Criminal Culpability and the Community

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Determining an offender's criminal culpability is an evergreen challenge. It demands a careful blending of the offender's moral responsibility for the crime with the offense's identifiable harmful impacts on its victims and society. Far from a mere abstract or occasional theoretical exercise, this evaluative undertaking represents a critical iterative stage before charges can be filed, findings of legal guilt rendered, or sentences imposed. Getting these assessments right is non-negotiable for a functioning justice system that relies on the public's respect and support.

This article argues that the prevailing view of criminal culpability, the central driver in the millions of criminal cases annually flowing through our justice system, is unduly narrow. More specifically, criminal conduct involves two distinct forms of injury to the victim. One form, physical or emotional harm to victims, is widely acknowledged. However, the other form, wronging by imposing unequal standing on the victim, has been unjustifiably minimized, with significant negative societal and systemic implications.

By conveying that they do not consider others' rights sufficiently important, offenders engage in a form of moral betrayal of both the victim and society. No longer equal with others in the community, the offender, through their blameworthy conduct, subjugates their victim while concurrently elevating their own status.

Our failure to properly account for this type of antisocial self-elevation as a separate and distinct injury prevents us from accurately describing the crime committed. It also limits our ability to account for the offense's full spectrum of adverse impacts on the victim and society. The proposed victim-centric approach addresses these issues and seeks to advance the justice system's ability to foster the equality-supporting civic bonds and shared social norms essential for a thriving society.

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I. INTRODUCTION

To accurately assess a criminal offender's overall culpability, judges, prosecutors, and other justice system personnel must carefully blend the offender's moral responsibility (*mens rea*) for the crime with its harmful physical, financial, and emotional impacts on the victim.[1] This is undeniably a heavy lift. No indictment can be filed, a finding of guilt rendered, or a sentence imposed without first going through this challenging, nuanced process.

This Article does not disagree that these are important, indeed necessary, stages in the criminal justice process. Nor does it quibble with the current approach's focus on deterrence and rehabilitation, even if achieving those objectives often proves elusive.

Instead, the position developed here is that our conventional conception of criminal culpability is too undifferentiated and offender centered. It unjustifiably omits a fundamental and distinct form of injury. By focusing almost entirely on an offender's state of mind and the identifiable harm caused to determine blameworthiness in the form of formal legal guilt, the prevailing account fails to account for the full spectrum of the crime's consequences.

[1] For ease of reading and to avoid the awkwardly repetitive use of "alleged" when referring to situations where no formal finding of guilt has been rendered, this Article will default to "offense" throughout and assume the reader appreciates that all situations where no conviction has been rendered necessarily involve *alleged* offenses.

More specifically, criminal conduct, properly understood, involves two very discrete forms of "injury" to the victim. The first form (namely, physical or emotional *harm* to victims) is, for good reasons, commonly accepted and largely uncontroversial. Yet the other (*wronging* by imposing unequal standing on the victim) has been widely overlooked. This is a serious mistake.

Although not always formulated this way, there is broad agreement that antisocial self-elevation, inherent in almost all crimes, raises the offender's moral blameworthiness in the *mens rea* sense.[2] But beyond that, the argument developed here is that an offender's morally culpable decision to wrong victims by imposing unequal standing on them deserves an independent, prominent place in our criminal justice vocabulary.

By engaging in antisocial, self-directed conduct that reflects *disrespect* for others' interests, the offender conveys that they do not consider others' rights sufficiently important. In that sense, the person engaging in criminal behavior participates in a form of moral betrayal of both the victim and society. The offender differentiates themselves from the social group. Through their actions, they publicly convey a mindset that the rules applicable to others do not equally apply to them; they exhibit a sense of superiority over their victim and other rule-followers. No longer equal with others in the community, the offender subjugates their victim while concurrently elevating their own status.

Consider a short hypothetical introducing the harming-versus-wronging distinction at the heart of the position staked out here. Assume Vanessa is at a restaurant one evening and leaves her blue cellphone on the bar while conversing with friends. Albert, who also owns a blue phone, mistakes Vanessa's phone for his own, takes it, and leaves the restaurant.

Now, assume alternatively that Albert notices Vanessa is not paying attention to her phone on the bar. Seizing the opportunity, Albert quickly swipes the phone and leaves the restaurant without Vanessa noticing.

Vanessa has been *harmed* in both scenarios because her cellphone is gone, and she must now buy a new one. However, to assess whether Vanessa was additionally *wronged*, we need to understand how Vanessa reasonably perceived the circumstances under which Albert took her phone.

In scenario #1, assume Vanessa later reviews the CCTV footage from inside the bar and realizes that Albert mistakenly took her phone. In scenario #2, in contrast, Vanessa sees Albert in the footage nervously looking around before stealing her phone.

In both scenarios, Albert tangibly harmed Vanessa's interests because he caused Vanessa to lose her phone permanently. However, only scenario #2 involves committing a crime because Vanessa, in addition to being harmed, has been wronged by Albert's intentional subjugation of Vanessa's rights. By stealing Vanessa's phone, Albert knowingly and without justification placed his

[2] The term antisocial is distinct from asocial (the latter referring to those who simply prefer a lack of social interactions); as used here, it refers to those who disregard the feelings and interests of others. *Antisocial*, CAMBRIDGE DICTIONARY (4th ed. 2021).

selfish interests above Vanessa's rights and, in so doing, disregarded and disrespected Vanessa's right to equal standing.

Of course, whether Vanessa at the time subjectively realizes the wronging—that is, recognizes that her phone has been stolen rather than taken by mistake—does not impact the action's criminality or Albert's knowing imposition of unequal standing. As discussed next, however, Vanessa's predictable emotional reaction to these two different explanations for her phone being gone directly addresses the centrality of the harming v. wronging distinction.

Although making assumptions is always tricky, it is probably fair to say that most readers will intuitively appreciate the expressive distinction this hypothetical is driving at. The reader who has at some point been criminally victimized will likely recognize the difference between how it feels to be harmed, as opposed to also being wronged.

Scholarship and research, in fact, support our gut-level feeling that there is a significant difference between how we subjectively perceive, say, losing a wallet because we left it on a restaurant table, on the one hand, and realizing that someone intentionally stole the wallet from the table when we were not watching, on the other.[3] Again, the person is harmed in both situations and must replace the wallet. However, the research supports our common understanding that the person victimized by the thief will generally feel a far more intense and longer lasting sense of frustration, vulnerability, and even anger at the moral betrayal and subjugation the intentional theft signals.[4]

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[3] *See generally* Mary Margaret Giannini, *Equal Rights for Equal Rites?: Victim Allocution, Defendant Allocution, and the Crime Victims' Rights Ac*t, 26 YALE L. & POL'Y REV. 431, 451 (2008) ("Through the commission of crime, the defendant's acts place him in a position superior to the individual he has harmed. The defendant's acts objectify the victim by treating that person as a means to an end—the commission of the crime—and simultaneously indicate his belief that community norms do not apply to him."); Axel Honneth, *Integrity and Disrespect: Principles of a Conception of Morality Based on the Theory of Recognition*, 20 POL. THEORY 187, 189–91 (1992) (discussing victims' physical and emotional injuries resulting from disrespect and denial of recognition); Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 957 (1985) ("The intrusiveness of [core] crimes threatens and denies a victim's 'personhood,' subjecting the victim to devastating psychological consequences."); *see also* T. Markus Funk, *Rethinking Culpability and Wrongdoing (in the Criminal Law—and Everyday Life)*, 92 U. CIN. L. REV. 1080 (2024) (providing an earlier examination of the harming versus wronging distinction and the importance of equal standing at the heart of this Article); Rex D. Glensy, *Quasi-Global Social Norms*, 38 CONN. L. REV. 79, 115 (2005) ("Fairness is an attribute that compels most of us to treat one another with respect and without bias. It is a quasi-global social norm that forms part of those norms founded on human compassion. It enhances societal cohesion and reduces social conflict." (quotation and citations omitted)); Kenneth W. Simons, *Equality as a Comparative Right*, 65 B.U. L. REV. 387 (1985) (contending that equal treatment is a comparative right because it is interpersonally dependent and stipulates a relation of equality); Geoffrey P. Miller, Norms and Interests, 32 HOFSTRA L. REV. 637, 641–42 (2003).

[4] *See* Miller at 641.

The central player in this proposed rethink of criminal culpability, then, is the importance of recognizing and accounting for the systemic importance of ensuring "equal standing" between individuals.[5] The offender who unjustifiably elevates their standing over that of their victim, creating a moral imbalance with both the victim and society, inflicts a very distinctive moral injury. By not controlling and conforming their behavior to basic societal expectations, the most fundamental of which are reflected in criminal laws,[6] and treating the victim as a means to an end, the offender disrupts the default presumption of equality and restraint on which healthy societies are based. Put differently, innocent actors merely err about the scope of the victim's rights. On the other hand, culpable aggressors who threaten a wrong deny victims their right to respect.

Putting an even finer point on it, this feeling of being wronged will differ depending on whether the person took the items intentionally, recklessly, negligently, or by innocent mistake. Although these assessments are far from mathematical, each successively less morally blameworthy attack on the victim's equal standing will, all other things being equal, directionally reduce the victim's feeling of being wronged. Wronging another through the imposition of unequal standing, in short, tells us *something additional* about the offender's moral blameworthiness and the impact the offender's actions have on their victim.

Understanding how one person unjustifiably elevating their interests over those of others disturbs the social order does not require a trip to the courthouse or the law library. Antisocial self-elevation in everyday life can range from the

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[5] *See generally* Robert F. Schopp, *Multiple Personality Disorder, Accountable Agency, and Criminal Acts*, 10 S. CAL. INTERDISC. L.J. 297, 319 (2001) ("The criminal justice system of a liberal society protects equal standing and individual self-determination by proscribing and punishing conduct that violates protected rights and interests."); Stephen R. Munzer, *Introduction* to NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 7 (Stephen Munzer ed., 2001) (discussing the equal standing of all people within a community regarding property rights). *But see* R.A. Duff, *Choice, Character, and Criminal Liability*, 12 LAW & PHIL. 345, 363, 380 (1993) (championing a character theory of criminal liability and explaining how criminal liability attaches to wrongful conduct that reflects an inappropriate attitude toward the law and the values it protects).

[6] *See generally* Aliza Plener Cover, *Supermajoritarian Criminal Justice*, 87 GEO. WASH. L. REV. 875, 891–94 (2019) ("[A] primary function of the criminal law is to express—and enforce—society's normative values. Relatedly, some theorists justify punishment as serving the important function of making the community whole again after it has been harmed by a lawbreaker."); Gregory Scopino, *Preventing Spoofing: From Criminal Prosecution to Social Norms*, 84 U. CIN. L. REV. 1069 (2016) (criminal law identifies conduct that society considers amoral and deviant); Lee Ann Basser & Melinda Jones, *Fostering Inclusive Societal Values Through Law*, 10 INT'L J. CHILD. RTS. 371, 397–98 (2002) (the law reflects basic socially agreed norms and practices); *see also* Christoph Engel & Michael Kurschilgen, *The Coevolution of Behavior and Normative Expectations: An Experiment*, 15 AM. L. & ECON. REV. 578, 600 (2013) (reviewing experimental findings and concluding that sanctions within a legal framework help coordinate normative expectations).

merely irritating (the shopping store line cutter, inconsiderate driver, internet troll, or loud public talker come to mind) to the criminal (the murderer, assaulter, robber, and "porch pirate" are but some examples).

Though not often discussed, significant comportmental connective tissue exists between those who routinely engage in selfish, socially damaging behavior. As detailed in Part VII below, those who routinely pursue antisocial conduct of one type tend to do so in most aspects of their lives. They do not compartmentalize their antisocial self-elevation. The habitually reckless driver is rarely a reliable employee, good student, loyal partner, timely taxpayer, or all-around law abider. The concern, in short, is that too many suffer from an atrophied moral muscle, with material adverse impacts on almost all aspects of their lives (and the lives of those around them).

For purposes of this Article, a good way to conceptualize standards of behavior enshrined in criminal law and subject to state action is to think of them as formalized norms. These *formal* norms take the form of established, written rules enforced by a governing body that defines baseline allowable behavior within a society. Violations can result in legal sanctions like fines or imprisonment. In contrast, *informal* norm violations are subject to potential nonlegal sanctions in the form of a social "tax."[7] The frustrating message the bad actors send in both kinds of norm-breaking is that rule-followers are suckers. Rule breakers, absent formal or informal punishment, "get one over" on others.

For good reasons, our justice system takes great pains to describe and label all aspects of misconduct deserving sanction accurately.[8] Accordingly, injury through wrongdoing and its imposition of unequal standing and subjugation of the victim's interests should be explicitly added to our common criminal justice vernacular. Taking a sliding-scale account of an offense's impact on equal standing, as a descriptive and evaluative matter, allows us to more persuasively signal conduct-guiding criminal justice outcomes to individual stakeholders, including to offenders, victims, witnesses, and family members.[9] More broadly,

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[7] *See generally* Jacob Bronsther, *The Corrective Justice Theory of Punishment*, 107 VA. L. REV. 227, 232–33 (2021); Jeffrey J. Rachlinski, *The Limits of Social Norms*, 74 CHI.-KENT L. REV. 1537, 1539–40 (2000).

[8] *See generally* Benjamin Levin, *After the Criminal Justice System*, 98 WASH. L. REV. 899, 916–19 (2023); Jonathan M. Hyman, *Bargaining and Criminal Justice*, 33 RUTGERS L. REV. 3, 38 (1980); Theodore G. Chiricos, Phillip D. Jackson & Gordon P. Waldo, *Inequality in the Imposition of a Criminal Label*, 19 SOC. PROBS. 553, 553–55 (1972).

[9] *See generally* Benjamin Ewing, *Prior Convictions as Moral Opportunities*, 46 AM. J. CRIM. L. 283, 325 (2019) ("All crimes (or at least all crimes legitimately classed as such) involve wronging other people, which, in turn, means disrespecting them or undermining their interests without adequate countervailing reasons for doing so. Crime and punishment, therefore, always put us on special notice of other people as constraints on how we may permissibly behave and should direct us toward strategies for giving others their due in general.").

it also allows system participants to better explain and justify charging, conviction, and sentencing decisions to the public.

II. AN OVERVIEW OF THE PREVAILING CONTEMPORARY VIEW OF CULPABILITY

The U.S. criminal justice system uses an offender's culpability as a basis for (1) grading the offense (i.e., under the facts of the case and from the *mens rea* perspective, was the offender acting morally innocently, negligently, recklessly, or knowingly and intentionally?) and (2) determining the appropriate punishment (i.e., what is the appropriate punishment, based on sliding-scale factors such as criminal history, the offender's moral culpability based on their *mens rea*, and the amount and type of harm inflicted?).[10]

The American Law Institute's Model Penal Code (MPC) exemplifies this prevailing undifferentiated approach. MPC § 2.02 defines the culpability requirements.[11] Section 2.04 then addresses ignorance or mistakes.[12] So, the MPC's first question is whether the actor created a substantial and unjustifiable risk of harming another.[13] Then, the inquiry immediately turns to whether that risk is created by a morally culpable individual who engaged in a gross deviation from what we should expect.[14] The process, therefore, compares the actual risk-taking conduct with a normative ideal to determine whether formal censure is appropriate.

As with the MPC, contemporary criminal statutes likewise largely fail to grapple with the deeper question of *why* such a deviation from the norm is so important. With only a few limited exceptions,[15] they do not apply the harming

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[10] *See generally Steps in the Federal Criminal Process*, OFF. OF THE U.S. ATT'YS, https://www.justice.gov/usao/justice-101/steps-federal-criminal-process [https://perma.cc/Z8RT-GPEN]; *A Brief Description of the Federal Criminal Justice Process*, FED. BUREAU OF INVESTIGATIONS, https://www.fbi.gov/how-we-can-help-you/victim-services/a-brief-description-of-the-federal-criminaljustice-process [https://perma.cc/MD7D-9RFP]; ALLISON BURKE ET AL., INTRODUCTION TO THE AMERICAN CRIMINAL JUSTICE SYSTEM 29–34 (2019), https://openoregon.pressbooks.pub/ccj230/open/download?type=print_pdf [https://perma.cc/BZP7-SWAQ].

[11] *See* MODEL PENAL CODE § 2.02 (AM. LAW INST. 2020), https://opencasebook.org/casebooks/9294-criminal-law/resources/2.2.1.2-mpc-section-202 [https://perma.cc/6W9Q-5JQH] [hereinafter MPC §2.02].

[12] *See* MODEL PENAL CODE § 2.04 (AM. LAW INST. 2020) https://opencasebook.org/casebooks/6141-tanaka-criminal-law-casebook/resources/7.1.1-model-penal-code-mpc-204-ignorance-or-mistake [https://perma.cc/49Q9-FCAK].

[13] MPC § 2.02, *supra* note 11.

[14] *Id.*

[15] For example, the tort of intentional infliction of severe emotional distress comes closer to addressing the species of wronging discussed here. That charge requires a factual determination of, among other things, whether the accused, through extreme and outrageous conduct, intentionally or recklessly caused severe emotional distress to another. *See*

v. wronging distinction. At all procedural stages, the criminal justice system's prevailing big-picture focus is squarely on assessing an offender's conduct by marrying (1) the harm to the victim with (2) the offender's perceived moral fault in threatening or causing that harm. This perspective is enshrined in criminal codes in the United States and abroad and championed by scholars and legal commentators.

For example, the *Principles of Federal Prosecution* states that the "person's culpability in connection with the offense" and the "seriousness of the offense" are critical tandem charging considerations.[16] The shortcoming that neither the Principles nor the MPC Commentary or similar state statutes address is the "why" element. Why, as a normative, evaluative, or descriptive matter, should different levels of culpability (or, from the MPC's perspective, more serious deviations from the normative ideal) result in a different "grading" of crimes and levels of punishment? At a deeper level, why should the system morally condemn us when we deviate from its determination of an ideal?

It is good and proper that more serious misconduct be punished more severely—but neither the MPC nor the scholarship answers these "why" questions by squarely pointing to the *unique injury* an offender's imposition of unequal standing inflicts on the victim and society.

In fact, despite the reams of law review articles aiming to explain the universal structure of criminal law, few explicitly tie the offender's subjective beliefs to what this Article refers to as antisocial self-elevation.[17] Similarly, a database search of the thousands of scholarly articles on criminal guilt will generate little to no results, recognizing the centrality of equal standing in the context of the harming v. wronging distinction.

Perhaps so little attention is paid to this dynamic because the answer is, at some level, intuitive.[18] The more culpable (morally blameworthy) the offender,

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RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 46 (AM. LAW INST., 2024), https://opencasebook.org/casebooks/4643-tobia-torts-2022/resources/2.1.5.3-restatement-2d-46-outrageous-conduct-causing-severe-emotional-distress [https://perma.cc/7GCV-ZAWF]; *See also* Martha Chamallas, *Trauma Damages*, 52 SW. L. REV. 543, 564–66 (2024).

[16] *Justice Manual*, U.S. DEP'T OF JUST., at § 9-27.230(2), (4), https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution [https://perma.cc/DZD6-2DBQ].

[17] *See, e.g.*, Giannini, *supra* note 3, at 451 ("While others may be bound to follow the law, the offender, by departing from social norms, emphasizes that he rejects being a part of, and living in relation to, his community. Crime, then, represents a social and moral imbalance between the victim, defendant, and society."); GEORGE FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT 37 (1996) (arguing that a criminal offense creates a moral imbalance between offender and victim that criminal punishment is meant to neutralize).

[18] On the topic of judgments of blameworthiness being intuitive, see Alexander Sarch, *Should Criminal Law Mirror Moral Blameworthiness or Criminal Culpability? A Reply to Husak*, 41 LAW & PHIL. 305, 309 (2022); *see also* W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. 173, 237 (2021) (contending that some prosecutors make nonenforcement decisions on intuitive judgments about the blameworthiness of defendants

the worse that offender's fundamental character and, therefore, the less the offender is likely to be deterred or rehabilitated.[19] Under this logic, the intentional offender is more morally blameworthy than the reckless one and, therefore, deserves more severe treatment.

The position taken here is that the unique injury inflicted by the imposition of unequal standing supports these intuitive judgments about enhanced moral culpability. In short, the contemporary practice of maintaining a near-total focus on the harm caused—with the offender's *mens rea* merely serving as an additional, albeit binary, measure of severity—reflects an unnecessarily crimped, offender-centric appreciation for how and why an offender's culpability matters.

III. CULPABILITY, CONDEMNATION, AND CAVEATS: THE NORMATIVE AND DESCRIPTIVE IMPORTANCE OF WRONGING

Black's Law Dictionary broadly defines culpability as a "breach of a legal duty" that is "blameworthy" or "worthy of censure."[20] Assessing an offender's criminal culpability is a daily task in justice systems worldwide.[21] But just because culpability determinations are a routine evaluative task for prosecutors, judges, and defense counsel does not mean assessing legal guilt through even the most careful balancing of moral blame and factual responsibility is easy. Far from it.

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on the basis of nontransparent, nontechnical principles and values); Paul H. Robinson, *The A.L.I.'s Proposed Distributive Principle of "Limiting Retributivism": Does It Mean in Practice Anything Other than Pure Desert?*, 7 BUFF. CRIM. L. REV. 3, 12 (2003) ("When the text [of a criminal statute] says that the distribution of punishment must reflect 'the blameworthiness of the offender,' those words refer to a concept, blameworthiness, which has a strong and clear intuitive meaning, one shared among most lay persons and many criminal justice professionals"); Paul H. Robinson, *Some Doubts About Argument by Hypothetical*, 88 CALIF. L. REV. 813, 821 (2000) (positing that broad hypotheticals aimed at teasing out levels of intentionality and blame result in people making "good faith intuitive judgment of blameworthiness").

[19] *See, e.g.*, Rachael A. Hill, *Character, Choice, and "Aberrant Behavior": Aligning Criminal Sentencing with Concepts of Moral Blame*, 65 U. CHI. L. REV. 975, 985 (1998) ("Commentators agree that the criminal law regime attempts to replicate closely society's notions of moral blame. Thus, the criminal law should, and usually does, operate to punish only the morally 'bad.'"); Jennifer Moore, *Corporate Culpability Under the Federal Sentencing Guidelines*, 34 ARIZ. L. REV. 743, 751–52 (1992) (discussing various broad conceptions of culpability).

[20] *Culpable*, THE LAW DICTIONARY, https://thelawdictionary.org/culpable [https://perma.cc/GE7Q-S82E].

[21] *See generally* Paul H. Robinson & Lindsay Holcomb, *Individualizing Criminal Law's Justice Judgments: Shortcomings in the Doctrines of Culpability*, *Mitigation, and Excuse*, 67 VILL. L. REV. 273, 276–80 (2022); Samuel W. Buell, *Culpability and Modern Crime*, 103 GEO. L.J. 547, 581–82 (2015); Kimberly Kessler Ferzan, *Holistic Culpability*, 28 CARDOZO L. REV. 2523, 2523–2524 (2007); Norman J. Finkel, *Commonsense Justice, Culpability, and Punishment*, 28 HOFSTRA L. REV. 669, 691–95 (2000).

To appreciate the magnitude of the challenge, consider the FBI's estimate that in 2022, more than 6.1 million criminal arrests were made in the United States, even excluding traffic offenses.[22] According to the U.S. Department of Justice, moreover, in 2021, almost 430,000 individuals were sentenced to incarceration in state or federal prison.[23] In each of these criminal cases, justice system personnel had to grapple with the weighty responsibility of determining an offender's criminal accountability and blameworthiness. They often had to evaluate complicated and unclear facts, determine harm, and assess the offender's moral accountability in the form of their *mens rea* before making charging decisions, formulating jury instructions, and determining appropriate sentences when convictions followed.

Such culpability determinations are naturally critical to the accused offenders, victims, and their respective loved ones. They have profound real-world consequences, directly affecting individual cases. Indictments are issued, guilty verdicts pronounced, and sentences justified based on these necessarily imprecise and largely retrospective assessments.

But even beyond that, accurately assessing culpability and legal guilt presents challenges because by appropriately punishing the guilty, exonerating the innocent, and allowing leniency when called for, legislators, prosecutors, and judges convey to the public that foundational norms of coexistence are intact, and that fairness and the rule of law prevail.[24] Their judgments can materially impact institutional trust and broader societal morality and cohesion.

Of course, as with all human endeavors, our justice system does not always achieve these objectives. But it is an institutional must to do what we can to ensure fairness and transparency and to reach the correct substantive outcomes.

Beyond accurately accounting for the injury inflicted on victims, safeguarding equal standing among people has foundational importance. A society that does not recognize the importance of protecting each person's equal standing, in effect, also makes the abstract ordering of legal possessions impossible. In a world without public ordering based on the equal standing

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[22] *See Crime Data Explorer*, FED. BUREAU OF INVESTIGATION, https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/explorer/crime/arrest (Jan. 15, 2025).

[23] *See CSAT Prisoners*, BUREAU OF JUST. STAT., https://csat.bjs.ojp.gov/freq-requested-charts [https://perma.cc/FR3A-U7NR].

[24] Procedural justice scholars have taught us that the public's internalized, subjective feelings concerning a justice system's legitimacy and fairness are potent and long-lasting but can quickly be upended by perceived unfair outcomes. *See generally* Eric J. Miller, *Encountering Resistance: Contesting Policing and Procedural Justice*, 2016 U. CHI. LEGAL F. 295, 356 (2016); Stephen Cody & Alexa Koenig, *Procedural Justice in Transnational Contexts*, 58 VA. J. INT'L L. 1, 8–11 (2018); Kristina Murphy, Ben Bradford & Jonathan Jackson, *Motivating Compliance Behavior Among Offenders: Procedural Justice or Deterrence?*, 43 CRIM. JUST. & BEHAV. 102, 105 (2016); Anthony Bottoms & Justice Tankebe, *Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice*, 102 J. CRIM. L. & CRIMINOLOGY 119, 120–21 (2012); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 284 (2003).

among people, the personal domain would be hostage to whether someone else has a greater interest in and the ability to use force to take an object or benefit.[25] Therefore, a justice system that disregards or, more likely, deprioritizes the strict enforcement of equal standing virtually ensures that the erosion of the rule of law will soon follow.

Of course, in a functioning democracy, we do not typically rely on lawmakers and law enforcers to convince us that engaging in criminal conduct is morally condemnable. To the contrary, the desire to impose a publicly expressed cost on the most extreme rule-breakers in the form of a criminal sanction appears to be baked into humanity. As 19th Century English lawyer, judge, and legal historian Sir James F. Stephen put it with more than a bit of dramatic flair: "[T]he infliction of punishment by law gives definite expression and a solemn ratification and justification to the [public's] hatred which is excited by the commission of the offence . . . ."[26]

Although we may not today speak of most offenses as evoking the public's "hate," a criminal sanction, for better or worse, and despite its complexity and unavoidable ambiguity,[27] continues to channel and express collective moral condemnation toward both the conduct and the person engaging in it.[28] Today, as ever, being criminally charged and convicted is accompanied by expressive and signaling dimensions. It conveys social meaning and institutionally reflects society's moral disapproval of the most severe examples of antisocial self-elevation. As will be argued below, this is a good and necessary thing.

Duff framed it this way: "We should use hard treatment punishments of certain kinds because they can serve the communicative aims of punishment

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[25] *See generally* M. Koziubra, *Human Rights and the Rule of Law*, 2011 LAW UKR.: LEGAL J. 10, 17 (2011); Oscar Vilhena Vjeira, *Inequality and the Subversion of the Rule of Law*, 4 SUR. – INT'L J. ON HUM. RTS. 27, 28–33 (2007); Guido Pincione, *Market Rights and the Rule of Law: A Case for Procedural Constitutionalism*, 26 HARV. J. L. & PUB. POL'Y 397, 407–08 (2003); William C. Whitford, *The Rule of Law*, 2000 WIS. L. REV. 723, 734–35 (2000).

[26] 2 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 81 (London, MacMillan 1883).

[27] *See* William DeFord, *The Dilemma of Expressive Punishment*, 76 U. COLO. L. REV. 843, 844 (2005); Joel Feinberg, THE EXPRESSIVE FUNCTION OF PUNISHMENT, IN DOING AND DESERVING 401 (1970), *discussed in* Bernard E. Harcourt, *Joel Feinberg on Crime and Punishment: Exploring the Relationship Between the Moral Limits of the Criminal Law and the Expressive Function of Punishment*, 5 BUFF. CRIM. L. REV. 145 (2001).

[28] *See generally* Jessica Bregant, Eugene M. Caruso & Alex Shaw, *Crime Because Punishment? The Inferential Psychology of Morality and Punishment*, 2020 U. ILL. L. REV. 1177, 1191–93 (2020) (conducting a study on the public's views of individuals who were criminally punished); Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 400 (1965) (describing criminal punishment as "a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, either on the part of the punishing authority himself or of those 'in whose name' the punishment is inflicted").

more adequately than mere convictions or symbolic punishments."[29] Bottoms and Tankebe, for their part, focus less on deterrence and more on just deserts and equal standing.[30] They reasonably offer that "citizens who have deliberately chosen the path of obedience might well be resentful if and when they observe a blatant lack of obedience to law, or an absence of self-restraint . . . ."[31]

Criminally proscribing certain conduct is society's way of imposing reciprocal relationships of restraint and self-policing on individuals when it comes to that conduct. Criminal offenders transgress the subset of societal norms that most put our equal standing at risk and that, therefore, are considered most crucial to the citizenry. These norms are so basic and essential to a functioning society that legislatures, through the democratic process, have enacted criminal laws to penalize those who disobey them.[32]

Those convicted of violating these anchoring norms deserve condemnation because they have ignored critical reciprocal relationships of restraint to pursue their selfish aims. The injury that such self-referential conduct imposes is also not merely theoretical or esoteric. The scholarly literature confirms that offenders' imposition of unequal standing on, and subjugation of, their victims through violent, but also lesser, criminal conduct often has tangible long-term adverse impacts.[33] These impacts include fear of crime, psychological and developmental damage, enhanced perception of the risk of future victimization, distrust of others, feelings of helplessness and vulnerability, anxiety and depression, and neighborhood dissatisfaction.[34] Few would disagree that to

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[29] ANTHONY DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 82 (2001); *see also* Paul H. Robinson, *Criminal Law's Core Principles*, 14 WASH. U. JURIS. REV. 153, 164–71 (2021) (noting the empirical and anecdotal support for the proposition that a community's sense of wrong and the related need to punish wrongdoers are fundamental and deeply ingrained); *cf.* Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1462–94 (2000).

[30] Viewed this way, criminal punishment operates along a tariff theory in that the criminal is expected to "pay" for their misconduct. The rate, in turn, is set by their overall culpability (in mainstream terms, their state of mind, harms caused, and criminal histories—the latter of which are most directly relevant to the recidivism and deterrence points discussed above). *See generally* Marie Manikis, *The Principle of Proportionality in Sentencing: A Dynamic Evolution and Multiplication of Conceptions*, 59 OSGOODE HALL L.J. 587, 592–94 (2022); Paul H. Robinson & Lindsay Holcomb, *The Criminogenic Effects of Damaging Criminal Law's Moral Credibility*, 31 S. CAL. INTERDISC. L.J. 277, 298–99 (2022); Michael Davis, *Just Deserts for Recidivists*, 4 CRIM. JUST. ETHICS 29, 46 (1985).

[31] Bottoms & Tankebe, *supra* note 24, at 138.

[32] *See generally* Scopino, *supra* note 6, at 1113–15; Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CALIF. L. REV. 643, 644–46 (2001); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 351–54 (1997).

[33] *See generally* Heleen J. Janssen, Dietrich Oberwittler & Goeran Koeber, *Victimization and Its Consequences for Well-Being: A Between- and Within-Person Analysis*, 37 J. QUANTITATIVE CRIMINOLOGY 101, 102 (2020).

[34] *Id.*

secure the common good, such offenders should face criminal sanctions and the attendant social, reputational, and professional costs.

Our culpability assessments are critical to systemic signaling. They drive daily real-world decisions, inform virtually all significant criminal justice outcomes, and offer the justice system a means of explaining why the offender's conduct was wrongful, blameworthy, and deserving of punishment.[35]

From determining whether pretrial detention is required and imposing punishment to evaluating the appropriateness of supervised release, the offender's criminal culpability plays, and must play, a central and consistent role throughout a case's lifecycle. It, therefore, is only sensible that we are not satisfied with anything but a fully informed understanding of that critical measure of moral blameworthiness.

IV. EQUAL STANDING AND THE UNIQUE INJURY INFLICTED BY "WRONGING"

The arguments constructed here are far from semantic. Nevertheless, it is sensible to drill down a bit more on how terminology drives the discussion.

In criminal law, "harm" in general terms narrowly refers to the concrete physical or emotional damage or injury, such as physical pain, suffering, or loss of property, that the offender caused.[36] Determining how much harm a criminal caused is primarily a factual inquiry. "Culpability," on the other hand, completes the moral blameworthiness picture by revealing what was going on in the offender's mind at the time of the offense.[37] The goal of determining culpability

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[35] *See generally* Colleen Murphy & Lesley Wexler, *Non-State Punishment*, 2024 U. ILL. L. REV. 819, 826 (2024) ("Punishment is distinguished by penalties in its expressive, condemnatory function."); Robert F. Schopp, *Mental Illness, Police Power Interventions, and the Expressive Functions of Punishment*, 39 NEW ENG. J. CRIM. & CIV. CONFINEMENT 99, 134 (2013) ("The [criminal law's] expressive function can play an important role in the preventive function of punishment, in vindicating the standing of various individuals and categories of individuals, and in maintaining the integrity of the process."); R.A. Duff, *Retrieving Retributivism*, *in* RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY 3 (Mark D. White ed., 2011) (discussing a "communicative theory" of punishment); DeFord, *supra* note 27, at 848; *see also* R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 27–30 (2001) (arguing that communicative punishment is society's expression that it takes its criminal norms, and those who violate them, seriously); JOEL FEINBERG, DOING & DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 102–05 (1970).

[36] *See generally* Gail L. Heriot, *The Practical Role of Harm in the Criminal Law and the Law of Tort*, 5 J. CONTEMP. LEGAL ISSUES 145 (1994); Orvill C. Snyder, *False Pretenses—Harm to Person from Whom Thing Obtained*, 24 BROOK. L. REV. 34, 35–37 (1957).

[37] *See generally* Martin Montminy, *Culpability and Irresponsibility*, 12 CRIM. L. & PHIL. 167 (2018); GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 759 (2000); A.P. SIMESTER, FUNDAMENTALS OF CRIMINAL LAW: RESPONSIBILITY, CULPABILITY, AND WRONGDOING 401 (2021). *But see generally* Mitchell N. Berman, *"Blameworthiness and*

("wickedness," indifference, etc.) is to allow the justice system to assess the offenders' moral blameworthiness and associated legal guilt.[38]

We have already used some hypothetical cases to illustrate how a morally blameworthy offender conveys disrespect by unjustifiably elevating their standing. In those criminal cases, the bad actor violates what we have described as "formal norms." But to further explain the disrespect dynamic, let us devote some additional time to discussing conduct that contravenes the more amorphous societal expectations in the form of informal norms.

Consider the reckless driver who uses the highway shoulder to cut others off in traffic while they, along with their fellow drivers, are waiting for the congestion to ease. Think of a queue of shoppers patiently standing in the cashier line at a grocery store when a fellow shopper barges ahead. Or consider the inconsiderate fellow traveler sitting in the airport departure area using a loud speakerphone to watch a video or make a call.

Most of us, at minimum, will feel a flash of frustration when confronted with such disrespectful, inconsiderate, and selfish behaviors. That they occur outside the realm of the strictly criminal hardly matters.[39] These perceived social slights, after all, violate basic informal social norms. Like formal norm violations constituting crimes, they are premised on the same expectations: recognizing and respecting one another's equal standing. Indeed, "people misbehaving" in the public square has spawned a cottage industry of viral videos, dedicated YouTube channels, and TV programs generating millions of clicks daily.

Our deep-seated, shared emotional reactions to such affronts are usually not readily explained by substantive delays, concrete injuries, or losses of tangible rights. There is typically no material "harm" in such situations. The reckless or selfish driver, inconsiderate line cutter, or noisy public nuisance generally does not impose an actual injury in the form of harm. Instead, what they, through their conduct and sometimes words, convey is disrespect toward the interests of

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"Culpability" Are Not Synonymous: A Sympathetic Amendment to Simester," CRIM. L. & PHIL., Mar. 2024, at 1, 2 (contending that blameworthiness and culpability are not overlapping in that to be blameworthy is to be justly liable to blaming practices in virtue of being at fault, whereas being culpable is to act in a fashion that manifests or issues from insufficient concern for morally weighty interests).

[38] *See generally* Andrew Ingram, *Out of Sight and Out of Mind: Criminal Law's Disguised Moral Culpability Requirement*, 56 U. RICH. L. REV. 491, 495–98 (2022); Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. Rev. 21, 37 (1997); *cf*. John F. Stinneford, *Punishment Without Culpability*, 102 J. CRIM. L. & CRIMINOLOGY 653, 683 (2012).

[39] Even Aristotle in *Rhetoric* suggested that prosecutors should lace their speeches with language arousing moral indignation (*orge*) in the judicial decision-makers. For an English translation of Aristotle's Rhetoric, *see* ARISTOTLE, RHETORIC (W. Rhys Roberts trans., 1994) (c. 400 B.C.E.). For the original Greek, *see* ARISTOTELIS, ARS RHETORICA 1882a, at 86–88 (Rudolfus Kassel ed., 1976).

others and a self-centered orientation.[40] They violate generalized expectations of social decorum and public civility.

To this point, we have distinguished between formal and informal norm-breaking, seen that protecting people from unjustified attacks on their equal standing is of significant systemic importance, and recognized that self-centered, entitled conduct in the public square operates on a continuum from the merely annoying to the seriously criminal. In the discussion that follows, we elaborate on these insights by examining whether there is a common moral muscle that fails to flex when individuals engage in these instances of antisocial self-elevation.

V. NORMS, ANTISOCIAL SELF-ELEVATION, PEOPLE BEHAVING BADLY, AND THE INCREMENTAL EROSION OF A HARMONIOUS SOCIETY

There is little dispute that a cooperative, well-functioning, pluralistic society requires settled norms of baseline behavior and a widely respected and trusted legal system to back it up.[41] As Edmundson put it, "The law-abiding also willingly comply with the not-outrageously-unjust informal norms that make social life tolerable."[42] On this account, the United States may be heading in the wrong direction.

Recent years have witnessed a worrying acceleration in antisocial conduct. Inconsiderate driving, line-cutting, outbursts on airline flights, improper use of handicapped parking spots, social media bullying, physical attacks, property damage, and the wholesale public abandonment of self-control during what should be low-level interpersonal conflicts have become regrettably regular real-life occurrences.[43] Far from cost-free, those who advance their self-

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[40] *See generally* Robert C. Solomon, *Justice v. Vengeance: On Law and the Satisfaction of Emotion*, *in* THE PASSIONS OF LAW 123 (Susan Bandes ed., 1999) (presenting a cognitivist theory that anger, which Solomon describes as a juridical emotion, and contending that anger is generated when one believes another has wronged them); *see also* Ian Armit, *Violence and Society in the Deep Human Past*, 51 BRIT. J. CRIMINOLOGY 499, 501 (2011) (arguing that "moralistic aggression" and "righteous anger" generated by "real or perceived slights" continues to be part of modern state societies).

[41] *See generally* Tom Tyler, *Understanding the Psychology of Social Order*, 69 AM. J. COMP. L. 748, (2021); Bottoms & Tankebe, *supra* note 24, at 154–60; Ana M. Novoa, *The Diminishing Sphere of the Cooperative Virtues in American Law and Society*, 3 HARV. LATINO L. REV. 49 (1999).

[42] William A. Edmundson, *The Virtue of Law Abidance*, 6 PHILOSOPHER'S IMPRINT 1, 2 (2006), *quoted in* G. Alex Sinha, *Virtuous Law-Breaking*, 13 WASH. U. JURIS. REV. 199, 226 (2021).

[43] *See generally* Olga Khazan, *Why People Are Acting So Weird*, ATLANTIC (2022), https://www.theatlantic.com/politics/archive/2022/03/antisocial-behavior-crime-violence-increasepandemic/627076/ (noting that "[b]ad behavior of all kinds—everything from rudeness and carelessness to physical violence—has increased" (citing Matthew Yglesias, *All Kinds of Bad Behavior Is On the Rise*, SLOW BORING (Jan. 10, 2022), https://

centered desires over the norms of mutual respect and basic civility incrementally erode the bedrock of a successful and harmonious society.

Many people see these dynamics in everyday life. As noted, otherwise calm individuals, including perhaps some who are reading these pages, feel flashes of anger when others ride their bumpers, recklessly pass them on the median, or disregard their place in a shopping line. These reactions may not be strictly rational, yet they appear universal. But why? The answer, it turns out, is found deep in our survival instincts, defense mechanisms, and the desire for social order and predictability deeply embedded in the human psyche.[44] We get upset when we encounter situations in which we follow the rules only to see others flagrantly ignore them.

The disturbing part of the selfish actor's conduct—the part that causes people to shake their heads in disbelief—can be traced to its expressive and symbolic significance. The antisocial self-elevating conduct threatens to disrupt the otherwise equal balance of respect for equality among individuals in a society. It inflicts unequal standing on those who are disrespected. The norm violator is unwilling to self-police their conduct and to subsume their self-directed subjective desires to critical social norms, including those formal norms transformed into criminal proscriptions, creating a unique injury. This injury, namely, the diminishing of the other and wronging through the imposition of unequal standing, lies at the heart of this Article's push for a more nuanced conception of moral culpability.

VI. WHEN THE PRIVILEGED CROSS THE EQUAL-STANDING LINE . . . OR, HOW THE KARDASHIANS AND OTHERS HELP US UNDERSTAND THE DEMAND FOR EQUALITY IN THE PUBLIC SQUARE

We have seen that being disrespected, particularly in the public square, bothers us, regardless of whether the informal norm violator is wealthy, famous, influential, or just a regular Joe or Jane. Yet, the same is not equally true when the rich, famous, or influential advantage themselves in the *private* spheres of their lives.

For example, few are bothered when members of these privileged classes use their greater resources and influence to get better medical care, drive safer vehicles, eat healthier foods, send their kids to private schools, live in nicer houses, and receive enhanced protection through private security. Society

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www.slowboring.com/p/all-kinds-of-bad-behavior-is-on-the [https://perma.cc/57NB-X32H] ("Shootings and murders surged in 2020, and while the 2021 increase appears to have been substantially smaller (as previously covered, this data reports with annoyingly large lags), the overall trend was toward more deadly violence in most cities, even as a few posted declines.")))).

[44] *See generally* Rex D. Glensy, *Quasi-Global Social Norms*, 38 CONN. L. REV. 79 (2005); *see also* Geoffrey P. Miller, *Norms and Interests*, 32 HOFSTRA L. REV. 637, 641–42 (2003); Phyllis J. Day, *Social Welfare: Context for Social Control*, 8 J. SOC. & SOC. WELFARE 29 (1981).

accepts that that the privileged live very separate, and in many senses more rarified, lives than their non-privileged peers.

We do not consider equal standing in such private-sphere situations because enjoying those advantages does not constitute violations of informal or formal norms or convey disrespect. This social order changes, however, as soon as the privileged leave their private environments and enter the public square, where adherence to norms is expected and any norm violations are on public display.

Consider, for example, when the members of the Kardashian family cut in line at Disneyland, shutting down a ride for themselves as others were left to watch and wait.[45] Kim and Khloé Kardashian reportedly took Khloe's daughter and some friends to Disneyland to celebrate a birthday.[46] They took over the park's "Mad Tea Party" teacup rides while other patrons were told to keep their distance, wait, and watch.[47] Even though the Kardashians reportedly paid for the privilege, the media and public outrage were immediate and stinging.[48] *Cosmopolitan* seethed scornfully: "[T]he Kardashians cut the line, get the ride to themselves, and make us common folk wait and watch them . . . typical."[49]

Disneyland, like shopping malls and other private-but-sort-of-public-places, is privately owned. However, it is operated in a way that renders it an "impure" or "quasi-public" good in the language of economists because, once service is provided, it cannot be easily denied to a person who wants to use it.[50] In that sense, the distinction drawn here between the private and public spheres can also be appreciated through the lens of private goods v. public or quasi-public goods.

Similarly, we have actor Alec Baldwin's refusal to stop playing Words With Friends and his decision to take his phone and lock himself in a commercial

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[45] The short video is available here: Storyful Viral, *Crowd Watches as Kardashians Ride Teacups at Disneyland*, YOUTUBE (Apr. 15, 2022), https://www.youtube.com/watch?v=o4aIzKVkMWo.

[46] *See generally* Meredith Clark, *Kim and Khloe Kardashian Spark Backlash After Video Alleges They Cut Lines at Disneyland*, INDEPENDENT (Apr. 15, 2022), https://www.independent.co.uk/life-style/kim-kardashian-khloe-disneyland-cutting-line-b2058847.html [https://perma.cc/A5PA-23BG].

[47] *Id.*

[48] *See* Iris Goldsztajn, *The Kardashians Cut in Line at Disneyland and People Are Not Having It*, MARIE CLAIRE (Apr. 20, 2022), https://www.marieclaire.com/celebrity/kardashians-cut-line-disneyland-crowds-waiting/ [https://perma.cc/2UL4-MRRJ].

[49] Mehera Bonner, *Kim Kardashian and Khloé Kardashian Get Backlash for Cutting Line at Disneyland, Making Everyone Wait Forever*, COSMOPOLITAN (Apr. 15, 2022), https://www.cosmopolitan.com/entertainment/celebs/a39734097/kardashians-backlash-cutting-linedisneyland [https://perma.cc/MNP7-L7SA].

[50] *See generally* Erika K. Wilson, *Blurred Lines: Public School Reforms and the Privatization of Public Education*, 51 WASH. U. J.L. & POL'Y 189, 216–17 (2016); Richard A. Tybout, *Quasi-Public Goods: Pricing the Commons*, *in* ECONOMIC MODELING FOR WATER POLICY EVALUATION 211 (R. M. Thrall et al. eds., 1976).

plane's bathroom before takeoff.[51] This conduct, requiring the flight to return to the gate so he could be removed, enraged passengers and the public.[52]

Finally, actress Reese Witherspoon[53] joined the long list of celebrities, politicians, and others, including actress Amanda Bynes, NBA star Allen Iverson, and actor Sam Worthington, who were publicly shamed after allegedly unsuccessfully playing the "Do you know who I am?" card with law enforcement.[54]

On the other side of the divide, several celebrities, including retired soccer player David Beckham and actress Tilda Swinton, were widely praised for waiting in line with members of the public for ten hours or more in February 2022 to pay their respects when the Queen of England was lying in state in Westminster Hall.[55] Others, including Members of Parliament, received the public's opprobrium for cutting the queue.[56]

The lesson is that society draws sharp lines of demarcation between instances of self-advancement in the private sphere, which rarely generates public disapproval, and selfish conduct in the public square, which tends to be met with near-instantaneous condemnation. These high-profile violations of informal norms and the instances of norm adherence further underscore the universal nature of our expectation of equal standing. In a well-ordered society, such exercises of unjustified self-preference and self-elevation in the public realm offend even those not directly impacted. The desire for and expectation of equal standing are, in short, far from a scholarly invention or abstraction; they appear to be baked into our psyches at a fundamental level.[57]

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[51] *See Alec Baldwin 'Kicked off Plane' over Words with Friends*, BBC NEWS (Dec. 8, 2011), https://www.bbc.com/news/world-us-canada-16063586 [https://perma.cc/YFH9-4KDR].

[52] *Id.*

[53] CNN, *Watch Reese Witherspoon Get Arrested*, YOUTUBE (May 3, 2013), https://www.youtube.com/watch?v=vjQldFr1o74#ddg-play [https://perma.cc/C4ET-4PZM].

[54] *See* Jim Hogue, *15 Celebs Who Said "Don't You Know Who I Am?" (And Failed)*, THE RICHEST (Apr. 12, 2016), https://www.therichest.com/rich-list/15-celebs-who-said-dont-you-knowwho-i-am-and-failed [https://perma.cc/KJY4-73WM]; *see also* Jen Doll, *Reese Witherspoon and the Beauty of Asking 'Do You Know Who I Am?,'* ATLANTIC (Apr. 23, 2013), https://www.theatlantic.com/culture/archive/2013/04/reesewitherspoon-do-you-know-who-i-am/315979 [https://perma.cc/BG56-2XKT].

[55] *See generally* Chiara Giordano, *Queen Queue Jump: Who Waited in Line and Who Didn't?*, INDEPENDENT (Sept. 22, 2022), https://www.independent.co.uk/news/uk/home-news/queue-queen-holly-willoughby-philip-schofieldb2172835.html [https://perma.cc/C6LK-AD4S].

[56] *Id.*

[57] *See generally* Paul H. Robinson, *Democratizing Criminal Law: Feasibility, Utility, and the Challenge of Social Change*, 111 NW. U. L. REV. 1565, 1570 (2017) (explaining that, in the criminal law and elsewhere, educated people have a tendency to "make up reasons after the fact to explain and give the appearance of rationality to their intuitive judgments"); Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814, 817–18 (2001) (contending that moral judgments are primarily based on innate and preconscious moral intuition; in contrast, moral reasoning, like formalist legal reasoning, is a post hoc rationalization for such a judgment).

VII. NORM-BREAKING AND THE CHRONIC OFFENDER

We have seen that wronging someone is normatively and qualitatively very different from merely harming them. Harming involves a relatively straightforward, though often not easily achieved, factual inquiry. The overriding question is the extent to which the offender caused the victim physical or emotional damage. To this point, this Article has sought to update this mainstream moral calculus by establishing that wronging another presents a significant additional form of injury freighted with greater moral complexity. This added form of injury should be recognized and discussed explicitly.

We have also seen that wronging operates on a broad continuum, from the merely rude, inconsiderate, or otherwise antisocial to the seriously criminal. What follows is an examination of such antisocial attitudes' durability and tendency to ramp up over time. Put another way, there are many who, despite long histories of inconsiderate norm-breaking behavior, do not engage in criminality. Yet, it is rare for the chronic recidivist or violent criminal not to have a long and readily traceable history of antisocial conduct. These personality characteristics, when present in sufficient variety and velocity, not only tend to produce criminality, but they also tend to make persons afflicted with them unreliable employees, poor students, disloyal friends and partners, and challenging neighbors.[58]

Impulsiveness, lack of empathy and conscientiousness, hostility, low self-control, self-centeredness, indifference, jealousy, sensation-seeking, spitefulness, alienation, high risk-tolerance, novelty-seeking, negative emotionality, and low reward-dependence are just some of the personality characteristics that studies directionally correlate with antisocial personalities.[59] At the extremes, the bundling of such self-seeking attitudes consistently correlates with a criminal mindset. Though, as noted, many having these

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[58] *See generally* Pedro Pechorro, Joao Maroco, Rui Abrunhosa Goncalves, Cristina Nunes & Saul Neves Jesus, *Psychopathic Traits and Age of Crime Onset in Male Juvenile Delinquents*, 11 EUR. J. CRIMINOLOGY 288, 289 (2014); Julie Carpentier, Benoit Leclerc & Jean Proulx, *Juvenile Sexual Offenders: Correlates of Onset, Variety, and Desistance of Criminal Behavior*, 38 CRIM. JUST. & BEHAV. 854, 855–56 (2011); Gina M. Vincent, Michael J. Vitacco, Thomas Grisso & Raymond R. Corrado, *Subtypes of Adolescent Offenders: Affective Traits and Antisocial Behavior Patterns*, 21 BEHAV. SCI. & L. 695, 707 (2003); Jamie Yoder, Melissa D. Grady & Madison Precht, *Relationships Between Early Life Victimization, Antisocial Traits, and Sexual Violence: Executive Functioning as a Mediator*, 28 J. CHILD SEXUAL ABUSE 667, 671 (2019).

[59] *See generally* Clare-Ann Fortune & Roxanne Heffernan, *Strengths and Weaknesses of the Psychology of Criminal Conduct: Implications for the Conceptualization, Assessment and Treatment of Antisocial Personality Pattern*, 39 BEHAV. SCI. & L. 678, 689–90 (2021); Joshua D. Miller & Donald Lynam, *Structural Models of Personality and Their Relation to Antisocial Behavior: A Meta-Analytic Review*, 39 CRIMINOLOGY 765, 768–85 (2001).

characteristics do not commit crimes, criminals, and particularly habitual and violent ones, tend to be marked by them throughout their life's course.[60]

At this point, some additional moderating observations are appropriate. The mere subjective desire for prestige, possession, and power is self-evidently not criminal. On the contrary, such self-seeking appetites are common and, in some sense, socially encouraged in contemporary society.[61]

That said, engaging in criminality represents a very particular transgressive expression. It requires the offender to act on these self-referential impulses despite the conduct having been criminalized. The offender subjugates their victim and disregards formal norms of baseline behavior while concurrently elevating their own status.[62]

Additionally, it is not an overstatement to say that everyone can occasionally behave antisocially. Transgressive acts, even if criminal, may not signal an antisocial personality.[63] Like all individual characteristics, antisocial personality traits operate on a broad continuum, with simple rude conduct on the one side and violent criminal victimization on the other. Many who engage in occasional lower level antisocial conduct, such as rude driving, cutting in line, parking in handicapped spots, taking two seats in a busy bus, and not

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[60] *See generally* Mark R. Fondacaro, *Social Ecology, Preventative Intervention, and the Administrative Transformation of the Criminal Legal System*, 40 GA. ST. U. L. REV. 277, 289–93 (2024); Albertina Oliverio & Gianmarco Cifaldi, *Mafia Minors and Prison: An Unavoidable Future? Socio-Cultural Determinism, Freedom of Choice and Jurisprudential Measures to Protect Young People*, 7 SOC. & SOC. WORK REV. 138, 139–41 (2023); John S. Callender, *Neuroscience and Criminal Justice: Time for a "Copernican Revolution?*,*"* 63 WM. & MARY L. REV. 1119, 1126–32 (2022); Nita A. Farahany & James E. Coleman Jr., *Genetics and Responsibility: To Know the Criminal from the Crime*, 69 LAW & CONTEMP. PROBS. 115, 116 (2006).

[61] *See generally* Eugen Kahn, *Crime and Personality*, 3 CURRENT LEGAL THOUGHT 1, 9–10 (1936) ("The same aggressiveness and ruthlessness we find in the criminal leader is found in many great leaders in war and peace, leaders who by virtue of their genius and imagination, push human affairs ahead, leaders who raise new standards in all stations of life. . . . There is, however, one attitude which is never amiss and which may well be kept in mind whenever society deals with crime and criminals: This is the attitude of human dignity which is the very backbone of true democracy."); *see also* Robert Agnew & Helene Raskin White, *An Empirical Test of General Strain Theory*, 30 CRIMINOLOGY 475, 476–79 (1992).

[62] Many of the dynamics discussed here, of course, also apply in the non-crime context. The reason otherwise calm individuals can get furious when cut off by a rude driver is but one example of how the imposition of unequal standing in the proverbial public square inflicts a distinct injury (and can really get under another's skin), even when there is no tangible harm and the misconduct has not come close to the level of criminality. Yet, for simplicity's sake, this Article will largely focus on criminal antisocial self-elevation.

[63] *See generally* Oliverio & Cifaldi, *supra* note 60, at 142. As used here, the term "antisocial personality" is not synonymous with a formal diagnosis of Antisocial Personality Disorder. *See generally* Ionut Serban, *The Contribution of Neuroscience on Ascertaining Individual Responsibility in Anti-Social and Anti-Legal Behaviour*, 7 SOC. & SOC. WORK REV. 61, 65–66 (2023).

appropriately curbing their aggression in routine social interactions, will never engage in conduct that brings them face-to-face with the criminal justice system.

However, engaging in a lifestyle characterized by chronic instances of unjustifiably elevating oneself over others does represent a sad throughline in most chronic and violent offenders' lives. Although we may wish it were not so, the self-elevating antisocial mindset and the dynamic risk factors that can drive it are perhaps the most uniquely durable linkage between the bulk of criminal offenders. Studies have consistently demonstrated that crime results from a confluence of certain age-persistent personality types which, when maximally expressed, result in a socially harmful disregard for others.[64]

Imposing unequal standing through wronging a victim is a significant criminal justice dynamic. As a normative and descriptive matter, we must begin to think and talk about an offender's wronging of a victim. This overdue shift in approach represents an improvement over the current limited focus on assessing the gravity of an offender's moral defect to render rehabilitation and deterrence-based judgments. The proposed approach enhances the U.S. justice system's ability to explicitly acknowledge and reinforce the equality-supporting civic bonds necessary for a society and the criminal justice system that undergirds it to succeed.[65]

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[64] *See generally* Phyllis Coleman, *Targeting School Shootings: Using Three Warning Signs - Animal Abuse, Domestic Violence, and Conduct Disorder—to Prevent Massacres*, 32 WIDENER COMMW. L. REV. 65, 128–30 (2023); Glenn D. Walters, Jonathan Kremser & Lindsey Runell, *Perceived Parental Competence, Moral Neutralization, and Cognitive Impulsivity in Relation to Future Delinquency: Understanding the Socialization Process*, 24 CRIMINOLOGY, CRIM. JUST. L. & SOC'Y 1, 2–3 (2023); Lahny Silva, *The Trap Chronicles, Vol. 2: A Call to Reconsider "Risk" in Federal Supervised Release*, 82 MD. L. REV. 530, 560 (2023); Fortune & Heffernan, *supra* note 59, at 689–90; Hassan Rafiey, Fardin Alipour, Richard Lebeau & Yahya Salimi, *Development and Validation of the Antisocial Traits Scale in the General Population*, 47 CRIM. JUST. & BEHAVIOR 369, 369–71 (2020); David P. Farrington, *Psychosocial Predictors of Adult Antisocial Personality and Adult Convictions*, 18 BEHAV. SCI. & L. 605, 620–21 (2000); *see also* Yu Gao, Yonglin Huang & Xiaobo Li, *Selfish Parents, Parenting Practices, and Psychopathic Traits in Children*, 39 BEHAV. SCI. & L. 624, 625 (2021) ("Due to [egocentric selfishness'] lack of others' perspective taking, this variant of selfishness is expected to contribute to low empathy, low altruism, low warmth, and unwillingness to share resources with others.").

[65] *See generally* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2029–30 (1996) ("Many social norms solve collective action problems. . . . Norms solve such problems by imposing social sanctions on defectors. When defection violates norms, defectors will probably feel shame, an important motivational force. The community may enforce its norms through informal punishment, the most extreme of which is ostracism. But the most effective use of norms is ex ante. The expectation of shame-a kind of social 'tax,' sometimes a very high one-is usually enough to produce compliance."); *see also* Thomas A. McGinn, *The Expressive Function of Law and the Lex Imperfecta*, 11 ROMAN LEGAL TRAD. 1, 2 (2015).

VIII. CONCLUSION

Justice systems worldwide acknowledge that a person can show hostility toward another's rights by intentionally, recklessly, or carelessly violating or otherwise disregarding them.[66] Even in cases of criminal negligence, an interpretive assessment of the objective facts can show an identifiable level of disregard.

By formally declaring that certain knowing and intentional physical contact, such as assault or battery, are subject to criminal sanction, the justice system signals to the public that the conduct represents an unacceptable substantive break in the expected norm and relationship of restraint.

Today's conventional conception of culpability treats "harm" and "injury" as interchangeable. The offender's *mens rea* and the physical or psychological harm the offender caused are used in tandem to gauge the gravity of the offender's moral deficit. The stated goal is to render all-things-considered judgments on the offender's ability to be rehabilitated and deterred from future law-breaking and, more broadly, to ensure that the proposed course of justice system action can be defended as just and fair.

The position advanced here accepts this model of culpability, as far as it goes. But it also points out that this prevailing approach is unduly narrow and confining. By omitting a significant species of damage to the victim and society, namely, *wronging*, we provide a necessarily crimped account of a person's criminal culpability. As a result, the justice system is limited in its ability to accurately describe the crime that was committed, the offense's adverse impacts on the victim and society, and why a particular punishment is called for and appropriate.

A respected justice system will uphold the rule of law. It will find itself at odds with the wrongdoer who, through his imposition of unequal standing, at some level denies the conceptual basis of rights and personality as an end. Stated plainly, the criminal engages in extreme antisocial self-elevation and, in so doing, denies their own right to equal respect.

In terms of practical steps to take, consider the above-discussed USDOJ's *Principles of Federal Prosecution* and the ALI's *Model Penal Code*. These and similar publications, including the various ABA standards, guide prosecutors, courts, defense counsel, and the public in understanding the offender's culpability and the offense's impact on the community and victims. Explicitly adding the seriousness of the offender's imposition of unequal standing to the

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[66] *See generally* Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 483 (2011) ("Because causal responsibility in criminal law is about the insult implied by injury, it depends on the offender's expectations and ends."); Benjamin B. Sendor, *Restorative Retributivism*, 5 J. CONTEMP. LEGAL ISSUES 323, 336–37 (1994) ("The law requires us to refrain from injuring those interests through fairly avoidable conduct, conduct that conveys disrespect for those interests.").

list of factors used to gauge victim and societal impacts and to reach culpability determinations is sensible and appropriate.

Conveying the full scope of an offender's injury to a victim allows us to enhance criminal punishment's expressive and descriptive objectives. Expanding the concept of injury by viewing culpability through this victim-centric lens facilitates a more holistic and transparent understanding of an offender's conduct. By explicitly recognizing and accurately labeling the imposition of unequal standing as a distinct and relevant injury, and by adopting the language of equal standing, our system will be better positioned to acknowledge and reinforce the equality-supporting civic bonds and shared norms vital to a flourishing society.