically use the criminal law to proscribe and censure forms of wrongdoing in which their own organs engage or collude, or when they are in effect complicit in or vicariously responsible for forms of offending which are far more difficult to avoid for some groups because of, for example, racial or economic inequalities and injustices which the state has the power—indeed, the obligation—to mitigate.

The cogency of this argument depends, of course, on the aptness of the analogy: that the criminal justice system is correctly conceptualised as an institutional analogue of interpersonal moral judgement and blame—itself guided by the juridical image. However, in our previous work (Lacey and Pickard 2013; 2015b), we have taken a very different view; arguing that, while the criminal justice system does indeed respond to forms of conduct defined in state criminal law as harmful or wrongful, and as a result entails distinctive state responsibilities towards victims of crime, over and above general welfare responsibilities (Lacey and Pickard 2018), the basic rationale of the system is that of public regulation in the pursuit of distinctive civic goods, including, crucially, harm reduction. The practices of criminal holding to account are premised on offender agency, which underpins both the capacity to take responsibility and to work towards behavioural change; hence not only the more familiar concepts of rehabilitation and reintegration, but also the more radical idea of forgiveness, should be central to criminal justice (Lacey and Pickard 2015a). On our view, in its ideal form, the criminal justice system as an institution accordingly sits more naturally with the genre of moral communication in regulatory mode. Its point is not fundamentally backward-looking: to blame and punish those who are morally responsible for past wrongdoing. Its point is forward-looking: to hold responsible and to account, as a way of regulating behaviour, reducing harm, and upholding approved legal standards protecting the public against harm.

At first sight, this picture of criminal responsibility judgements and practices as distinct from backward-looking moral blame and punishment may invite incredulity. Particularly since the revival of retributivism, and with the currency of the idea that punishment as a form of censure is necessary for deterrence, the tendency to equate holding someone criminally responsible with morally blaming them seems to have become ever stronger. There is an important difference, however, between what we have called ‘affective’ as opposed to ‘detached’ blame (Pickard 2011, 2013; see also Lacey and Pickard 2013, 2015a, 2018). A finding of criminal responsibility must indeed be a finding of blameworthiness in the ‘detached’ sense of a judgement that the conditions for criminal accountability for breach of a legal standard have been met by the offender. But this does *not* dictate that such a judgment be accompanied by ‘affective’ blame towards the offender—where this involves, among other things, not merely moral address and practices aimed at regulation of behaviour, but, in addition, outright condemnation of character and the range of hostile, negative emotions, such as, e.g., anger, indignation, resentment, contempt, disgust, hatred, and scorn, that are commonly part and parcel of moral blame (Strawson 1962) and most extant retributive theories of justice (Lacey and Pickard 2013, 2015a, 2018; see also Struhl 2015).

We can, in other words, conceptually separate practices of holding responsible and to account from interpersonal models of affective blame. But why *should* we do so in criminal law, morally or politically?

The answer is that practices of criminal responsibility-attribution and accountability should aim not simply at retribution but at rehabilitation and reintegration (cf. Lacey and Pickard 2013; 2105a). Hence they should be guided by models oriented to effecting behavioral

change—such as, e.g., evidence-based clinical work. As one of us has argued, clinical practice in therapeutic contexts with people who engage in damaging or harmful forms of conduct often adopts a stance of ‘responsibility without blame’ (Pickard 2011, 2013; www.responsibilitywithoutblame.org). On the one hand, non-pharmacological therapeutic interventions supporting behavioral change must be premised on an assumption of a degree of agency on the part of the individual: people can only work to change that over which they have some choice and control. Of course, it matters tremendously that agency comes in degrees. There are social determinants of mental health—just as there are in relation to crime—which include certain forms of structural and severe historical and contemporary injustice alongside adverse early experiences and trauma, and which individuals suffer through no fault of their own. Such circumstances and experiences not only contribute to the aetiology of mental health problems, but can in addition affect degree of individual agency for those who face them, in at least the following ways: through impact on the development of a capacity for emotional and behavioral control, and through limiting the choices that are realistically available as alternatives. In so far as choice and control are diminished in these or other circumstantial ways, so too is responsibility. On the other hand, if affective blame or stigmatization enters the therapeutic process, this invariably destroys the efficacy of the intervention. The reasons for this are many, but include, e.g., heightened risk of disengagement, distrust, and damage to the therapeutic alliance; feelings of hopelessness, worthlessness, and isolation—all of which impede self-efficacy and motivation to change; and, in some cases, even the encouragement or entrenchment of an attachment to an oppositional identity (cf. Lacey and Pickard 2015a). Non-pharmacological therapeutic interventions that support behavioral change, in other words, *require* an assumption of a degree of agency and so too a degree of responsibility, but are *obstructed* by affective blame. In the clinic, responsibility is a powerful tool for behavior regulation, *if* deployed without

affective blame. This is why this form of therapeutic intervention offers such a valuable model for criminal justice contexts; it does not pathologize but rather takes individual agency seriously (while nonetheless acknowledging circumstances that bear on its limitations) and uses responsibility and accountability practices—among other forms of intervention, of course—to help people change behavior that is damaging to them and harmful to others.

With this framework in the background, let us return to the issue of authority and standing. Consider the following hypothetical example. A therapist who herself struggles with substance misuse is working with a client who misuses substances. Her therapeutic role involves supporting her client to acknowledge the harmfulness of their drug use—to own their problem, as it’s sometimes put—and to better understand the role of drugs in their life and believe in their own capacity to change. Unsurprisingly, this role sometimes requires challenging her client in ways which require compassion but which must also be clear and direct—and so may be difficult to hear—in order to encourage them to acknowledge the problem and begin to take responsibility for making a change. Does the therapist’s own substance misuse undercut her authority to do her job and challenge her client in this way—to engage their agency and hold them responsible for their behavior, as we might say? Surely not. Indeed, her own experience may offer her important insights and understanding, enabling her to do her job *better*. Certainly, the therapist could be accused of hypocrisy were she to morally blame or censure her client for their problem drug use. But this is not her role, which is, rather, that of clinical engagement oriented to caring for her clients and helping them to effect the desired change. Relatedly, if, through a lack of discretion about her own problem or some other form of unprofessionalism, she were to undermine her client’s confidence in her and hence her ability to carry out her role, that would be a different matter: the basis for her professional authority might be undercut. But it would be a question of her

professional authority and capacity to fulfil her professional role and its associated goals, and not a discrete matter of her standing to hold her client responsible and to account to whatever degree is appropriate for a type of behavior of which—as it happens—she, herself, is equally guilty. The reason for this is that although therapy requires a genuine relationship between two people, its goal is not moral judgment of one by the other, but psychological understanding combined, in a case like this, with behavioral *regulation*. And, as with the earlier hypothetical example of the older son's regulative authority to send his younger sister to her room, facts that would undercut a person's standing to blame in an interpersonal context do not, in a therapeutic context, undercut a therapist's authority to do her job—including challenging her client and holding them compassionately to account, as they do the work that therapy facilitates.

As with that earlier example, we note that this example is trivial, as compared with questions of the criminal justice's system's authority to convict and sanction in conditions of structural and severe historical and contemporary injustice. Nonetheless, in what follows, building on the responsibility without blame framework and the intuitions we hope these hypotheticals to have evoked, we argue that, *pace* those theorists who have argued for a strong analogy between the juridical image of interpersonal moral blame and the criminal justice system, the closer analogy is in fact between the regulative aspects of moral discourse and criminal justice. The more formalized, regulatory, or role-based a critical practice, the less straightforward the inference from personal moral defects such as complicity or hypocrisy to loss of the authority to carry out that practice. Hence, if the criminal justice system is modelled less on a juridical image of interpersonal moral blame and more on an ideal of regulative responsibility practices (as exemplified by, e.g., parental or clinical contexts), it follows straightforwardly that it cannot lose its standing to blame—for *its function is not to*

blame to begin with. The question is therefore not how standing is lost, but rather what conditions must be met if the authority to regulate behavior—via whatever means are appropriate to the particular context—is to be legitimate.

3. CRIMINALIZATION AS REGULATION: THE IDEA OF LEGITIMATE STATE AUTHORITY

In developing an argument about the inaptness of concerns about discrete moral standing in what we might call ‘regulatory discursive contexts’—such as, we have suggested, the criminal justice system—it is useful to begin by noting the counterintuitive implication if these concerns were indeed to be allowed to intrude. Namely that, within an established regulatory social practice, it could be the case that a standard has been clearly breached and that an identifiable individual or collectivity (e.g., ‘the offender’) is clearly responsible for that breach, and yet that the person or body generally charged with applying the standard and calling to account does not have the authority to do so. This seems particularly troubling in contexts where the justificatory basis for such regulatory social practices inheres in the value of its aim, such as, e.g., the reduction of harmful conduct. For this reason, philosophers such as Daniela Dover (2019, 2020), Miranda Fricker (2016) and Victoria McGeer (2012; 2019) who are inclined to think that interpersonal moral blame itself has regulative qualities and ambitions, have reason to be cautious about the idea that problems of meddling, hypocrisy, and complicity, readily or incontrovertibly undermine standing.

However, in a criminal justice context, the difficulties are yet clearer, as loss of standing would equate to loss of the state’s capacity to hold particular offenders accountable for criminal conduct. In this respect, it is significant that even Antony Duff (2001) and Gary

Watson (2015), who model criminal justice on interpersonal moral blame, *in practice* back off from a strict ‘no standing’ position and argue instead in favour of ‘compensating for injustice by other means’: for example through sentencing mitigation, modified prosecution policy, social policies, and, in Duff’s case, special rituals inviting the offender to express their experience of injustice, or a Commission to review it. These are all valuable ideas, and they are in our view—depending on context and their likely impact—welcome in their innovation. But the fact that they fall short of a thorough demolition of the standing to hold to account that is in principle advocated by these theorists suggests at the very least a profound tension between the principled and the practical—a tension, we believe, sufficient to motivate a reconsideration of the principle.

Strikingly, in so far as the criminal justice system has its own positive and distinctive institutional conception of standing at all, it is arguably in the form of its claims to ‘jurisdiction’ (Farmer 2016, 118–38). The scope of a legal system’s jurisdiction—etymologically, how far and to whom that system speaks in its civil, criminal, or other legal voice—in relation to different forms of legal standard is a key institutional condition for its effective and legitimate operation, carving out as it does just what is this branch of the law’s ‘business’.⁵ The law cannot operate outside of its jurisdiction; this would be a form of meddling—to put the point metaphorically and by analogy with interpersonal moral blame. Without clear and effective protocols of jurisdiction, no legal order can function properly. Moreover, how far jurisdiction is recognized to run depends upon—and gives us crucial clues to—what the implicit or explicit rationale for the relevant aspect of the system is. In this respect, it is important to note that norms of jurisdiction typically have a spatial dimension. Legal systems characteristically claim the right to ‘speak the law’ to only a certain group of

⁵ In other words, jurisdiction is in effect a theory of what Patrick Todd (2019) calls the ‘business condition’ of standing.

people: those within a particular territory governed by a legitimate state, or those with particular attachments to that territory in some cases.⁶

Unquestionably, the modern liberal state is responsible for creating and maintaining a civil society within its legal jurisdiction, where respect and equality accrue to all, and so has an obligation to address historical and rectify contemporary structural and severe injustice (Braithwaite and Pettit 1990). If it fails in this—as many states do—it stands open to moral criticism and political accountability. But it does not follow that, where some such conditions prevail, it automatically loses its right to hold to account—*if* the criminal justice system is not defined by analogy with interpersonal moral blame.

To substantiate this thought, we need say a little more about a very basic question: that of, to paraphrase Vincent Chiao (2016), what the criminal law is *for*. As we have seen, the scholars who have advanced the case for thinking that deficits such as hypocrisy or complicity undermine the state's standing to hold account in the courts have generally made their argument on the basis of an analogy between interpersonal moral blame and criminal justice: the view that what criminal law is 'for' is quasi-moral blame and censure. By contrast, as suggested in Section 2, our view of criminal responsibility without blame (cf. Kelly 2018) sits most naturally with a *regulatory* view of the function of criminal law: what one of us has in previous work dubbed a conception of 'criminalization as regulation': (Lacey 2016a, ch. 1; 2016b; 2004). But ours is far from being the only such model of criminal justice: indeed, in

⁶ Current debates about the expansion of universal jurisdiction for certain particularly heinous offences are often couched in moralistic terms. This issue is beyond the scope of our article: suffice it to say that we would regard a better way to understand the evolution of transnational and international jurisdiction as being tied to that of authoritative governance structures (and aspirations about developing such structures) at the supranational level. Of course, for many people, particularly those seeking asylum or forced into migration, which legal jurisdiction they fall under—never mind whether the laws of that jurisdiction are just—may be a matter of luck.

recent years there has been what is often referred to as a ‘political’ or ‘public law’ turn in criminal law theory, developing a wide range of purposive, regulatory interpretations of criminal justice. Lindsay Farmer has elaborated a sophisticated argument about the role of modern criminal law in underpinning varying conceptions of civil order (Farmer 2016); while Vincent Chiao has argued that criminal law in the modern administrative welfare state exists fundamentally to sustain cooperation within public institutions, and should be supported to the extent (and only to the extent) that we have good reason to value the social order established by those institutions (Chiao 2019: cf. Thorburn 2019). Cognate accounts of the distinctive political or practical quality of state criminal justice as a system for social regulation or the facilitation of social cooperation have been offered by Stephanie Classmann (2020) and Peter Ramsay (2020). We do not propose to debate the relative merits of these various models in this article. What is important is that these influential conceptions of criminal law, with which our own position resonates in at least this one key respect, share a recognition that criminal law is ‘for’ ends quite distinct from those of moral blame and censure, and must be understood and assessed—morally and otherwise—in light of this fact. Note that none of these conceptions of what it is to have an institution of criminal law and a system of enacting criminal justice is in any way inconsistent with the idea that criminal law and the exercise of its institutional power are appropriately subject to searching critical scrutiny. Indeed Chiao, to take just one example, places considerable emphasis on the fact that his account of the function of criminal law offers a justification for it which is entirely contingent on the value of the socio-political order which it exists to coordinate; while Farmer’s interpretive account would be consistent with just the same qualification. In sum, if we conceptualise criminal law on a regulatory model, broadly speaking, it follows that the idea of standing to blame as a distinct condition on holding to account cannot simply be assumed by analogy with the juridical model of interpersonal moral blame.

Indeed, evidence that the criminal law's function is significantly regulatory can be found in the fact that most modern criminal justice systems feature offences in which liability is 'strict'—in the sense that it can be imposed irrespective of fault—and hence shaped by circumstances in a particularly vivid way. Following H.L.A. Hart, strict liability offences may be regarded as sacrificing the general principle in favour of a requirement of proof of fair opportunity to comply with the law (Hart 1968, ch. 1); and, of course, there are many offences for which liability is not strict. But, when the sacrifice is made, it is not done carelessly, but precisely on the basis of a principled assessment of the relative harms at issue according to the regulatory goals of the system. Hence it is not only that we and others have aimed to offer reasons why we ought to conceptualise the criminal law as forward-looking and regulative in function. Elements of most modern criminal justice systems already do.

If we accept a forward-looking, regulative conception of criminal law as an exercise of state power whose rationale combines—depending on the particularities of one's view—some or more elements of harm reduction, the promotion of civil order, social cooperation, and rehabilitation and reintegration, then there is no issue of its standing to blame *per se*—precisely because *blaming* is not what the criminal justice system is supposed to *do*. However this does not rule out the possibility that a state could lack the authority to hold to account.⁷ The reason for this is simple. The state itself may be *illegitimate*. And, if the state which is exercising its power through the criminal justice system lacks legitimacy, it thereby fails to have authority—as opposed to coercive power—to regulate the behavior of those who fall within its jurisdiction.

⁷ Indeed in his early work, Antony Duff argued that state punishment could not be justified absent radical changes to our social and political systems: Duff 1986, 291–9.

What makes a state legitimate is, of course, a core question of political philosophy, the answer to which is contested. A review of the relevant debates is beyond the scope of this article;⁸ but across the various differences of view, it is generally agreed that a key example of an illegitimate state would be one which is authoritarian, in the sense of anti-democratic and anti-egalitarian. Authoritarian states can wear their authoritarianism more or less on their sleeve. Power can be seized by force—or it can be sucked from a people by anti-democratic tactics such as voter disenfranchisement, unfettered spending on lobbying, political propaganda, or the deployment of the military against internal dissent and protest. Equally, anti-egalitarian principles and policies can be overt or masquerading; one example of the latter would be the claim, widely made in literature on the expansion of criminalization and punishment in the United States after the civil rights advances of the 1960s, that criminal justice policy was used not for proper and transparent regulatory criminal justice purposes but as a proxy for, in Michelle Alexander’s words, the construction of a ‘New Jim Crow’ (Alexander 2010; see also Beckett 1997). In the real world, there is no perfect state: there will always be some respects in which any modern liberal democracy could be more democratic and egalitarian. And it is a difficult theoretical and empirical question whether some particular state that professes to be a modern liberal democracy is in truth sufficiently anti-democratic and anti-egalitarian to count as an authoritarian regime. We do not rule out that this may prove so and that some contemporary states may be so rotten, corrupt, complicit in oppression and injustice, and deficient in a commitment to democracy and equality, that they have no legitimacy. If so, then, in our view, they lack the authority to hold those who live within their territories to account. But there will always be a decision of where to draw the line—how grave and pervasive a state’s illegitimacy must be, for it to lack the authority

⁸ For an excellent overview, see Peter (2017).

to regulate conduct. And, although we make this point as one of principle, the practical concern, clearly felt by legal moralists such as Duff and Watson, it is also relevant in our view. When criminal offences genuinely speak to harmful or wrongful conduct—an assumption of course which may not be met, and which, in particular, is most certainly not met in the case of the criminalization of drug possession (cf. Husak 2002), arguably the major tool in the construction of the ‘New Jim Crow’ (Alexander 2010) —an undermining of the state’s authority to hold to account would imply the further harm of a lost opportunity to engage the offender in an effort to prevent future harm: a classic case of ‘two wrongs making a right’.⁹

4. IN CONCLUSION

Criminal justice theory has become increasingly concerned with the idea of the system’s standing to blame because of a sound instinct that something profoundly important may be currently lacking in many jurisdictions. This instinct has on the whole been conceptualised by appeal to a model of how the standing to blame can be lost in interpersonal contexts, as if a juridically imagined relationship between two individuals is analogous to the relationship between institution and defendant (an application of ‘legal moralism’ in some sense). In particular, the state’s standing to convict and punish has been called into question by its vicarious responsibility for that misconduct which results from forms of structural and severe historical and contemporary injustice known to be associated with heightened risk of individual offending—much as a blamer’s standing to blame can be called into question by

⁹The extent to which criminal law contains mechanisms allowing for the critical scrutiny of or challenge to morally unjustified laws of course varies across systems, with jury nullification—so-called ‘perverse’ jury verdicts—one significant such mechanism in common law systems.

their complicity in the blamee's wrongdoing. In this article, we have argued that it is a mistake to align the two domains. The result of recognising this is not that the criminal justice system's institutional authority is in all cases legitimate, but that we should understand the conditions that make it so—or make it not so—in different terms.

Of course, specific instances of hypocrisy, complicity, or meddling on behalf of individuals who work within the criminal justice system may, as a matter of fact, undermine its perceived legitimacy and authority in these particular instances. But to generalize the interpersonal moral standing argument to 'regulatory contexts' is too quick. We note, too, that the criminal law contains the resources to address the facts that would otherwise justify a charge of state complicity in offending—for example, 'rotten social background' conditions of poverty, abuse, oppression, and genuine lack of educational and employment opportunities—through, for example, a more nuanced application of the requirement of a fair opportunity to comply with the law required for a guilty finding, or mitigation in relation to sentencing (cf. Duff (2001) and Watson's (2015) ideas of 'compensating for injustice by other means', noted above). No doubt, the criminal law ought to avail itself of these resources a great deal more than it typically does; the point is rather that it is not the case that the only way for the criminal law to reckon with such systemic failures of the state is through an abdication of the authority to hold to account.

The overall project of criminal justice—as of other regulatory, coordinating practices and discourses—carries a robust presumption of authority subject to jurisdiction rules even under conditions of particularized individual moral defects by those who work within it. Severe structural injustices, on the other hand, such as those perpetrated by authoritarian, anti-democratic, anti-egalitarian regimes, go directly to the question of the overall legitimacy of

the state's authority and must be faced as such. If—as may well be the case in many jurisdictions in today's world—these structural injustices are so grave as to undermine the legitimacy of the state's authority to criminalise and punish because in effect the democratic process itself and the public regulatory goods which underpin that legitimacy are ones from which too many are structurally excluded—then the state as a whole lacks authority, and so too do its various organs and institutions. In the institutional context of regulatory systems such as criminal justice, 'standing to call to account' is, accordingly, best understood as continuous with the question of legitimate state authority.

5. REFERENCES

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