

RESEARCH ARTICLE

In Their Name: On the Standing of the State to Hold Marginalized Offenders to Account

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Abstract

Many claim that if a state is responsible for structural injustice, then that state lacks the standing to hold marginalized offenders to account. Call this the *compromised standing claim*. I argue that this claim sits in tension with a further assumption: that states hold offenders to account *in their people's name*. Specifically, I argue that when A holds B accountable in the name of C, A's own hypocrisy and complicity are not sufficient to undermine her standing to hold B accountable. This means that there exists a gap between a state's responsibility for structural injustice and its compromised standing. After motivating this challenge, I consider one response according to which the *people* have lost their standing with respect to marginalized offenders and that the state, qua representative, inherits the standing of its people. I propose two strategies for making this response precise and argue that neither can vindicate the compromised standing claim in its standard form.

I. Introduction

Many authors claim that if a state is responsible for structural injustice, that state lacks the standing to hold marginalized offenders to account. In its common form, this claim ranges over even serious crimes committed by the marginalized and asserts that marginalized offenders have significant complaints against being held accountable. Hence, on this view, the standing of unjust states is significantly compromised even with respect to marginalized offenders guilty of murder and assault. Call this the *compromised standing claim*.¹

¹For defense of the compromised standing claim, see R.A. DUFF, PUNISHMENT, COMMUNICATION AND COMMUNITY (2001); R.A. DUFF, ANSWERING FOR CRIME (2007); R.A. Duff, *Blame, Moral Standing and the Legitimacy of the Criminal Trial*, *RATIO* 23:123–40 (2010); Victor Tadros, *Poverty and Criminal Responsibility*, *J. OF VALUE INQUIRY* 43:391–313 (2009); Gary Watson, *A Moral Predicament for the Criminal Law*, *INQUIRY* 58(2):168–188 (2015); Jeffrey Howard, *Punishment, Socially Deprived Offenders, and Democratic Community* (2013); Jeffrey Howard & Avia Pasternak, *Criminal Wrongdoing, Restorative Justice, and the Moral Standing of Unjust States*, *THE JOURNAL OF POLITICAL PHILOSOPHY* 31(1):42–59 (2023); Andy Engen, *Punishing the Oppressed and the Standing to Blame*, *RES PHILOSOPHICA* 97(2):271–295 (2020); ERIN I. KELLY,

To say that a state is responsible for structural injustice is to say that the policy decisions of that state perpetuate patterns of systemic disadvantage.² In the U.S. context, one might point to drug criminalization policy, harsh mandatory minima, and three-strikes laws, as well as insufficient labor protections, inadequate welfare spending, and a failure to pay reparations for slavery and Jim Crow as examples of policy decisions that perpetuate patterns of systemic disadvantage. Proponents of the compromised standing claim standardly say that a state's perpetuation of structural injustice makes it *hypocritical* or *complicit* with respect to the crimes the marginalized commit.

The compromised standing claim enjoys widespread support. Yet, it sits in tension with a further assumption commonly made by its proponents: that states hold offenders accountable *in their people's name*. Victor Tadros writes of the criminal trial as a forum through which offenders are "held responsible by the people, as represented by the state."³ Anthony Duff writes that while an offender is "called to answer by a particular court [...] it is not that court *to* which he is accountable." Instead, "he is answerable to those, or that, in whose name this court speaks."⁴ In this picture, states act as proxies or representatives of their people. States hold offenders accountable in their people's name in that they both i) act as the interpreters and executors of their peoples' rights, and ii) secure those rights through a mechanism, the criminal law, that symbolically speaks in the community's voice.⁵ If this is correct, however, then it is unclear why a state's own wrongdoing should undermine its standing. Consider the following case.

Party: Rowdy has recently hosted a wild house party. During the party, some of Rowdy's guests trespassed onto Neighbor's property and damaged her fence. As per community policy, the elected representative of the community, Spokesperson, responds by suspending some of Rowdy's community privileges and demanding, on behalf of Neighbor and the community as a whole, that Rowdy make amends for his wrongdoing. While most members of the community are respectful and have never disturbed the peace, Spokesperson herself has little regard for the community's peacekeeping norms. Furthermore, Spokesperson both *encouraged* Rowdy to host his party and supplied him with the sound system that he would ultimately use to disturb his neighbors.

Spokesperson's standing to hold Rowdy accountable on her own behalf is significantly compromised. But is Spokesperson's standing similarly compromised when holding Rowdy accountable *to* the community? It seems not. Notice that a response from Rowdy such as "Who are *you* to blame me" or "You're just as bad as me!" would seem inappropriate here. Spokesperson is not blaming Rowdy herself; rather, she is

THE LIMITS OF BLAME: RETHINKING PUNISHMENT AND RESPONSIBILITY (2018), at ch.6; TOMMIE SHELBY, DARK GHETTOS: INJUSTICE, DISSENT, AND REFORM (2016), at ch.8.

²Here I take a *state* to refer to the institutional apparatus that governs a particular territory and that claims a monopoly on the legitimate use of coercive force in that territory.

³Tadros, *supra* note 1, at 395.

⁴DUFF, PUNISHMENT, COMMUNICATION AND COMMUNITY at 185, emphasis in original.

⁵Duff denies that "the voice of the criminal law is the voice of the state", insisting that the criminal law speaks "in the voice of ... its citizens" R. A. DUFF, THE REALM OF CRIMINAL LAW (2018), at 109–110.

simply performing the role assigned to her by the community. Were Rowdy to make such a complaint, one might reasonably respond as follows: “But you’re being held accountable to the community. It is in *their name* that Spokesperson is exercising her powers.” Since Rowdy *is* accountable to the community, it is unclear how he has a legitimate claim that he is not held accountable *to* that community. This implies that where A holds B accountable in the name of C, A’s own wrongdoing is insufficient to significantly compromise her standing.⁶ Hence, if states hold offenders to account in their people’s name, there is a *gap* between a state’s responsibility for structural injustice and its compromised standing. The proponent of the compromised standing claim must show how this gap can be closed.

One way to try closing the gap between a state’s own wrongdoing and its significantly compromised standing is to say i) that when a state is responsible for structural injustice, its *people* will lack the standing to hold marginalized offenders accountable, and ii) that the state, qua representative, *inherits* the standing of its people. Since several proponents of the compromised standing claim suggest that citizens of countries like the U.S. have lost their standing and seem to endorse the idea that states inherit the standing of their people, I take it that a response of this kind is latent in the literature.⁷ If a response of this kind can be made to work, the compromised standing claim may be on solid ground.

I argue that a response of this kind is unlikely to vindicate the compromised standing claim in its standard form. I begin by noting that this response is under-specified without some story about what it means to say that the *people* have lost their standing. I then examine two possible strategies for making this explicit. The first strategy claims that the citizenry of a structurally unjust state have lost their standing as a *collective*. The second strategy claims that the majority of individual citizens have lost their standing. Call these the *collectivist* and *individualist* strategies, respectively. I argue that the collectivist strategy faces two metaphysical challenges and that the individualist strategy can at best vindicate a much weaker form of the compromised standing claim. In particular, I argue that since the majority of citizens will not lack the standing to hold marginalized offenders accountable for serious crimes like assault and murder, the individualist strategy may at best establish that unjust states lack the standing to hold marginalized offenders accountable for minor offenses.

The paper is structured as follows. [Section II](#) clarifies the content of the compromised standing claim and introduces what I mean by the standing to hold accountable. [Section III](#) spells out the assumption that states hold offenders to account in their people’s name and shows how this gives rise to a gap between a state’s own wrongdoing and its compromised standing. [Section IV](#) considers a strategy according to which the people of a structurally unjust state have lost their standing as a collective. [Section V](#) considers a strategy according to which most individual citizens have lost their standing. [Section VI](#) briefly considers the prospects for defending the compromised standing claim without appeal to citizens’ lack of standing. [Section VII](#) concludes.

⁶You might think that Rowdy retains some minor complaint against being held accountable by Spokesperson qua representative. Even if this is right, the challenge persists. Since it seems that acting in the name of another at least dramatically tempers the degree to which one’s own wrongdoing undermines one’s standing, it follows that the proponent of the compromised standing must show why a state’s responsibility for structural injustice should *significantly* compromise its standing.

⁷E.g., DUFF, *supra* note 4, Howard, *supra* note 1; Tadros, *supra* note 1; and Watson, *supra* note 1.

II. The Compromised Standing Claim and the Standing to Hold Accountable

A. The Compromised Standing Claim

I make three clarificatory remarks about the content and normative implications of the compromised standing claim.

First, it is possible to devise weaker and stronger versions of the compromised standing claim. A strong version asserts that structurally unjust states lack the standing to hold marginalized offenders to account for even serious crimes like murder and assault. A weaker version asserts that structurally unjust states lack standing only with respect to relatively minor offenses committed by the marginalized. Since proponents of the compromised standing claim commonly have the strong claim in mind, this is my target.⁸ As we shall see, however, there may be reason to think that only the weaker claim is defensible.

Second, the compromised standing claim is *not* the claim that marginalized offenders are less responsible, or blameworthy, than their nonmarginalized counterparts.^{9,10} Worries about diminished responsibility may be appropriate, yet such worries are orthogonal to worries about compromised standing. The compromised standing claim asserts that it is *pro tanto* wrong for an unjust state to hold marginalized offenders to account even when those offenders are fully responsible for their crimes.

Third, while the compromised standing claim is often framed as the claim that unjust states *lack* the standing to hold marginalized offenders accountable, this obscures the fact that standing is most likely a scalar rather than a bivalent concept. Accordingly, the appropriate interpretation of the compromised standing claim is that a state's responsibility for structural injustice *significantly* compromises its standing with respect to marginalized offenders.¹¹ While I sometimes refer to states' *lack* of standing, this should always be substituted for the claim that standing is significantly compromised.

B. Standing Norms on Holding Accountable

To hold another accountable is to demand an answer to a charge of alleged wrongdoing and respond with blame or punishment if that other is found guilty

⁸Duff writes: "if the law lacks the standing to call the unjustly excluded to account, it lacks that standing in relation to *all* crimes, including the most serious *mala in se*" (DUFF, *supra* note 4, at 184, emphasis original). For similar statements of the strong claim, see Watson, *supra* note 1, at 184; and Howard & Pasternak, *supra* note 1, at 43.

⁹Nor is it the claim that the marginalized lack duties to obey the law (DUFF, *supra* note 4, at 184–186). See SHELBY, *supra* note 1, ch.7 for an argument that marginalized offenders may lack duties to obey.

¹⁰Here I use 'responsibility' to refer to what gets referred to in the responsibility literature as 'accountability.' For careful discussion about the ways structural injustice may decrease responsibility, see DAVID O. BRINK, *FAIR OPPORTUNITY AND RESPONSIBILITY* (2021), ch.9.

¹¹Writing of the implications of compromised standing, Watson writes that the U.S. does "serious injustice to many defendants" by holding them accountable (Watson *supra* note 1, at 175). Duff concludes from compromised standing that "our present practices of criminal justice are, if not *wholly* unjustified, very largely unjustified" (DUFF *supra* note 4 at 200, emphasis original). See also Tadros, *supra* note 1, at 393, and Howard & Pasternak, *supra* note 1, at 49.

without excuse.¹² I assume that norms of standing govern when parties are at liberty to interfere with others in this way. This characterization of standing norms finds support in the common observation that those on the receiving end of standingless blame can appropriately *dismiss* that blame.¹³ This is not to suggest that where Sally lacks the standing to blame Brian, Brian can appropriately regard himself as blameless. Instead, it is to say that where Sally lacks standing, Brian can appropriately dismiss Sally's blame, in particular. Given that blame without standing is typically accompanied by feelings of indignation on behalf of the blame's recipient, it is assumed that A's standing to hold B accountable covaries with A's possession of an *agent-relative directed duty* to refrain from holding B accountable. The duty is *agent-relative* in that it is a duty held by A, specifically. The duty is *directed* in the sense that it is a duty that A owes to B.¹⁴

Since to lack standing is to have a directed duty not to be held accountable, the compromised standing claim entails that marginalized offenders have legitimate claims that the state refrains from holding them accountable through its courts.¹⁵ Of course, it is nonetheless sometimes all things considered permissible to override a person's legitimate claims. Because of this, many proponents maintain that it will often be all things permissible for unjust states to hold the marginalized to account.¹⁶ In such cases, there will be a moral residue that calls to be addressed. Here several proponents suggest that unjust states may incur duties to publicly recognize the wrong done to the offender by trying and punishing her.¹⁷

I remain agnostic in this paper as to what standing *is*. At a general level, we can simply identify standing with a Hohfeldian right. This admits of several possible refinements, however, depending on how one specifies the internal structure of this right. Authors tend to disagree as to whether standing is best understood as a normative power, a privilege, or a combination of normative power and privilege.¹⁸

¹²For similar formulations of what it means to hold another to account, see Howard & Pasternak, *supra* note 1, at 45; Duff, *Blame, Moral Standing and the Legitimacy of the Criminal Trial*; and James Edwards, *Standing to Hold Responsible*, JOURNAL OF MORAL PHILOSOPHY 16: 437.

¹³Cohen speaks of those on the receiving end of standingless blame as being able to *silence* that blame. Todd similarly speaks about the recipient of standingless blame being "entitled to reject" the blamer's blame. Radzik in turn, talks of agents being *able to ignore* the criticism of those that lack standing, whilst Herstein, Edlich and Snedegar all speak in terms of permissibility of *dismissing* or *deflecting* blame. See, respectively, Gerrald A. Cohen, *Casting the First Stone: Who Can, and Who Can't Condemn the Terrorists?*, ROYAL INSTITUTE OF PHILOSOPHY SUPPLEMENT 58: 113–36 (2006), at 119; Patrick Todd, *A Unified Account of the Moral Standing to Blame*, NOÛS 53(2): 347–74 (2019), at 355; Linda Radzik, *On the Virtue of Minding Our Own Business*, JOURNAL OF VALUE INQUIRY 46:173–182 (2012), at 177; Ori J. Herstein, *Justifying Standing to Give Reasons*, PHILOSOPHER'S IMPRINT 20(7):1–18 (2020); Alexander Edlich, *What about the Victim? Neglected Dimensions of the Standing to Blame*, JOURNAL OF ETHICS 26:209–228; Justin Snedegar, *Explaining Loss of Standing to Blame*, JOURNAL OF MORAL PHILOSOPHY, 1–29.

¹⁴For discussion, see Snedegar, *Id.*; Herstein, *Id.*; and Edwards, *Id.*

¹⁵This is why Duff associates a state's compromised standing with a *bar to trial*; if states lack standing, offenders can claim that they do not have to answer to the state's courts (Duff, *supra* note 12).

¹⁶E.g., Watson, *supra* note 1; Tadros, *supra* note 1; Howard & Pasternak, *supra* note 1; and SHLEBY, *supra* note 1.

¹⁷E.g., Watson, *Id.* Doing this without undercutting the communicative aims of the criminal law may prove difficult, of course, for it is clearly important for the state not to imply that the offender is *blameless*.

¹⁸For discussion, see Edwards, *supra* note 12; Ori J. Herstein, *Understanding Standing*, PHILOSOPHICAL STUDIES, 174:3109–3132 (2017); and Kyle G. Fritz & Daniel J. Miller, *A Standing Asymmetry between Blame and Forgiveness*, ETHICS: 132(4).

Each account will predict slightly different things about the way in which standing norms regulate our interference with one another's wrongdoing. Because these differences are largely inconsequential for the purposes of this paper, I shall simply talk about standing as a right.

C. Bases for Loss of Standing: Hypocrisy and Complicity

The dismissive responses that characterize lack of standing find their voice in a variety of expressions. These include: "You're just as bad as me!", "You're partly responsible!", and "That's none of your business!" Each of these responses is typically taken to point toward a distinct basis for loss of standing. These are standardly referred to as the *hypocrisy basis*, the *complicity basis*, and the *meddling basis*, respectively.¹⁹ Because there is more than one basis, loss of standing is *multiply realizable*.

The meddling basis points to the fact that the blamer lacks a sufficient *stake* in the wrongdoer's conduct. If criminalization is suitably restricted to conduct in which the state takes a proper interest, however, then the meddling basis for loss of standing will not apply. Proponents of the compromised standing claim thus standardly appeal to hypocrisy and complicity as the relevant bases for a state's loss of standing. I will explicate each basis and the relationship between them.

We can identify both narrow and broad readings of the hypocrisy basis. According to a narrow reading, the hypocrisy basis states that A lacks the standing to blame B for B's wrongdoing if A has committed similar or worse wrongs herself and has failed to make amends for that wrongdoing.²⁰ According to a broad reading, the hypocrisy basis states that A lacks the standing to blame B for B's wrongdoing if A lacks concern for the very values that would condemn that wrongdoing.²¹ The broad reading seems more promising. But both face difficulties.

The narrow reading cannot capture many cases that we intuitively recognize as hypocritical. Charges of hypocrisy seem appropriate even if the other has not *committed* similar or worse wrongs. For instance, those who desperately desire to commit murder but who lack the opportunity to follow through on these desires nonetheless appear hypocritical if they blame others for murder.

The broad reading, on the other hand, suffers from what we might call the *scope problem*. Suppose that Sally regularly commits assault. Does this mean Sally lacks concern for the values that would condemn *theft*?²² Answering such questions requires specifying the scope of the value that one has shown insufficient concern for. This proves tricky. If one specifies the value in a fine-grained way, then murderers may only lack the standing to blame murderers. If one specifies the value in a coarse-

¹⁹ A further potential basis points to the past wrongs that the blamer has done to the blamed. We might call this the *impaired relationship basis*. I restrict myself to discussion of hypocrisy and complicity since these two conditions are most frequently cited as the basis for the compromised standing claim. For relevant discussion, see T.M. SCANLON, *MORAL DIMENSIONS* (2008), ch.4; and Tadros, *supra* note 1, at 405.

²⁰ Edlich, *supra* note 13, at 211.

²¹ See Todd, *supra* note 13.

²² For discussion, see Jules Holroyd, *Punishment and Justice*, *SOCIAL THEORY AND PRACTICE*, (2010); Matt Matravers, 'Who's Still Standing? A Comment on Anthony Duff's Preconditions of Criminal Liability', *JOURNAL OF MORAL PHILOSOPHY* 3(3): 320–30 (2006); and Benjamin S. Yost, *Standing to Punish the Disadvantaged*, *CRIMINAL LAW AND PHILOSOPHY* 3:1–23 (2022).

grained way however, such that pickpockets lack concern for the value of bodily integrity, then it follows that pickpockets lack the standing to hold even murderers to account. Both results seem wrong. Because of the problems faced by both readings, I adopted a modified version of the broad reading. Specifically, I assume that where X is a wrong of severity S, A lacks the standing to hold B accountable for X if A lacks concern for wrongs of similar or greater severity than S.²³

Roughly, the complicity basis states that A lacks the standing to blame B for Xing if A is *culpably involved* in B's Xing, where this entails that A's involvement is both wrong and that A is responsible for that wrongdoing. The complicity basis is sometimes understood as entirely independent from the hypocrisy basis. However, once one adopts a broad reading of the hypocrisy basis, it follows that the complicity basis is best understood as a *special case* of the hypocrisy basis: a special case in which A has shown themselves to lack the relevant kind of concern *through* their involvement in B's wrongdoing.²⁴ I assume this is correct. Of course, this is not to deny that complicity may have independent moral importance in our assessments of standing. Indeed, blaming others for wrongs that one is wrongfully involved in seems *worse* than blaming others for wrongs that one has simply failed to show insufficient concern for. One promising way to capture this intuition is to say that complicity *aggravates* the wrong of standingless blame. In this picture, while a lack of concern for similar or worse wrongs triggers a duty not to blame, complicity strengthens that duty. So construed, loss of standing is scalar.²⁵

Why does a state's responsibility for structural injustice make it hypocritical and complicit with respect to the crimes the marginalized commit? One prominent argument appeals to the fact that structural injustice is *criminogenic*: structurally unjust conditions increase the likelihood that the marginalized commit crime.²⁶ Since structural injustice is criminogenic, proponents argue that states perpetuating such injustice are therefore partly *responsible* for the crimes the marginalized commit. From here, we can say that unjust states have shown themselves to lack concern for the wrongdoing committed by the marginalized and that they have done so *through* their very involvement in those crimes. Unjust states are thus both hypocritical and complicit with respect to the crimes committed by the marginalized. This motivates the thought that the standing of unjust states is *significantly compromised*.²⁷

²³This captures the intuitive thought that, as Tadros puts it, "rapists and murderers ought not to hold thieves responsible for stealing" (Tadros, *supra* note 1, at 396). For similar explication of the hypocrisy basis, see Findlay Stark, *Standing and Pre-Trial Misconduct: Hypocrisy, 'Separation,' Inconsistent Blame, and Frustration*, CRIMINAL LAW AND PHILOSOPHY 18: 327–49 (2024).

²⁴For discussion, see Todd, *supra* note 12; and KASPER LIPPERT-RASMUSSEN, *THE BEAM AND THE MOTE* (2024), at 117–121.

²⁵See Tadros, *supra* note 1, at 404 for a suggestion along these lines. Although, see LIPPERT-RASMUSSEN, *Id.* at 121 for doubts that complicity makes any further difference to standing.

²⁶Of course, structural injustice must be *wrongfully* criminogenic for the complicit argument to go through. See Tadros, *Id.*, and Watson, *supra* note 1 for discussion and defense.

²⁷The broad reading of the hypocrisy condition can be used to argue that states that perpetuate structural injustice have compromised standing with respect to *all* offenders (Yost, *supra* note 22; Matravers, *supra* note 22). If standing is scalar, however, then the proponent of the compromised standing claim can accept this result while maintaining that it is only when hypocrisy is aggravated by complicity that we have a weighty concern with compromised standing; see, e.g., Tadros, *Id.* This is why I frame the compromised standing claim as a claim about *significantly* compromised standing.

I have arguably said nothing about what *explains* loss of standing. To point to the bases for loss of standing, you might say, is simply to provide an *extensional* account of standing norms; it is to provide an account of the conditions under which an agent can be said to lack standing. One explanation for why hypocrisy and complicity undermine standing points to the fact that blame under such conditions generates a particular kind of egalitarian wrong. Roughly, the hypocritical blamer makes an objectionable claim that she is morally superior to the target of her blame; she implicitly claims to be exempt from the very norms that she blames the other for violating.²⁸ This explanation may prove promising. For my purposes, however, I need not commit myself to its truth. I shall thus speak as if hypocrisy and complicity are explanatorily basic.²⁹

III. Holding Accountable in the Name of Others

A. Motivating the Challenge

I argue that the compromised standing claim is in tension with the assumption that states hold offenders to account in their people's name. If states hold offenders accountable in their people's name, then there exists a *gap* between the wrongdoing of the state and its compromised standing. Below I provide further motivation for this challenge. Following Duff, I understand a state's people to be coextensive with its citizenry.³⁰

We should distinguish acting *in the name* of another from acting for another's *sake*. While both imply acting to promote the other's interests, the former implies a certain kind of representation. For my purposes, I take the relevant form of representation as having both formal and symbolic components.

Formally, states hold offenders to account in their people's name in that they act as the authorized interpreters of their citizens' rights and duties. These rights will include rights to be protected from public wrongdoing and rights that public wrongs be publicly denounced. These duties will include duties to protect others from public wrongdoing as well as duties to condemn such wrongs. *Symbolically*, states hold offenders to account in their people's name in that the criminal law provides an institutional manifestation of the community's voice. I take it that it is the conjunction of these two kinds of representation that motivates authors like Duff and Tadros

²⁸See Herstein, *supra* note 18, at 10 for this formulation. For alternative formulations of the egalitarian explanation, see R.J. Wallace, *Hypocrisy, Moral Address, and the Equal Standing of Persons*, PHILOSOPHY AND PUBLIC AFFAIRS 38(4): 307–341 (2010); and Kyle G. Fritz & Daniel J. Miller, *Hypocrisy and the Standing to Blame*, PACIFIC PHILOSOPHICAL QUARTERLY 99: 118–39 (2018). For criticism, see Todd, *supra* note 13. For the view that an egalitarian account provides answer to why hypocritical or complicitous blame is *wrong* but not an explanation for why these conditions undermine standing, see LIPPERT-RASMUSSEN, *supra* note 23, at ch.2.

²⁹A proponent of the compromised standing claim cannot bracket this issue so easily. If we were convinced by the egalitarian explanation for loss of standing *and* we thought that claims to moral equality only make sense between natural persons, then we might doubt that there could ever be a standing-based complaint against being held accountable by the state in the first place. The state, after all, is not a natural person.

³⁰Duff writes: “a defendant in a criminal court appears ... as a citizen who must answer to his fellow citizens” (DUFF, *supra* note 5, at 103). See further R. A. DUFF, ANSWERING FOR CRIME, at ch.2; and R.A Duff, *Responsibility, Citizenship, and Criminal Law*, PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW (R.A Duff & Stuart Green eds., 2011).

to speak of criminal law as a mechanism through which offenders are held accountable *by* the people.^{31,32}

This conception of the state as acting from certain rights and duties of its citizens has a long pedigree in political philosophy. For my purposes, I need not commit myself to any particular account of how states come to stand as representatives in this formal sense. One might appeal to the actual (express or tacit), hypothetical, or normative consent of citizens who thereby permit their states to secure their rights and discharge their duties.³³ Whichever way we cash out the basis for such authority, however, it does not follow that a state *will* always act in its citizens' name.³⁴ For this reason, we will likely want to say that a state acts in the name of its citizens in Xing if and only if doing so constitutes a *reasonable interpretation* of what securing and discharging its citizens' rights and duties requires in that circumstance.³⁵ This observation will be relevant in Section VI when we briefly consider the suggestion that a structurally unjust state might *fail* to hold marginalized offenders accountable in the name of its people.

Does holding accountable in the name of another affect one's standing? The story of Spokesperson and Rowdy sketched above suggests it does. Recalling that Spokesperson is both hypocritical and complicit with respect to Rowdy's wrongdoing, Rowdy would thus have a significant complaint if Spokesperson were to hold her accountable on her own behalf. But does Rowdy have a significant complaint about being held accountable by Spokesperson qua representative? Assuming that Spokesperson *is* truly acting in the name of the community, the answer seems to be *no*. Once again, note that the paradigmatic responses characteristic of loss of standing look inappropriate in this case. Responses of the form "Who are *you* to blame me?" or "You're just as bad as me!" simply misdescribe what Spokesperson is doing when she holds Rowdy accountable as a representative of the community. Spokesperson is simply performing the role assigned to her by the community. Since Rowdy *is*

³¹For the thought that criminal law represents in this symbolic sense, see Feinberg's famous claim that criminal punishment expresses condemnation from the community in JOEL FEINBERG, *DOING AND DESERVING* (1970), at 98–100. For canonical discussion of different forms of political representation, see HANNA F. PITKIN, *THE CONCEPT OF REPRESENTATION* (1967).

³²Alternative conceptions of "acting in the name of" will yield different specifications of who is being represented by the state. If a formal component was sufficient, for instance, then we may wish to expand the set of persons in whose name the state acts. For instance, we might think that even non-citizen visitors authorize the state to prosecute and punish in their name.

³³For a classic example of an explicit consent account, see John Locke, *The Second Treatise of Government*, LOCKE: TWO TREATISES OF GOVERNMENT (Peter Laslett ed., 2022). For a contemporary related account that appeals to citizens' willful transfers of rights and duties to the state, see Stephanie Collins & Holly Lawford-Smith, *The Transfer of Duties*, *THE EPISTEMIC LIFE OF GROUPS* (Michael Brady & Miranda Fricker eds., 2016). Normative consent points to cases in which citizens have *duties* to consent. In this context, citizens would normatively consent just in case they have duties to transfer some of their rights and duties to the state. For original discussion of normative consent, see DAVID ESTLUND, *DEMOCRATIC AUTHORITY* (2008), ch.1.

³⁴Public protests using the slogan "Not in my name" highlight this idea. While a state might claim to be exercising its citizens' legitimate rights to self-defense in pursuing a war effort, whether this is true will depend on the nature of the state's conduct in that war.

³⁵For related discussion, see Anna Stilz, *Collective Responsibility and the State*, *THE JOURNAL OF POLITICAL PHILOSOPHY* 19(2): 190–208.

accountable to the community in this case, it is unclear how he could claim that an injustice was being done to him in being held accountable *to* this community.³⁶

This result is entirely compatible with thinking that Spokesperson is not fit for the job, that Spokesperson doesn't deserve to be in such a position of authority, and that the community should therefore elect a new representative. This can all be true. What Rowdy's lack of a complaint suggests, however, is that Spokesperson's *own* conduct does not defeat her standing when she is properly acting on behalf of the community. This presents a clear challenge for the proponent of the compromised standing claim, for it suggests that where a state holds offenders accountable in its people's name, that state's own hypocrisy and complicity are insufficient to significantly compromise its standing.³⁷

B. A Response

There are at least two ways that one might try to explain the conclusion that Spokesperson has standing in *Party*.³⁸ First, you might say that in holding Rowdy accountable in the community's name, Spokesperson's blame lacks whatever feature ultimately explains why hypocrisy and complicity undermine standing in the first place. For instance, if you were persuaded by some broadly egalitarian explanation for why hypocrisy and complicity undermine standing, then you might think that the relevant egalitarian wrong is absent when hypocrites, like Spokesperson, act solely within their capacity as representatives.³⁹ Second, you might say that Spokesperson has the standing to hold Rowdy accountable because the community has standing, and that representatives *inherit* the standing of those they represent.⁴⁰ Since the first explanation relies upon a contested account of what explains the loss of standing and the second explanation is implicit in at least several defenses of the compromised standing claim, I bracket the first explanation and consider the prospects for a response if we accept the second.

Those who think that representatives inherit the standing of those they represent might say the following: *Party* is a poor analogy for the case of a structurally unjust society. In *Party*, it was assumed that the members of the community were, in effect,

³⁶There is an obvious confound in considering cases like this, since we might imagine that Spokesperson's response to Rowdy includes some form of personal rebuke or criticism from Spokesperson herself. Once we control for this confound, however, it is difficult to see how Rowdy could have a legitimate complaint against being held accountable by Spokesperson.

³⁷As noted in fn. 6, this challenge stands even if you think that Rowdy retains some minor complaint against being held accountable by Spokesperson. Since it seems that acting in the name of another at least dramatically tempers the degree to which one's hypocrisy and complicity undermine one's standing, it follows that the proponent of the compromised standing must show why a state's responsibility for structural injustice should *significantly* compromise its standing. I thank David Enoch, Maggie O'Brien and Adam Slavny for the discussion.

³⁸I thank Luís Duarte d'Almeida for pushing me to clarify the possibilities discussed in this section.

³⁹For the related suggestion that A's claim against standing in a relation of inferiority with respect to B is tempered when 'B' refers to an office or role, see NIKO KOLODNY, *THE PECKING ORDER* (2023), ch.5.

⁴⁰For defense of the claim that representatives might, in my words, *inherit* the standing of those they represent, see Kyle G. Fritz & Daniel J. Miller, *Putting Standing to Work* (unpublished manuscript) (on file with author). For related discussion about how representatives might come to occupy the normative space of those they represent, see Alexander Edlich & Jonas Vandieken, *Acting on Behalf of Another*, *CANADIAN JOURNAL OF PHILOSOPHY*, 52(5): 540–555.

morally faultless. But this is surely *not* true for the citizens of states that are responsible for perpetuating structural injustice. A more appropriate case, one might suggest, is *Party 2*.

Party 2: Just like *Party* except the members of the community are all guilty of hosting similarly wild house parties in the past and are each responsible for encouraging Rowdy to host his party.

One might think that *Party 2* provides a better fit with a structurally unjust society. Further, if Spokesperson *inherits* the standing of those she represents, perhaps Rowdy *does* have a weighty complaint. “I don’t have to answer to *them*” she might say, “They’re just as bad as me!”⁴¹

I take it that many proponents of the compromised standing claim do want to say something like this. Duff, for instance, writes of criminal defendants as being “called to answer by their fellow citizens collectively,”⁴² and suggests that the citizenry of structurally unjust states have compromised *their* standing with respect to the marginalized.⁴³ Howard follows suit. Howard writes: “That judges should normally think of themselves as acting on behalf of the whole citizenry suggests that they should take their standing to punish to be compromised with respect to offenders who are victims of egregious social injustice.”⁴⁴ Like Duff, Howard suggests that it is the very fact that state officials hold offenders to account on behalf of the citizenry that explains why marginalized offenders have claims against being tried and punished by such officials. Such officials, Howard tells us, should see themselves as “acting on behalf of a body of people who have lost their standing to punish.”⁴⁵

From these comments, we might offer the following argument on behalf of the proponent of the compromised standing claim.

- (1) When holding an offender accountable in the name of its people, a state has standing to the degree that its people have standing.
- (2) If a state has perpetuated structural injustice, then the people of that state will have lost their standing to hold marginalized offenders to account.
- (3) Therefore, if a state has perpetuated structural injustice, then that state will lack the standing to hold the marginalized to account (the compromised standing claim).

⁴¹One might still doubt the appropriateness of this complaint if Rowdy’s direct victim, Neighbor, retains her standing. In places, Duff writes as if third party citizens themselves speak on behalf of the direct victims of crime. He writes: “the community speaks, through the court, on behalf of the victim whose wrong it shares” (DUFF, *supra* note 4, at 162). If this is right, however, then we might think that the only persons who need standing for the state to have standing are the offender’s direct victims. I do not pursue this issue, but it is worth noting that this may provide independent reason to doubt the plausibility of the response examined here. For the thought that states act specifically in the name of the victims of crime, see Adil A. Haque, *Group Violence and Group Vengeance: Towards a Retributivist Theory of International Criminal Law*, BUFFALO CRIMINAL LAW 9(1):273–328 (2005).

⁴²DUFF, ANSWERING FOR CRIME, at 191.

⁴³See DUFF, *supra* note 4, at 188: “he is not answerable [...] to the political community [...] and thus [...] he is not answerable before the criminal courts, which act in the name of that community and its law.”

⁴⁴Howard, *supra* note 1, at 123.

⁴⁵*Id.* at 135.

If successful, this argument would succeed in closing the gap between a state's own perpetuation of structural injustice and its compromised standing, at least for democratic states in which the citizenry is implicated in the state's unjust policies. According to this argument, states lack standing *because* their people lack standing.

This argument may appear promising. However, (1) is currently underdescribed. Without specifying what it means to say that the *people* lack standing, the argument cannot be evaluated. In the following sections, I consider two ways that one might try to specify the first premise. I call these the *collectivist strategy* and the *individualist strategy*, respectively. I provide two reasons to think that the collectivist strategy is unlikely to prove persuasive and argue that the individualist strategy vindicates, at best, a weaker version of the compromised standing claim. Put differently, I argue that neither interpretation of (1) is capable of persuasively securing (2), and that the argument above, therefore, looks unsound.

IV. The Collectivist Strategy

The collectivist strategy interprets (1) as follows.

- (1') When holding an offender accountable in the name of its people, a state has standing to the degree that the people, qua collective, have standing.

I suspect that many will interpret (1) this way.⁴⁶ Yet there are two reasons why the collectivist strategy is unlikely to prove persuasive. The first is that a body of citizens does not seem capable of *refraining* from holding the marginalized accountable. This gives us reason to doubt that a body of citizens could possess a duty not to do so. The second is that the collectivist strategy relies on a highly controversial claim in social metaphysics, namely, that an unstructured group of individuals can be responsible for wrongdoing. Before considering each, let me say a few words about the kind of group that a body of citizens might be.

Authors in the social metaphysics literature commonly identify three types of groups: *corporate agents*, *teleological groups*, and *unstructured groups*.⁴⁷ Corporate agents are groups that possess a rational point of view, a capacity for action, and a decision-making architecture that renders the group responsive to moral reasons.⁴⁸ States, companies, and organizations are all likely candidates for corporate agents, so understood. *Teleological* or *goal-oriented* groups, on the other hand, lack the kind of decision-making architectures corporate agents possess. However, since

⁴⁶See Watson, *supra* note 1, at 177 for the suggestion that the entire political community is responsible for the structural injustices suffered by the marginalized. See DUFF, *supra* note 4, at 139 for the claim that the marginalized have suffered at "our collective hands." Similar remarks can be found in Tadros, *supra* note 1.

⁴⁷For this tripartite division of group-types, see TRACEY ISAACS, *MORAL RESPONSIBILITY IN COLLECTIVE CONTEXTS* (2011); Anne Schwenkenbecher, *Joint Moral Duties*, *MIDWEST STUDIES IN PHILOSOPHY* 38(1): 58–74 (2014); Bill Wringe, *Global Obligations and the Agency Objection*, *RATIO* 23(2): 217–231 (2010); and STEPHANIE COLLINS, *ORGANIZATIONS AS WRONGDOERS: FROM ONTOLOGY TO MORALITY* (2023). Terminology often varies. Collins speaks instead of *collectives*, *coalitions* and *combinations*, respectively, and the cases that I refer to as instances of *unstructured groups* often get referred to as *random collections*, *random groups* or *mere aggregates*.

⁴⁸For accounts of corporate agency, see Phillip Pettit, *Groups with Minds of Their Own*, *SOCIALIZING METAPHYSICS* (Frederick Schmitt ed., 2003); Phillip Pettit & David Schweikard, *Joint actions and group agents*, *PHILOSOPHY OF THE SOCIAL SCIENCES* 36:18–39; and COLLINS, *Id.*

they are composed of individuals oriented toward a shared goal, teleological groups are often described as acting, much like corporate agents.⁴⁹ The fossil fuel lobby is an example of such a collective. Members of the fossil fuel lobby are responsive to one another's actions and share a loose set of goals that guide them in acting together. Lynch mobs or loosely organized protest groups would be further examples. Finally, *unstructured groups* are groups that lack any of the properties of the first two types. Unstructured groups lack both formal decision-making procedures as well as the kinds of shared goals characterizing teleological groups. "Consumers," "Europeans," or "the set of commuters currently riding the District Line" are examples of unstructured groups. The individuals composing such groups might share preferences and interests, but they do not share intentions to collectively bring about some end.

I claim that a body of citizens is an *unstructured group*. A body of citizens possesses neither its own group-level decision-making procedure nor a shared commitment to a goal around which citizens can be described as acting together. Of course, a citizen body will be composed of subgroups that *do* possess these properties. Some citizens will be members of companies, organizations, and, of course, the state itself. Other citizens will be members of lobbying or protest groups. The citizenry as a whole, however, does not possess the properties possessed by either of these kinds of groups.⁵⁰

A. A Duty Not to Hold Accountable

To lack standing is to possess a directed duty to refrain from holding accountable. Hence, the collectivist interpretation of (1) assumes that a citizenry has a duty not to hold the marginalized to account. One might doubt that unstructured groups possess duties. However, even if we accept that unstructured groups have duties, it is quite unclear whether we can describe a body of citizens as possessing a duty not to hold accountable.

Those sympathetic to the claim that unstructured groups *can* possess duties typically point to cases like the following.

⁴⁹There is a rich literature on teleological collectives focused on when a group of individuals can be said to 'act together'. Views differ with regards to the nature and content of the intentions present in joint action. For examples, see Michael Bratman, *Shared cooperative activity*, PHILOSOPHICAL REVIEW 101(2): 327–341 (1992); CHRISTOPHER KUTZ, *COMPLICITY* (2000), Raimo Tuomela, *Joint Intention, We-Mode and I-Mode*, MIDWEST STUDIES IN PHILOSOPHY 30(1):154–67 (2006); and Margaret Gilbert, *Shared Intentions and Personal Intentions*, PHILOSOPHICAL STUDIES 144(1): 167–87.

⁵⁰Some might insist that the citizenry is a corporate agent because the citizenry just *is the state*. But the state's members are *not* its citizenry even on the most expansive conception of the state, in which all those eligible to vote are part of the state qua corporate agent. In the U.S., for instance, millions of convicts are disenfranchised; millions more are disenfranchised due to age. Since we are assuming, with Duff, that states hold offenders to account in the name of their citizens, it follows that a state holds offenders to account in the name of an unstructured group. For discussion of the expansive conception of the state, see Stephanie Collins & Holly Lawford-Smith, *We the People: Is the Polity the State?* JOURNAL OF THE AMERICAN PHILOSOPHICAL ASSOCIATION 78–97 (2021). For defense of the expansive conception, see COLLINS, *supra* note 46.

Commuters: A group of ten commuters in a train car witness Wrongdoer attack Victim. Wrongdoer can be stopped if and only if all ten commuters organize together to overpower Wrongdoer.⁵¹

Intuitively, the commuters ought to rescue Victim. Yet, since no single commuter can alone save Victim, it seems that the duty of rescue must fall to the commuters' *qua group*. Since the commuters constitute an unstructured group, this suggests that unstructured groups can bear duties.

There are two ways to make sense of the collective duties ascribed to unstructured groups. On the one hand, collective duties might refer to sets of individual duties. On this view, the commuters' duty of rescue reduces to individual duties to collectivize or work together in the pursuit of a joint action.⁵² On the other hand, collective duties might be seen as irreducibly collective; on this view, the commuters *share* a duty to save Victim.⁵³

Let us assume that unstructured groups can possess collective duties. Granting this, we must still ask whether a citizenry could be intelligibly described as possessing the specific duty at issue: the duty not to hold offenders to account.

I assume that possessing a duty to X requires that Xing be sufficiently feasible for the duty-holder. If Suzy can prevent some dire harm only by proving the Goldbach Conjecture, then Suzy does not possess a duty to prevent that harm, assuming that solving the Goldbach Conjecture is not remotely feasible for Suzy. It follows that whether the citizenry possesses a duty not to hold marginalized offenders accountable depends upon whether the citizenry can feasibly organize to refrain from so doing. Yet, it is unclear whether a citizenry *can* organize itself in this way. The state prosecutes, tries, and punishes offenders on its citizens' behalf, but the citizenry cannot feasibly organize itself to *stop* the state from doing so. Such organizational limitations put pressure on our ability to ascribe collective duties to the citizenry. As Schwenkenbecher writes:

A random group's joint ability can be diminished by several factors, including obstacles to communication or limitations to the group members' individual abilities to perform the contributory action. If the obstacles are too great, then the group has no joint ability and its members do not hold joint duties.⁵⁴

If we agree that barriers to communication and organization undermine our ability to ascribe collective duties to unstructured groups, then we have good reason to doubt that a citizenry could possess a duty not to hold marginalized offenders accountable.⁵⁵ This provides the first reason to doubt the collectivist interpretation of (1).

⁵¹For original discussion of cases of this kind, see Virginia Held, *Can a Random Collection of Individuals Be Morally Responsible?* JOURNAL OF PHILOSOPHY 90(3):453–67.

⁵²For a reductionist view of this kind, see STEPHANIE COLLINS, GROUP DUTIES: THEIR EXISTENCE AND THEIR IMPLICATIONS FOR INDIVIDUALS (2019).

⁵³See, e.g., Schwenkenbecher, *supra* note 47; and Gunnar Björnsson, *Essentially Shared Obligations*, MIDWEST STUDIES IN PHILOSOPHY 38(1): 103–120 (2014).

⁵⁴Schwenkenbecher, *Id.* at 70.

⁵⁵For skepticism about the ability to ascribe collective duties to bodies of citizens for precisely this reason, see *Id.* at 70.

B. Unstructured Groups and Collective Wrongdoing

A second reason to doubt the plausibility of the collectivist strategy stems from its implicit assumption that we can ascribe not only collective duties to unstructured groups but also collective *wrongdoing*. To say that an entity is hypocritical or complicit is to point to past wrongdoing committed by that entity; it is the entity's past wrongdoing that grounds its lack of standing. Hence, the collectivist interpretation of (1) demands that we can pin responsibility for wrongdoing on the citizenry qua collective. Even if one accepts the ascription of collective duties to unstructured groups, the claim that such groups can act wrongly is decidedly more controversial.

You might wonder why the ascription of collective duties to unstructured groups does not just entail that such groups can act wrongly. Does not our positive verdict about a collective duty of rescue in *Commuters* entail that the commuters, qua group, act wrongly if they fail to collectively save Victim? This question is perfectly reasonable given the tight connection between duties and wrongdoing in normal (i.e., noncollective) contexts. However, there are reasons to doubt that this is true in the context of unstructured groups. Indeed, many of those who endorse ascriptions of collective duties to unstructured groups are keen to deny that such groups act wrongly by failing to discharge such duties. We can motivate the separation between collective duties and collective wrongdoing by way of the following case.

Commuters 2: Just like *Commuters* except now we add that the commuters collectively fail to save Victim. However, three of the ten commuters conscientiously attempt to organize together with the others to save Victim while the remaining seven obstinately refuse.

Just like in the original case, it seems natural to say that the commuters had a collective duty to rescue Victim. It is much less clear, however, whether we should conclude that the commuters act wrongly in *Commuters 2*.⁵⁶ Consider things from Victim's perspective. Victim would surely not wish to claim that the commuters' qua group wronged her. Instead, she would surely point toward the seven who failed to intervene as responsible for wrongdoing. Notice that this is not simply an observation about who it would be appropriate to *blame*. Instead, it is to observe that attributing wrongdoing to the commuters as a group seems wrongheaded. One explanation for this intuition stems from the tight connection we tend to draw between an entity's capacity for wrongdoing and our ability to call that entity to answer. Since there is no locus of moral agency over and above the individual commuters, it follows that the commuters as a group cannot be called to answer for what they causally do.⁵⁷

⁵⁶Collective duties do not entail collective wrongdoing on Collins' reductive account because collective duties are, in effect, heuristic devices for referring to *sets* of individual duties; see COLLINS, *supra* note 52. Yet, even those who endorse non-reductionist accounts of collective duties can still drive a wedge between collective duties and collective wrongdoing. Tracey Isaacs makes exactly this move. Isaacs claims that ascriptions of irreducibly collective duties are appropriate in virtue of their motivational potential but maintains that unstructured groups are nevertheless improper candidates for backward-looking assessments of wrongdoing; see Tracey Isaacs, *Collective Responsible and Collective Obligation*, *MIDWEST STUDIES IN PHILOSOPHY* 38(1): 40–57 (2014).

⁵⁷Compare unstructured groups with corporate agents. Since an organization like the BBC *does* have a locus of agency over and above the individuals making up that group, it seems quite reasonable to attribute wrongdoing to the BBC as such.

Notice that *Commuters 2* is a particularly appropriate case to consider in the context of the compromised standing claim. Since some citizens in a structurally unjust state like the U.S. will be *victims* of structural injustice and others will be actively working *against* such injustice, the citizen body will be differentially implicated in the state's wrongdoing in much the way that the commuters are differentially implicated in the wrong done to Victim. If it is inapt to describe the commuters as responsible for collective wrongdoing in *Commuters 2*, then it is similarly inapt to describe the citizenry as responsible for collective wrongdoing in supporting the state's unjust social policies.

Of course, some authors *do* defend the attribution of wrongdoing to unstructured groups.⁵⁸ Such defenses appear to require jettisoning the highly plausible connection between the capacity for wrongdoing and the capacity to answer for one's own conduct.⁵⁹ Though I doubt that such a move proves plausible, I cannot hope to decisively refute such arguments here. Instead, cases like *Commuters 2* show why we might doubt the plausibility of ascribing wrongdoing to unstructured collectives.

This section considered two reasons to doubt the plausibility of the collectivist strategy. Since I believe that these objections are compelling, I assume that the collectivist strategy fails to provide a plausible interpretation of (1). I now turn to a second strategy according to which a state's standing is some function of individual citizens' standing.

V. The Individualist Strategy

The individualist strategy interprets (1) as follows.

(1'') When a state holds an offender accountable in the name of its people, the standing of that state is some function of individual citizens' standing.

Jeffrey Howard may have this interpretation of (1) in mind when he writes that state officials should think of themselves as acting on behalf of a "body of people who have lost *their* standing to punish."⁶⁰ Either way, this alternative formulation looks attractive in that it appears to sidestep the metaphysical challenges plaguing the collectivist strategy; according to the individualist interpretation of (1), the only entities said to possess standing are individual citizens.

The individualist strategy, however, faces a metaphysical challenge of its own. This is because the proponent of this strategy must first specify the function from the standing of individual citizens to the standing of the state. Assuming that standing is

⁵⁸See Wringer, *supra* note 47; Björnsson, *supra* note 53; and Gunnar Björnsson, *Collective Responsibility and Collective Obligations Without Collective Moral Agents*, THE ROUTLEDGE HANDBOOK OF COLLECTIVE RESPONSIBILITY (Saba Bazargan-Forward & Deborah Tollefsen eds., 2020).

⁵⁹Bill Wringer suggests that unstructured groups can still be called to answer for their conduct despite lacking a locus of moral agency because such groups can be called to answer *through* their members: individuals can be called to answer for the *group's* moral wrongdoing (Wringer, *Id.*). Yet, this proposal seems to confuse causal and moral responsibility. In *Commuters 2*, we might well call the individual defectors to account for the group's collective failure to save victim, where this failure is understood in purely causal terms—the defectors, after all, are accountable for the group's *causal failure* to save victim. But it seems quite odd to say that by calling the defectors to account for the causal failure of the group we are therefore calling the group to account for its collective wrongdoing.

⁶⁰Howard, *supra* note 1, at 135, my emphasis.

scalar, there are two reasonable ways that one might specify this function. On the one hand, the state's standing to hold an offender to account might equal the standing of the *median citizen*—the citizen who sits in the middle of all the other citizens once the citizens have been ranked from no standing to complete standing. On the other hand, the standing of the state might be equal to a hypothetical *mean* citizen, a hypothetical citizen whose standing is equal to the weighted sum of individual citizens' standing. Note that there are an infinite number of functions in this second class since one could in principle assign arbitrarily many different weightings to the different citizens to reflect the fact that different citizen's standing mattered more in the overall assessment of a state's standing. Some of these weightings will be more reasonable than others, of course. It might be reasonable, for instance, to assign more weight to the standing of victims and affected third parties insofar as these individuals might be thought to possess *special standing* to hold offenders to account.

We might call the problem of specifying the function from individuals' standing to the standing of the state the *specification problem*. I do not wish to claim that the specification problem is unsolvable. However, a proponent of the individualist strategy needs to offer an account of how to specify such a function.⁶¹

For my purposes, I use an approximation for what a reasonable function might be and show that on this approximation the individualist strategy may at best vindicate a *weak* version of the compromised standing claim. That is, I argue that if we accept the individualist interpretation of (1), then the second premise, (2), is *false* if it is understood to range over even serious crimes committed by the marginalized. To show this, I consider how the standing of what I call the "representative citizen" varies as we consider different offenses committed by the marginalized, where I assume that this representative citizen provides a rough approximation of what the standing of the state might be on any number of reasonable functions. That is, I take the representative citizen to provide a reasonable proxy for both the median citizen and a hypothetical mean citizen with some reasonable choice of weights. I now justify my choice of representative citizen.

Suppose, as seems reasonable, that all U.S. citizens above a certain age can be roughly divided into four groups: oppressors, activists, marginalized citizens, and bystanders.⁶² Oppressors use their power to actively support their state's structurally unjust policies while activists campaign to undo such policies. Suppose that each and every oppressor lacks the standing to hold marginalized offenders accountable no matter the crime and that each and every activist and marginalized citizen possesses standing with respect to all crimes. This leaves bystanders. Bystanders neither actively support nor actively oppose their state's unjust policies. Instead, they simply live their lives with greater and lesser degrees of awareness of the injustice in their society. I assume that all bystanders act wrongly for not being activists.

Now, assume that the bystanders subdivide into two further groups. *Excused* bystanders are those citizens who cannot be reasonably expected to be activists and are therefore not blameworthy for their contributions to state injustice. There are at least two reasons why some bystanders might be excused. First, being an activist may be prohibitively costly for some bystanders. Second, many bystanders will be

⁶¹Proponents would also ideally tell us *why* standing works this way. Why should the state's standing to hold accountable be inherited as a *function* of individual citizens' standing? I put this further issue aside.

⁶²Here I am excluding children. We might think either that all children have standing, or that all children who are developmentally mature enough to blame have standing.

nonculpably ignorant of the relevant social science that would allow them to support the right political candidates. In contrast to excused bystanders, *unexcused* bystanders lack any such excuses and are therefore blameworthy for not being activists. Let us assume that the majority of the citizens are *unexcused bystanders* and that the standing of the state to hold a particular offender accountable will therefore reflect the standing of the unexcused bystanders.⁶³ Let Jane be an arbitrary unexcused bystander. Jane will be what I refer to as my *representative citizen*. In considering the degree to which the state's standing is compromised with respect to a particular marginalized offender, I will consider the degree to which Jane's standing to hold that offender accountable is compromised.⁶⁴

The compromised standing claim implies that Jane will have significantly compromised standing with respect to even serious crimes committed by the marginalized. Since I have assumed that the complicity condition for loss of standing is a special case of the hypocrisy condition, it follows that to determine whether Jane has compromised standing with respect to a particular marginalized offender we can simply ask whether Jane lacks concern for wrongs of a similar or worse severity to the crime committed.

With this on the table, how might one show that Jane has compromised standing with respect to serious crimes committed by the marginalized? I consider one straightforward strategy that might be used to argue that Jane has compromised standing with respect to such crimes and show that this strategy proves indecisive. I then provide one reason to think that Jane does *not* possess compromised standing with respect to such serious crimes.

One way to argue that Jane lacks the standing to hold marginalized offenders accountable for serious crimes is simply to point to Jane's blameworthy acts and omissions. Jane has failed to make sufficient effort to vote against candidates running on structurally unjust policy platforms and has therefore contributed toward several unjust candidates winning office. Jane has also failed to actively protest against her state's unjust policies. We can assume that from Jane's epistemic vantage point, these actions and omissions all contribute to structural injustice. From here, you might conclude that Jane has shown herself to lack concern for crimes like assault and murder since she has knowingly contributed toward the very conditions that make the commission of such crimes more likely.

This argument proves indecisive. This is because the inference from Jane's blameworthy contributions to her lack of concern for the relevant severity of wrongdoing requires some clear sense of how much one's actions would need to contribute to structural injustice for them to reveal insufficient concern. It might be suggested that *any* contribution toward a state's unjust social policies reveals insufficient concern for wrongdoing like assault and murder. This suggestion fails,

⁶³This seems like a reasonable assumption given that the standing of the state would be either the standing of the median or hypothetical mean citizen.

⁶⁴The five groupings offered in this section are obviously idealizations. Each group identifies an ideal type, and actual citizens will not neatly correspond to any one of these types. Some will be activists with respect to one policy while bystanders (excused or unexcused) with respect to others. Some will count as oppressors only with respect to some sub-set of state acts and omissions, and so on. While the strategy employed here involves idealization, however, this is not obviously problematic. If we consider most citizens to be closest to the ideal type of unexcused bystanders, then we can still profitably talk of our representative citizen as an instance of an unexcused bystander.

however. To see why, consider a case unrelated to structural injustice. Suppose that Alice tells you that she is committed to the policy platform of a particular presidential candidate and wants that candidate to win. You then find out that Alice did not vote for her preferred candidate because she had to run a minor errand on polling day. Do Alice's actions on polling day reveal that she lacks concern for the policy platform that she told you about? Surely not. Alice knows that her chance of making a difference by voting is infinitesimally small. Given this fact, there is no sure inference from Alice's failure to vote for her preferred candidate on polling day to the claim that she lacks concern for her preferred candidate's policy platform. But this shows that in assessing how a person's conduct reflects their commitments, we need to consider that person's beliefs about the likely effects of their actions.

This brings us back to Jane. How significant do Jane's actions need to be to reveal that she lacks concern for wrongdoing like assault and murder?⁶⁵ Since the answer to this question is unclear, this strategy proves to be, at the very least, undecisive. It is unclear whether our representative citizen has compromised standing with respect to serious crimes committed by the marginalized. I now present one reason why we should *not* think that Jane has such compromised standing.

Suppose that the compromised standing claim is true. It follows that Jane's blameworthy contributions to structural injustice significantly compromise her standing to hold marginalized offenders accountable for crimes like assault and murder. Now, suppose that Jane witnesses a marginalized citizen, Sally, brutally attacking Victim on the street before fleeing with Victim's purse. Sally is subsequently prosecuted but, let us suppose, is granted bail while awaiting trial. One day, Jane overhears Sally bragging to a friend in public about the injury that she caused Victim. Jane plucks up the courage to confront Sally. "What you did was despicable," Jane says, "you should be ashamed of yourself." By hypothesis, Jane has significantly compromised standing with respect to Sally. Hence, it follows that Sally has a legitimate complaint against Jane's attempt to hold her accountable in this way. Sally can legitimately turn to Jane and say, indignantly, "Look who's talking!" Yet this result seems very strange. While a response of this kind might be appropriate if Jane were to blame Sally for petty theft at a grocery store, or even for pickpocketing, arson, or vandalism, the thought that Sally has a legitimate complaint against Jane's blaming her for assaulting Victim is particularly odd. Yet this is what the compromised standing claim entails. This provides good reason to think that Jane does *not* have significantly compromised standing with respect to crimes like murder and assault.

Maybe the intuition that Jane has standing to blame Sally should be dismissed as a case of motivated thinking: we want to think that our contributions to structural injustice are not as grave as they are, so we bias our assessments of how such contributions affect our standing to blame. If this is right, then the intuition elicited above is unreliable and does not tell against the compromised standing claim. This response does not seem particularly plausible. While we should be wary of such biasing effects, it seems much more plausible to think that our intuition in this case reflects the large and important differences between these two kinds of wrongdoing. Jane's contributions to her state's unjust social policies *are* blameworthy, but her

⁶⁵ Again, here we are focusing on whether Jane meets the hypocrisy basis for loss of standing. Since we assumed that the complicity basis is a special case of the hypocrisy basis, to determine whether Jane's standing is compromised we need only look to whether she lacks such insufficient concern.

blameworthiness surely doesn't rise to the level of those guilty of serious crimes such as assault or murder.

The individualist strategy, then, cannot vindicate the compromised standing claim in its standard form. The individualist strategy might give us a workable interpretation of (1), but that interpretation cannot secure the compromised standing claim in its standard form. The argument given in [Section III](#) is therefore unsound. At best, the individualist strategy vindicates a weak version of the compromised standing claim: states responsible for structural injustice have significantly compromised standing to hold marginalized offenders to account for relatively *minor* offenses.

Of course, my arguments in this section rely upon the assumption that most citizens in countries like the U.S. are unexcused bystanders. If most citizens are instead closer to oppressors than unexcused bystanders, then my choice of representative citizen is flawed, and the conclusion above will not follow. I cannot assess this assumption here. However, it seems more plausible that most citizens are simply *disengaged* with the injustices happening around them than that they are actively seeking to perpetuate such injustices.

VI. An Alternative Defense of the Compromised Standing Claim

Before closing, let us briefly consider an alternative defense of the standard compromised standing claim. Like the argument in [Section III](#), this defense seeks to close the gap between a state's responsibility for structural injustice and its compromised standing. But, unlike that earlier argument, this response makes no appeal to the compromised standing of the citizenry. Instead, this response *denies* that structurally unjust states hold marginalized offenders to account in their citizens' name. If unjust states do not speak for their citizens, then the standing of structurally unjust states can be assessed by simply considering a state's *own* hypocrisy and complicity which, I assume, is sufficient to compromise its standing with respect to even serious crimes committed by the marginalized. I consider two arguments to this effect.

According to the first argument, an agent's complicity in an offender's wrongdoing undermines not only her standing to hold that wrongdoer to account on her own behalf but also her ability to speak in the name of those affected by the wrongdoing. To appreciate this suggestion, consider *Party* once more. Here we assumed that Spokesperson speaks in the name of Neighbor and the wider community in holding Rowdy to account. But is this right? Spokesperson, after all, is partly responsible for Rowdy's wrongdoing. Could the members of the community not say: "You don't speak for us! You're partly responsible!" On this picture, Spokesperson *fails* to act within her role as representative and thus cannot be said to inherit the standing of those she represents. In response, however, we should distinguish between illegitimate representatives and merely flawed representatives. To say that Spokesperson fails to speak in the name of the community is to call her an illegitimate representative; it is to say that she steps outside of her authorized mandate. In [Section III](#) I sketched a view according to which representatives will act within their mandate to hold others accountable so long as their doing so constitutes a reasonable interpretation of what securing the rights of their representees requires. If we think that this is right, then it is hard to see why Spokesperson fails to act within her role as representative in holding Rowdy accountable. Of course, holding that Spokesperson is a legitimate representative is compatible with holding that she is a *flawed*

representative. After all, Spokesperson has a case to answer to the community and has a duty to hold herself accountable for her own wrongdoing. The same analysis, it seems, is applicable to the state. Just because unjust states have duties to hold themselves accountable for wrongfully raising the probability of crime does not mean that they necessarily step outside of their representative role when they hold marginalized offenders to account.

A second argument points to the unjust treatment of marginalized offenders within the criminal justice system itself. According to this argument, when states commit injustices in the process of holding offenders to account, they cannot credibly claim to be acting in their people's name. To appreciate this, note that even if a state is authorized to secure its citizens' rights through criminal law, there will nonetheless be restrictions upon the *ways* that a state can secure those rights. A state that subjects offenders to discriminatory or overly punitive treatment in the process of holding them accountable may thus act *outside* its mandate as representative.

This second argument has merit. However, notice that it does not provide a defense of the compromised standing claim as it is standardly understood. Rather, it supports a more qualified claim: if a state is responsible for structural injustice *and* that state subjects all marginalized offenders to unjust treatment within the criminal law, then that state has significantly compromised standing to hold marginalized offenders accountable. I cannot hope to assess this more qualified claim here. However, we might think that the claim of unjust treatment will not be applicable to marginalized offenders across the board. If so, then this argument would not support the standard version of the compromised standing claim.

VI. Concluding Remarks

This paper has argued that the compromised standing claim sits in tension with a further assumption widely accepted by its proponents: that states hold offenders to account in their people's name. If A holds B accountable in the name of C, A's own hypocrisy and complicity are insufficient to significantly compromise her standing. This means that there is a gap between a state's own responsibility for structural injustice and its significantly compromised standing. After motivating this challenge, I considered one line of response according to which democratic states like the U.S. inherit the compromised standing of their people. While this response is likely to be popular, I argue that it cannot vindicate the compromised standing claim in its standard form. In particular, I argued that a collectivist interpretation of the people's standing runs into metaphysical problems and that an individualist interpretation serves to vindicate, at best, a restricted version of the compromised standing claim.

I have not attempted to show that the compromised standing claim in its standard form is necessarily false. In closing, I briefly considered the possibility that structurally unjust states might *fail* to speak on behalf of their people when holding marginalized offenders to account. Authors are invited to consider whether an alternative defense of this kind can prove plausible. If it cannot, then authors might wish to defend a *weaker* version of the compromised standing claim. In particular, proponents might pursue a version of that claim according to which unjust states lack the standing to hold marginalized offenders accountable for certain minor offenses.

Finally, it is worth emphasizing that worries about compromising standing are merely one among many other worries that we might have about the legitimacy of

criminal law in societies marred by significant structural injustice. One significant concern relates to the blameworthiness of marginalized offenders. Conditions of severe material disadvantage may lead to both cognitive and volitional impairments that diminish responsible agency. So too might the circumstances of poverty render previously wrongful conduct permissible. To the extent that structurally unjust conditions provide increased grounds for justification and excuse not currently recognized in the criminal law, it follows that many marginalized offenders are currently suffering disproportionate punishment. If my concerns about the standard compromised standing claim prove correct, compromised standing may provide only minimal cause for concern. Concerns about diminished blameworthiness may be much more pressing.

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