Criminal Law and Philosophy
https://doi.org/10.1007/s11572-022-09650-8

ORIGINAL PAPER

Standing to Punish the Disadvantaged

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Accepted: 31 October 2022

Abstract

Many philosophers and legal theorists worry about punishing the socially disadvantaged as severely as their advantaged counterparts. One philosophically popular explanation of this concern is couched in terms of moral standing: seriously unjust states are said to lack standing to condemn disadvantaged offenders. If this is the case, institutional condemnation of disadvantaged offenders (especially via hard treatment) will often be unjust. I describe two problems with canonical versions of this view. First, its proponents groundlessly claim that disadvantaged offenders may be punished as severely as advantaged ones, even though such punishment is unjust in light of the state's loss of standing. Second, and more importantly, moral standing arguments prohibit states from blaming advantaged as well as disadvantaged offenders. This unwelcome outcome suggests that standing approaches incorrectly analyze the source of moral misgivings about punishing the disadvantaged. I conclude that those who share such concerns should put standing accounts aside.

Keywords Punishment · Justifications of punishment · Standing to blame · Moral standing · Condemnation · Social disadvantage · Expressivism

One welcome development in legal theory and social and political philosophy is the increased scrutiny placed on the state's purported right to punish disadvantaged offenders. Many philosophers and legal theorists express misgivings about subjecting those with less access to education, wealth, health care, and job opportunities to the same harsh treatment as their advantaged counterparts. Consider Nicole Jackson, a 14-year old who escaped from a group home, broke into a house, then repeatedly fired a shotgun at the deputies who were trying to apprehend her. After being shot and taken into custody, she was charged with attempted murder of a police officer.[1]

[1] https://www.nytimes.com/2022/05/12/us/middle-school-shootout-police.html. All the details of Jackson's story are taken from this article.

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Published online: 19 November 2022

Her troubled childhood involved dozens of involuntary commitments to psychiatric facilities for emergency health reasons. In the two years after she had become a ward of Florida, Jackson had been in five group homes, a foster home, and four mental hospitals. Through all these difficulties, Jackson received a mere month in residential therapeutic care—the only kind of treatment that would give her a fighting chance. Much of the reason for this neglect is systemic. Florida provides less mental health funding per capita than any other state, and at any given time, more than 1500 children are stranded on waiting lists for behavioral health services.[2] It is reasonable to think that there would be something wrong with Florida punishing Jackson to the same degree as a 14-year old who faced no such mental health challenges or one who benefited from high-quality mental health interventions.

One philosophically popular explanation for why the state would be wrong to punish in a formally equal way is that the state's neglect constitutes a defect in its relationship with her, a defect that undermines its right or title—its *moral standing*—to punish her. This defect is typically characterized in terms of hypocrisy or complicity. My paper calls this explanation into question. After situating moral standing arguments with respect to other attempts to explain worries about punishing the disadvantaged, I briefly review Antony Duff and Victor Tadros's moral standing approaches to punishing disadvantaged offenders. I then discuss two serious shortcomings with their views. Most importantly, unjust states are also hypocritical and complicit with respect to *advantaged* offenders. The upshot is that unjust states lose standing to punish advantaged offenders as well as disadvantaged ones. This surprising outcome suggests that standing approaches do not adequately explain moral qualms about punishing disadvantaged offenders. Those who harbor misgivings about punishing the disadvantaged think that what is wrong with punishing them has to do with their neglect, oppression, or marginalization. For those disturbed by social inequality, it is natural to think that the best account of why we should pay attention to disadvantaged offenders would not recommend equal attention to the advantaged. This is especially the case if lost standing requires leniency in punishment. An account of why we should go easy on disadvantaged offenders should not also recommend softening the sentences of the advantaged. I dub this the "advantaged offender problem."[3] The second flaw in standing arguments has to do with proponents' insistence that states punish the disadvantaged despite the injustice of doing so. This verdict is in tension with an important moral principle—punishment must be justified if it is to be imposed. (Admittedly, this is not an objection to the standing approaches as such, but to the specific versions offered by our theorists.) To

[2] https://www.nytimes.com/2022/05/12/us/middle-school-shootout-police.html.

[3] I am not the first to register concern about the implications of Duff and Tadros's views for advantaged offenders. Poama (2021) identifies something like the advantaged offender problem in Duff, but neglects mention of Tadros. Poama also holds that Duff's unjust state loses its legitimacy to punish *tout court* (2021: 79). As the reader will see, I think this assessment misses the mark. The unjust state loses standing only with respect to the values about which it is hypocritical. Howard and Pasternak (2021) discuss both Duff and Tadros, but say nothing about complicity. Their analysis of the advantaged offender objection is quite brief, though they expend considerable effort in defending Duff against it. I attack this defense in Sect. 2.3.

make matters worse, punishing in the absence of standing is inconsistent with Duff and Tadros's core moral commitments. I conclude that standing approaches should be discarded.

1 Standing and Punishment

1.1 Situating Standing

Moral standing is just one route for analyzing and explaining the moral risks of punishing marginalized offenders. The effort likely commenced with Judge Bazelon's famous call for the criminal justice system to recognize a partial excuse based on "rotten social background"; he defends this proposal by alleging that seriously disadvantaged offenders possess diminished responsibility (1973). Richard Delgado (1985) and Richard Lippke (2003) develop Bazelon's view, adding that severe social disadvantage leads to volitional deficiencies. This line of inquiry alleges that disadvantaged offenders are less responsible for their misdeeds than advantaged ones, and therefore less legally and morally culpable.[4]

There is a different set of arguments defending disadvantaged offenders' reduced culpability that does not question their moral capacities. Jules Holroyd and Christopher Lewis contend that disadvantaged offenders are generally less blameworthy because their motives for criminal offending are less morally objectionable (Holroyd 2010; Lewis 2016). More specifically, disadvantaged offenders often commit crimes to acquire basic social necessities they are unjustly denied.[5] And so they are less blameworthy than middle- or upper-class offenders.

Moral standing arguments turn our focus from the offender to the state. Proponents typically make no claims about the offender's moral blameworthiness, and if they do, they affirm offenders' full moral agency (e.g., Fritz 2019: 312). Standing approaches instead focus on the state's license to blame. Their distinctive claim is that polities marked by systematic economic and racial injustice *lack moral standing* to condemn disadvantaged criminals. This is because such states are said to act hypocritically toward disadvantaged offenders and sometimes even to become complicit in their wrongdoing (Duff 2001; Tadros 2009). So penal institutions can censure disadvantaged offenders only on pain of injustice.

A fourth approach questions the legitimacy of state punishment in unjust societies. Tommie Shelby, for example, argues that economically and racially unjust states forfeit the right to punish the ghetto poor for committing *mala prohibita*

[4] Many philosophers eschew this strategy, because they are troubled by the implication that disadvantaged offenders are less responsible for their deeds than advantaged ones; those harboring reservations include von Hirsch and Ashworth (2005: 63), Tadros (2009), Holroyd (2010), and Fritz (2019). Lippke is immune to this criticism insofar as he posits that *anyone* would succumb to the chronic and significant temptations to offend faced by the disadvantaged (2011). He also distinguishes between disadvantaged offenders, who cannot be blamed for their deficiencies, and advantaged ones, who may be (2003: 471).

[5] Holroyd would have the criminal law view social disadvantage as a mitigating circumstance at sentencing. Lewis is agnostic on this point.

offenses and lesser *mala in se* offenses (2016: ch. 8). States lose their penal legitimacy in these domains, because such legitimacy (which Shelby calls "right-to-be-obeyed" legitimacy) is earned by securing a fair system of social cooperation. Erin Kelly offers a similar argument, though, unlike our other theorists, she denies that punishment should have any truck with blame or desert in the first place (2012).

Moral standing responses to the question of punishing disadvantaged offenders have garnered the bulk of the scholarly attention in the last decade. Duff (2001) and Tadros (2009) have set the terms of extensive discussion (Watson 2015; Beade 2019; Fritz 2019; Howard and Pasternak 2021) and criticism (Matravers 2006; Holroyd 2010; Chau 2012; Duus-Otterström and Kelly 2019; Poama 2021). In part this popularity is owing to increased interest in the expressivist view, traceable to Joel Feinberg (1965), that one of the central purposes of punishment is to blame, censure, or condemn offenders. If you think states are in the business of censuring offenders, and that this business justifies punishment, then you will be interested in whether states are blaming in a morally licit fashion. Furthermore, as Nicola Lacey and Hanna Pickard observe, the importance of condemnation in the philosophy of punishment reflects the "juridical image" of the moral life often found in contemporary moral philosophy, a picture that emphasizes judging, blaming, censuring, and holding to account (2021: 255–56). Finally, and most importantly, focusing on institutional standing to blame rather than wrongdoer's desert is a promising way of approaching the problem of punishing the disadvantaged, because the rules and structures that generate disadvantage are created and reinforced by the state.

I am going to argue that standing approaches are fatally flawed. And so we have reason to take a different route. Perhaps we should adopt one of the other options noted above—though I'm not sure, as they have their own shortcomings.[6] But I will make no recommendation in this regard. My aim is not to identify the best way of understanding the moral stakes of punishing the disadvantaged, just to shut the door on standing theories.

Before proceeding, a brief comment on terminology: standing is usually thought of as a right, or a title, or a type of authority, though none of these alternatives enjoys a consensus. Matt King describes the "common core" of different notions of standing to blame as "a special status that corresponds to the blamer's position exclusive of others" (2019). Nothing in what follows requires anything more determinate than this.[7]

1.2 Tadros on Hypocrisy, Complicity, and Standing

Tadros' discussion of punishment in unjust societies focuses on the unjust distribution of material benefits and opportunities; he is primarily interested in the plight of the poor. His view makes much of the claim that poverty is criminogenic—that it makes the poor more prone to offending than their middle-class or well-off

[6] Interested readers can consult Ewing (2017) for criticisms of some of the other approaches.

[7] For a helpful analysis of what it is to have, or lack, standing to blame, see Edwards (2019).

counterparts (Tadros 2009: 391). Assuming that authorities know that a poor person's probability of committing crime would drop if she could enter the middle class, Tadros argues that a distributively unjust state acts *hypocritically* when it condemns poor offenders for failing to respect the rights and interests of their victims.

The moral principle relevant to the charge of hypocrisy runs as follows: "one person ought not to criticize another person for a particular action if the first regularly flouts the standards that he would hold the other person to himself" (2009: 396). In other words, hypocritical condemnation implies that that the blamer is not subject to the same reasons as the one blamed. The blamer denies that he and the target of his condemnation have the same status as moral agents, that they have the same status in the court of reason (2009: 397). But we ought not deny such things, given the equality of persons.

For Tadros, the norm flouted by a hypocritical state declares that individuals and groups must respect the rights and interests of others. A distributively unjust state displays indifference to the rights and interests of victims of crime because it creates, exacerbates, or condones criminogenic economic inequality. An unnecessarily elevated crime rate and the associated violations of crime victims' rights are something the state would avoid if it properly attended to its citizens. According to the hypocrisy principle, distributively unjust states act in a morally impermissible fashion when they condemn criminals' indifference to the rights and interests of others, because such states engage in the very same type of disrespect. This hypocrisy undermines a state's moral standing to blame disadvantaged offenders.[8]

Tadros identifies a second way in which criminogenic disadvantage hollows out the standing to punish. By knowingly creating criminogenic conditions, or knowingly failing to ameliorate them, the state becomes *complicit* in disadvantaged offenders' wrongs (2009: 399 ff.). Complicit agents lose standing to blame because they are partly responsible for the putatively blameworthy action; they are accomplices in a moral, if not a legal, sense. As "co-defendant," the complicit agent cannot legitimately sit in judgment of the offender (2009: 400).

1.3 Duff on Exclusion, Hypocrisy, and Standing

For Duff, unjust states are those which tolerate or promote "serious, persisting, and systematic injustice" (2001: 183). In unjust states, some citizens are denied full political and normative status; they are, in Duff's words, *excluded* from the political community. Exclusion undermines the state's standing to punish, and does so by

[8] On Fritz's telling, someone can lose standing to blame by evincing a differential disposition to hold responsible (DDHR). Hypocrisy involves acting on a DDHR, but one also displays a DDHR when one blames someone for an act one permits a third party to perform. P can lose standing by blaming Q but not R (or by blaming Q more than R) for an act that both Q and R commit (Fritz 2019: 318). Central to Fritz's more inclusive analysis is the state's disposition to hold different citizens responsible to varying degrees. Adverting to some states' tendency to punish some racial minorities and the poor more frequently, and more harshly, than whites and the well-off, Fritz concludes that such states holds their citizens differentially responsible. The state loses its standing to punish the disadvantaged not because it criticizes the disadvantaged offender for something it does itself, but because it maintains a DDHR.

violating what Duff calls a precondition of punishment. The preconditions of punishment are the basic social and institutional conditions that must be met for a state to be permitted to engage in the practice of punishment (2001: 179).

One precondition is that the accused have a duty to obey the law; the criminal justice system may haul someone to court only if he has such a duty. Punishment in seriously exclusionary states fails to meet this precondition, because people who are politically, normatively, or materially divested of political membership have no duty to obey the law. I will set this precondition aside, because it bears on the fundamental legitimacy of punishment. Any related arguments against punishing the disadvantaged are better thought of as a member of the family of legitimacy-based views that include Shelby.

Duff restricts questions of standing to issues surrounding the second precondition (2001: 186). Here we are to assume that social injustice or inequality is not of the most grievous sort, and that the disadvantaged retain a general obligation to obey the law (2010: 137). But Duff argues that the state may nevertheless lose its standing to blame disadvantaged offenders for reasons of hypocrisy. On his view, the legal system gets its standing to blame from the fact that it expresses, actualizes, and protects the declared values of a political community, as well as the fundamental values of equal concern and respect. When a state condones or perpetuates injustice, it contravenes the declared values of the political community it purports to express and defend (2001: 186). More specifically, when a state unrepentantly flouts certain principles of justice—respect and concern for others—it loses standing to blame wrongdoers guilty of the same type of disrespect. (I say unrepentantly because if the state makes itself answerable for its wronging of the disadvantaged, it regains much of its license to blame.) This is just what Tadros means by hypocrisy, and indeed Duff states that moral judgments in the legal case parallel those made in cases of interpersonal hypocrisy (Duff 2001: 186–88).

Hypocrisy restricts the law's standing to blame, because "to put a person on trial is to call him to answer" (2010: 138), and one cannot issue such a call without having the standing to do so. Duff goes so far as to claim that the hypocritical state lacks the right to condemn excluded offenders for *any* of their offenses, including the most grievous *mala in se* crimes (2001: 184, 196). We can see the reason for this startling claim by recalling that most crimes can be described as violations of duties of equal concern and respect. These are just the wrongs the hypocritical state is guilty of with respect to disadvantaged offenders.[9]

1.4 Punishing the Disadvantaged

Both Tadros and Duff believe that the legal condemnation of crime involves institutionalized hard treatment, i.e., punishment. Because states that have lost standing to blame for reasons of hypocrisy or complicity cannot properly condemn

[9] Duff's remarks on state complicity with disadvantaged offenders are brief enough that no particular view on the matter can be ascribed to him (2010: 129, 133, 134).

disadvantaged wrongdoers, it is natural to think that they may not punish them either, especially because penal hard treatment is generally much more harmful than public condemnation. But both Tadros and Duff deny this conclusion. They assert that refraining from punishing disadvantaged malefactors wrongs victims (and in Tadros's case, potential victims) by failing to respect their rights and recognize their moral significance as members of the political community (Tadros 2009: 410; Duff 2001: 199). These wrongs are particularly objectionable when they befall socially marginalized victims and compound the injustices they experience. Accordingly, the state must punish disadvantaged offenders even when they lack standing to do so. Both describe this state of affairs as a regrettable injustice (Tadros 2009: 410; Duff 2001: 199). But while punishment in unjust states is morally tainted, it is, in Duff's words, "the best we can do in our morally problematic situation" (2001: 199). To be sure, Tadros and Duff do not leave the practice completely untouched. Tadros proposes that victimless crimes committed by the disadvantaged go unpunished, as there are no victims to be vindicated (2009: 413). Duff denies that unjust states may punish disadvantaged offenders for *mala prohibita* offenses, and adds that penal practices should be transformed to acknowledge that punishment in the context of injustice is itself unjust (2001: 200).

2 The Advantaged Offender Problem

There is a significant drawback to analyzing the problem of punishing disadvantaged offenders in terms of standing: standing arguments also let *advantaged* offenders off the hook. Moral leniency for the wealthy and powerful is an unwelcome conclusion for a view motivated in part by concern for the unjust treatment plaguing the socially disfavored.[10] As we will see, both Duff and Tadros are vulnerable on this score.

2.1 Hypocrisy

One aspect of the advantaged offender problem is that institutional hypocrisy undermines the standing to punish the disadvantaged and advantaged alike. Recall that the ground of the unjust state's hypocrisy is either its denial of the requisite concern and respect (Duff) or its allegation that agents have different standing in the court of reason (Tadros). Either way, the unjust state's condemnation of wrongdoers' similarly disrespectful treatment of others is objectionably hypocritical. Unfortunately, hypocrisy cannot be confined to the state's treatment of disadvantaged offenders. *Many* offenders lack sufficient concern and respect for their victims. If the unjust state loses standing to blame those whose crimes involve a culpable lack of concern for others, the state will lose standing to blame advantaged offenders.

There is an obvious way around this problem. One simply needs to identify a norm that is violated by the unjust state and disadvantaged offenders but not by advantaged ones. This strategy is suggested by considerations bearing on the nature

[10] Others who have worried about something in the vicinity include Holroyd (2010: 89) and Ewing (2017: 48).

of hypocrisy itself. Hypocrisy diminishes one's standing to blame only with respect to the specific value about which one is hypocritical. As Holroyd puts it, judgments about hypocrisy and standing are *value-relative* (2010: 87). We don't universally prohibit the hypocrite from blaming others. If P is a burglar, he cannot legitimately blame Q for her burgling on pains of hypocrisy. But it remains open for P to blame Q for failing to take care of her dying sister, or for capriciously assaulting her friend, or what have you, so long as he has not done something similar.

Accordingly, the type of case that might escape the advantaged offender problem is one where the blamer is hypocritical with respect to a standard that adverts to relatively specific actions or values; think of the prohibition of theft. Because the hypocrite is precluded from blaming only those who commit the very same action, the moral consequences of hypocrisy are confined. Standing arguments thus have a reply to the advantaged offender objection if there is a standard violated by the unjust state and the disadvantaged offender but not the advantaged offender. Unfortunately, the prospects of locating such a standard are dim, because the more fine-grained the description of the value violated by the disadvantaged offender, the less plausible it is to accuse the state of committing a similar misdeed. A distributively unjust state does not commit burglary or assault, whatever other wrongs it commits. Additional reasons for pessimism include Duff and Tadros' conspicuous failure to offer guidance on this point.[11] They provide some concrete examples of ordinary moral hypocrisy—Duff's censorious academic comes to mind—but when they formulate the norms violated by the state and the target of the state's blame, they retreat to the generalities highlighted above (see, e.g., Duff 2001: 186; Tadros 2009: 396).

Tadros gets in the ballpark of specificity when he says that a state that facilitates or ignores poverty is hypocritical in blaming poor offenders (2009: 405). For him, a state's failure to remedy the effects of criminogenic poverty shows the state to be as callous about victims' rights as poor offenders. Tadros would accuse the distributively unjust state of hypocrisy, were it to blame an offender for disrespecting her victim's property rights, because the state's toleration of criminogenic policies *also* disrespects victims' property rights. But this view is grist for my mill, because even here it is difficult to establish the similarity of the wrongs committed.

To see why, imagine a polity characterized by serious economic inequality, where the authorities refuse to enact ameliorative egalitarian policies and, in fact, pass legislation forbidding such efforts. The problem for Tadros is that the state's policies, while criminogenic, might be plausibly characterized as *respecting* property rights. After all, libertarians believe that low taxation and bars on redistributive support for health care or education honor property rights, even if they have the knock on effects of exacerbating inequality or engendering crime. So from a libertarian perspective, there is no hypocrisy in punishing the thief. Indeed, punishing theft explicitly demonstrates concern for property rights by sanctioning their violation. Of course, libertarianism might be intellectually bankrupt. But taking a Rawlsian approach does Tadros no favors. For Rawls, serious economic injustice is not wrong

[11] Other critics note that Tadros and, to a lesser extent, Duff waffle when identifying the value the hypocritical state allegedly violates (Matravers 2006; Holroyd 2010; Fritz 2019).

because it violates property rights; it is wrong because it violates the requirement to enact policies that benefit the least well-off. This wrong is in no wise similar to the wrong committed by the thief. Now, there might be some *other* account of distributive justice that will serve Tadros' aims, but surely he does not want the success of his hypocrisy analysis to rely on a parochial political philosophy. So while Tadros's effort is not necessarily doomed, he has clearly failed to demonstrate how he can avoid relying on the generic assessment of hypocrisy that leads to the advantaged offender problem.

Duff and Tadros's difficulties stem from the fact that the wrongfulness of an action can be described in specific or general terms. The more specific the description of the state's hypocritical act, the more it can be tailored to the crimes committed by the disadvantaged, and the more likely one is to escape the advantaged offender problem. However, the more specific the description, the less likely it is to pick out an act committed by both the disadvantaged offender and the state, and the less plausible the charge of hypocrisy will be. If one tries to solve this problem by reverting to a capacious description, like "treating others unequally in the court of reason," one facilitates a coherent hypocrisy analysis at the price of vulnerability to the advantaged offender problem.[12] It seems to me, then, that hypocrisy analyses of disadvantaged offending are plausible only if they equivocate between these two levels of description.

Even if proponents of standing approaches could identify specific norms violated (or wrongs committed) by both the offender and penal authorities, I doubt they could escape the advantaged offender problem. This is because there are many policies and practices that encourage the well-off to commit crimes, and arguments from criminogenesis will apply in all such cases. For example, lax enforcement of white collar financial crimes (tax evasion, embezzlement, antitrust violations, etc.) promotes criminal activity on the part of advantaged offenders. The US government's hands-off approach is illustrated by the fact that the FBI's Uniform Crime Reports does not bother to collect statistics on the commission and cost of most white collar crime.[13] Consider also the government's lackadaisical enforcement of workplace safety violations: OSHA's penalty for the most egregious violation of workplace safety standards that result in a fatality is a misdemeanor carrying a maximum of six months in prison![14] Don Blankenship, CEO of Massey Energy, was convicted of breaking federal mine safety laws after the Upper Big Branch mining explosion

[12] That Tadros has a strong commitment to the capacious explanation is suggested by his claim that murderers lose standing to blame those guilty of less severe crimes, like burglars (2009: 396). If murderers may not legitimately condemn burglary, it cannot be because murderers flout property rights; it must be because both murderers and burglars disrespect their victims, or because some other equally general reason obtains.

[13] Fraud and embezzlement are exceptions; see https://ucr.fbi.gov/nibrs/nibrs_wcc.pdf. For the list of crimes tracked by the UCR, see https://crime-data-explorer.app.cloud.gov/pages/explorer/crime/crime-trend. For more on the disparities between the criminalization and punishment of crimes committed by the wealthy and the poor, see Reiman and Leighton (2010).

[14] https://www.osha.gov/laws-regs/oshact/section_17.

killed 29 miners.[15] But he served a mere year in prison, which pales in comparison to the consecutive 25 years to life sentences handed out to Leo Andrade for stealing videotapes worth $150 from a Kmart (*Lockyer v. Andrade* 2003). In Blankenship's case, both he and the federal government violated the requirement to institute reasonable measures to protect worker safety. So if relevantly specific norms can be identified by a hypocrisy analysis, many will apply to wealthy offenders, reviving the advantaged offender problem.

I should note that Tadros admits that middle- and upper-class offenders are also victims of hypocrisy (2009: 409). However, he underestimates the consequences thereof. On his construal, advantaged offenders have a hypocrisy defense only when they commit crimes of the type made more prevalent *among disadvantaged offenders* by unjust distributive policies. This view simply ignores most of the problem: the state's inability to condemn a multitude of white collar offenses for reasons of hypocrisy. Tadros might not be too concerned about this lapse, as he thinks he can solve the advantaged offender problem by appealing to complicity. But this gambit fares no better.

2.2 Complicity

The advantaged offender problem infects complicity arguments as well. Recall that one can lose standing to blame by being complicit in the action one denounces. Tadros claims that when a state facilitates or ignores criminogenic disadvantage, it becomes complicit in the crimes committed by disadvantaged offenders. It cannot therefore blame them for said crimes. Tadros contends that once complicity is factored in, the advantaged offender problem more or less withers away. His basic idea is that while both advantaged and disadvantaged offenders can complain of hypocrisy on the part of a state that embraces criminogenic policies, only disadvantaged offenders may object to punishment on the grounds of complicity. Because criminogenic government policies facilitate the crimes of the disadvantaged, not the advantaged, the latter cannot raise a complicity defense. And complicity enables more robust protection against censure than hypocrisy, because it has a greater moral significance. Someone who facilitates another's wrongful act and then blames them for that act is more blameworthy than a hypocrite: the complicit agent is partly responsible for the offender's wrong, while the hypocrite is not.

The weakness in Tadros's analysis should more or less leap off the page. As I emphasized above, the state's favorable treatment of white collar offenders is *also* criminogenic. And so the state is also complicit with advantaged offenders' crimes. Tadros has an implicit response to this worry: on his conception of complicity, the action that renders P complicit with Q's offense must be *prima facie* wrong or unjust (2009: 407). Let's call this the "injustice condition." The state makes itself complicit with impoverished offenders' misdeeds by imposing a *wrongful* economic

[15] https://www.washingtonpost.com/news/post-nation/wp/2016/04/06/former-coal-ceo-sentenced-to-a-year-in-prison-for-2010-west-virginia-coal-mine-disaster/. State laws sometimes provide more stringent penalties, though even then, safety violators are typically treated with kid gloves.

disadvantage on them. By contrast, when the state fails to pursue white collar crime as aggressively as drug offenses, it does not act wrongfully, and the injustice condition goes unmet. This refined conception of complicity leads Tadros to the conclusion that advantaged offenders' protections against blame are much weaker than those of their disadvantaged counterparts (2009: 409).

But aren't policies that generate criminogenic advantage also wrongful? White collar criminal activity is extraordinarily serious—financial crimes cost US citizens more than all FBI Index crimes combined (these include robbery, burglary, larceny, automobile theft, and arson) (Reiman and Leighton 2010: 119–123). So policies that facilitate or ignore white collar crime are just as harmful, hence wrongful, as those that facilitate lesser economic crimes. Furthermore, most theories of distributive justice that impugn economic inequality will insist that there is injustice in both the unwarranted disadvantaging of one group and the unwarranted advantaging of another. Wrongfully advantaging the wealthy thus satisfies the injustice condition. Because the state is complicit in the crimes of the wealthy, it lacks standing to prosecute them. We remain mired in the advantaged offender problem.

Benjamin Ewing thinks this problem can be ameliorated, though not completely eliminated, by tweaking Tadros's injustice condition. Ewing distinguishes between two types of criminal complicity: complicity which wrongs the offender's victim, and complicity which wrongs both the offender and her victim. Ewing claims that complicit agents lose standing to blame when they wrong or harm the *target* of their criticism (2017: 51). So Ewing denies that a white collar criminal can mount a complicity defense, on the (quite plausible) grounds that she is not wronged or harmed by her preferential treatment. This is the case even if the state's lenient white collar crime policy is distributively unjust. But I don't think that Ewing takes any of the bite out of the advantaged offender objection.

Ewing relies on the comparative claim that a state of affairs involving criminogenic policy that wrongs offenders is *worse* than a state of affairs involving criminogenic policy alone. This unobjectionable claim relies on basic moral arithmetic: we can count more wrongs or injustices in the former case, assuming a roughly equal level of criminogenesis. A state with criminogenic policies that wrong both victims of increased crime rates and the (disadvantaged) perpetrators of those crimes themselves is worse than one with non-perpetrator-wronging criminogenic policies. But this comparative claim exerts no pull on our assessments of complicity. To be complicit with a wrongful state of affairs is to be partly responsible for it. The quantity of wrongs an agent commits does not affect her responsibility for those wrongs; being responsible for more wrongs does not entail that one is more responsible for any of them. So the fact that a state with criminogenic policy that wrongs offenders is in some sense more unjust than a state with criminogenic policies that do not wrong offenders says nothing about the latter state's responsibility for the crimes it encourages or facilitates. That the latter state commits fewer injustices does not lessen its responsibility for its criminogenic policies, and so its complicity remains intact.

Shifting our focus to a state's noncomparative wrongs doesn't help Ewing either. Wronging an offender is not a necessary condition of standing-sapping complicity. Our judgments about complicity are frequently insensitive to the fact that an accomplice wrongs the principal agent: we would not say that an accomplice to murder

who belittles and disparages the trigger-puller is complicit while a genial accomplice is not—or that the former is *more* complicit than the latter. So our assessments of state complicity will be insensitive to the state's wrongful treatment of the principal agent of the offense, even if we acknowledge that such cases involve more injustice overall. Because the state's unimpeachable treatment of the advantaged offender doesn't exonerate it against charges of complicity, the advantaged offender objection is untouched.[16]

2.3 A Duffian Response

Howard and Pasternak believe that Duff has the resources to survive the advantaged offender objection.[17] Key here is the second precondition of punishment, which is that there exist relations of mutual accountability between the state and its citizens. Howard and Pasternak contend that in states responsive to the needs of their privileged citizens (likely a good many of the states that meet the first precondition), privileged offenders may be called to account, even in contexts where the state acts hypocritically in making such demands (2021: 6–7). A state that enables or facilitates significant disadvantage fails to display sufficient concern and respect for some of its citizens, so when it blames advantaged offenders, its blame is hypocritical. But because the state holds itself accountable to privileged offenders, it stands in a proper political relationship with them, and retains standing to censure them for their misdeeds despite its hypocrisy. The hypocrisy version of the advantaged offender problem is thus defused.

I'm skeptical that the state's accountability to advantaged offenders cancels out the standing-sapping effects of hypocrisy. This is because the wrong of hypocrisy is a different sort of animal than the wrong of exclusion. If the former undermines standing, the presence or the absence of exclusion is immaterial, unless hypocrisy and exclusion are jointly necessary for lost standing. But Duff says nothing about joint necessity, and it makes little sense to insist on it. If hypocrisy wronged only the excluded, it would be a relational or person-relative wrong. But hypocrisy is not a relational or person-relative wrong (Tadros 2009: 395–7; Holroyd 2010). When a politician who builds his career on defending "traditional" family values is caught with his pants down, all of his criticisms of liberal sexual morality are revealed to be hypocritical, regardless of their target.

Maybe hypocrisy isn't actually that important for Duff. (Howard and Pasternack gravitate toward this interpretation (2021: 6)). Perhaps Duff's discussion of hypocrisy is meant merely to illustrate a more fundamental claim, namely that the

[16] Ewing might insist that in the wrongful treatment case, there is an *additional* defect in the state's relationship with an offender that undermines standing, namely the state's wrongful treatment of the offender. But this response is too vague. Duff and Tadros discuss hypocrisy and complicity in order to defend the claim that *these types* of wrongful treatment weaken or eliminate standing. So if Ewing's effort here is to be at all persuasive, he needs to identify the type of wrongful treatment at issue and explain why it affects standing in a manner appropriately connected to complicity.

[17] I appreciate an anonymous reviewer pressing me on this point.

community and its legal system "has so notably failed to treat [the disadvantaged offender] in accordance with its declared values" that it "can hardly claim the right to call him to account for his alleged failure to respect those values as embodied in the criminal law" (2001: 186).[18] Although we can easily spot the hypocrisy here—the law flouts the very same standards as those it blames—the fundamental moral problem might be the disadvantaged offender's *exclusion* from the political community. Indeed, the vast majority of Duff's discussion of loss of standing focuses on exclusion and the state's violation of the second precondition of punishment.

If this is what Duff has in mind—if it is the unjust state's lack of responsiveness, not its hypocrisy, that ultimately explains its lost standing—he might seem to have an effective response to the advantaged offender objection. The unjust state excludes the disadvantaged but not the advantaged offender; it holds itself accountable to the advantaged offender but not the disadvantaged one. The unjust state thus seems to forfeit its license to blame only the disadvantaged offender.

But this defense does not succeed. We can spot its weakness by expanding our view out from the state's refusal of accountability and its attendant exclusions. Duffian political communities are not built on mutual relations of accountability alone. Among other things, community requires a shared commitment to defining values (Duff 2001: 47). Indeed, this aspect of community plays a leading role in Duff's understanding of the purpose of the criminal law. One of the basic functions of criminal legal proceedings is to communicate that a community's defining values are not to be contravened (2001: 83, 186; 2010: 138). Now the shortcomings of the vindication become readily apparent. A state that violates a value is not well-placed to censure *any* citizen who commits a similar violation. Hypocrisy is one way to explain this. But the more fundamental issue is that in such cases, the criminal law does not fulfill one of its most important functions. By failing to treat the disadvantaged with the requisite concern and respect, the state shows itself to be insufficiently motivated by such values. If the state disrespects these values, it ceases to adequately protect and promote them. It thereby ceases to *be* the protector of those values (even though it protects them in some local instances). Because the state fails to fulfill its function in this regard, it loses standing to blame *anyone* for violating said values, regardless of whether the targets of blame enjoy relations of accountability.

3 The "Punish Anyway" Objection

The standing arguments considered above hold that hypocrisy and complicity wrong advantaged offenders as much as disadvantaged ones, and so level down the state's moral standing to blame across the board. Practically speaking, if reduced standing results in less severe punishment, these theories confer additional benefits on advantaged offenders, heaping penal leniency on top of other social advantages. Both are

[18] Much hangs on Duff's claim that something "analogous" to hypocrisy undermines legal standing to blame (2001: 186). Unfortunately, the passages that follow do not help us understand the details of the analogy.

counterintuitive results for a theory aimed at explaining the particular injustices suffered by disadvantaged offenders. But while Tadros and Duff have no solution to the explanatory failures of their theories, they do have a response to uneasiness about leniency for the advantaged. Both deny that unjust states should go easy on advantaged offenders because they deny that lost standing entails penal leniency. So there is no leniency to be distributed.

This way of getting around the practical aspect of the advantaged offender problem might raise some eyebrows, as one would expect that a lack of standing to blame would restrict, if not invalidate, the state's license to condemn through hard treatment. Because hypocritical or complicit states cannot properly condemn disadvantaged wrongdoers, it is natural to think that they may not punish them, or at least may do so only in a somewhat lenient fashion. After all, penal hard treatment involves far more significant harms than public condemnation, and standing approaches prohibit the latter. I now want to argue that this expectation is warranted. Duff and Tadros' insistence that unjust states should punish anyway cannot be coherently combined with the conceptual commitments that undergird their interest in standing. As a result, their position on the imperative to punish is groundless and should be disregarded. (As a reminder, this issue is specific to Duff and Tadros. It is not intrinsic to standing arguments.) The upshot is that neither disadvantaged nor advantaged offenders may be punished on Duff and Tadros's view, and the practical iteration of the advantaged offender problem retains its force.

Let's first get clear on the reason behind Duff and Tadros's rejection of blanket leniency for disadvantaged offenders. They say that refraining from punishing disadvantaged malefactors wrongs *victims* by failing to respect their rights and recognize their moral significance as members of the political community (Tadros 2009: 410; Duff 2001: 199). These wrongs are particularly objectionable when they befall socially marginalized victims, compounding the injustices they experience. To avoid these significant moral wrongs, the state must punish disadvantaged offenders even when they have no standing to do so.

More specifically, Tadros asserts that refraining from punishment constitutes an injustice to actual and potential victims of crime; the injustice of "failing to publicly recognize [their] moral significance" (2009: 410). For Tadros, an economically unjust state faces a moral dilemma: it must either augment the injustice perpetrated against disadvantaged offenders by punishing them or treat disadvantaged victims of crime unjustly.[19] Dealing with victimless crimes is less morally fraught. The state may not punish disadvantaged offenders who commit victimless crimes, because there are no victim interests to respect (2009: 413). But in all other cases, the state must go ahead and punish those whom it lacks standing to punish.

Duff is concerned with states that normatively and practically exclude some groups from the benefits of full citizenship. Here the second precondition of the practice of punishment is not met, and the state has no right to ask the excluded to answer for their offenses, much less punish them. Duff thinks that many existing

[19] The latter option could also be construed as amplifying injustice, insofar as the state has committed an injustice by facilitating or ignoring criminogenic conditions.

states are in fact exclusionary, and he concludes that many states lack standing to punish a significant number of those who come before their courts (2001: 196). But this sweeping claim winds up in the same cramped corner with Tadros. Not surprisingly, Duff's brief for punishing in the face of injustice focuses on victims' place within the community. For Duff, abolition would exacerbate the social and political exclusion already suffered by many crime victims by refusing to make their offenders answer to them for their crimes (2001: 199). So unjust states face normative pressure to punish for the very same reasons that speak against the practice. Duff concludes that until standing is recuperated, the best path forward is for unjust states to sanction disadvantaged offenders while publicly acknowledging both that the moral justification for doing so is compromised, and that offender and other disadvantaged citizens have been mistreated (2001: 200).

Duff and Tadros take away with one hand what seems to have been given by the other, with a few minor concessions. Those with serious qualms about the unmitigated punishment of the disadvantaged will be unimpressed by their tepid proposals. Of course, highlighting that punishing anyway is an unpalatable way of dealing with disadvantaged offenders does not yet show the approach to be unwarranted. To make my case, I will focus on a commitment shared by our theorists, namely, that punishment is justified in part by its condemnatory features, demonstrating that this commitment is incompatible with punishing anyway.

Condemnation plays a starring role in expressivist justifications of punishment—Joshua Glasgow identifies the core of expressivism as the claim that "punishment is permissible at least in part because it is the only, or the best, way for society to express condemnation of the criminal offense" (2015: 602). But one need not be a card-carrying expressivist to harbor what I call the "expressivist commitment," the conviction that punishment is justified in part by its reprobatory features. Those holding expressivist commitments believe that blame or condemnation of an offender is a necessary feature of justified punishment.[20]

The expressivist commitment can be illustrated by briefly examining a theory that eschews it. Desert-based retributivists believe that punishment is justified when it gives offenders their just deserts. Desert, blameworthiness, or culpability is thus a necessary condition of legitimate punishment. When the blameworthy act is also validly prohibited by law, culpability is a sufficient condition of legitimate punishment. So a blameworthy offender cannot meaningfully object to hard treatment on the grounds that the state lacks standing to blame her. Consequently, an unjust state can punish legitimately, and it does so when it convicts an offender for a legally specified offense and sanctions her proportionately to her criminal wrongdoing. In such cases, just deserts are served.

By contrast, those who subscribe to the expressivist commitment believe that licit condemnation is a necessary condition of legitimate punishment, and that reprobative defects undermine that legitimacy. As we have seen, standing approaches are so

[20] Some theorists hold that condemnation or reprobation is a part of the definition of punishment but not its justification; see, e.g., Boonin (2008) and Zimmerman (2011). They do not share the expressivist commitment.

committed. Once the expressivist commitment is in view, the incompatibility with the punish anyway response should be clear. If serious social injustice eliminates a state's standing to blame disadvantaged offenders, that social injustice corrupts the state's communication with them. Because penal hard treatment is justified by its role in the condemnation of an offense, whenever censure cannot be (properly) communicated, penal hard treatment ceases to be justified. The conclusion to be drawn is that the punishment of disadvantaged offenders is unjustified. And when punishment is unjustified, it may not be imposed.

Of course, Duff and Tadros don't see it this way, expressivist commitments notwithstanding. Their view is that while punishing disadvantaged offenders is *pro tanto* unjust on account of lost standing, it is justified when all relevant moral facts are taken into consideration. States are permitted to sanction disadvantaged offenders absent standing to do so, because the reasons favoring punishment outweigh the countervailing reasons stemming from the state's lack of standing. After surveying and signing on to Duff and Tadros's position on punishing the disadvantaged, Kyle Fritz succinctly captures the consensus:

> Many times (though not always) these reasons in favor of punishing offenders (security, justice for the victims, positive consequences) will be weightier than the state's lack of standing, and so the state should, all things considered, punish them. (Fritz 2019: 324–5)

If Duff and Tadros (and Fritz) are correct, my objection will fall flat. So let us see whether any version of this view survives scrutiny.

3.1 An Expressivist Response

At the outset, it's important to note that if a consideration is relevant to debates about penal practice, it must count as a reason for or against punishing under a justification of punishment. Otherwise it will carry little to no deliberative weight. To wit: a utilitarian might be pleased to hear that a given sentence would serve the malefactor his just deserts. But this favorable consideration would carry no deliberative weight if the punishment achieved no socially beneficial consequences. For the utilitarian, an absence of utility counts as a (decisive) reason not to punish, while giving an offender his just deserts counts as nothing. The standing theories we've canvassed hold that the injustice of punishing the disadvantaged is less problematic than failing to express the appropriate concern and regard for victims (Duff 2001: 199; Tadros 2009: 410; Fritz 2019: 324). So victim-based considerations should count as reasons to punish under the justifications assumed by Tadros and Duff. If they don't count as such, they cannot be weighed against the strong standing-based reasons not to punish that flow from their justifications.

That concerns for victims do count as reasons to punish can be confirmed with a brief glance at the expressivist commitment. To condemn a criminal act is also to condemn the harms and wrongs the criminal inflicts. Blame and condemnation thus plausibly communicate regard for victims and an affirmation of their full moral

status.[21] Indeed, many who share expressivist commitments explicitly incorporate this affirmation into their general justification of punishment (e.g., Hampton 1992; Duff 2001: 28, 72, 114, et passim; Glasgow 2015: 610, 627). Because victim-centered considerations favoring punishment can be appropriately connected to the justification of punishment, and count as reasons for these theories, reasons to punish (stemming from concern for victims) and reasons to refrain from punishing (stemming from a lack of standing) both obtain. If standing theorists are correct that communicating regard and respect for victims outweighs the reasons against punishing furnished by injustice or exclusion, punishment is back on the table.

To assess this weighing, we need to sort out a complication. Condemnation encompasses two distinct judgments: a negative assessment of an offender and a positive assessment of a victim. For those with expressivist commitments, punishment must capture at least one of these two aspects to be justified. But the two aspects could be disjunctively or jointly necessary. This distinction is important, because if expressions of the two judgments are jointly necessary, the state's loss of standing to condemn the offender means the justificatory bar is not cleared, even though victim-centered reasons are justification-relevant and could count in favor of punishment in other circumstances. When punishment is unjustified, it is forbidden, and the punishment-favoring considerations are impotent. The unjust state is barred from punishing disadvantaged offenders straightaway. By contrast, if the value of expressing concern for the victim were to count as a reason to punish in the absence of legitimate condemnation of the offender, it would have to be because expressing such concern does the expressive work of punishment all by itself (or perhaps in combination with other considerations, as I discuss below in Sect. 3.2.). The upshot is that if expressing concern for victims legitimates states' punishment of disadvantaged offenders, it must be because the positive and negative aspects of condemnation independently satisfy the expressivist commitment. So is this the view on the table?

Duff doesn't address this point, much less clarify his position. Relevant passages are hard to come by, but the evidence suggests that concern for the victim carries little weight. The vast majority of ink he spills is devoted to expression relating to offenders, with victims receiving only a few scattered mentions. More importantly, given his philosophical commitments, communication with the victim and society is, on its own, deficient as a justification. If hard treatment were imposed on an offender *only* to say something, however important, to the victim, or to say something to society about the victim, the resulting practice would violate a norm Duff holds dear, the prohibition against treating people as mere means (see, e.g., 2001: 13–14). Just as importantly, hard treatment intended solely as communication to a victim would fail to address the offender as a member of the community, as someone bound to community norms and who is to be engaged with in this respect (2001: 84, 113). And the nonnegotiable core of Duff's justification is that punishment

[21] I'm not saying condemnation *must* involve a concern for the victim, just that it's reasonable to think that it does.

communicates the community's censure *to* a member of that community in order to encourage repentance.[22]

More generally, anyone who asserts that expressing concern for victims satisfies the expressivist commitment faces a daunting challenge. She must demonstrate that this expression requires the imposition of hard treatment on offenders. (She cannot assume the validity of this requirement, because the task of justifying punishment is the task of vindicating legal authorities' intentional imposition of hard treatment on wrongdoers.) The only philosopher I know of who has tried to justify punishment by appeal to a concern for victims is Jean Hampton. On Hampton's retributivist expressivism, the justification, and basic purpose, of punishment lies in its symbolic vindication of crime victims; punitive hard treatment purportedly sends a message that annuls the inferiorizing message sent by the offender.

But adopting a Hamptonian approach runs into several hurdles. The first is that Hampton's victim-centered approach rejects the moral convictions that undergird standing arguments; she categorically denies that state complicity with wrongdoing renders punishing the disadvantaged problematic in any way (see especially Hampton 1998: 43). This deep tension would need to be resolved if the friend of punishing anyway were to incorporate a Hamptonian view.

In addition, Hampton's theory suffers from a number of substantive shortcomings, which is attested to by her relatively isolated position within punishment theory.[23] I will mention just two. First, Hampton misconstrues the purpose of punishment. Society in general does not accept or endorse the message of inferiority sent by the offender, so there is no need to create an outrageously expensive penal institution to counter that message. (Tadros rejects Hampton's approach for this reason (2011: 108).) Second, even if there is such a need, legal officials can affirm the victim's moral worth in less costly and intrusive ways: the state can offer victims monetary compensation, restitution, counseling, home security systems, and so on. And of course the state can also strive to reduce criminogenic conditions! In other words, Hampton never establishes why communicating concern for victims recommends hard treatment to the exclusion of alternatives.[24] If hard treatment, especially hard treatment in the form of incarceration, is unnecessary to achieve the victim-affirming goals of punishment, then punitive hard treatment is not justified by concern for victims. And so the Hamptonian version of the punish anyway response is on the ropes.

[22] Duff tries one other strategy. He asserts that punishing an excluded offender can *constitute* her as a citizen, insofar as punishment is an attempt to communicate with citizens of a community (2001: 199). But this seems to get things absolutely backwards, and is baldly incompatible with the preconditions of punishment.

Tadros offers a few remarks about "intrinsic" expressivist reasons to punish disadvantaged offenders; these are subject to the objections I levelled against Duff (2009: 411–12).

[23] Hampton seems to get a bit more uptake in the philosophy of international criminal law—see for example Luban (2010) and Reeves (2019)—but I think this is owing to the different moral questions raised by prosecuting war crimes.

[24] For detailed criticism of Hampton's views, see Dolinko (1991) and Gert, Radzik, and Hand (2004).

3.2 Deterrence-based Responses

An alternative is to hitch the punish anyway response to a justificatory feature that has nothing to do with the expressivist commitment. The most obvious candidate is deterrence—general deterrence or, even better, the deterrence of crimes committed against disadvantaged offenders.

Tadros could employ such a strategy. His book-length justification of punishment singles out social protection as the basic purpose of punishment. Tadros's program is instrumentalist, holding that punishment is justified insofar as it reduces the harm caused by criminal wrongdoing. (It is also nonconsequentialist, because he derives the value of crime control from the importance of protecting citizens' rights, which in turn rests on their status as persons (2011: 126).[25]) At the same time, Tadros downplays the significance of the expressivist commitment, cashing out the value of punitive condemnation in instrumental terms: on his view, states are permitted to condemn wrongdoing through punishment only if hard treatment is the most effective means of censure (2011: 103, 107). He doubts that that this bar is cleared (2011: 108–9). But even if it is, he insists that censuring wrongdoers and vindicating victims are not worth the enormous social and economic costs associated with penal institutions (2011: 107).

It is easy to see how Tadros's view pushes unjust states to punish in the face of injustice—punishing the disadvantaged (allegedly) promotes the fundamental goal of deterring harm to innocents. But once we have this justificatory apparatus in place, and have relegated penal expressivism to the sidelines, standing loses much of its normative force. As I noted above, Tadros assigns condemnation a fairly insignificant instrumental value. Moreover, his account is downright inhospitable to standing arguments. A hypocritical or complicit state might incur practical costs in communicating with marginalized offenders, insofar as their hearts will tend to be hardened by the state's hypocrisy or complicity. This communicative infelicity counts as a reason, however slight, for states to avoid hypocrisy and complicity. But misgivings about punishing disadvantaged offenders no longer have anything to do with lost standing. They center on the fact that the consequences of penal sanctions are not as good as they might otherwise be. Tadros's view should thus not be numbered among standing arguments.

So are Tadros's arguments about hypocrisy and complicity to be left flapping in the wind? One way to rehabilitate them as standing arguments would be to take a pluralist line and say that punishment is justified by a variety of considerations, one of which leads to moral qualms about lost standing and one or more of which suffices to justify punishing anyway. On a pluralist account, punishment fulfills a variety of sometimes unrelated purposes, and a broad range of sometimes unrelated considerations count as reasons favoring punishment. So pluralists have little trouble

[25] Tadros adds that the intentional harm imposed on an offender is permissible not just because the state has a duty to protect potential victims of crime, but also because punishment compels the offender to comply with the duties of justice she incurs as a wrongdoer, duties which include averting future harms to the victim.

claiming that the salutary consequences of punishing in the teeth of injustice outweigh the injustice.

This seems to be Fritz's approach. He characterizes lack of standing as a "powerful *pro tanto* reason" not to punish disadvantaged offenders (2019: 324). But he sets this reason against other *pro tanto* reasons to punish and finds that the latter often overcome the former. Let me cite his conclusion once again:

> Many times (though not always) these reasons in favor of punishing offenders (security, justice for the victims, positive consequences) will be weightier than the state's lack of standing, and so the state should, all things considered, punish them. (2019: 324–5)

This all-things-considered justification relies on a variety of reasons stemming from expressivist, deterrent, and victim-centered considerations.

To address the pluralist response, a few metatheoretical remarks are in order. Some justifications of punishment are monistic; think of old chestnuts like desert-based retributivism and utilitarianism. Others are dualist or pluralist. To take a distinction from Mitchell Berman, pluralist justifications are either structured or unstructured; unstructured accounts are "purely additive" or "merely conjunctive" (2008: 287). For example, the United States Supreme Court asserts that punishment is justified on both retributive and consequentialist grounds (1972). Fritz also seems to endorse unstructured pluralism.

Unstructured theories are permissive. They hold punishment to be justified by any relevant consideration. Contrast these with structured dualist theories like those of Hart and Rawls' two-level theories (which justify the institution of punishment in consequentialist terms and the imposition of punishment in retributivist terms), Morris's limiting retributivism (which sets retributively proportionate sentencing ranges within which consequentialist considerations can be applied), or Berman's view (which justifies "core" cases of punishment by retributivist considerations and "peripheral" cases by consequentialist ones).[26] These theories all provide principled ways of marking the moral and institutional territory to be justified by retributive or consequentialist considerations. Hart and Rawls, for example, believe that consequentialism answers the question of why we have criminal courts and prisons in the first place, and retributivism answers questions about who to punish and how much to punish them.

To me, unstructured pluralist accounts are for the birds. For one thing, they generate intractable moral conflicts. If we mash together retributivism and utilitarianism, legal authorities will be confronted with intractable dilemmas, given the incomparability or incommensurability of the moral values at stake. Should they punish the innocent if they thereby secure large reductions in criminal activity? Should they refrain from punishing the guilty if sanctioning them does no good and a lot of harm? More pertinently, as Tadros has already noted (2011: 107), they will face conflicts between vindicating victims and promoting the most efficient means of crime control. Moreover, if we take a page from SCOTUS and simply ignore these

[26] For some of the relevant work, see Rawls (1955), Hart (1968), Morris and Tonry (1990), and Berman (2008).

normative conflicts, unstructured dualism will justify almost any infliction of penal hard treatment, because one consideration or other will serve as a license. This result is too permissive for a practice as harmful and costly as punishment. Finally, unstructured pluralist accounts are vulnerable to objections leveled against any of their components.[27] Even if the theoretical conjuncts independently justify punishment, they must each survive criticism for the pluralist view to remain pluralist. This is a high bar to overcome. So while pluralists can handily justify punishing the disadvantaged despite the state's lack of standing, this rescue strategy comes at the cost of an unpalatable justification of punishment.

4 Conclusion

To wrap up, let me reiterate that standing arguments are not necessarily burdened with the problem of punishing anyway. Friends of the standing approach could simply concede that states lacking standing forfeit the moral title to punish disadvantaged offenders. I, for one, believe this is their only coherent option. The concession comes at a price, insofar as it offers leniency to advantaged as well as disadvantaged offenders. But it is almost definitely a price worth paying. Because the practical aspect of the advantaged offender problem is tied to the explanatory failures explored in Sect. 2, the costs are already on the ledger. In other words, the fundamental problem with standing arguments is that they do not explain in any satisfactory way why punishing the disadvantaged in unjust states is of special moral concern. Anyone harboring such concerns would be better off adopting a different approach.

Acknowledgements Thanks are owed to Anthony Reeves for his helpful comments on this paper.

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[27] For more on this point, see Boonin's criticisms of conjunctive and disjunctive hybrid justifications of punishment (2008).

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