

REASON PAPERS

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Editor's Note

Iris Murdoch is said to have quipped that “philosophy is often a matter of finding occasions on which to say the obvious.” To most readers, the task of explaining why terrorism is always unjustified is likely an instance of Murdoch’s observation. Nevertheless, the issue is, as with all things in philosophy, not as obvious as we might think. Vicente Medina’s *Terrorism Unjustified: The Use and Misuse of Political Violence* (Rowman & Littlefield, 2015) examines the concept of terrorism and its complicated history while defending the view that terrorism is never morally justified. In this issue of *Reason Papers*, we are proud to publish papers from an Author-Meets-Critics event on Medina’s book held at Felician University. First, Theresa Fanelli of Felician University raises concerns about how our understanding of mental incapacities could affect the evaluation of acts of terrorism. Irfan Khawaja, also of Felician University and organizer of the event, raises several disagreements with Medina’s account of terrorism. In particular, he crafts an in-depth counter-example to Medina’s view that terrorism is categorically wrong. Like Professor Khawaja, Graham Parsons of the United States Military Academy argues that, while most acts of terrorism are not justifiable, there might be certain delimited cases of reasonable terrorism. Though such cases might not ever be actualized, Parsons suggests that they show that Medina’s categorical rejection of terrorism might be too strong. The symposium ends with Medina’s reply to these criticisms and his continued defense of terrorism as unjustified.

The two articles featured in this issue are papers I doubt one would find in other journals. Since most academic journals require an ever narrower focus, it is rare to read pieces such as these that bring together a wide range of ideas, history, and disciplines to connect and integrate disparate paths of knowledge.

In “The Postmodern Critique of Liberal Education,” Stephen R. C. Hicks of Rockford University integrates centuries of philosophic arguments about the nature and purpose of education. Hicks examines the long history of attacks on liberal education to demonstrate the philosophic roots of both pre- and postmodern criticisms. Hicks then

identifies, clarifies, and challenges the postmodern critique of liberal education. Lastly, he looks to the future of liberal education.

Jason Kuznicki of the Cato Institute looks deep into human history to discover the roots of how we think about politics. Pulling from genetics, anthropology, ancient epic poetry, and the Bible, Kuznicki argues in “Politics as an Extension of the Harem” that gendered oppression, namely the subjugation of women and low-status men, is central to understanding the origins and development of political governance up through the contemporary era. This understanding, along with the increased inclusion of previously excluded groups, provides fuel for Kuznicki’s speculations about the future of political governance.

The issues closes with a review essay of Erin Kelly’s *The Limits of Blame: Rethinking Punishment and Responsibility* (Harvard University Press, 2018). This work takes on the justifications for harsh criminal punishments and mass incarceration. At the core of Kelly’s argument is a challenge to the alignment of legal guilt and moral blameworthiness that she sees as central to retributivist’s justifications. Alexandre Abitbol’s review essay agrees with Kelly’s call for a philosophical and humanistic reform of the criminal justice system. However, it is critical of Kelly’s diagnosis that removes moral blame from the system.

Thanks for reading *Reason Papers*.

Shawn E. Klein

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Symposium: Vicente Medina's *Terrorism Unjustified: The Use and Misuse of Political Violence*

Comments on Vicente Medina's *Terrorism Unjustified*

Theresa Fanelli

Felician University

Coming from the perspective of a behavioral psychologist as well as having spent 20 years in federal law enforcement, I largely agree and appreciate much of the author's well researched, expansive definitions, history, and schools of thought on terrorism. The discussions of the dimensions of terrorism are rigorously presented. These dimensions include, but are not limited to, the notions of just vs. unjust, moral vs. amoral, and the perceived guilt or innocence of combatants vs. noncombatants. The author also includes discourse surrounding broader reckless and deliberate acts of violence.

A generally agreed upon definition of terrorism focuses on the use of political violence by individuals or groups who deliberately or recklessly inflict substantive undeserved harm or threaten to do so on those who can be conceived of as innocent noncombatants beyond a reasonable doubt, while aiming at influencing a domestic or international audience. Kidnapping, extortion, or certain acts of murder

can also be viewed as terrorism if the perpetrator of the act deliberately or recklessly harms or threatens to harm innocent civilians as a way of promoting domestic or international political goals. Terrorism is also described as purposeful and can be used to defend and preserve a certain political order. Terrorists are understood to operate with a sense of rationality being conditioned with what they believe is a higher good, rather than a cost-benefit analysis.

My considerations focus on the primary underpinning of the author's premise and groundwork for the book's subsequent reasoning and deductions. What would the author's reflections be regarding the importance of the mental capacity or incapacity of the actor as it relates to the many variants of definitions, explanations, even oppositional arguments on terrorism presented in the book?

If the mental capacity or state of the actor(s) is such that the actor cannot predict the consequences of his/her actions, or in many cases understand the consequences of his/her actions, under which category would they fall?

For children or culturally deprived individuals that do not develop any skill set with which to reason and predict the consequences of their actions, is it fair or accurate to then place any of these labels onto them, be it as a "terrorist" or "combatant"?

Would these individuals truly have intent, be deliberate, or threaten in a way consistent with many of the components of terrorism? If a person is acting under a defect of reasoning, impaired perception, or not knowing the nature and quality of the act he/she was committing, can that act then be considered terrorism?

If the individual cannot appreciate the wrongfulness of his/her conduct or is unable to conform his/her conduct to the requirements of the law or society, should he/she be considered a terrorist?

The United States Military Justice System, as well as the United States Criminal Courts Code 18 Section 17, The Insanity Defense, have versions of an insanity defense, or a diminished capacity consideration that explore mitigating circumstances on the defendant's

behalf.¹ Among other things, this is largely determined by the mental state of the actor during the crime in question. Did the person understand what they were doing at the time of the crime, and furthermore could he/she foresee the damage that would occur? These are a few of the considerations taken into account to determine the mental capacity of an individual before being held “responsible” or “not responsible” for a crime or, in turn, possessing the “intent” while committing the crime.

What mental assessment should be considered when the actor is involved in “terrorism”? This mental check would, in part, address the overall mental capacity of the individual at the time of the incident. This check would take into account an age level of which the person’s reasoning and overall mental capacity may not be considered that of an adult. Also, should one consider whether there a history or underlying mental disease or defect? These questions are geared specifically towards children, young adults, culturally deprived, and those whose mental capacity was either arrested, not developed due to age, or not developed at all.

In the context of evaluating the justice or injustice of a purported act of terrorism, or the moral status of the combatants and the noncombatants, what considerations, if any, would the author give to a person with an unreliable, distorted perception? If so, what effect would this have on the characterization of the intent of the person, or deliberation before an act of terrorism? Could a less than “rational” individual or one incapable of foresight and insight be, by definition, able to commit a terrorist act? If the intent or deliberateness were undermined due to age, mental defect, or cultural depravity, but the mechanics of the terrorist act were to meet the legal criteria, should the act be considered terrorism?

¹. *Uniform Code of Military Justice: Congressional code of military criminal law applicable to all military members worldwide* (Washington, D.C.: U.S. Dept. of Defense. 2000).

Terrorism Justified: Comment on Vicente Medina's
Terrorism Unjustified

Irfan Khawaja

Felician University

1. Introduction

Vicente Medina's *Terrorism Unjustified* offers a comprehensive, clear, and thorough critique of terrorism.¹ There's a sense in which I agree with and greatly admire Medina's argument, and a sense in which I fundamentally disagree with and reject it. In this paper, I'll focus on the disagreement, in the hopes that in doing so, the implicit agreement will come out as well.

I'll start in Section 2 with some critical observations on his definition of "terrorism." The definition, I suggest, pushes the reader in two different directions—a categorical rejection of terrorism, and a subtly conditional rejection. On the latter interpretation, terrorism can be justified, but only in situations that Medina regards as extremely implausible and unlikely. In Section 3, I'll offer an extended thought-experiment, verging on a fable, intended to give plausibility to one such situation. In other words, the case I describe will be one in which it seems (to me) justifiable to target people that Medina would regard

¹ Vicente Medina, *Terrorism Unjustified: The Use and Misuse of Political Violence* (Lanham, MD: Rowman and Littlefield, 2015). All references to the book in this symposium are by page numbers in parentheses.

as “innocent noncombatants,” or else to foresee harm to them without having to meet a “reasonable doubt” criterion as to their moral status. In Sections 4 and 5, I’ll make explicit what the fable leaves implicit.

2. Medina’s definition of “terrorism”

Though the book addresses a fair bit of complexity, the crux of Medina’s argument is straightforward, and proceeds in essence as follows: Even in warfare, innocent noncombatants enjoy categorical immunity from the deliberate or reckless infliction of substantive harm. Given this, all such harm is undeserved, and being undeserved, is always (or almost always) impermissible. Since the infliction even of foreseeable harm requires stringent protection for the innocent, foreseeable harm becomes reckless (hence impermissible) when inflicted on those who are not believed beyond a reasonable doubt to be guilty of some serious crime. Any attempt to flout one or both of these norms would be morally wrong; because terrorism flouts both, it is doubly wrong.

In a deeper sense, terrorism flouts the complex application of a single norm, the Principle of Double Effect, or alternatively, St. Paul’s principle that evil ought never to be done that good (or imagined good) may come. So while some individual terrorists may well be craven criminals or unhinged psychopaths, in a deeper and more fundamental sense, terrorism is a kind of teleology or consequentialism run wild: even at their best, terrorists are people unwilling to observe humanly decent limits on their promotion of justice or well-being.

Despite the extensive attempts made to rationalize or excuse it (Medina’s argument continues), terrorism stands condemned: like murder but unlike homicide or warfare, terrorism is always wrong; like the word “murder” and unlike the words “homicide” and “warfare,” the word “terrorism” should always be used, whether in legal or other contexts, to denote something morally impermissible and out of bounds. That said, our attempts to deal with terrorism ought themselves to be kept in bounds, lest they come to mimic the terrorism we oppose.

Medina formally defines terrorism as “the use of political violence by individuals or groups who, with the aim of influencing a domestic or an international audience, deliberately or recklessly inflict substantive undeserved harm or threaten to do so on those who can beyond reasonable doubt be conceived as innocent noncombatants.”² The definition, I think, aptly captures the essence of his argument. Four observations are worth making about the definition, and by implication, the argument for adopting it.

First, note that the genus of the definition is “*use of political violence.*” This genus is contestable from a variety of different perspectives. As Medina notes, feminist commentators have quarreled with the idea that terrorism is necessarily a use of *political* violence; perhaps domestic violence is a form of terrorism.³ One might also, in an age of cyberterrorism, quarrel with the idea that terrorism requires *violence*: it’s not clear that a virus-based computer shut-down is *violent*.

I would contest the idea that a definition of terrorism should describe it merely as *a* use of violence rather than an initiatory use. There is a fundamental moral difference between an initiatory use of violence and a response to one.⁴ That distinction is so fundamental (I would argue) that it ought to be the focus of an analysis of terrorism, and an explicit part of the definition of the term. In saying this, I don’t mean to suggest that Medina is unaware of the distinction, or that he ignores it in the book. I simply note for now that the distinction takes a back seat to other considerations.

Second, notice that the phrase “aim of influencing a domestic or an international audience” is neutral as between the *kinds* of messages that one might send through the use of violence. One kind of message might be termed dramatic or spectacular: one uses violence primarily to put on a kind of show for as-yet uninvolved third parties,

²Ibid, p. ix.

³Ibid, p. 62.

⁴ The distinction is most sharply insisted on by political libertarians, e.g., Ayn Rand, Murray Rothbard, Robert Nozick, and others. But one need not be a libertarian to regard the principle as fundamental.

in order to draw those third parties' attention to one's cause. But a very different kind of message might be termed defensive or deterrence-based: one uses violence in response to someone who has initiated that violence, the message being to cease and desist from it. Again, I don't mean to suggest that Medina's account contradicts this distinction. I mean that like the initiatory/retaliatory distinction, it takes a back seat to other things.

Third, as Medina himself recognizes in the third and fourth chapters of the book, the criteria for someone's being an "innocent noncombatant" are highly contestable. Hence someone might well accept Medina's definition of "terrorism" but reject his account of who qualifies as an "innocent combatant." Such a person would in one sense agree, and in another sense disagree, with Medina's account.

Finally, someone might accept that innocent noncombatants enjoy immunity against *deliberate* harm-infliction, but think (like Medina himself) that innocent noncombatants do not enjoy immunity against *foreseeable* harm-infliction. Such a person might quarrel with the idea that the relevant standard for foreseeably inflicting harm is the juridical one Medina embeds in his definition—guilt "beyond a reasonable doubt."⁵ This critic might well agree that while we ought not to target "impeccably innocent" civilians,⁶ we can, in targeting others, resign ourselves to harming innocent civilians as long as we foresee rather than intend the harm that befalls them. We need not be able to distinguish the guilty from the innocent "beyond a reasonable doubt," however: juridical standards (the critic might continue) apply in courtrooms, not battlefields. Battlefields require battle-appropriate standards, and "certainty beyond a reasonable doubt" is not feasibly applied there. So a lesser standard will do.

So far, none of these observations, whether individually or jointly, adds up to a full-blown criticism of Medina's argument; they're all just observations offered more or less in passing. Jointly, however,

⁵ On reasonable doubt, see Medina, *Terrorism Unjustified*, pp. 24, 59, 84, and 200.

⁶ On "impeccably innocent civilians," see Medina, *Terrorism Unjustified*, pp. 13, 67-68, 74, 89, 114, 159, 166, and 205-6.

they do draw attention to a possibility that Medina either overlooks or underplays, and that I regard as a counter-example to his view.

What if there was a form of political violence with the following features?

- It was a retaliatory response to someone else's initiated violence.
- The message it sent was intended primarily for the initiators of that violence, and primarily told them to cease and desist.
- It inflicted harm on a population whose members were a complex combination of guilty and innocent people.
- The culpable substantially outnumbered the innocent.
- Only the guilty were targeted for harm, but
- Instead of satisfying a "reasonable doubt" standard, targets were selected on the basis of a strong probability that the culpable would be harmed, treating collateral damages as foreseen rather than intended.
- The covert intermingling of guilty and innocent in the target population was part of the strategy of aggression itself.
- The only option faced by the victims was to enact the preceding strategy, or face subjugation and possible extermination.

The conditions in the preceding list are difficult, perhaps impossible to imagine in the abstract. They might also appear to be a contrived collection of claims artificially designed to produce a counter-example to Medina's view. I disagree. In the next section, I offer an extended thought-experiment designed to illustrate what they would look like in just *one* of the sorts of case that exemplify them— asymmetric warfare against an imperialist aggressor.⁷ In this case, and cases like them, I suggest, terrorism is justified.

⁷ Another case would be that of strategic or area bombing against a totalitarian aggressor. Though I lack the space to develop the point, much of what I say

3. Asymmetric warfare against an imperialist aggressor: a thought-experiment

Imagine that you live in a place where your ancestors have lived since time immemorial. Suppose that one day newcomers arrive on your shores, and conquer you by force: they kill you, rape you, rob you, kidnap you, torture you, and demand your subservience, on pain of repeating the process until you get the message. Suppose that you somehow manage to get hold of their playbook, and it turns out to be a bastardized version of the first few chapters of Machiavelli's *Prince*.⁸ In particular, your conquerors espouse "Machiavelli's" advice on the right way to consolidate a conquest, and on the correct attitude to have in political life toward morality and justice.

On the first issue, conquest, Machiavelli has two pieces of advice. The first is the valorization of conquest itself: conquest is a good thing, morally and practically. Morally, it brings the conqueror glory; practically, it brings him spoils. At a deep metaphysical level, conquest is man's way of conquering or taming the vicissitudes of fortune.

His second point is strategic. A conqueror must first ascertain whether the conquered people are fundamentally similar to the conquerors--culturally, ethnically, linguistically, religiously--or different from them.

in defense of this sort of case of terrorism might also be said, with appropriate changes, in defense of area bombing against a totalitarian aggressor who puts his own civilians in harms' way, and (many of) whose civilians support his aggressive projects. See Medina's index entries for "area bombing," as well as "Bennett, Jonathan" (both on Medina, *Terrorism Unjustified*, p. 276), as well as the discussion of "supreme emergency" (Ibid, pp. 170-85).

⁸ See Niccolo Machiavelli, *The Prince* (New York: Modern Library, 1950), with Introduction by Max Lerner, chapters 1-7, but particularly chapter 3. I should emphasize that the reading I offer in the text is not intended as an accurate exegesis of *The Prince*, but of an ideological reading intended to rationalize conquest. The reading I offer is in the spirit of Leo Strauss's *Thoughts on Machiavelli* (Chicago: University of Chicago Press, 1958) without explicitly relying on it. See also Peter Breiner, "Machiavelli's 'New Prince' and the Primordial Moment of Acquisition," *Political Theory*, vol. 36:1 (2008), pp. 66-92.

Suppose in this case that the two peoples are fundamentally different from one another. If so (Machiavelli continues), the optimal method of conquest is to colonize the conquered people in such a way as to fragment the land they hold and make political unity among them impossible. In other words, the prince is advised first to consolidate his conquest, and then to import civilians from his home country, arming at least some of them, and planting them within the conquered country. Doing so fragments the indigenous population, undermining its unity. It also surrounds them with paramilitary forces that keep them constantly in fear. Given the nearly universal taboo on attacking civilians, the settlers can then be declared immune from attack. Those who attack them are demonized as enemies of humanity; their attacks, in turn, become a pretext for intensified militarization.

As an auxiliary measure (Machiavelli continues), it helps to place the capital of one's country within the conquered territory, in part to keep the conquered people under surveillance, and in part to solidify the sense that the conquered land is part of the conqueror's original inheritance. In other words, the conqueror regards himself as making a mythological "return" to a place that was always his. He makes sure to import civilians susceptible to this belief.

On the second issue, the conqueror's playbook announces that it's better to *appear* to be just and moral than to *be* so. Conquest is not easily compatible with the principles of justice; justice is both an obstacle to the act of conquest, and to the task of maintaining it. So justice has to be dispensed with, but in a clever way. It would be silly of a conqueror to repudiate justice explicitly. It makes more sense for the prince to be seen as sincerely committed to justice despite his lack of commitment. The best way to do so would be to treat justice as a default position from which deviation is always (or often) permissible. In this way, the prince may well succeed in convincing himself (or at least half-convincing oneself) of his commitment to justice, and in so doing, fully or almost fully convincing others.⁹

The exact status of the imported "civilian" population is somewhat tricky. At a basic level, they are there to effectuate a deliberate, explicit plan of conquest under that very description. As a

⁹ Machiavelli, *The Prince*, chaps. 15-18.

matter of knowledge, some may know this, others may not. Of those who know it, some may know it explicitly, and others may know it tacitly. Of those who know it tacitly, some may be uneasily and evasively aware of it but in denial, while others may just be dimly aware. As a matter of promoting the ends of the conquest, some may be willing and eager participants; others may participate, but only when called upon to do so; and some may be reluctant or even averse participants, pushed into the project through duress or coercion. As time passes, new generations will arise in these colonies, and in different ways, the preceding considerations will come to apply to them. But each generation's decision about how to transmit its knowledge and roles to future generations will involve a series of choices. Unless the settlers are literally lost in amnesia, they will not be able to forget the significance of their presence in a foreign place.

We have no good vocabulary for characterizing the complicity of the "civilian" part of the project of conquest. Some may be innocent shields, some may be culpable shields, and some may more accurately be described as spears or spear-points than shields. *Ex hypothesi*, a substantial number of them are *somehow* complicitous in the project of conquest. I would simply insist that *to the extent* that they are complicitous in a project of conquest, they are *not* "impeccably innocent."¹⁰

The prince knows all of this. Adhering to no consistent principle or policy of his own, but claiming to do so, he loudly declares that while he expects some resistance from the conquered people—he isn't naive, after all—he expects that whatever resistance they mount ought at least to satisfy certain civilized moral constraints. Among these is non-combatant immunity. Only savages, he says, would treat the colonizing population as a single, undifferentiated unit, or regard

¹⁰ My terminology here is influenced by Robert Nozick's in *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 33-35. See also Nozick's "War, Terrorism, Reprisals—Drawing Some Moral Lines," in *Socratic Puzzles* (Cambridge: Harvard University Press, 1997), especially p. 303, where he criticizes Michael Walzer for paying "insufficient attention to the way guerillas exploit the morality of those they attack." In my view, both Walzer and Nozick pay insufficient attention to the ways in which imperialists exploit the morality of those they invade.

every member of that unit equally as a target. Civilized resisters would differentiate between targets. Indeed, a genuinely civilized, gentlemanly resister, equal to the conqueror in honor, would insist on pursuing the most difficult targets. Morally speaking, an honorable resister would either choose to target strictly military targets, or choose the noblest path of all, the path of non-violence. The prince fails to note the (*ex hypothesi*) obvious: if the conquered population attacks strictly military targets, it is sure to be defeated; if it practices non-violence, it is sure to be subjugated.

Eventually, a second playbook is discovered. This playbook sounds a lot like Locke's *Second Treatise*, retrofitted for the use of a Machiavellian prince.¹¹ This second playbook gives the prince the language of natural rights, alerting him to the utility of appeals to this language. He quickly comes to learn that if he dresses the imperatives of conquest in the language of rights, things go more smoothly than they might otherwise have done: the language of rights seems to work on the relevant people like a weird sort of charm.

Granted, adoption of this language requires that the prince recognize such phenomena as “aggression,” that he repudiate any reliance on it, that he endorse the notion of a “right of self-defense,” and that he pledge to exercise this right of self-defense only against aggressors, and in a proportionate rather than disproportionate fashion. But this isn't much of a problem for him. After all, the playbook offers no determinate account of any of these things. And a well-educated

¹¹ John Locke, *Two Treatises of Government* (Cambridge: Cambridge University Press, 1988), ed. Peter Laslett. As with my use of Machiavelli, the use I make of Locke here is not intended as an accurate exegesis of Locke; it's intended as the sort of ideological reading of Locke that might be offered by an imperialist. For readings of this ideological sort, see Barbara Arneil, *Locke and America: The Defence of English Colonialism* (Oxford: Oxford University Press, 1996), and Craig Yirush, *Settlers, Liberty, and Empire: The Roots of Early American Political Theory, 1675-1775* (Cambridge: Cambridge University Press, 2011), and Alasdair MacIntyre, "Community, Law, and the Idiom and Rhetoric of Rights," *Listening: A Journal of Religion and Culture*, vol. 26 (1991), pp. 96-110. Also suggestive is Marx's discussion of “primitive accumulation” in *Capital*. See Karl Marx, *Capital: A Critique of Political Economy* (New York: Penguin, 1992), tr. Ben Fowkes, Vol. I, Part 8, pp. 873-942.

Machiavellian prince is smart enough to exploit the semantic indeterminacy of such open-textured, coarse-grain, highly contested concepts for the purpose of maintaining an occupation.

The “Lockean” playbook has a few more features. For one thing, it has a theory of property. It says that we all have natural rights to property which we acquire by labor—our own, and that of our servants.¹² We acquire property in land by a process of initial acquisition. This process, of course, comes with constraints. A person can appropriate land for his own use, but only if he intends to improve it rather than waste it, and only if he leaves “enough and as good” for others. Apart from a few primitive and archaic (but politically useful) examples, the playbook contains no account of the criteria for improvement, waste, or leaving enough and as good. It turns out that the prince has his own criteria for all of these things; as it happens, the indigenous population's real estate holdings fail all of the relevant criteria.

From the prince's perspective, the indigenes are a profligate, irrational, and licentious bunch of people: having improved nothing for generations, having wasted huge tranches of natural resources, and having taken far too much for either their own or anyone else's good, they sit on land and water that they stubbornly claim to be theirs, won't allow the settlers to use, and defend with violence. Clearly, these resources have to be taken from them in the name of justice and human progress—no easy task, but one that just happens perfectly to cohere with the colonizing project that the prince had earlier conceived.

There's one last set of claims in this quasi-Lockean playbook. It says, paradoxically enough, that conquest is prohibited. More precisely, it says that *aggressive* conquest is prohibited, but *defensive* conquest is a different thing. And obviously, when you confront someone who unjustly holds huge quantities of real estate that they won't share with you, they're the aggressor. So in that case, odd as it sounds, defensive conquest is legitimate.

¹² A Machiavellian-Lockean regime won't have slaves. It may have a few people who have sold themselves into *drudgery*, but as Locke insists (*Second Treatise*, chapter IV), drudgery isn't slavery.

There is one last proviso in the Lockean playbook: defensive conquest is conquest of territory, not of goods. When you conquer a territory defensively, you're not allowed to loot and plunder the inhabitants. You're only permitted to govern the inhabitants by putting down insurrections, but permitting them to keep what's justly theirs. More precisely, you can permit them to keep what's justly theirs minus any expenses you may have incurred in conquering them. "What's theirs minus expenses" ought to be small in most cases, and leave them with plenty of stuff to hold onto.

Of course, as the Versailles Settlement suggests, "smallness" is a contestable concept: what Clemenceau regarded as small Keynes regarded as large, and the Weimar rulers regarded as even larger (to say nothing of the Nazis). But in a way, the whole issue of what's "theirs minus the expenses of conquest" is moot. Recall that by Lockean strictures, the holdings of indigenous, conquered inhabitants were illegitimate in the first place. The proviso under discussion says that when a prince conquers a territory, he's not allowed to loot and plunder the inhabitants—assuming that the inhabitants genuinely own something! If they don't, the prince's problem is solved: he can't be looting what never belonged to anyone in the first place. Whatever resistance he meets can then be construed as theft. He is making property of what was hitherto unowned; they are attacking his productive efforts in an attempt to steal it. How else does one deal with a society of robbers but by force?

Suppose you learn all of this about your conqueror—the whole brutal, cynical truth laid out in two treatise-length volumes of Pentagon Papers-like detail. Now suppose that you canvass your options. Inaction is not a feasible option: while it may not bring "imminent" genocide, it would bring subjugation, and resistance to the intended subjugation is just a few steps away from genocide. A conventional attack on your adversary's combat troops would lead to certain defeat: the weaker party can't compete on the same grounds as the stronger one. An attempt to target all and only the culpable parties while sparing the innocent by the standard of certainty beyond a reasonable doubt is made impossible by the *deliberate strategy* of the prince. He has set things up so that you *can't* apply it, and done so just for that reason. You try good-faith negotiations, but they fail. What else would you

expect of negotiations with a Machiavellian leader? You try to appeal to justice of those who are “impeccably innocent.” But this doesn’t work. Some of them are inaccessible to you; some are too suspicious to grant you a hearing; some are coldly indifferent to your plight; and the rest are powerless to make the sort of change that counts.

You settle, then, on the following strategy. You find targets that are accessible to you, that minimize your own casualties, and that inflict casualties on your conqueror. Your attacks are intended to send a message: cease and desist. You pick “civilian” targets, but do so in the knowledge that many of these “civilians” are armed combatants, while many others, whether overtly armed or not, are culpably complicitous in the conquest. Indeed, as time passes, the ratio of culpable to non-culpable changes in your favor: very few people can non-culpably be ignorant of the fact that they are part of a plan of conquest. You pick targets where it is likely that the guilty will congregate, in the knowledge that the targets will vary in culpability from completely culpable to impeccably innocent. The longer they spend in conquering you, the fewer can be presumed innocent, and the more the innocent can be regarded as the responsibility of the conquerors who brought them there in the first place. Every passing day enables your conqueror to consolidate and normalize his conquest. Your strategy merely aims to undo what he’s done.

You acknowledge the impossibility of being certain beyond a reasonable doubt that your targets are all or even mostly guilty. You hope that they are, and do the best that you can to ensure it. But you justify your uncertainty by telling yourself that you are fighting a war, not arguing a legal case. You are facing a ruthless, deceitful conqueror, not facing a jury of your peers. You didn’t put yourself in this situation; he did. You wouldn’t have chosen to be in this situation; you’re in it because he *put* you in it. If you could run, you would. But you can’t even do that.

You’ve read the conqueror-prince’s playbook, and as far as you’re concerned, in dealing with him, guilt and innocence do not track the conventional distinction between combatant and non-combatant (or “civilian”). They track the distinction between *those who know the playbook strategy and/or are culpably ignorant of it*, and *those who are non-culpably ignorant of it or are aware of it but non-culpably*

present in the conquered land without viable means of escape. The latter category, you conclude, are innocent shields and hostages of the first. But the first category includes harmless-looking free riders on the conquest—people who cash in on conquest but refuse to fight. It's terrible to have kill them both without knowing which is which. But maybe the prince should have thought of that before he invaded.

4. What the thought-experiment shows (and doesn't show)

My thought-experiment is easy to misunderstand, so let me clarify a few things about it, starting with what it was *not* meant to say or imply.

First, the Machiavellian-Lockean “playbook” I described is *not* meant to be a description of Medina's theory. Medina's theory is a critique of terrorism; the playbook is a rationalization of imperial conquest. The two things have nothing to do with each other.

Nor is it meant to be an objective or accurate account of either Machiavelli or Locke (or their combination). It's meant to be an extended description of a plausible ideological misuse of both Machiavelli and Locke in the service of imperial conquest.

Nor is it meant to describe some actual or historical situation. It's intended as a hypothetical account, not an account of some actual or actualized state of affairs.

Nor is it meant to be an entirely realistic account of how conquest works. It's unlikely that any real-life conqueror would translate “Machiavelli” or “Locke” directly into practice. It's also unlikely that he would describe his plans as cynically and explicitly as my hypothetical prince does. Even if he did, it's unlikely that the conquered population would get access to those plans. Further, it's unlikely that any real-life resistance movement would operate as deliberately or without malice as mine does, or face a situation as clearly delineated as mine is. The real world is more complex than anything I've described.

That said, the thought-experiment is not pure fantasy, either. Machiavelli and Locke, among many others, have been read and used

as I've described. Conquests have taken place that at least approximate what I've described. Playbooks of conquest have been written and published, some remarkably candid—and sometimes, such playbooks do find their way into enemy hands. And while no real-life resistance movement would operate exactly as my thought-experimental one does, no real-life counter-terrorist operation operates exactly as Medina recommends, either. So while hypothetical, my thought-experiment is within the realm of realistic possibility.

By Medina's standards, my resistance operation is a terrorist operation. While its operatives do not deliberately target impeccably innocent civilians (at least not *qua* innocent, under that description), they recklessly inflict harm on the innocent without knowing beyond a reasonable doubt whether their targets are guilty or innocent. Put another way, they gamble with the lives of the innocent in the hopes of either hitting the guilty or sending the guilty a message.

My thought-experiment is designed, at length, to give a plausible reason for their doing so: "terrorism" is, in a case like this, the only viable means of resistance against injustice. The thought-experiment is as long and detailed as it is because (as I see it) the details give added plausibility to the idea that "terrorism," or something like it, is justified in this sort of case. What is essential to the case is not just that the victims are facing the terrible injustice of conquest, but that the victims are forced, in resistance, to target civilians *precisely because their conqueror wants it that way*. The details help explain why.

5. Conclusion

If my thought-experiment works, it offers a counterexample to Medina's claim that terrorism is categorically wrong. In cases like the one I describe, either terrorism is not *always* wrong, or there are justifiable forms of warfare that closely resemble terrorism without quite counting as terrorism. Personally, I prefer the latter conclusion,

but given the argument of *Terrorism Unjustified*, I doubt Medina would be content with either. I'm eager to consider his response.¹³

¹³ Thanks to Alison Bowles, Anas Mashni, Awad Mansour, Sari Nusseibeh, David Riesbeck, Michael Young, and my students and colleagues at Felician University (Rutherford, New Jersey), Al Quds University (Abu Dis, Palestinian Territories), and Forman Christian College and University (Lahore, Pakistan) for helpful conversation on the issues discussed here. Thanks likewise to Shawn Klein and Carrie-Ann Biondi for agreeing to publish the symposium, and for the hard work they put into editing it. Thanks above all to Vicente Medina, both for writing the book and for doing us the honor of participating in this Author-Meets-Critics symposium at Felician University that led to this published version of the symposium in *Reason Papers*.

None of the preceding individuals is responsible for anything I say here, and nothing I say should be construed as incitement to any criminal act. In compliance with a request made by the President and Academic Vice President of Felician University, I assert explicitly that the views I defend in this paper are exclusively my own, and do not represent the views of Felician University. My institutional affiliation is listed for purposes of identification, rather than to claim official status of any kind.

Response to *Terrorism Unjustified* by Vicente Medina

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While my purpose here is to offer some critical remarks about it, I should begin by voicing my general agreement with the thrust of Vicente Medina's rich and sweeping book, *Terrorism Unjustified*.¹ At the practical level, I share with Medina a strongly anti-terrorist outlook. I believe the world is filled with too many terrorist outrages; terrorism is a global scourge that we ought to collectively condemn and resist; and by and large the groups we refer to as "terrorist groups" are well beyond the pale morally. In the law and in professional ethics, the deliberate or reckless harming of noncombatants should be unequivocally prohibited. In our public policies, such behavior should be confronted.

That being said, when we get into the details of our respective positions we find some interesting disagreements between us that are worth exploring. Medina would likely categorize my opposition to terrorism as "soft core" in contrast to his "hard core" objection. For him, terrorism is absolutely indefensible in all circumstances from the perspective of ultimate moral principle. For me, it is difficult to justify

¹ Vicente Medina, *Terrorism Unjustified* (Lanham, Maryland: Rowman and Littlefield, 2015).

such a categorical, fundamental condemnation of terrorism. While I think the vast majority of terrorism is egregiously immoral, I can nevertheless imagine cases of reasonable terrorism.

Still, I think terrorism as Medina understands it—the deliberate killing or maiming of noncombatants—ought to remain categorically and absolutely prohibited in our laws and professional military ethics. So, while I disagree with Medina’s assessment of terrorism at the level of ultimate morality, I do not think we should qualify our rejection of it at the practical level. My position regarding terrorism is therefore similar to a common view of torture: It might be the case that there are possible circumstances where torture is understandable—so-called “ticking bomb” cases—but nevertheless our laws and professional codes should absolutely prohibit it. It seems to me that the deliberate targeting of noncombatants in war should be thought of similarly.²

I want to discuss two reasons why I think it is more difficult than Medina appreciates to categorically and fundamentally condemn terrorism. The first reason is that the concept of terrorism is too vague and laden with normative content to be categorically rejected in a non-question begging way. The second reason is that, even if we accept Medina’s definition of terrorism, it is unclear that we can categorically distinguish terrorism from conventional wartime violence. In particular, Medina’s appeal to impeccable innocence to distinguish the victims of terrorism from the victims of non-terrorist violence is unpersuasive as it fails to appreciate the extent to which typical victims of conventional war, i.e. combatants, are innocent.

1. The Concept of Terrorism

To his credit, Medina spends considerable time in Chapters 2, 3, and 4 examining some of the various definitions of “terrorism” that are in the literature and defending his preferred definition. As Medina notes, this extended discussion of the meaning of the term is necessary because the concept is so contested. Indeed, Medina’s method in his book follows the pattern of philosophical treatments of terrorism. In order to come to clear conclusions about it, philosophers and legal

² To be clear, Medina would reject such a view of torture as well as terrorism. For him, torture, like terrorism, is unjust in all cases.

scholars usually spend considerable energy trying to nail down a definition of it. Most philosophical essays and books on terrorism have long sections or chapters called “Definitional Issues” or something of the sort.

We should note that this is a distinctive feature of the literature on terrorism. On other controversial ethical or legal matters that have been the subject of the attention of many commentators, we do not see such extended debate about what exactly is under discussion. The literature on abortion or the death penalty, say, is not pervaded by deep and prolonged debate about the meaning of “abortion” or “death penalty.” Surely, there are some definitional debates to be had and there are fuzzy cases that reasonable people can disagree about how to label. We debate whether the use of the morning after pill is an act of abortion, for instance. We could even debate whether life sentences in cruel and inhumane conditions could qualify as death sentences. But these sorts of disputes are much more restricted than they are in the case of the literature on terrorism. There are not, as Medina notes of terrorism, 109 different definitions of abortion in the literature. With “terrorism” fuzzy cases abound.

This feature of “terrorism” poses a problem for projects like Medina’s that attempt to draw categorical conclusions about the morality of terrorism. Because of the contestable nature of the concept, all attempts to clearly define the term and draw conclusions about it will be vulnerable to the charge that the word has been “stolen.” That is to say, critics can always readily assail a narrow definition of “terrorism” as false and demand that a clear treatment of terrorism needs to include other understandings. As a result, the different commentators on terrorism talk about different things and end up talking past each other.

It seems to me that this characterizes the literature on terrorism. Due to the extraordinary contestability of “terrorism,” each author or group of authors defend a particular view of the morality of terrorism but only on condition of a narrow definition of “terrorism.” Each scholar’s conclusion needs to be underscored as merely a conditional of the form “If ‘terrorism’ is X, then it is morally or legally Y.” In discussions of other concepts, such conditional conclusions are self-evident and of little consequence. However, in the case of

terrorism, the conditional nature of our conclusions creates a problem. Given there is no agreement about X, there is plenty of room to deny the antecedent of the conclusion. As a result, the literature on terrorism is really a balkanized set of literatures about a wide range of distinct phenomena that masquerades as a focused discussion of a singular topic.

This problem is evident in Medina's book. In his attack on terrorism in Chapter 3, Medina defines terrorism as "the deliberate or reckless harming of noncombatants." However, when he turns to examining the views of apologists of terrorism in Chapter 4, he notes that they typically have a very different understanding of "terrorism." For this reason, it seems that we may not be looking at a disagreement between Medina and the apologists for terrorism. Perhaps Medina and the apologists are just talking past each other. The attempt to include these disparate discussions under the singular topic of terrorism helps paper over this problem.

Furthermore, the term "terrorism" seems to be more laden with normative meaning than other subjects of sustained philosophical and legal analysis. To call someone a "terrorist" or some act "terrorism" is *a priori* to say something harshly critical. The terms "abortion" or "death penalty" do not carry this level of normative baggage. This is not to say that the terms "abortion" or "death penalty" have no normative content whatsoever. These are not strictly neutral terms. In ordinary usage, abortions and capital punishments are, by nature, very bad, grave, solemn, and so forth. Still, there is an important difference between these concepts and terrorism. The quality of normative content in the concept of terrorism is different. In ordinary usage, terrorism is by nature not merely bad; it is savage, barbaric, criminal, and deviant. Indeed, the term is often used as an insult.

This feature of "terrorism" creates two problems for projects like Medina's. First, it makes it hard to employ the term in a non-question begging way. If "terrorism" is implicitly barbaric, disgusting, criminal, etc., then to use it to refer to someone or something will beg the normative or legal question. Simply to apply the term to something is to condemn it. As a result, those who wish to defend what is being referred to as "terrorism" will simply reject the label. In practice, you do not readily find people defending things that they refer to as

terrorism. What you find are people defending things that others call terrorism. Instead of helping us pick out a subject for subsequent ethical or legal analysis, “terrorism” ends up obscuring important ethical disagreements. In practice, the term should really only be applied following an ethical or legal analysis of the subject in question, not before.

Second, because the normative content of the term is bound up with ongoing political movements and events, use of the term is highly divisive. We must be mindful that the occasion for the burgeoning literature on the ethics of terrorism is a growing awareness of particular groups and movements called “terrorists” and the heightened experience of being threatened by them. At the same time, there are a number of governments and administrations that have waged a “war on terrorism” or have embraced any of a variety of “counterterrorist” programs. As political beings situated in the world we are implicated in these events in a variety of ways. We are threatened by the terrorism of some groups and perhaps protected by the terrorism of others. We are perhaps sympathetic to the goals (if not the means) of some groups who engage in terrorism and reject the reduction of them to mere “terrorists” whereas other groups we see as aptly reduced to “terrorists.” We support some governments and their campaigns against terrorism and we reject others. For these reasons, we usually come to the philosophical discussion of terrorism as partisans in a specific historically-situated political moment. Our goal in these discussions of terrorism is often to say something that contributes to an understanding of our current political situation as we see it. However, we will find conclusions about terrorism more or less intuitive depending on our background understandings and political commitments. We will want some actors and causes to be confirmed as terrorists and not others.

In this way, it is extremely difficult to carry out an objective assessment of terrorism. When philosophers such as Medina offer normatively neutral definitions of terrorism and try to objectively assess the ethics or law of it, their debates over definitions can become proxies for other, more important, debates about particular wars, movements, or agendas. To treat the term as if it does not have normative content or as if it can be abstracted from our particular

political moment allows us to mask political agendas as debates about the meaning of “terrorism.” In this sense, there is a politics of “terrorism.”

I do not mean to imply that it is impossible for philosophers to objectively assess the ethics of terrorism. I think philosophers could create neutral definitions of the term and use them consistently, embracing their conclusions even if they unsettle their prior political commitments. Philosophers often do this with other important concepts such as “freedom” and “equality.” We take pride in our ability to analyze these concepts and apply our conclusions consistently even when we dislike where they take us. Still, “terrorism” is different than these other concepts in that it is so laden with normative content and bound up in specific political agendas. In attempting to objectively assess terrorism the distance philosophers create between their discussions of terrorism and political reality call into question the relevance of their conclusions in a way their assessments of other concepts do not. If the point of investigating terrorism was to draw conclusions about our particular political moment, then isolating the concept from its meaning in the discourse that is driving that moment will undermine the practical significance of the investigation. Moreover, the objective assessments philosophers might make are always highly vulnerable to misunderstanding or manipulation when we attempt to bring these assessments to bear on the relevant politics.

There is also evidence that Medina’s debate with the apologists of terrorism falls victim to confusion resulting from the unacknowledged normative content of “terrorism.” I have already noted that the so-called apologists of terrorism offer a different definition of “terrorism” than does Medina. It is also noteworthy that the apologists define “terrorism” as something much tamer than does Medina. As Medina describes it, the apologist’s definition of terrorism is,

The use of political violence by individuals or groups, provided they are not engaged in an interstate armed conflict, who deliberately inflict substantive harm or threaten to do so

against their alleged enemies, aiming at influencing a domestic or international audience.³

It is striking how different the prospects of defending such activity are compared to Medina's preferred understanding of terrorism. Ethically speaking, it seems much easier to imagine reasonable cases of the apologist's terrorism than reasonable cases of Medina's terrorism. On the apologist's definition, terrorism is hard to distinguish from any political violence by nonstate actors. But surely a nonstate group that respects noncombatant immunity while inflicting substantive harm against their enemies aiming at influencing a domestic or international audience is in principle easier to defend than a nonstate group that does not respect noncombatant immunity. In fact, I see nothing in Medina's discussion to indicate that he is opposed to what the apologist's define as terrorism categorically. Moreover, Medina gives no reason to conclude that those described as apologists for terrorism support what Medina defines as terrorism. We can expect that at least some of the so-called apologists for terrorism are opposed to what Medina describes as terrorism. Yet Medina nevertheless describes these commentators as his opponents in a substantive moral disagreement.

The appearance of such a substantive disagreement is made possible by the implicit normative baggage in the concept of terrorism. What appears as a substantive disagreement is largely the mere fact that one party is unwilling to defend anything called terrorism while the other party is willing to defend some things called terrorism. Even though they are talking about different things, the normative content of the term suggests a moral dispute. This seems to me to be an example of confusion that can arise when philosophers attempt to objectively evaluate concepts that are so normatively and politically charged in common usage. The divisive usage creates the impression of clear fault lines around a distinct phenomenon while the philosophical examination subdivides the term into distinct types of activity with various ethically relevant qualities. In the philosophical realm, one could be against one definition of terrorism and see another as potentially permissible. But common usage intrudes on such nuance

³ Medina, *Terrorism Unjustified*, p. 94.

and demands that we take a side in the ongoing political debate. In this way, we can end up envisioning disagreement where there is none.

For these reasons, I am skeptical of categorical condemnations of terrorism. Again, I share with Medina a generally anti-terrorist outlook. Whatever terrorism is it is extremely difficult to defend. My concern though is that the sort of “hard core” opposition to terrorism that Medina favors cannot be justified because the concept is so indeterminate and because it is *a priori* morally problematic. To rule out the possibility of justified terrorism presupposes a clearer definition of terrorism than our usage permits and, in order to be non-question begging, requires stripping the concept of its normative content.

I wonder if for the sake of clear-eyed ethical and legal analysis we should cease conducting philosophical scholarship on terrorism altogether. Why not just focus on the family of activities most associate with terrorism instead, such as targeting noncombatants in war, deliberately creating fear in a civilian population for political ends, or political violence by non-state actors? These topics can be ethically and legally evaluated without the difficulties stemming from the meaning of “terrorism.” Surely we cannot do away with the term in our social and political lives, but it seems that facing up to the reality of how the term works in our social and political lives calls into question the value of attempts to meaningfully assess terrorism objectively. Terrorism just might not be the sort of thing that can be fruitfully studied by moral philosophers.⁴

2. Innocence and Noncombatant Immunity

Medina criticizes terrorism on the grounds that it violates the duty of nonmaleficence, or the duty to refrain from “intentionally bringing about undeserved harm or significant risk of it against the impeccably innocent.”⁵ The basis of this duty lies in a conception of

⁴ In “Doing Away with Harm,” *Philosophy and Phenomenological Research* 85, no. 2 (September 2012), pp. 390-412, Ben Bradley proposes something similar with the concept of harm. I owe this reference to an audience member at the symposium on *Terrorism Unjustified* held at Felician College, April 21, 2018.

⁵ Medina, *Terrorism Unjustified*, p. 41.

the human person as possessing, in virtue of being a human person, an inherent dignity and an associated set of rights, including the rights to life and liberty.⁶ People who have not forfeited these rights are owed respect by others. In particular, such people cannot be used as a means for ends that are not their own.⁷ Terrorists violate the duty of nonmaleficence. They deliberately or recklessly harm innocent noncombatants thereby violating their victim's rights by using them as a means to the terrorist's political ends.⁸

Those who are innocent are those who have done nothing to forfeit their rights to not be harmed. There are a number of senses in which one can be innocent according to Medina. One can be innocent in a *Mens Rea* sense, in a Good Samaritan sense, in a blameless sense, in a harmless sense, or in a guiltless sense.⁹ If one fails to be innocent in these senses, one is no longer impeccably innocent and can, in certain circumstances, lose one's right to not be harmed.

According to Medina, combatants always fail to be impeccably innocent. Combatants pose a substantive threat to others by deliberately harming or threatening to harm others.¹⁰ Combatants are not innocent in the sense that they are not harmless. They are engaged in the business of war, as Walzer puts it, and are therefore not innocent.

Some combatants could also be non-innocent in other senses as well. For instance, some combatants will engage in unjust wars voluntarily and with full knowledge. Combatants like this will be guilty and/or blameworthy in addition to being harmful. But many combatants will not be guilty or blameworthy; they will be coerced

⁶ Ibid., p. 42.

⁷ Ibid., pp. 67-8.

⁸ Ibid., pp. 77-8.

⁹ Ibid., p. 79.

¹⁰ Ibid., p. 90.

into fighting or misled about the nature of the war. Medina calls such combatants innocent or involuntary threats.¹¹ While they may be innocent of blame or guilt, they are not innocent of posing harm or a threat of harm to others. Combatants can therefore be divided into culpable, innocent, or involuntary threats to others.¹² But all combatants, in virtue of posing a threat to others, are not impeccably innocent and have forfeited their right to not be harmed. They may, under certain conditions, be deliberately attacked in war by their opponents.

Some noncombatants might be non-innocent who have contributed in significant ways to a community's war. Still most noncombatants will be innocent in all senses. Terrorism is wrong because it involves the deliberate or reckless harming of innocent noncombatants. Terrorism thus uses persons who have done nothing to forfeit their rights as mere means to the terrorist's ends.

I am not convinced that innocence separates noncombatants from combatants so neatly. I will argue that, according to domestic military law and conventional military ethics, typical combatants are innocent in a stronger sense than Medina recognizes. For this reason, I doubt that he has shown that terrorism is categorically different from conventional acts of war, especially deliberate attacks on combatants.

While Medina acknowledges that some combatants may be guilty or blameworthy, he claims that even if they are not, they are always harmful or threatening harm. To repeat, the two types of objective threats that are neither guilty nor blameworthy are innocent threats and involuntary threats. Innocent threats are those who are unaware of their threatening behavior. Involuntary threats are those who are coerced into engaging in threatening behavior.

This leaves out an important type of guiltless or blameless threat. It is possible for a person to be ethically bound to engage in threatening behavior. Such a person could pose a guiltless or blameless threat to others but is different from an innocent or involuntary threat. Such a person, call her a *dutiful threat*, is not necessarily physically

¹¹ Ibid., pp. 71-4.

¹² Ibid., p. 91.

coerced and could be fully cognizant of the nature of her activity. In any case, the dutiful threat will be doing nothing wrong. The dutiful threat is innocent in a stronger sense than the innocent or involuntary threat. In posing a threat to others they are doing what they are obligated to do. They have done nothing for which they need to be excused. As a result of their duty to threaten, dutiful threats would render themselves non-innocent in the sense of being guilty or blameworthy if they were to deliberately not threaten the relevant others. It is hard for me to see how this person could forfeit her right to not be harmed by doing her duty.

To illustrate, consider a hypothetical situation where three gladiators battle each other for sport but each for different reasons. The first gladiator participates because he has been coerced by the authorities who are threatening harm to his loved ones if he does not fight. The second gladiator participates because he has been manipulated by the authorities to falsely believe the other two gladiators pose a threat to him and his community, and the only way of thwarting the threat is by defeating them in staged battle. The third gladiator, however, participates because he is bound legally and professionally to engage in battle when his authorities tell him to. While each of these gladiators threaten others with harm, they are each innocent in some sense. Following Medina, the first gladiator is an involuntary threat and the second is an innocent threat. The third, however, is what I am calling a dutiful threat. While I am deeply skeptical of the possibility of justifying the obligations we are imagining the third gladiator to have, if we suppose for the sake of argument that he has them, he seems to be engaging in threatening behavior more innocently than the other two gladiators. The first two gladiators are doing wrong but are excused. The third gladiator is simply doing what he ought to do. He cannot be criticized for threatening others while the other two can. He would be non-innocent if he deliberately avoided the battle. The other two, however, would be thoroughly innocent if they did so.

In point of fact, traditional just war thinking as well as current military law puts soldiers in a moral and legal position where they will typically be dutiful threats should they be called upon to engage in combat. According to conventional thinking, unless it is obvious that a

war is unjust a soldier is obligated to participate in war upon the command of her political authority. In this sense, soldiers are understood as the instruments of their political community. They may be used upon command for the sake of others. Thus, in most cases, when they go to war soldiers are only doing what they are obligated to do. To cite just one example, Francisco Vitoria argues that soldiers ought not to serve in wars that are patently unjust.¹³ But when they are unsure about the justice of the war soldiers are “required to carry out the sentence of [their] superior.”¹⁴ If being a material threat to others is a soldier’s duty, it is puzzling to hold that, in virtue of threatening others, they forfeit their right to not be harmed. Morally speaking, they might have had no choice but to threaten others. The problem is that if a person is obligated to engage in threatening behavior and by engaging in threatening behavior one can, in turn, permissibly be attacked by others, then it seems that such persons do not have a right to not be harmed in the first place. If dutiful threats are legitimate targets, then dutiful threats are agents who have no autonomy over the forfeiture of their rights. They can find themselves in situations where morality requires that they give up their right not to be harmed whether they want to or not. The permission to kill dutiful threats seems tantamount to the instrumentalization of the person who poses the dutiful threat.

We should also note another respect in which soldier’s lives are instrumentalized. In international law and conventional military ethics there are very few constraints on what can be done to combatants during war. Of course, there are limits on the sorts of weapons that can be used against them and there are elaborate constraints on the treatment of wounded or captured combatants. Still, combatants that are not wounded, captured, or attempting to surrender, may generally be attacked at will. It does not matter if they are fighting for a just or unjust cause, if they were conscripted or volunteered, or if there is any military utility in attacking them. As long as one is a combatant during war, one is treated as a legitimate target of attack. As Gabriella Blum concludes, “The striking feature of the mainstream

¹³ Francisco Vitoria, *Vitoria: Political Writings*, edited by A. Pagden and J. Lawrance (New York: Cambridge University Press, 1991), pp. 307-8.

¹⁴ *Ibid.*, p. 312.

literature is its general acceptance (albeit at times with some moral discomfort) of the near-absolute license to kill all combatants and of the law's view of combatants as nothing more than instruments of war."¹⁵

Furthermore, when we explore the origins of the idea that soldiers are obligated to fight in war upon command and are legitimate targets of attack in war we find further tensions with theories of noncombatant immunity like Medina's. When traditional just war theorists explain how soldiers come to be instruments of violence for their political communities, they appeal to a view that permits the use of innocent individuals for the sake of the political community. To continue with the example of Vitoria, he justifies the right of the civil power to command subjects in war on the grounds that individuals are to communities what limbs are to bodies: they may be used and sacrificed for the sake of the whole. As he says, "there is no reason why the commonwealth should not have the same power to compel and coerce its members as if they were its limbs for the utility and safety of the common good."¹⁶ This seems like a denial of the duty of nonmaleficence as Medina understands it. For Vitoria and the just war tradition, soldiers may be used for the sake of ends that are not their own.

These extraordinary burdens of military service are underscored by the nature of the division between the military and civil society in most liberal states. Military servicemembers have a different political status than do civilians. Servicemembers are denied the full host of constitutional rights that civilians enjoy, including the right to self-preservation. To join the military is to literally move from first to second-class citizenship. As the United States Supreme Court describes it, "The military constitutes a specialized community governed by a separate discipline from that of civilian society."¹⁷ This "separate

¹⁵ "The Dispensable Lives of Soldiers," *Journal of Legal Analysis* 2, no. 1 (Spring 2010), p. 72.

¹⁶ Vitoria, *Vitoria: Political Writings*, p. 11.

¹⁷ United States Supreme Court, *Orloff v. Willoughby*, 345 U.S. 83, no. 83 (1953), 94. The best discussion of the change in civil standing brought about

discipline” entails the reduction of the servicemember to an instrument of national security. Indeed, the US Armed Forces enlistment/reenlistment contract describes enlistment as “more than an employment contract.”¹⁸ Enlistment, unlike employment, enacts a change in the enlistee’s political standing. Military servicemembers can be legally obligated to engage in life-threatening action among other things. This treatment of members of the military has long been the source of objections to standing armies precisely because it is inconsistent with respect for the rights of persons. Kant, for instance, held that “the hiring of men to kill or to be killed seems to mean using them as mere machines and instruments in the hands of someone else (the state), which cannot easily be reconciled with the rights of man in one’s own person.”¹⁹

It would be unfair to single out Medina for failing to face up to this problem. Medina is operating within the parameters of traditional thinking about noncombatant immunity. Alongside the above commitment to the instrumentalization of soldiers, conventional just war thinking has appealed to innocence to ground the immunity of noncombatants. If there is a problem here for Medina, there is also a problem for Suarez, Vitoria, Grotius, Vattel, and Walzer. I happen to think all these figures have a serious problem reconciling their theories of discrimination in war with their commitments to the subordination of soldiers.²⁰ I wonder if Medina can explain how a soldier’s obligation to serve in war upon command can be reconciled with the claim that soldiers forfeit their rights not to be harmed by threatening others. It would seem that we face a dilemma here. On one hand, we can

through enlistment that I know of is Michael Sullivan, *Earned Citizenship* (New York: Oxford University Press, 2019), Ch. 4.

¹⁸ U.S. Department of Defense, ‘Enlistment/Reenlistment Document Armed Forces of the United States’, DD Form 4/1, October 2007, at 2, <http://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd0108.pdf> (accessed April 21, 2018).

¹⁹ “Perpetual Peace: A Philosophical Sketch,” in *Kant: Political Writings*, ed. H. S. Reiss (New York: Cambridge University Press, 1991), p. 96.

²⁰ For elaboration, see Graham Parsons, “The Dualism of Modern Just War Theory,” *Philosophia* 45, no. 2 (June 2017), pp. 751-71.

consistently embrace the duty of nonmaleficence to all, including combatants. This would appear to require fully incorporating military servicemembers into civil society and adding restrictions to the treatment of combatants in war. However, this would seem to imperil the ability of communities to provide for their security. On the other hand, we can accept that persons can, at least in some cases, be used in war for collective ends. However, this risks undermining important restrictions on the conduct of war, especially noncombatant immunity.

3. Conclusion

To reiterate, these are some reasons I have for skepticism about Medina's categorical, fundamental condemnation of terrorism. I am not suggesting that terrorism is generally defensible or that terrorism is not a terrible global problem. I am also not suggesting that we should reform our laws or professional codes to make harming noncombatants more permissible. Noncombatant immunity ought to remain prohibited at the practical level. Still, I am inclined to a soft core rejection of terrorism because I think hard core criticisms are on shaky footing. It is unclear what terrorism refers to and whether it can be used in a non-question begging way; and, even if we accept Medina's definition of terrorism, I am not sure that noncombatants are significantly more innocent than typical combatants.²¹

²¹ The views expressed in this article are the author's and do not represent the views of the United States Military Academy, the United States Army, or the Department of Defense

Terrorism Always Unjustified and Rarely

Excused: Author's Reply

Vicente Medina

Seton Hall University

I would like to express my gratitude to Professors Irfan Khawaja, Graham Parsons, and Theresa Fanelli for having read my work and for offering illuminating suggestions, comments and criticisms from which I have learned quite a bit. Irfan deserves special recognition for having taken the lead in organizing this event. I am also grateful to the dean of Arts and Sciences, Professor George Abanza, and members of the administration and faculty who have made this event possible.

By following the suggested order of speaker, I will address Professor Khawaja's comments first. I will then reply to Professor Graham's comments, and lastly, I will try to answer Professor Theresa Fanelli's pointed questions.

1. Reply to Professor Irfan Khawaja's comments

I am flattered to learn that Professor Khawaja finds some virtue in my argument against terrorism. Also, I am grateful for his insightful comments. In addition, I find his counterargument to my hard-core opposition to terrorism challenging. I define the term “terrorism” as “the use of political violence by individuals or groups who deliberately or recklessly inflict substantive undeserved harm or threaten to do so on those who can be conceived of as innocent noncombatants beyond reasonable doubt, aiming at influencing a domestic or an international audience” (p. 59).¹ Professor Khawaja argues, based on the letter and the spirit of my definition, that “since the infliction even of foreseeable harm requires stringent protection for the innocent, foreseeable harm becomes reckless (hence impermissible) when inflicted on those who are not believed beyond reasonable doubt to be guilty.”² Under my definition, foreseeable harm becomes reckless and hence morally impermissible when it is deliberately inflicted on those who can be conceived of as innocent noncombatants beyond reasonable doubt.

Professor Khawaja offers a counterexample by focusing on the possible use of foreseeable reckless violence, namely deliberately inflicting substantive harm, that, according to him, might be justified against an imperialist aggressor and the civilian population who support and/or benefit from the aggression. In his counterexample, he argues that one can reasonably justify using foreseeable terrorist violence against those who might be conceived of as innocent noncombatants but not necessarily “beyond reasonable doubt.” If his counterexample works, he would have then shown that that my hard-core definition of terrorism is too narrow because it does not capture one of the many complexities of war, be it an interstate or an intrastate armed conflict.

¹Vicente Medina, *Terrorism Unjustified: The Use and Misuse of Political Violence* (Lanham, MD: Rowman and Littlefield, 2015). All references to the book in this symposium are by page numbers in parentheses.

² Irfan Khawaja, “Terrorism Justified: Comment on Vicente Medina’s *Terrorism Unjustified*,” *Reason Papers* vol. 41, no. 1 (Summer 2019), p. 12

As some feminists have argued, Professor Khawaja underscores that part of my definition of the term “terrorism” as the “use of political violence” might be contested. Feminist scholars contend that domestic violence should be interpreted as terrorism too. He also indicates that the practice of cyberterrorism need not involved the use of violence. Since in my book I already addressed some of the feminist challenges to my definition of terrorism, I will not repeat my argument (p. 62-64). Nevertheless, I would like to underscore that while the practice of cyberterrorism does not necessarily inflict physical violence on its victims, it might inflict psychological or emotional violence on them just by the magnitude of the threat in question. Moreover, psychological or emotional violence takes its physical toll on its victims. So, while I concede that the concept of terrorism, as any political concept, is highly contestable, I am not convinced that one might do without the concept of violence when discussing the practice of terrorism.

Professor Khawaja also objects to my defining terrorism as “a use of violence” rather than as “an initiatory use of violence.”³ He claims that “there is a fundamental moral difference between an initiatory use of violence and a response to one.”⁴ Sometimes there might be such a fundamental moral difference, but that need not always be the case since oftentimes that would depend on whether those who initiated the violence were actually justified in doing so. Also, two points are worth making. First, in many political conflicts it is rather difficult to determine who is responsible for initiating the violence, and second, even if one can determine with reasonable certainty who the responsible person or persons are for having initiated the unjustified violence or aggression, it does not follow that the victims are justified in using any means to defend themselves from the aggressors. For example, during WW II the Nazis were responsible for initiating the aggression against Great Britain, but it is at least questionable whether the British were justified in deliberately using indiscriminate area bombing against innocent German civilians. One might raise the same objection against the fire-bombing of Tokyo by

³ Ibid, p. 13.

⁴ Ibid, p. 13.

US Bomber Command and the dropping of the two atomic bombs on Hiroshima and Nagasaki in 1945 at the end of the war.

A part of my definition of terrorism that Professor Khawaja is objecting to can be formulated as a proviso, namely that the deliberate reckless infliction of terrorist violence might be justified against people (in his counterexample the imperialist aggressor and the civilians who support and/or benefit from the aggression) provided they are beyond reasonable doubt non-innocent or combatants. That is, they are in some substantive sense guilty or they are combatants by virtue of which the victims of the aggression can rightfully target them. The proviso refers to a necessary condition. That is, in an armed conflict one can deliberately or recklessly use terrorist violence against people only if they are beyond reasonable doubt non-innocent or combatants.

Since under Professor Khawaja's counterexample it would in principle be impossible to differentiate "beyond reasonable doubt" combatants from innocent noncombatants, there might be instances under which one could justify the deliberate use of reckless violence against a conglomerate of people, including civilians and/or innocent noncombatants, if the following conditions obtain: (1) That is the only effective way to stop the aggression or to bring the aggressor to the negotiating table to reach a reasonable and fair agreement, and (2) the imperialist aggressor has been so Machiavellian to make sure that those who try to use violence to stop them would be forced to use "reckless violence" against civilians or innocent noncombatants. By intentionally mixing combatants and noncombatants, they have become practically indistinguishable. In that way, if the natives decide to repel the aggressors by using deliberate reckless violence against them, they would be forced to kill innocent noncombatants since they could not differentiate "beyond reasonable doubt" between combatants and noncombatants. By doing so, the aggressor could automatically argue that the natives are terrorists because they are recklessly targeting those who are civilians or innocent noncombatants. As a result, they could charge the natives with violating LOAC (a.k.a. Law of Armed Conflict) and hence of committing war crimes.

Given his assumptions, Professor Khawaja's challenge to my proviso is well taken. According to him, in his counterexample the armed conflict is so messy that the standard of innocent or guilty

beyond reasonable doubt seems to be too demanding if one believes in giving a fighting chance to the natives, namely those who are victims of the aggression. He assumes that the natives are facing the following dilemma: either they honor my proviso, or they do not honor it. If they honor my proviso, they would remain subjugated. If they do not honor it, they would have a fighting chance against the aggressor. Hence, they either would remain subjugated or they would have a fighting chance against the aggressor. It is morally wrong for them to remain subjugated. Hence, they should have a fighting chance against the aggressor. Whether they should have a fighting chance against the aggressor would ultimately depend on the extent to which one could reasonably expect them to succeed in accomplishing their goal of defeating the aggressor or of bringing them to the negotiating table.

Professor Khawaja rightly underscore that the standard “innocent beyond reasonable doubt” is typically used in a court of law. War is generally described as an interstate armed conflict. But interstate armed conflicts are not decided in a court of law. Hence, the standard “innocent beyond reasonable doubt” is not applicable in war, or so Professor Khawaja assumes. Still, while the standard “innocent beyond reasonable doubt” is typically used in a court of law, it does not follow that it could not be used in a meaningful sense during an armed conflict to distinguish between justified and unjustified behavior of those engaged in it. That is, standards of reasonableness can be meaningful and useful in helping us to justify or excuse people’s behavior, including their behavior in extreme situations such as war. Also, strictly speaking, while the rightness or wrongness of wars is not typically decided in a court of law, there are historical examples, such as during the Nuremberg and Tokyo Trials, where the nature of the war was legally decided to some extent in a court of law. For many, the Allied were on the right beyond reasonable doubt. But, for others, at times they were not “innocent beyond reasonable doubt” because despite the initiatory use of violence by the aggressors, they also committed atrocities that could be described as morally equivalent to those committed by the Nazis and the Japanese. Moreover, some armed conflicts can be said to be decided in the court of public opinion, such as the Vietnam War, or the invasion of Iraq.

Let me move on to address Professor Khawaja's main argument. I do not think that I could do as good a job as he has done in presenting his interesting and challenging counterexample. So, I will try to present just a modified version of it that I hope does justice to his elaborate argument. Also, I will not try to argue against his interpretation of Machiavelli's *Prince* or Locke's *Second Treatise of Government*. I will, however, underscore that despite Professor Khawaja's ingenious counterargument, it is a bit of stretch to assume that Machiavelli's and Locke's political theories are compatible in any significant way. Nevertheless, I am accepting for the sake of argument his Machiavellian-Lockean playbook as described by him. Therefore, I will grant to Professor Khawaja virtually every premise of his argument or counterargument.

Machiavellian-Lockean Counterargument based on Asymmetrical Warfare

[P1] An imperialist aggressor acts according to the Machiavellian-Lockean playbook to try to justify their aggression against the native population.

[P2] Since an imperialist aggression is unjust, the native population has a right of self-defense against the imperialist aggressor and those who openly and/or tacitly benefit from the aggression.

[P3] Based on their right of self-defense, the natives can try several options to try to preserve not only their lives but also their livelihood, namely their land.

[P4] They can try to engage in bona fide negotiations with the aggressor.

[P5] They can resort to using violence only against the aggressor's armed forces according to LOAC (a.k.a. Law of Armed Conflict).

[P6] They can resort to using deliberate reckless violence, namely terrorism, foreseeing that culpable and inculpable members of the aggressor's population would be seriously harmed.

Professor Khawaja stipulates that [P4] & [P5] are futile because the natives will be unable to defend themselves successfully against the imperialist aggressor.

Professor Khawaja assumes that [P6] provides natives with the only real chance to successfully exercise their right of self-defense against the imperialist aggressor.

[C] Therefore, according to Professor Khawaja, natives have a right to resort to terrorism against the imperialist aggressor and those who openly or tacitly benefit from the aggression.

Let me make the following observation about [P6]. It seems that in his counterargument Professor Khawaja makes a substantive and questionable assumption, namely that by adopting [P6] the natives could have a real chance of defeating the aggressor. Two questions occur to me: (1) Is Professor Khawaja's assumption a reasonable and fair assumption? And (2) even if his assumption were reasonable, would a natives' victory be a worthwhile one or simply a pyrrhic victory? Since the natives, according to Professor Khawaja, are justified in engaging in terrorism against the aggressor and those who openly and/or tacitly benefit from the aggression, they might be able to defeat them by killing or seriously harming a disproportionate number of people who might be reasonably conceived of as innocent. If, however, Professor Khawaja were to insist that, strictly speaking, no members of the aggressor's community could be conceived of as "innocent beyond reasonable doubt," then I think his counterexample, while being philosophically stimulating, does not seem relevant for real case scenarios. He, however, admits as much.

Professor Khawaja states, "if [his] thought-experiment works, it offers a counterexample to Medina's claim that terrorism is categorically wrong."⁵ For Professor Khawaja's "either terrorism is not *always* wrong, or there are justifiable forms of warfare that closely resemble terrorism without quite being terrorism."⁶

I offer the following two observations. First, I argue in the book that while terrorism as I conceive of it is categorically wrong and

⁵ Ibid, p. 24.

⁶ Ibid, p. 24.

hence never justified, I also argue that terrorism might under extenuating circumstances be excused (p. 205-208). During extenuating circumstances like the one described by Professor Khawaja, the natives might be excused but not justified in using terrorism against the aggressor and those who openly or tacitly benefit from the aggression. For me, terrorism is permissible under extenuating circumstances because it could be excused. But it is not excused because it is permissible.

Of course, Professor Khawaja might object that he does not see a relevant moral distinction between a justification and an excuse. I agree that the distinction between justification and excuse is nebulous at times.⁷ But here are some thoughts about the distinction. I do think that justification can be offered in two different ways: (1) as offering sufficient reasons, and/or (2) as offering only deontic reasons. The same distinction does not seem relevant for the concept of excuse.

For example, an action is justified if one can offer sufficient reasons for it. Or an action is justified if I have not only a right but also a duty to do it. For example, consider how the first sense of justification is used in the following example. Assuming that X is a viciously imperialist aggressor, I have sufficient reasons for defending myself against the undeserved harm that X is deliberately trying to inflict on me. I might also justify my action by claiming that I have duty to defend myself from the aggressor. Both senses of justification might be intimately linked at times. But I do not think that it is ever “just” or “right” in the sense of having not only a right but also a duty to deliberately or recklessly kill or substantively harmed impeccably or objectively innocent people. We might, nonetheless, be excused in doing so under extenuating circumstances as the one illustrated by Professor Khawaja’s counterexample.

I am excused in doing X if it is wrong for me to do it, but I am not necessarily culpable for my action. For example, we typically excuse individuals based on their mental fitness, benign ignorance, duress, and I would like to add also when they are faced with a moral

⁷ For a classic discussion related to this distinction, see J.L. Austin, “A Plea for Excuses” *Proceedings of the Aristotelian Society*, 57, no. 1 (June 1956), pp 1-30.

dilemma not of their own making where no matter which way they choose to act innocent people will be seriously harmed. So, while Professor Khawaja argues that there are instances, like in his counterexample, where terrorism might be justified, I rather argue that terrorism is never justified but sometimes excused. It is not evident to me that the natives have also a duty to deliberately use reckless violence against the aggressor and those who openly and/or tacitly benefit from the aggression.

2. Reply to Professor Graham Parsons's comments

I am grateful to Professor Graham for his insightful comments and criticisms, and I am also happy to learn that we agree, at least in principle, that terrorism is more often than not unjustified. However, we seem to disagree at the practical level of whether there might be circumstances under which terrorism could be justified. My position is virtually an absolutist deontological position: terrorism is equivalent to murder or manslaughter in domestic law, or equivalent to crimes against humanity or war crimes in international humanitarian law (a.k.a. IHL). Murder or manslaughter as well as crimes against humanity or war crimes are categorically unjustified. Therefore, terrorism is categorically unjustified. Still I argue that under extenuating circumstances, like a supreme emergency, terrorism might be excused.

Professor Parsons views terrorism as analogous to “the common view of torture” where “it might be the case that there are possible circumstances where torture is understandable—so called “ticking bomb” cases—but nevertheless our laws and professional codes should absolutely prohibit it.”⁸ I think the analogy between terrorism and torture is a relevant one; however, I would not want to argue, as Professor Parsons argues, that “there are possible circumstances where torture is understandable,” as in ticking bombs scenarios.⁹ I rather argue that terrorism, like torture, is categorically

⁸ Graham Parsons, “Response to *Terrorism Unjustified* by Vicente Medina,” *Reason Papers* vol. 41, no. 1 (Summer 2019), p. 27.

⁹ *Ibid.*, p. 27.

prohibited and therefore never justified, not even under extenuating circumstances of supreme emergency. While for me terrorism, like torture, is never justified, under extenuating circumstances, such as a supreme emergency, it might be excused.

Since I adopt a virtually absolutist deontological position condemning the practice of terrorism, I think that the distinction between justification and excuse could be illuminating for discussions about the use of political violence, especially terrorism. When we try to justify an action, we typically appeal to reasons that we have some control over, such as having knowledge that is motivating us to act the way we do. But when we try to excuse an action, we typically appeal to reasons that we might not have control over, such as benign ignorance, accidental or unintentional behavior, or simply facing a serious moral dilemma where no matter which way we act objectively innocent people will be harmed.

For example, consider the farfetched trolley example.¹⁰ Suppose I see a loose trolley speeding towards five people that I can reasonably foresee will kill them if I do not divert the trolley to a different track. I can divert the trolley to a different track where I can reasonably expect that one person will be killed. Consequentialists will typically argue that I have not only a right but also a duty to divert the trolley that will kill one person rather than five. So, from a consequentialist perspective, I am justified in doing so. Even some nonconsequentialist scholars, like F. M. Kamm, argue that I am justified in saving the five persons rather than the one person because in doing so I am promoting a greater good.¹¹ In this scenario, I have control whether to act to save the five innocent persons or simply to save the one innocent person. Hence, according to Kamm and perhaps Professor Parson, I am justified rather than excused in doing so.

On the contrary, I argue that in the above example, I am not justified in deliberately killing one presumably innocent person to save five. However, in the face of such a serious dilemma, I am excused in

¹⁰ Philippa Foot, "The problem of abortion and the doctrine of double effect," *Oxford Review*, 5 (1967), pp 5–15.

¹¹ F. M. Kamm, *Intricate Ethics: Rights, Responsibilities, and Permissible Harm* (New York: Oxford University Press, 2007), p. 132.

saving the five rather than the one. I agree that the distinction between justification and excuse is precarious at times. But, in this example, I contend that I have a right in the weak sense that I can choose to save the five rather than the one, but it is not clear to me that I have a duty to save the five rather than the one. I do not think that it is ever “just” or “right” to deliberately kill objectively innocent people. We might, nonetheless, be excused in doing so under extenuating circumstances as explained in the trolley example.

Professor Parson offers two reasons why he thinks it is rather difficult for me to defend a categorical objection against terrorism. “The first reason is that the concept of terrorism is too vague and laden with normative content to be categorically rejected in a nonquestion begging way.”¹² “The second reason is that, even if we accept [my definition of terrorism], it is unclear that we can categorically distinguish terrorism from conventional wartime violence.”¹³ He underscores that my appeal to the impeccably innocent “to distinguish the victims of terrorism from the victims of non-terrorist violence is unpersuasive as it fails to appreciate the extent to which typical victims of conventional war, i.e. combatants, are innocent.”¹⁴

I agree with Professor Parsons’ objection that the concept of terrorism is highly contestable, and it is quite challenging to offer a nonquestion begging definition that could be universally accepted. I have tried to highlight that point in my work. That is why I write in the postscript that “I do not pretend that my definition of terrorism will be universally accepted. I hope, nevertheless, that I have succeeded in making the definition philosophically sophisticated and politically acceptable to those who share certain basic moral intuitions. That is, those who view morality primarily as determined by agents’ intentions and subsidiarily by the consequences of their actions” (p. 204). Nevertheless, I agree with Professor Parson’s legitimate observation that “different commentators on terrorism [might] end up talking past each other.”¹⁵ I guess that is a risk commonly present in philosophical and political circles when discussing not only issues about political

¹² Parsons, “Response to *Terrorism Unjustified* by Vicente Medina,” p. 27.

¹³ *Ibid.*, p. 27.

¹⁴ *Ibid.*, p. 27.

¹⁵ *Ibid.*, p. 28.

violence but also highly contestable issues such as issues about human rights, democracy, and justice, to mention only a few.

I am somewhat flummoxed, however, about Professor Parson's second objection, namely that I fail "to appreciate the extent to which typical victims of conventional war, i.e. combatants, are innocent."¹⁶ It is important to note that combatants by the mere fact of being so are in the business of war. Regardless whether they voluntarily enrolled or were conscripted into the armed forces, during war soldiers are a threat to those who are conceived of as their enemies. Hence, they are not harmless to their enemies. Therefore, they can be rightfully targeted. That is not the case with noncombatants. They are presumed to be innocent until proven otherwise. Of course, noncombatants or civilians could be guilty in other ways, such as being vicious informers of a tyrannical regime, being an innocent threat such as unknowingly or inadvertently carrying a weapon of mass destruction, or they might present an involuntary objective threat such as being in the wrong place at the wrong time.

Professor Parson argues that I and those whom I call apologists of terrorism, be they hard-core or soft-core ones, might not be disagreeing about the nature of terrorism. He writes that "perhaps Medina and the apologists are just talking past each other."¹⁷ There is a sense in which we are talking past each other because we offer different conceptions of terrorism. But there is also a sense in which we are not talking past each other, but we are rather trying to present arguments that any reasonable person could assess as more or less compelling depending on their morals and intuitions.

I am not sure how to interpret Professor Parson's claim that because of the normative baggage that the term "terrorism" presupposes, he thinks that the use of the term is "partisan."¹⁸ If one were to follow Professor Parson's reasoning, one could argue that a term such as "murder" also has normative baggage. Hence to be consistent Professor Parson must argue that those who use the term "murder" are always partisans too. Afterall, one who kills another

¹⁶ Ibid., p. 27.

¹⁷ Ibid., p. 29.

¹⁸ Ibid., pp. 29-30.

person with malice aforethought can always think of a justification or at least an excuse for having done so. Of course, what needs to be determined is whether those who are charged with having committed murder did it with malice aforethought.

I understand that the meaning of the term “murder” seems to be less contestable and more stable than the meaning to the term “terrorism.” That is because the term “murder” is legally entrenched virtually everywhere. But the contemporary lack of consensus about the meaning of terrorism does not exclude the possibility that in the future the international community might agree on an international definition of terrorism that would become *jus cogens* in international law. After all, the concept of crimes against humanity, which was and perhaps for some still is rather contestable, became part of international law and hence legally binding after the Nuremberg and Tokyo Trials in 1945-1946 after WWII.

Also, it is evident that many pundits, journalists, social scientists and scholars complain about the lack of consensus about the meaning of the term “terrorism.” But there seems to be nothing exceptional about the contestability of this term. As any political term, the term “terrorism” is rather polemical. Some might express its polemical meaning by using the trite expressions: “one person’s terrorist is another person’s freedom fighter,” or “one person’s terrorism is another person’s patriotism.” Others who use these expressions might convey a kind of connotative indeterminacy, be it morally, politically and/or contextually. Still, others might want to describe the cynicism of those who claim to represent the national interest of powerful states in trying to deal with the threat of terrorism by nonstate actors ignoring, at times, the unjustified or excessive violence inflicted by those representing powerful states on noncombatants, be they objectively innocent or not.

However, from the lack of consensus about the meaning of the term “terrorism,” it does not follow that we cannot make reasonable judgments about the use or misuse of violence, especially in the case of terrorism. If one were to argue so, then one would be committed to a kind of ethical relativism, which I do not think Professor Parson is committed to. I argue that despite the controversial nature of the term “terrorism,” we can make reasonable and fair judgments about

distinguishing between degrees of harmful acts and whether the harm is deserved. Also, I argue that there is a sense of the term “innocent,” namely impeccably or objectively innocent, that is crucial for passing judgments about the use of political violence as in the cases involving terrorism. I grant that there might be hard cases where we might reasonably disagree about the use of political violence, but there are also cases where it would be morally wrong and perhaps even morally incoherent to disagree that the use of political violence as terrorist violence is beyond the pale, as in the case of 9/11 or the most recent attack by an alleged white supremacist against two mosques at Christchurch, New Zealand on March 15, 2019 where 51 innocent worshipers were killed.¹⁹

Professor Parson argues that “there is also evidence that Medina’s debate with the apologists of terrorism falls victim to confusion resulting from the unacknowledged normative content of “terrorism.””²⁰ It is evident that there is a substantive normative debate between opponents and apologists of terrorism about the use of political violence, but the debate is not necessarily related to the “unacknowledged normative content of “terrorism.”” On the contrary, it is precisely because we acknowledge different normative content by appealing to different moral intuitions and different moral principles that we disagree in our conceptions of terrorism and the justification and/or excuse of political violence.

Professor Parson is right that I offer the following working definition of those whom I refer to as apologists of terrorism, be they hard-core or soft-core ones. I stipulate that for them terrorism is “The use of political violence by individuals or groups, provided they are not engaged in an interstate armed conflict, who deliberately inflict substantive harm or threaten to do so against their alleged enemies, aiming at influencing a domestic or international audience” (p. 94). Yet I am somewhat puzzled when Professor Parson writes, “Ethically speaking, it seems much easier to imagine reasonable cases of the

¹⁹ Shannon Van Sant, “Accused Shooter in New Zealand Mosque Attacks Charged with Terrorism,” *NPR*. Available from: <https://www.npr.org/2019/05/21/725390449/accused-shooter-in-new-zealand-mosque-attacks-charged-with-terrorism>.

²⁰ Parsons, “Response to *Terrorism Unjustified* by Vicente Medina,” p. 31.

apologist's terrorism than reasonable cases of Medina's terrorism...In fact, I see nothing in Medina's discussion to indicate that he is opposed to such behavior categorically."²¹

Perhaps Professor Parson does not necessarily disagree about my characterization of those whom I refer to as apologists of terrorism. But we do seem to disagree about the justification for inflicting substantive harm or threatening to do so against "alleged enemies." My sense is that whether we are justified in using violence, be it political or otherwise, against an "alleged enemy" outside an interstate armed conflict zone would depend to large extent on the following considerations. One would need to determine whether the so-called alleged enemy is a true enemy, or I simply believe him to be so. I can always claim that a person or a group is my enemy, but I could simply be mistaken in my belief. For example, I might be using such a designation for spurious partisan purposes. I will need to demonstrate that the alleged enemy actually harmed me or others who did not deserve to be so harmed, or there is an imminent and credible threat that my enemy is willing and able to seriously harm me or others now or in the foreseeable future. For example, a thief could point a gun at me demanding that I give him my wallet or else he would kill me. In this case, he is an objective or real enemy because neither do I deserve to be so threatened nor he deserve my money. Hence, I have a right to defend myself against his unjustified threat.

Next, Professor Parson argues that since discussions about terrorism are mostly discussions about fundamental moral disputes, he is skeptical about "categorical condemnations of terrorism."²² He offers instead to focus "on the family of activities most associate with terrorism."²³ His is a worthwhile suggestion that it is recognized in international law (IL). As of today, there is no universally agreed definition of terrorism in IL, but there are legal instruments against specific acts of terrorism many of which have been signed and/or ratified by members of the UN. The main problem with this piecemeal approach is that it is biased in favor of states and against nonstate actors. Still, it is better than having no international instruments at all.

²¹ Ibid., p. 32.

²² Ibid., p. 33.

²³ Ibid., p. 33.

Critics of government officials who represent the interests of powerful states question how these officials designate certain groups as terrorists. They frequently argue that government officials sometime ignore or simply downplay legitimate claims of nonstate actors by selectively defining the term “terrorism” in a negative sense as an illegal act committed only by nonstate actors. And yet, because states or those acting on their behalf have deliberately killed or seriously harmed far more objectively innocent noncombatants than nonstate actors have done, their view of terrorists and terrorism appears to be one-sided. Regrettably, such a one-sided view of terrorism prevails in domestic and international law.

Professor Parson kindly acknowledges my five different conceptions of the term “innocent”: in mens rea sense, in a Good Samaritan sense, in a blameless sense, in a harmless sense, and in a guiltless sense. And yet, he is not convinced that “innocence separates noncombatants from combatants so neatly.”²⁴ In addition, he underscores that “in accordance with conventional law and military ethics, typical combatants are innocent in a stronger sense than Medina recognizes.”²⁵ That might be the case but at least according to LOAC combatants by virtue of being combatants have no legal immunity. One could argue, however, that sometimes combatants might be conceived of as having moral immunity. That is, in war those who are on the right ought not to be targeted. The problem with this position is that frequently in war is rather difficult to determine who is on the right.

Professor Parson concludes his interesting and worthwhile comments claiming that he supports the soft-core rather than my hard-core opposition to terrorism because he thinks that “hard-core criticisms are on shaky footing.”²⁶ My sense is that if one accepts Professor Parson’s view that the use of the term “terrorism” is embedded in fundamental moral disputes and hence the term is necessarily partisan, his acceptance of a soft-core opponent’s view of terrorism, being also partisan, is also on “shaky grounds.” I argue that such a view is on shaky moral grounds because it allows for justifying, in the strong sense of justification as having not only a right but also a

²⁴ Ibid., p. 35.

²⁵ Ibid., p. 35.

²⁶ Ibid., p. 40.

duty, to deliberately kill few objectively innocent people to save the life of many objectively innocent ones. I find such justification morally questionable.

Lastly, Professor Parson offers two more plausible objections. First, he is skeptical whether we can offer a non-question begging definition of terrorism. I agree with his skeptical objection. However, in virtually any substantive controversy in philosophy, especially those dealing with moral and political issues, we will be begging the question at some point in the argument. So, I do not think that disagreements about the nature and justification of terrorism is the exception but rather the rule of moral and political arguments. And second, he is uncertain that “noncombatants are significantly more innocent than typical combatants.”²⁷ I am puzzled by his last claim. While it is true that oftentimes noncombatants might be as harmful and hence as non-innocent as combatants are, it also true that combatants by the role they play consensual or obliged are in the business of war. Therefore, they are non-innocent in a substantive way, namely they are in principle harmful to their enemies.

3. Reply to Professor Theresa Fanelli’s comments

I am impressed and thankful to Professor Fanelli for her accurate description of my argument. I think she raises a question that is crucial for assigning responsibility and liability to those who might engage in political violent acts, such as terrorism, but do not seem to be moral agents proper, such as children and mentally challenged individuals. This is an important issue that unfortunately I do not address in my work, but it is certainly worthwhile exploring it in our present context.

Professor Fanelli asks the following question: “What would the author’s reflections be regarding the importance of the mental capacity or incapacity of the actor as it relates to the many variants of definitions, explanations, even oppositional arguments on terrorism presented in the book?”²⁸ Let me underscore that those who engage in

²⁷ Ibid., p. 40.

²⁸ Theresa Fanelli, “Comments on Vicente Medina’s *Terrorism Unjustified*”

counter-terrorist activities are likely to be faced with a dilemma of whether to kill or seriously harmed individuals who strictly speaking cannot be conceived of as responsible moral agents. Still, the same individuals might present a direct threat, an innocent or an objective involuntary threat to others who do not deserved to be so threatened, including those who engaged in counter-terrorist activities.

Professor Fanelli raises a pointed question: “If the mental capacity or state of the actor(s) is such that the actor cannot predict the consequences of his/her actions, or in many cases understand the consequences of his/her actions, under which category would they fall?”²⁹ In other words, if the person who is presenting the threat to others who do not deserve to be so threatened is not strictly speaking a moral agent, should he or she be considered a terrorist? Also, it is important to explore the extent to which they might or might not be conceived of as responsible or liable for their violent actions.

I define terrorism as “the use of political violence by individuals or groups who deliberately or recklessly inflict substantive harm or threaten to do so on those who can be conceived of as innocent noncombatants beyond reasonable doubt, aiming at influencing a domestic and/or an international audience” (p. 59). For the sake of argument let us suppose that members of Al-Qaeda strapped a mentally challenged ten years old girl with a suicide vest full of explosives and instruct her to detonate her vest during the rush hour in Penn Station, New York City, to try to kill and seriously harmed as many innocent people as possible. Let us also suppose that she voluntarily walks into Penn Station ready to detonate her vest. Professor Fanelli asks the following pointed question: “For children or culturally deprived individuals who do not develop any set with which to reason and predict the consequences of their actions, is it fair or accurate to then place any of these labels onto them, be it as a “terrorist” or “combatant”?”³⁰

My answer to the above question might seem puzzling to some. While the above-mentioned mentally challenged ten years old

Reason Papers Vol. 41, no. 1 (Summer 2019), p. 9.

²⁹ *Ibid.*, p. 9.

³⁰ *Ibid.*, p. 9.

girl does not strictly speaking “deliberately” choose to inflict substantive harm on typically innocent noncombatants, her act could be classified as a reckless criminal act. In addition, someone could underscore that her reckless act is “politically motivated.” Evidently, she is not the one who is political motivated because she is mentally challenged, but the Al-Qaeda acolytes who duped her into carrying out the reckless act are politically motivated. They are simply using her only as a means to carry out their criminal act. Hence, under my definition of terrorism, while she lacks mens rea or criminal intent, her act could be sensibly classified as a terrorist act. But Professor Fanelli’s concern is whether we can reasonably and fairly classify her as a “terrorist” with all the legal implications that such a label carries with it.

My view is that given the characteristics of the act already mentioned, her action could be conceived of as a terrorist act, but she is certainly not a “terrorist” in the sense that we ascribe this term to a typical adult person. What follows from this distinction? First, that not all acts labeled as terrorist acts are committed by terrorists proper. Like in the case already described, the mentally challenged ten years old girl is engaged in a terrorist act, but she is not a terrorist. She is rather a victim of terrorism too. Second, since she has been manipulated by some Al-Qaeda rank-and-file acolytes to carry out the terrorist act, she is not a responsible moral agent and should be looked upon as a victim of terrorism rather than as a perpetrator of a terrorist act. She is just the means used by the Al-Qaeda acolytes to try to commit a politically motivated violent act for which they rather than her are responsible for. And third, even if she has been persuaded to voluntarily carry out such a violent act, she seems not to be morally responsible for this act because she is mentally unfit. If so, the law needs to be lenient rather than harsh on hers and similar cases. The same reasoning applies to the regrettable phenomenon of child soldiers in different parts of the globe.

Articles

The Postmodern Critique of Liberal Education

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1. The Philosophical Mission of Education

The great battles over education have always been philosophical.

As parents and teachers our goal is to develop within the child the knowledge, character, and skills necessary for successful living as an adult human being in the real world. That complicated goal immediately involves us in philosophy, as each of its components requires us to address hard questions.

If education is about *knowledge*, then what counts as knowledge? When does one *know*, in contrast to merely having an *opinion* or entertaining a *hypothesis*? How does one acquire *genuine* knowledge—by observation? Reasoning? Faith? Mystical insight? Or is knowledge impossible? The philosophical questions of Epistemology are central to education's mission.

If education is about *character* and preparation for *successful living*, then what is good character and what is successful living? Which traits are *virtues* and which are *vices*—pride or humility? Perseverance or laziness? Gluttony or moderation? Can those traits be taught, and if so how? Is there even such a thing as character? And what are the *value* components of a successful life—love, wealth,

health, wisdom? The philosophical questions of Ethics are also central to education's mission.

If education is to prepare children for life as *adult human beings*, then what is it to be a fully developed human being? We are *rational*, in principle, but also *emotional*—are those in conflict, or should they be harmonious? We have *physical* needs and capacities, but also *psychological* ones—how do our minds and bodies relate? We are subject to *biological* constraints and *environmental* conditioning—but do we also have a *volitional* capacity that enables us to make our own choices and thereby shape our own lives? The philosophical questions of Human Nature are central to education's mission.

And if education is to prepare children to leave the stylized confines of the nursery, their parents' homes, and formal school in order to go fully into *the real world*, then what is that reality? The real world is made up of humans, other animal species, and human technologies—and beyond that ecosystems and climate systems and solar systems and galaxies. Beyond all of those *natural* systems, is there also a *supernatural* reality inhabited by the gods or a God? And if so, what is our ultimate reality and destiny? The philosophical questions of Metaphysics are also central to education's mission.

Many answers have been given to those many questions. The answers that have most greatly influenced education across history have been given by those who were also the great philosophers in history—Plato, Augustine, Locke, Kant, and others.

The multi-dimensional philosophical battle over education has been played out over centuries by individual thinkers and competing schools of thought. Yet in broad historical strokes, the history of education can be divided into three eras: the *Pre-modern* era, prior to 1500 or so, in which a traditional or classical model of education dominated—the *Modern* era of the last several centuries, in which the ideal of liberal education came to dominate—and now our uncertain *Post-modern* intellectual era of flux and harsh critique that may signal the end of both the traditional and liberal models of education.

Postmodernism fundamentally rejects modernism and premodernism, so let us begin by making the contrast between modern

liberal and premodern traditional education. That will put us in a position to see in clear relief the nature of the postmodern challenge.

2. Modern Liberal Education Versus Premodern Authoritarian Education

In the early modern world, the great battles over education began as a reaction against traditional practices that were often authoritarian in theory and practice and distant from practical concerns. Approved truths were taught and the false was censored. Students dutifully listened and repeated and obediently did what they were told.

The modern revolution in education was multi-dimensional: it stressed worldly practicality, independence of judgment, the priority of experience and reason, free expression and discussion, and play as a key to learning.

Consider Michel de Montaigne's "On the Education of Children" (1575), with its emphasis upon cultivating independence of judgment:

"[I]f he [the student] embraces the opinions of Xenophon and Plato by his own reasoning, they will no longer be theirs but his. Who follows another follows nothing. He finds nothing, and indeed is seeking nothing. 'We are not under a king; each man should look after himself.' . . . Truth and reason are common to all men, and no more belong to the man who first uttered them than to him that repeated them after him."¹

At the time, Montaigne's independence claim is striking, especially in the context of the long-held view that following the intellectual authority of others—whether captured in Scripture or classical texts or the established institutions—was the proper, deferential attitude.

¹ Michel de Montaigne, "On the Education of Children," in *The Essays: A Selection*, trans. John M. Cohen (New York: Penguin Books, 1993), p. 56, <http://hs.umt.edu/ghr/documents/152MontaigneEducationofChildren.pdf>.

A generation later, in 1597, Francis Bacon delivered his famous aphorism, “Knowledge is *power*.”² Bacon is modern in emphasizing the practicality of knowledge: knowledge is a means to an end, to be used as a tool to improve the human condition here in the natural world. At the time, Bacon’s claims were in striking contrast to long-held views that knowledge is end in itself and that the best knowledge is of other-worldly things and often distant or irrelevant to practical concerns.

In Galileo Galilei’s 1615 widely circulated open letter to the Grand Duchess Christina, we find the modern claim that science and religion are equally worthy and legitimate modes of understanding reality, and that the methods of experience and reason should take precedence over the traditional methods of faith and threats of punishment for those who question or disbelieve.

“In discussions of physical problems we ought to begin not from the authority of scriptural passages but from sense-experiences and necessary demonstrations.”

Galileo continues,

“I do not feel obliged to believe that that same God who has endowed us with senses, reason and intellect has intended us to forego their use and by some other means to give us knowledge which we can attain by them.”³

Galileo’s claim is striking in era of unquestioning piety and intellectual intimidation when, for example, many were afraid to advocate openly Copernicus’ new sun-centered model of the heavens—and when those who have, like Giordano Bruno, have been tortured and executed in part for having done so.

² The fuller line is “*Ipsa scientia potestas est*” (“Knowledge itself is power”). Francis Bacon, *Essays Religious meditations. Places of perswasion and disswasion. Seene and allowed* (EEBO-TCP, 2003), <http://name.umdl.umich.edu/a01255.0001.001> (accessed July 30, 2019).

³ Galileo Galilei, “Letter to the Grand Duchess Christina of Tuscany,” trans. Paul Halsall (Internet History Sourcebooks Project, 1997), <https://web.stanford.edu/~jsabol/certainty/readings/Galileo-LetterDuchessChristina.pdf>.

Another generation bring us to John Milton's 1644 sweeping rejection of censorship in favor of the open publication of ideas.

“[T]hough all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter? . . . She needs no policies, nor stratagems, nor licensings to make her victorious; those are the shifts and the defences that error uses against her power. Give her but room.”⁴

Open publication and discussion by anyone and everyone—that is a strikingly modern method of advancing learning and discovering new knowledge—especially in the context of the long-held claims that error must be censored and that only authority-approved truths may be allowed into public circulation.⁵

A generation later, all of these trends culminate in John Locke's comprehensive philosophy and are applied to education in his *Some Thoughts concerning Education*. In addition to the above themes, Locke adds that learning is a source of pleasure and should be pursued freely:

“[G]reat care is to be taken, that [education] be never made as a business to him, nor he look on it as a task. We naturally, as I said, even from our cradles, love liberty, and have therefore an aversion to many things, for no other reason, but because they

⁴ John Milton, *Areopagitica* (Project Gutenberg, 2013), <http://www.gutenberg.org/files/608/608-h/608-h.htm> (accessed July 30, 2019).

⁵ The philosopher René Descartes in 1633: “I inquired in Leiden and Amsterdam whether Galileo's *World System* was available, for I thought I'd heard that it was published in Italy last year. I was told that it had indeed been published but that all the copies had immediately been burnt at Rome, and that Galileo had been convicted and fined. I was so astonished at this that I almost decided to burn all my papers.” René Descartes, “Letter to Mersenne, late xi.1633,” in *Selected Correspondence of Descartes*, trans. and ed. Jonathan Bennett (Early Modern Texts, 2013), https://www.earlymoderntexts.com/assets/pdfs/descartes1619_1.pdf.

are enjoined us. I have always had a fancy, that learning might be made a play and recreation to children.”⁶

Locke’s remarks are again modern and striking in the context of a long history of seeing education as a painful duty that one must undertake because those in authority have decreed it so.

From Bacon in 1597 to Locke in 1690 is a revolutionary century of modern ideas displacing orthodox ones. The new themes are of independence of judgement, the use of experience and reason to acquire new knowledge, the social shift to open publication and free expression and discussion, the emphasis upon pleasure and freedom as core values in the pursuit of knowledge, with the goal being the empowerment of each individual who chooses to participate.

3. Were the Moderns Fair to the Premoderns?

In revolutionary times, the debates are polarized, tempers run high, and there is always the risk of caricature in presenting the other side’s arguments. So let us consider directly the words of those on the other side, beginning with the most influential philosopher of education in history. In Plato’s works we find many themes of premodern authoritarian education, and we find them given sophisticated philosophical justification.

On the issue of freedom in education. Plato makes use of the myth of Gyges,⁷ about the shepherd boy who found a magical ring that enabled him to become invisible at will—and who then used that power to steal, rape, and murder. The moral of the story is that human nature tends to the bad, and that given the power of freedom humans will naturally abuse it. Consequently, much of education must impose

⁶ John Locke, “Some Thoughts Concerning Education,” in *The Works*, vol. 8 (*Some Thoughts Concerning Education, Posthumous Works, Familiar Letters*) (The Online Library of Liberty, 2011), sec. 148, http://oll.s3.amazonaws.com/titles/1444/Locke_0128-08_EBk_v6.0.pdf.

⁷ Plato *Republic*, 359a-360d. See also *Phaedrus* 253d-e.

strong discipline and the use of punishment to correct the natural human tendency towards evil.⁸

On the issue of play and pleasure in education. In Plato's famous allegory of the cave in *The Republic*,⁹ Socrates goes out of his way to use the language of compulsion, pain, and duty. The ignorant learners in chains at the bottom of the cave do not initiate the process of learning. Rather, they are *compelled* to stand and *forced* to turn and move toward the otherworldly light, and the entire upward ascent toward enlightenment is *painful* to them.¹⁰

On the issue of open publication and discussion. Also in *The Republic*, Plato makes a systematic case for censorship, especially of literature, music, and the arts. The task of the Platonic philosopher is to take up the "ancient quarrel between philosophy and poetry"¹¹ and to assert the State-enforced dominance of philosophy. To be well educated, children must be exposed to good material and shielded from bad material. But many tales from Homer and Aristophanes and others portray the gods, great men, and the laws in immoral and ridiculous fashion. Therefore, the State should censor much painting, poetry, theatre, and music.

⁸ In *Phaedrus* Plato also gives us the famous charioteer analogy of the human soul: "In the beginning of this tale I divided each soul into three parts, two of which had the form of horses, the third that of a charioteer. Let us retain this division. Now of the horses we say one is good and the other bad; but we did not define what the goodness of the one and the badness of the other was. That we must now do. The horse that stands at the right hand is upright and has clean limbs; he carries his neck high, has an aquiline nose, is white in color, and has dark eyes; he is a friend of honor joined with temperance and modesty, and a follower of true glory; he needs no whip, but is guided only by the word of command and by reason. The other, however, is crooked, heavy, ill put together, his neck is short and thick, his nose flat, his color dark, his eyes grey and bloodshot; he is the friend of insolence and pride, is shaggy-eared and deaf, hardly obedient to whip and spurs." *Phaedrus*, 253e-c.

⁹ Plato *Republic*, 515c.

¹⁰ In St. Augustine's religious Platonism, the doctrine of Original Sin parallels the Myth of Gyges, and Augustine's famous phrase *Per molestias eruditio* ("True education begins with physical abuse") parallels Plato's points about imposed discipline and pain.

¹¹ Plato *Republic*, 607b, 386a, 401b, and 595a.

On the issue of independence of thought. In Book 7 of *Laws*, Plato's final work, we find an argument for why the State should regulate children's games in order to train them to become adults who will follow the laws obediently and uniformly. The Athenian Stranger says to Clinias the Cretan:

"I assert that there exists in every State a complete ignorance about children's games—how that they are of decisive importance for legislation, as determining whether the laws enacted are to be permanent or not. For when the program of games is prescribed and secures that the same children always play the same games and delight in the same toys in the same way and under the same conditions, it allows the real and serious laws also to remain undisturbed."¹²

The Stranger continues:

"But when these games vary and suffer innovations, amongst other constant alterations the children are always shifting their fancy from one game to another, so that neither in respect of their own bodily gestures nor in respect of their equipment have they any fixed and acknowledged standard of propriety and impropriety; but the man they hold in special honor is he who is always innovating or introducing some novel device in the matter of form or color or something of the sort; whereas it would be perfectly true to say that a State can have no worse pest than a man of that description, since he privily alters the characters of the young, and causes them to condemn what is old and esteem what is new. And I repeat again that there is no greater mischief a State can suffer than such a dictum and doctrine: just listen while I tell you how great an evil it is."

Beware of the independent innovator and the experimenter. He is the State's worst enemy.

To the extent that the Stranger and Socrates speak for Plato, we get a model of education that endorses these top goals: Children must learn (1) rule-following—especially rules made by others, and made in the past—and not to think of changing things. More broadly,

¹² Plato *Laws*, 797a-d.

in the corpus of Plato's works, we get a model of education that stresses (2) imposed discipline, (3) obedience, (4) censorship, and (5) the expectation that learning is a painful duty.

All of these points are suggestive in Plato, and they are often couched in question form and the words put into the mouths of the semi-fictional Socrates and other characters. However, they do indicate a framework that many later educators took and applied more or less consistently, in both religious and secular form, for almost two millennia.¹³

4. A Counter-Liberal Reaction

The modern revolution in education began with the Renaissance and reached its intellectual maturity with the representative figures mentioned above—the western European thinkers Montaigne, Bacon, Galileo, Milton, and Locke in the long seventeenth century.

But the liberal revolution was not decisive for all of Europe, for further to the northeast a counter-revolution in education was initiated in the German states and especially in Prussia.

Immanuel Kant lectured and wrote on education a century after Locke and was well aware of Lockean liberal education. Yet Kant brought his formidable intellect to bear upon attacking its major elements, counter-point for point.

Locke had emphasized children's self-motivation and the freedom to pursue their own interests. Kant disagreed: children must learn to do what they must out of *duty*, not out of *inclination*. From Kant's lectures on education, first delivered in 1776/77:

¹³ In the premodern era, Plato inspired followers who saw themselves as interpreting and transmitting pure Platonism (e.g., Plotinus) and thinkers who effected mergers with pagan (e.g., Porphyry), Jewish (e.g., Philo of Alexandria), Christian (e.g., Augustine), Islamic (e.g., Avicenna) thought and educational practice. Members of the latter group are generally labeled "Neo-Platonic."

“One often hears it said that we should put everything before children in such a way that they shall do it from *inclination*. In some cases, it is true, this is all very well, but there is much besides which we must place before them as *duty*. . . . For in the paying of rates and taxes, in the work of the office, and in many other cases, we must be led, not by inclination, but by duty. Even though a child should not be able to see the reason of a duty, it is nevertheless better that certain things should be prescribed to him in this way.”¹⁴

Locke had argued that human beings are born morally *tabula rasa* and become good or bad by the choices they make. Kant disagreed, re-asserting a version of Original Sin:

“the history of *freedom* begins with badness, for it is *man’s* work.”¹⁵

Since we must strive not to repeat Eve and Adam’s *disobedience* in the Garden of Eden, education must first establish *obedience* within children.

“Above all things, obedience is an essential feature in the character of a child, especially of a school boy or girl.”¹⁶

Kant’s emphasis upon obedience was no doubt influenced by his reading of Johann Georg Sulzer, the leading education theorist in the German states. In his 1748 *An Essay on the Education and Instruction of Children*, Sulzer stated his fundamental thesis this way:

“Obedience is so important that all education is actually nothing other than learning how to obey.”

Sulzer elaborates:

¹⁴ Immanuel Kant, *On Education*, trans. Annette Churton (The Online Library of Liberty, 2011), chap. 4, sec. 82, http://oll.s3.amazonaws.com/titles/356/Kant_0235_EBk_v6.0.pdf.

¹⁵ Immanuel Kant, “Speculative Beginning of Human History,” in *Perpetual Peace and Other Essays*, trans. Ted Humphrey (Indianapolis: Hackett, 1983), p. 54.

¹⁶ Kant, *On Education*, sec. 80. Note the significance of “*above all things*.”

“It is not very easy, however, to implant obedience in children. It is quite natural for the child’s soul to want to have a will of its own, and things that are not done correctly in the first two years will be difficult to rectify thereafter. One of the advantages of these early years is that then force and compulsion can be used. Over the years, children forget everything that happened to them in early childhood. If their wills can be broken at this time, they will never remember afterwards that they had a will, and for this very reason the severity that is required will not have any serious consequences.”¹⁷

Much of Kant’s writing on education reads like a gloss upon Sulzer’s views. How will the students learn obedience given their natural unruliness and tendency to badness? The solution is that parents and teachers must impose structure upon them. There must be, Kant argues,

“a certain plan, and certain rules, in everything, and these must be strictly adhered to. For instance, they must have set times for sleep, for work, and for pleasure, and these times must be neither shortened nor lengthened.”¹⁸

However, of course, children will be childish and often disobedient. Consequently, punishment is an essential part of education:

“Every transgression in a child is a want of obedience, and this brings punishment with it.”¹⁹

¹⁷ Johann Georg Sulzer, *Versuch von der Erziehung und Unterweisung der Kinder (An Essay on the Education and Instruction of Children)*, quoted in Alice Miller, *For Your Own Good* (New York: Farrar, Straus and Giroux, 2002), 8–14, <http://www.nospank.net/fyog5.htm> (accessed July 30, 2019).

¹⁸ Kant, *On Education*, sec. 83.

¹⁹ Kant, *On Education*, sec. 83. Compare St. Augustine: “It is evident that the free play of curiosity is a more powerful spur to learning these things than is fear-ridden coercion; yet in accordance with your laws, O God, coercion checks the free play of curiosity. By your laws it constrains us, from the beatings meted out by our teachers to the ordeals of the martyrs, for in accord with those laws it prescribes for us bitter draughts of salutary discipline to

Kant then follows with many paragraphs laying out a taxonomy of disobediences and the corresponding appropriate kinds of punishments.

Once again, we have a striking contrast to the new liberal approach, as expressed in Locke's words:

"I am very apt to think, that great severity of punishment does but very little good; nay, great harm in education: and I believe it will be found, that, cæteris paribus, those children who have been most chastised, seldom make the best men."²⁰

But we should not overstate the harshness of Kant's system, as even he recognized the often brutal strictness of the traditional education, and, as a man with one foot in the modern world, he wants to soften its effect to some degree:

"Children should sometimes be released from the narrow constraint of school, otherwise their natural joyousness will soon be quenched."²¹

Yet even the compromise statement gives an indication of Kant's image of what proper school experience will be like: school is a place that quenches any joy one might have.

It is again worth quoting Locke for the contrast:

"I have always had a fancy, that learning might be made a play and recreation to children; and that they might be brought to desire to be taught, if it were proposed to them as a thing of honour, credit, delight, and recreation, or as a reward for doing something else, and if they were never chid or corrected for the neglect of it."²²

recall us from the venomous pleasure which led us away from you." *The Confessions*, ed. David Vincent Meconi, S.J., trans. Maria Boulding (San Francisco: Ignatius Press, 2012), bk. 1, chap. 14.

²⁰ Locke, "Some Thoughts Concerning Education," sec. 43.

²¹ Kant, *On Education*, sec. 88.

²² Locke, "Some Thoughts Concerning Education," sec. 148. A footnote-worthy contrast also is worth making over the place of the arts, including dance and literature. When Locke turns to curricular matters, dance instruction

We thus have so far, at a high level of abstraction, a two-way debate between a premodern authoritarian educational philosophy system—with advocates stretching across the centuries from Plato to Augustine to Kant—and a modern liberal educational philosophy with its roots also ancient thinkers but developed systematically in the generations from Montaigne to Galileo to Locke.

A table captures the essentialized points of contrast.

| Premodern authoritarian education | Modern Liberal Education |
|--|---|
| Obedience | Independence |
| Elevate the mind and devalue the body | Mind and body equally important |
| Morally bad and sinful | Morally blank slate |
| Children naturally opposed to learning | Children naturally curious |
| Learning as painful | Learning as pleasurable |
| Duty | Pursuit of happiness |
| Compulsion | Choice |
| Imposed discipline | Self-discipline |
| Punishment regularly applied | Punishment de-emphasized |
| Censorship | Open publishing and discussion |
| Emphasis upon theoretical | Emphasize integrating theory and practice |

is among the very first items he mentions. Kant, in part due to his Pietist upbringing with its prohibitions upon imagery and morally-suspect physical activities, mentions dance only disapprovingly (sec. 51 and 59) and states that children should not be allowed to read novels (sec. 69).

5. The Postmodern Challenge to Both Premodern and Modern Liberal Education

We now turn to postmodernism, the sprawling intellectual and cultural movement that began in the second half of the twentieth century. Postmodernism is a critical movement based upon a fundamental rejection of *both* the modern and the premodern. Consequently, it casts itself as rejecting *both* traditional authoritarian education *and* liberal education and as calling for a fundamentally distinct third option.

What could a fundamental third option be?

One element is *cognitive*—the debate over whether knowledge is achieved through rational or non-rational methods. But what if knowledge of any sort is impossible and all we have are subjective stories we happen to believe? Another element is *moral*—the debate over whether objective value is found in this life or in an afterlife. But what if no genuine value exists, and all is merely amoral power struggles? Yet another element is about *human identity*—the debate about whether individuals are defined by the possession of a unique God-given soul or by the choices they each make on their own. But what if no individuality actually exists, and humans are constructs of their social environments? And another element is *political*—the debate about whether education should teach one to accept one's place in a feudal hierarchy or prepare one for living a free and self-responsible life. But what if we reject hierarchy and freedom and substitute a radical equality? Most major philosophical debates are three-way affairs, not two-way, and postmodernism represents a consistent third alternative.

Emphasizing the *post-* prefix: postmodernism situates itself historically as *after* the modern world, and it situates itself intellectually as *rejecting* or going *beyond* the intellectual principles that animated the modern world, just as those modern principles were an earlier intellectual rejection of premodernism.

The roots of the postmodern challenge were laid by two counter-modern thinkers who were disturbed deeply by modernity's revolution. Kant's philosophy is both a reactionary defense of traditional faith and duty—and a sophisticated critique of modernism

that lays foundation for postmodernism. Jean-Jacques Rousseau is well known in education circles for his *Émile* (1762), but his collectivized and emotionalized philosophy is also significant to the future developments that feed into postmodernism.

That long series of developments from the 1750s to the 1950s includes Karl Marx's strong-versus-weak exploitation theory,²³ Friedrich Nietzsche's perspectival power-politics,²⁴ John Dewey's pragmatic assimilation of the individual to the group,²⁵ and Martin Heidegger and the other Existentialists' emotionalized anxiety, dread, and disquiet.²⁶ (See my *Explaining Postmodernism: Skepticism and Socialism from Rousseau to Foucault* for the intellectual history.²⁷)

²³ Karl Marx and Friedrich Engels: "In one word, for exploitation, veiled by [feudalism's] religious and political illusions, it [modernism's capitalism] has substituted naked, shameless, direct, brutal exploitation." "Manifesto of the Communist Party," in *The Marx-Engels Reader*, ed. Robert C. Tucker, 2nd ed. (New York: W. W. Norton & Company, 1978), p. 475.

²⁴ Friedrich Nietzsche: "Here one must think profoundly to the very basis and resist all sentimental weakness: life itself is essentially appropriation, injury, conquest of the strange and weak, suppression, severity, obtrusion of peculiar forms, incorporation and at the least, putting it mildest, exploitation". *Beyond Good and Evil*, trans. Walter Kaufmann (New York: Vintage, 1966), sec. 259.

²⁵ John Dewey's *Democracy and Education* (1916) on how individuals become part of the community: "Individuals do not even compose a social group because they all work for a common end. The parts of a machine work with a maximum of cooperativeness for a common result, but they do not form a community. If, however, they were all cognizant of the common end and all interested in it so that they regulated their specific activity in view of it, then they would form a community." *Democracy and Education* (Project Gutenberg, 2015), chap. 1, <http://www.gutenberg.org/files/852/852-h/852-h.htm>.

²⁶ On "the fundamental mood of anxiety" [Angst], see Martin Heidegger, "What Is Metaphysics?" in *Existentialism: from Dostoevsky to Sartre*, ed. Walter Kaufmann (New York: New American Library, 1975), pp. 242–264.

²⁷ Stephen R. C. Hicks, *Explaining Postmodernism: Skepticism and Socialism from Rousseau to Foucault*, expanded edition (New Berlin, Wisconsin: Scholargy Publishing, 2004).

6. What Postmodernism Rejects

According to modernism, the defining and dominant themes of the world it has created, if boiled down to eight, are these:

There are *objective* truths about the world, and it is possible for us to acquire knowledge of them by observation, reasoning, and, in the difficult cases, a fully sophisticated scientific method.

The fruits of *science* and *technology* can be developed and enjoyed by all, and that great advancements in knowledge and well-being have been made and will continue to be made.

The reason that makes possible knowledge is *universal*: every human has this capacity and we all live in the same world, so through a process of discovery, debate, discussion, and publication, we can come to agreement upon a set of universal truths about the way the world works, including moral and political truths about human values and rights.

The modernists emphasize *individualism*—that individuals have their own lives to live and their own happiness to pursue. So a progressive emancipation of all of the human population is an important goal.

Modernists believe that *justice* is an objective, definable, and universal principle, and that we should be able to develop a democratic-republican political and legal system that consistently achieves justice.

Modernists emphasize *equality*, particularly against the feudalism that divides people into groups and classes based on sexuality, religion, or other dimensions.

Free-market capitalism as an economic system leaves individuals free to run their own lives economically, to control their own property, and as the most successful economic system of the modern world.

Progress is a realistic ideal. Modernists optimistically believe that by taking seriously all of the above—reason, individualism, a commitment to freedom, equality, and justice, and the institutionalizing

them socially—we can solve all of the world’s problems. Humans can progress and achieve happiness in their lives.

The postmodern claim is that the entire modernist narrative is wrong—and that it is a self-congratulatory patting-oneself-on-the-back story that modernists tell to self-justify their system.

Suppose we take, for example, modernism’s political liberalism. The modern world prides itself on its commitment to freedom for individuals, its commitment to extending the franchise, and to eliminating many various arbitrary social barriers. Postmodernist reject this assessment—especially, they will argue, if we look at anybody who is not a white, male, or ethnically Anglo-Saxon. Modern society is still dominated by sexism—males dominating females—by racism, with whites as a group dominating non-whites as a group—and by ethnocentrism, with powerful ethnicities dominating weaker ethnicities, and so forth. As Henry Giroux phrases it,

“Within the discourse of modernity, the Other not only sometimes ceases to be a historical agent, but is often defined within totalizing and universalistic theories that create a transcendental rational white, male, Eurocentric subject that both occupies the centers of power while simultaneously appearing to exist outside time and space.”²⁸

Or take modernism’s economic claim that capitalism has generated huge amounts of wealth and extended liberty and property rights. Certainly, there has been a great deal of wealth generated, but postmodernists argue that Rousseau and Marx were essentially right: we have an economic system that is characterized by a small group of rich people at the top who control of most of society’s wealth and who use it to advantage themselves at the expense of everyone else.

Regarding technology, modernists tell a good-news story about innovative technologies—airplanes, X-ray machines, antibiotics, entertainment devices, and so on. But the postmodern argument is that

²⁸ Henry Giroux, “Postmodernism as Border Pedagogy: Redefining the Boundaries of Race and Ethnicity,” in *Postmodernism, Feminism, and Cultural Politics: Redrawing Educational Boundaries*, ed. Henry Giroux (Albany, NY: State University of New York Press, 1991), p. 220.

technology is in fact damaging human relationships with each other. We have nuclear weapons and other high-tech military devices, and ultimately that means some human beings will exterminate large numbers of other human beings—or that these weapons will be tools that the rich and powerful will use to keep the others under threat. Also these technologies—our ability to drive our own cars, have central heating, fly anywhere in the world—are ultimately ruining the environment. The modern world is self-destroying, but nonetheless it talks a pretty story about environmental beautification and pretending to be green.

Or take the modern scientific institutions: many postmodernists will claim that scientific ways of thinking about the world—with its emphasis on reason, experiment, analysis, mathematics—is merely one way of thinking about the world. Perhaps white males are proficient at science, but there are other ways of thinking about the world, and we should not require all people to think the way that white males do. Consequently, modernism's science is often an intellectual imperialism by making everybody bow down before science and those with scientific credentials. Scientific claims are eclipsing various other ways of human beings trying to come to know the world and themselves. Penny Strange, for example, hopes for

“an escape from the patriarchal science in which the conquest of nature is a projection of sexual dominance.”²⁹

Consider also modern individualism: postmodernists will argue it is a mask for what is really an ongoing group conflict. Human beings are defined by their cultural identities—their economic backgrounds, their learned sexual gender roles, their racial groups, and the technological environments they find themselves. Consequently, humans are not fundamentally individuals but rather are dissolved by the forces of modernity—what Fredric Jameson calls “the death of the subject”³⁰—so modernist rhetoric about being our own selves and thinking independently is a fraud used to cover group conflicts.

²⁹ Penny Strange, “It’ll Make a Man of You,” quoted in *Beyond Patriarchy: Essays by Men on Pleasure, Power, and Change*, ed. Michael Kaufman (Toronto: Oxford University Press, 1987), 59.

³⁰ Fredric Jameson, *Postmodernism, or, the Cultural Logic of Late Capitalism*

Finally, and most fundamentally problematic, the postmodernists will target modernism's emphasis on reason's competence and our ability objectively to come to know the world. The claims of reason have been revealed to be a fraud. In Foucauldian formulation:

“It is meaningless to speak in the name of—or against—Reason, Truth, or Knowledge.”³¹

Postmodernism takes skepticism seriously and reaches relativistically subjectivist conclusions. Reason of course can generate many stories—but they are merely stories. All we have socially is a number of competing narratives, and these narratives are subjective creations—in most cases group-subjective creations. None of them can claim to be the true account of the way the world really is.

Instead, the “truth”—if we can use language of “truth” in postmodernism—is a cynical truth that the world is really governed by power and conflict. Rather than a happy-ever-after story of progress that the modernists want to tell—the world is an ongoing series of zero-sum battles—winners versus losers, this group versus that group, amoral power struggles, and so on without end.

The modernist claims of reason have been shown, by the time we get to twentieth-century philosophy, postmodernists argue, to be fatally flawed—just as the claims of mysticism and faith in the earlier, premodern era were shown to be fatally flawed. We are amidst the next revolution.

7. The Postmodern Philosophical Alternative to Modernism

Consequently, a consistent suspicion about *both* the claims of mystical faith and the claims of reason emerge in postmodernism as a thoroughgoing skepticism. Using the standard postmodern language: all we have are *narratives*. Any society has any number of competing

(Durham, NC: Duke University Press, 1991), p. 15.

³¹ Todd May, *Between Genealogy and Epistemology: Psychology, Politics, and Knowledge in the Thought of Michel Foucault* (University Park, PA: Pennsylvania State University Press, 1993), p. 2.

narratives, and every group believes that its particular narrative is “right.” But there is no way to step outside of any of the stories that we have come to believe and to judge them objectively against each other or against any sort of independent world. There is no meta-stance that we can take and no one true meta-narrative, so all we are left with is competing, relative, group-defined narratives. Our narratives are *socially subjective*.

This implies metaphysical *anti-realism*. If we are skeptical about all narratives, then that will include any metaphysical narratives. One of great metaphysical battles historically has been between those who believe in the existence of God and those who are naturalistic. But both of them make the claim that there is a true account of reality. They simply disagree over whether reality, however it is conceived, ultimately is only the natural world or the natural world plus a supernatural world. But as skeptics, the postmodernists argue that there is no such thing as a true account of reality. That is to say, they are *anti-realistic*: no “true” account of reality can be given. Naturalism and supernaturalism are equally subjective narratives. It is meaningless to try to address metaphysical questions and come up with a “true” account of the way the world works.

With respect to human nature, the postmodernists first contrast themselves to the premodernist claims about the nature of mankind, e.g., that there is an inborn guilt that all humans bear. This sin is seen as inhering in individuals, and each individual’s primary responsibility is to choose to form the right kind of relationship with God. By contrast, moderns see individuals as morally *tabula rasa* creatures with independent capacities that they can develop for good or for evil.

But in contrast to both, strongly asserted in postmodernism is the notion that human beings are fundamentally members of groups: racial groups, gender groups, ethnic groups, economic groups, and these group memberships define and determine who one is. Postmodernists are mostly environmental determinists of a collectivist variety—that is, each human is an overlapping and shifting set of racial, sexual, ethnic, and other group identities. Richard Rorty writes

of our socially conditioned “ethnocentric” predicament: “we must, in practice, privilege our own group.”³²

When it comes to the ethics, postmodernism emphasizes conflict and oppression as characteristic of modernity, with stronger groups beating up and taking advantage of the weaker groups. Socially, writes Millicent Bell, “all unions are doomed to be compromises of dominion and submission.”³³ Yet one should have compassion for those groups that have been typically on the losing end of these various conflicts, and use that empathetic compassion to lead to an identification with those groups struggles and fight with them to end their oppression.³⁴

In politics, postmoderns reject modernism’s free-market democratic-republicanism as well as the remnants of premodern feudalism. Replacing that is an emphasis on egalitarianism as an ideal against which we should measure social progress. The modern world is not actually characterized by egalitarianism, but egalitarianism, nonetheless, should be a kind of regulative standard guiding our thinking. All of the major postmodernists are advocates of socialist politics and economics.³⁵

Therefore, the postmodern strategy is to focus its efforts *critically*, that is to say, negatively against modern society. Modern

³² Richard Rorty, *Objectivity, Relativism, and Truth: Philosophical Papers*, vol. 1 (Cambridge: Cambridge University Press, 1991), p. 29.

³³ Millicent Bell, “The Bostonian Story,” *Partisan Review* 52, no. 2 (1985): p. 113.

³⁴ Rorty especially urges “empathy” and “sensitivity” to the suffering groups—within the limits of our ethnocentric predicament.

³⁵ Taking Michel Foucault, Jacques Derrida, Jean-Francois Lyotard, and Richard Rorty as the major representatives. Here is Derrida on the significance of socialism to his deconstruction: “Deconstruction has never had any sense or interest, in my view at least, except as a radicalization, which is to say also *in the tradition* of a certain Marxism, in a certain *spirit of Marxism*” [italics in the original]. Jacques Derrida, *Specters of Marx* (New York: Routledge, 2006), p. 115. Foucault was a member of the French Communist Party in the early 1950s and later became a Maoist. Derrida did not join the Communist Party, but he published in journals that were communist-friendly. Lyotard was also worked with Marxist groups. Rorty was not a Marxist but rather a social-democrat who stakes out of position at the far-left end of the social-democratic political spectrum.

society is a multi-dimensional battleground that privileges *some* groups at the expense of other groups. White people are at the top of the heap, and anybody who is non-white is marginalized. Males are increasingly at the top, and females are pushed down the hierarchy. In Western nations and those affected by colonialism, the Anglo-Saxon and Protestant ethnicities have become privileged. Modern society also privileges a heterosexuality, saying that males and females should be in monogamist marital relationships; so various alternative sexualities including homosexuality are marginalized. Moreover, environmentally we humans have privileged ourselves as the most important species, seeing all other species are merely commodities for our use, which leads us to exterminate them, use them, and enslave them however we want.

So as postmodern *critical* theorists, we must oppose the sunny-skies-unlimited-optimism that is characteristic of the modern world. Postmodernism is an intellectual attitude with a tightly integrated emotional attitude that tends strongly toward *pessimism* and *cynicism*.

The modern world tells many good-news stories about itself. It prides itself on certain accomplishments: liberty, equality, progress, and the like. The postmodernist's perspective is that we should see all such stories as rhetorical devices that strong groups use in the power struggle to position themselves and advance their groups at the expense of others. Therefore, our job as postmodernist critical thinkers is to be *suspicious* about the cover story and to *tear off its masks* to expose that it is a rhetorical device. And we should always look for the underlying social reality—the darker story about power conflicts, about groups using any tools, including rhetorical and philosophical tools, to advance their interests at the expense of other groups. That darkness is characteristically the center of gravity for postmodernism.

A table summarizes the contrasts.

| Modern themes | Postmodern themes |
|--|------------------------------|
| Objectivity possible | Social subjectivism |
| Science and technology as universally beneficial | Science as partial narrative |

| | |
|-------------------------|-----------------------------|
| Reason is universal | Reason is socially relative |
| Individualism | Collectivism |
| Justice | Power |
| Equality before the law | Exploitation |
| Free-market capitalism | Egalitarian socialism |
| Progress | Cynicism |

8. Postmodernism's Revolution in Education

What does this imply for *education*?

The postmodern world of education is a struggle for power, and all participants must enter the fray. In his *Criticism and Social Change*, Frank Lentricchia puts it bluntly: postmodernism “seeks not to find the foundation and the conditions of truth but to exercise power for the purpose of social change.”³⁶ Chandra Talpade Mohanty makes the same point focusing more specifically upon women and Third World peoples: the academy and the classroom are

“political and cultural sites that represent accommodations and contestations over knowledge by differently empowered social constituencies. Thus teachers and students produce, reinforce, recreate, resist, and transform ideas about race, gender, and difference in the classroom.”³⁷

There are many such competing ideas, but none of them can claim truth. As Henry Giroux reminds us in “Border Pedagogy as Postmodernist Resistance,” postmodernism has rejected both premodern-religion-friendly and modern-science-friendly philosophies:

³⁶ Frank Lentricchia, *Criticism and Social Change* (Chicago: University of Chicago Press, 1983), p. 12.

³⁷ Chandra Talpade Mohanty, “On Race and Voice: Challenges for Liberal Education in the 1990s,” in *Between Borders: Pedagogy and the Politics of Cultural Studies*, ed. Henry A Giroux and Peter McClaren (New York: Routledge, 2014), p. 147.

“It does this by refusing forms of knowledge and pedagogy wrapped in the legitimizing discourse of the sacred and the priestly; its rejecting universal reason as a foundation for human affairs; claiming that all narratives are partial; and performing a critical reading on all scientific, cultural, and social texts as historical and political constructions.”³⁸

Yet even though no group’s “knowledge” is truer than any other group’s, some groups dominate the academic world. Especially one group has the central space in education—the “transcendental rational white, male, Eurocentric subject”—and the privileging of that group has meant the diminishing all of the other groups:

“Read against this Eurocentric transcendental subject, the Other is shown to lack any redeeming community traditions, collective voice, or historical weight.”³⁹

Students learn that they must think and be like white-male-Europeans in order to gain acceptance within current education and to be considered worthy of its fruits. But what that really means, Giroux continues, is that

“students who have to disavow their own racial heritage in order to succeed are ... being positioned to accept subject positions that are the source of power for a white, dominant culture.”⁴⁰

Therefore, the postmodernist educator must resist and oppose the tendency of modernism to assimilate everybody to one group’s way of thinking.

This requires a revolution—an institutional restructuring of higher education—with many components.

³⁸ Henry Giroux, “Postmodernism as Border Pedagogy: Redefining the Boundaries of Race and Ethnicity” in *Postmodernism, Feminism, and Cultural Politics: Redrawing Educational Boundaries*, ed. Henry Giroux (Albany, NY: State University of New York Press, 1991), pp. 245–246.

³⁹ Giroux, “Postmodernism as Border Pedagogy,” p. 220.

⁴⁰ Giroux, “Postmodernism as Border Pedagogy,” p. 251.

Under modern liberal education, one expectation has been that all individuals can learn together, no matter what gender, race, or ethnicity, and that a healthy collision of different perspectives helps everyone learn. But, postmodernists argue, the mixing of dominant and minority groups leads to the silencing and the suppression of minority groups. So institutionally it is necessary to create separate academic fields for the disempowered groups—women, blacks, Third-World peoples. Specialized courses, departments, and centers for those groups alone to partake of will, Mohanty urges, support their

“attempts to resist incorporation and appropriation by providing a space for historically silenced peoples to construct knowledge. These knowledges have always been fundamentally oppositional.”⁴¹

That separation will enable those marginalized groups to become empowered and fight back against the dominant powers.

Another component of the restructuring is to emphasize the postmodern rejection of education as a *pursuit of truth* and its replacement with the view that education is primarily about the *training of social and political activists*. Following Lentricchia, the educator’s task is to help students “spot, confront, and work against the political horrors of one’s time.”⁴² The teacher’s purpose is first to show students realize that they live in a pathological system that is marked by power struggles in which the weaker are constantly oppressed, exploited, and taken advantage of by strong groups. One’s job as a teacher is next to cultivate the students’ identification with those oppressed and exploited groups—which will then make the students into the revolutionaries who will overcome modern society and bring forth a postmodern one.

That will enable those oppressed Others, in Giroux’s words, “to both reclaim and remake their histories, voices, and visions as part

⁴¹ Mohanty, “On Race and Voice: Challenges for Liberal Education in the 1990s,” p. 147.

⁴² Lentricchia, *Criticism and Social Change*, p. 12.

of a wider struggle to change those material and social relations that deny radical pluralism.”⁴³

9. Postmodern Teacher Training

Another component of the restructuring focuses on the training of teachers. All of the above means that postmodernism needs the right kind of teachers, which implies that it must first transform the teachers who will be the cultural workers who go into the schools and transform the next generation of students. Therefore, we need to remake the teachers-to-be who are coming into the higher-education teacher-training programs.

Particularly we must take up the challenge of *re-training* teachers-to-be who—by the time they get to us professors of education—have already been raised in modernist society. Having being so raised, they likely have internalized the image of the white-male-Anglo-Saxon-Protestant as the proper way of being. Most teachers in contemporary Western society are themselves white, and most of them have been conditioned to think in terms of liberal capitalism. So they must learn to become self-reflectively critical of their own upbringing and their own identities. They need to be taught not to think of themselves as training people to be cogs in the modern capitalist machine. To the extent that they do so, they will become teachers who are more sensitive to other groups’ ways—non-white ways of thinking about things, non-human-centered ways of thinking about things, non-heterosexual ways of thinking about things, and so on.

As Giroux phrases it,

“This suggests that to the degree that teachers make the construction of their own voices, histories, and ideologies problematic they become more attentive to Otherness as a deeply political and pedagogical issue.”⁴⁴

So postmodernism makes teacher reeducation a priority.

⁴³ Giroux, “Postmodernism as Border Pedagogy,” p. 251.

⁴⁴ Giroux, “Postmodernism as Border Pedagogy,” p. 253–54.

The University of Minnesota provides an example. Its College of Education and Human Development empowered a Race, Culture, Class, and Gender Task Group. In its report, the task group's contingent of postmodernist professors proposed a requirement that all teachers to be certified by the University of Minnesota agree to a postmodern intellectual framework. Teacher candidates must demonstrate that they reject the language of "The American Dream" and the "myth of meritocracy." That is, they must reject the modernist story—the idea that if we free individuals and treat people as individuals and eliminate legal obstacles—then with encouragement and freedom anybody can achieve his or her own dream, achieve happiness. That is the modern story that America is the land of opportunity open to all. Instead, the report explains:

“aspiring teachers must be able ‘to explain how institutional racism works in schools’” and “the history of demands for assimilation to white, middle-class, Christian meanings and values, [and] history of white racism, with special focus on current colorblind ideology.”⁴⁵

With the establishment of a new postmodern mission and the corresponding re-training of teachers, the rest of educational practice can then be re-cast along postmodern lines:

- (1) Curriculum matters, including decisions about what texts will and will not be read,
- (2) Speech policies within the classroom and on campus, including which views can be expressed and which views cannot,
- (3) Guest speaker invitations and disinvitations,
- (4) Testing and other methods of evaluating student performance, and
- (5) Hiring policies for new teachers and administrators.

⁴⁵ Katherine Kersten, “At U, future teachers may be reeducated. They must denounce exclusionary biases and embrace the vision. (Or else.)” *Minneapolis Star-Tribune*, December 2, 2009, <http://www.startribune.com/opinion/70662162.html> (accessed April 2, 2015).

10. The Future of Liberal Education

It is a truism to say that education is politicized.

Yet a key purpose of this survey essay is to show that political battles over education are not fundamentally about politics. They are driven by philosophical commitments. The reason why the policy battles are so heated is not only that the practical-implementation stakes are high but that each practical implementation affirms or denies an entire philosophy of life.

Educators are thoughtful and passionate human beings, and they are always sensitive to whether any given particular policy coheres or conflicts with their deep philosophical commitments. Yet often those philosophical commitments are semi-implicit and semi-articulated. So a first recommendation for educators is to make explicit those philosophical issues and becoming informed about them. This would require making the philosophy of education a more significant portion of the formal- and self-education of future teachers.

A second purpose of this essay has been to show that the philosophical battle is a three-way debate on the major issues. To be sure, this essay has presented premodernism, modernism, and postmodernism as idealized types, though I have included major and representative thinkers for each type and let them speak in their own words. And certainly within those idealized types there are variations within each camp and continuing attempts by some to blend them. The adequacy of that categorization itself is part of the ongoing debate. Yet there is a rhetorical tendency by all participants to see their enemy as monolithic—for premoderns to see their foes as those who've fallen from the one true way, for postmoderns to cast all of their enemies as traditionalists, and for moderns to label their opponents as authoritarians.

A third purpose is to address the question of how education should proceed given that (1) the education-policy debates are not settled and are not likely ever to be settled, and (2) the underlying philosophical debates are many, deep, and also unsettled. I will not now present and defend a position on all of those philosophical

debates, so absent a philosophical treatise, I can answer the question only in terms of my own liberal-education commitments.

The purpose of education is to equip a young person for real life. That requires theoretical knowledge conjoined with practicality, book learning integrated with actionable skills, ready content and methods to solve unfamiliar problems, an awareness of the achievements of the past and the forward-looking abilities to discover the new.

And part of real life is a social world with its current intellectual landscape characterized by vigorous and wide-ranging debate about all of the major questions of human significance. That means an educated person needs to know the full range of the debate on all major controversial issues.

In the face of controversy, there is an asymmetry of purpose in the three approaches to education. Premodern education has historically tended to slip into an authoritarian indoctrination. Postmodern education has not been any different, often slipping into “politically-correct” indoctrination. Both easily devolve from education in the full sense to training in the narrow sense of mere followers and mere activists.

For liberal education, the imperative is different.

Liberal education is the education suitable for free individuals in a free society. That requires the development of individual judgment. It requires the developed capacity for self-responsible action that respects the equal right of others to do the same. And all of that requires *informed* judgment on the many great and difficult challenges of life, from matters about love, friendship, and family, to matters economic, religious, political, and aesthetic. Free thinkers must know their own commitments and the arguments for them—but to make those commitments well they must also know the arguments against them, and the arguments for and against the other major positions. There are no shortcuts possible in liberal education.

John Stuart Mill is regularly quoted on this point:

“He who knows only his own side of the case, knows little of that. His reasons may be good, and no one may have been able to refute them. But if he is equally unable to refute the reasons on the opposite side; if he does not so much as know what they are, he has no ground for preferring either opinion.”

Less often attended to are the following sentences, with their implications for hiring policies:

“Nor is it enough that he should hear the opinions of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. . . . He must be able to hear them from persons who actually believe them He must know them in their most plausible and persuasive form.”⁴⁶

So a standing policy for education should be to insist upon true *intellectual* diversity in the curriculum and the faculty.

Professors can and should have something to profess. Yet their first responsibility is to ensure that their students are informed and in a position to assess independently what the professor is professing. Any self-respecting teacher will cover all of the major arguments. In addition, any self-respecting education institution will ensure intellectual diversity among its teachers and professors.

Our only method of making progress on matters of controversy is to shun all forms of coercion, all the way from the subtle indoctrination of young minds to the outright physical intimidation of all.

Liberal educators must affirm, in Thomas Jefferson’s words, “the free right to the unbounded exercise of reason and freedom of opinion.”⁴⁷

⁴⁶ John Stuart Mill, *On Liberty* (Project Gutenberg, 2011), chap. 2, pp. 67–68, <http://www.gutenberg.org/files/34901/34901-h/34901-h.htm> (accessed April 2, 2015).

⁴⁷ Thomas Jefferson to Roger Weightman, Monticello, 24 June 1826, from Library of Congress, *Thomas Jefferson Exhibition*, <https://www.loc.gov/exhibits/jefferson/214.html> (accesses July 30, 2019).

Politics as an Extension of the Harem

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Genetic evidence indicates that during human evolutionary history, relatively few men have been reproductively successful when compared to women. Archaeological, anthropological, and textual evidence deepens our understanding of this phenomenon, at least for late prehistory and early history. Such evidence indicates that certain men's reproductive success occurred through the severe *political* oppression of women, and also of low-status men. This paper will argue that prehistoric and early-historical gendered oppression lies at the origin of what we think of as politics, with widespread and often surprising implications that continue to the present day.

For example, military glory, or *kleos*, may be a holdover from this earlier social pattern, under which soldiers accepted *kleos* as a substitute for the reproductive success that their rulers enjoyed in their stead. The transition to recorded history coincided with a gradual tendency toward monogamous marriage, but women's political objectification remained, as did free access to women's bodies for powerful men. And men often remain motivated by *kleos*, an ideology

that has long outlived its original purpose. Significant holdovers from conquest polygyny thus remain with us and inform politics today.

Indeed, governing in itself has long been a male-dominated activity, and this may well be the reason why. In ways both genetic and cultural, we are the heirs of conquest polygyny. Must we remain so forever? This paper will close with an extended speculation on humanity's far future, informed by its distant yet ever-present past.

1. The Genetic Evidence and Its Social Implications

Western literature begins with two men fighting over a sex slave. To explain this unusual narrative choice, students are commonly told that the *Iliad* begins in medias res. To open with the Trojan War already well underway heightens the drama of the story. My argument, though, will be the *Iliad* does not begin in medias res. It begins at the beginning, with a man's control over a woman's body. This, I will argue, should be understood as a fundamental matter of politics, on which the *Iliad* is a commentary. To make this case requires some scientific background, to which we now turn. Although it is unfortunately somewhat technical, it is also highly illuminating.

Some human genetic information is uniquely transmitted by men; this information is located in, and transmitted through, the Y chromosome. Y chromosomes are uniquely passed from a biological father to approximately 50% of his offspring; possessing one usually means that these offspring are phenotypically male. Apart from a tiny number of mutations, each human male's Y chromosome is identical to that of his biological father.

Other human genetic information is almost uniquely transmitted by women; this information is encoded in, and transmitted through, mitochondrial DNA. Occasional male transmission of mitochondrial DNA has been recorded, but it is exceedingly rare.¹ Mitochondrial

¹ Shiyu Luo, C. Alexander Valencia, Jinglan Zhang, Ni-Chung Lee, Jesse Slone, Baoheng Gui, Xinjian Wang, Zhuo Li, Sarah Dell, Jenice Brown, Stella Maris Chen, Yin-Hsiu Chien, Wuh-Liang Hwu, Pi-Chuan Fan, Lee-Jun Wong, Paldeep S. Atwal, and Taosheng Huang, "Biparental Inheritance of Mitochondrial DNA in Humans" PNAS December 18, 2018 115 (51) 13039-

DNA is almost always passed from a biological mother to all of her offspring via the egg cell. Apart from these rare cases, plus a tiny number of mutations, a human's mitochondrial DNA is likewise identical to that of their biological mother.

The distinct inheritances of the patrilineal Y chromosome and of the matrilineal mitochondrial DNA allow geneticists to estimate the genetic diversity and hence the relative sizes of the reproductive populations within each biological sex over the course of human evolutionary history. Recent analysis reveals that women as a group have been much more reproductively successful than men. The typical reproductively successful man impregnated many different women, but there were few such men. The typical reproductively successful woman probably bore the children of just one man, or of only a few. But many more women had offspring in total. This state of affairs seems to have prevailed across all human populations and for many thousands of years. The authors of an important recent paper write:

Our results confirm the controversial assertion that genetic differences between human populations on a global scale are bigger for the NRY [non-recombinant Y chromosome] than for mtDNA [mitochondrial DNA]... Model-based simulations indicate very small ancestral effective population sizes (<100) for the out-of-Africa migration as well as for many human populations. We also find that the ratio of female effective population size to male effective population size (N_f/N_m) has been greater than one throughout the history of modern humans...²

The authors add that “our results indicate a consistent strong excess of N_f [number of reproductive females] versus N_m [number of reproductive males] starting even before the out-of-Africa migration...

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<https://doi.org/10.1073/pnas.1810946115>.

² Sebastian Lippold, Hongyang Xu, Albert Ko, Mingkun Li, Gabriel Renaud, Anne Butthof, Roland Schröder and Mark Stoneking, “Human paternal and maternal demographic histories: insights from high-resolution Y chromosome and mtDNA sequences,” *Investigative Genetics* 5, no. 13 (2014), <https://doi.org/10.1186/2041-2223-5-13>.

These results suggest, in turn, that sex-specific processes that reduce N_m , such as polygyny and/or sex-specific migration, have characterized humans over most of our prehistory.”³

From a normative perspective, “sex-specific migration” sugarcoats a set of conditions that probably merit no such treatment. In plain English, humanity’s evolutionary nursery appears to have been a harem, likely populated by conquest, in which many women were made available to only one man.⁴ And if our social conditions did not literally resemble a harem, then the best that may be said is that these conditions cannot readily be distinguished from one.

We can add with confidence that a great many of the women who populated prehistoric and early historic societies saw their reproductive fates determined by conquest. Victorious men reproduced with vanquished women; vanquished men may never have reproduced at all, or if they did, their children were killed. Even in recorded history, low-status victorious men have certainly reproduced much less often, and left less of a genetic legacy, than those of higher status. It is estimated, for instance, that Genghis Khan is a direct male-line ancestor to one in 200 living men⁵ and that Charlemagne is an ancestor to all living persons of European descent, though not through the male line alone.⁶ A saying attributed to the former, well known through a paraphrase in *Conan the Barbarian*, captures the ideal of conquest polygyny. Genghis Khan is said to have held it best in life

³ Ibid.

⁴ The term “harem” is culturally fraught and should not be taken uncritically by the reader. Other terms exist to describe similar institutions, but reasons of economy and familiarity still seem to weigh in its favor. As I note below, I use this term in a notional way that does not coincide exactly with the institution to be found in historical time.

⁵ Tatiana Zerjal et al, “The Genetic Legacy of the Mongols,” *American Journal of Human Genetics* 72 (2003), pp. 717–721.

⁶ Joseph T. Chang, “Recent Common Ancestors of All Present-Day Individuals,” *Advances in Applied Probability*, 31, no 4 (1999), pp. 1002-1026.

to crush your enemies, to see them fall at your feet—to take their horses and goods and hear the lamentation of their women. That is best.⁷

The notion of a primordial matriarchy also seems more doubtful in light of the genetic evidence.⁸ This should not surprise, prehistoric “goddess” figurines notwithstanding. In recorded history, misogynist cultures have also worshipped goddesses with no discernible gains in social status for actual women. And even the divine interpretation of the much-celebrated Venus figurines is disputed. They may have had an apotropaic function without reference to a deity. To which we add another, distinctly sinister interpretation: Given that women were commonly treated as possessions, these figurines may have been used as tokens of possession, that is, as adornments that reminded viewers of a man’s privileged status. They may even have been tokens that entitled a man to possess a woman in the near future, perhaps when the spoils of war were divided. The figurines seem to have changed gradually over time from fully formed but stylized representations into ever more abstract shapes—culminating in globular, perfunctory tokens that show only a set of breasts or buttocks. The stringing together of many such tokens in necklaces recalls the familiar practice of stringing together coins, which, with some speculation, perhaps they were.⁹

Without written records, however, our speculations may be only the product of contemporary prejudice.¹⁰ Caution is in order, yet

⁷ Harold Lamb, *Genghis Khan: The Emperor of All Men* (Doubleday, 1927), p. 107.

⁸ Cynthia Eller, *The Myth of Matriarchal Prehistory: Why An Invented Past Will Not Give Women a Future* (Beacon Press, 2000), openly questioned this hypothesis before the evidence discussed here became available. Marija Gimbutas, *The Civilization of the Goddess: The World of Old Europe*. (New York: HarperCollins, 1992), is the most familiar text taking the affirmative view.

⁹ Ina Wunn, Davina Grojnowski. *Ancestors, Territoriality, and Gods: A Natural History of Religion*. (Springer, 2016), p. 100.

¹⁰ Vandewettering, Kaylea R., "Upper Paleolithic Venus Figurines and Interpretations of Prehistoric Gender Representations," *PURE Insights* 4, article 7 (2015), offers a caution of just this type.

we would also be remiss not to speculate at all. What, for example, does this evidence suggest about the origin of government? It would be strange indeed if a reconceptualization of prehistory and early history left our understanding of government untouched. Feminists have always insisted that government has been about the conquest of women's bodies by men; this contention is hardly new. But we may now add details to this claim, including the following:

- Conquest polygyny has been long-lasting and pervasive enough to have left legible genetic traces in present-day humans;
- Conquest polygyny probably motivated a large share of the violence found in the archaeological record; and
- Modern theories of governance are implicated in that the historical origins of government in the west have often been used to justify and reify current arrangements. Theories seeking to explain the state and other forms of governance will therefore require various degrees of rethinking.

For example, the genetic record alone significantly challenges contractual theories of government. Philosophers from David Hume to Carole Pateman have faulted social contract theory for putting a set of aspirations where a description belongs.¹¹ They were clearly correct as to historical time, and we can now say that they were all but certainly correct about prehistory as well. Government has been about conquest all along, said Hume; Pateman added that the domination of women in particular has been omnipresent but elided in the standard accounts of political theory. Other voices can be added as well, such as the anarchist sociologist Franz Oppenheimer, whose early 20th-century analysis of the formation of the state seems newly apposite: "The first stage [of state formation]," wrote Oppenheimer, "comprises robbery and killing in border fights, endless combats broken neither by peace

¹¹ David Hume, "Of the Original Contract," in *Essays Moral, Political, and Literary*. Originally published as volume 1 of *Essays and Treatises on Several Subjects* (London: Printed for Cadell, Donaldson, and Creech, Edinburgh, 1777). Carole Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988).

nor by armistice. It is marked by killing of men, carrying away of children and women, looting of herds, and burning of dwellings.”¹²

The word “harem” may require some unpacking, at least as I deploy it here. Although polygyny and female domestic seclusion are distinct social practices, they commonly overlap one another, and they would have left similar genetic evidence. Secluded women have fewer opportunities to commit adultery than the patriarch, and their offspring are less likely to survive. Nonpatriarchal men would be similarly disadvantaged. These men were in effect secluded from women, either because the women were kept in special women’s quarters, or because the men were away at war. I therefore refer notionally to the harem as a nexus among institutions that we cannot and perhaps should not disentangle, including polygynous marriage, sequestration of women, and gender segregation in hunting and warfare.

Among hunter-gatherers, women were not confined in physical structures, of course; but reproductive access does seem to have been radically inegalitarian and must have been controlled by practices that would have been available at the time, including social sanctions, geographic gender segregation without physical confinement, and possibly infanticide.¹³

We have evidence from historical time that women and men were often reproductively limited by all of these methods. Why, though, would prehistoric men do such things? We do not have an entirely satisfying answer to this question. Recent consensus in the field of deep history holds that prehistory, before the development of intensive cereal grain agriculture, was in some respects a relatively pleasant time to be alive. Nutrition levels and other measures of overall health appear to have been fairly good, if not in comparison to industrialized societies then certainly in comparison to the first intensive grain

¹² Franz Oppenheimer, *The State: Its History and Development Viewed Sociologically*, trans. John M. Gitterman. (Indianapolis: Bobbs-Merrill, 1914) p 56.

¹³ Mays, S & Eyers, Jill. “Perinatal Infant Death at the Roman Villa Site at Hambleton, Buckinghamshire, England,” *Journal of Archaeological Science* 38 (2011), pp. 1931–1938.

cultivating societies. The hunter-gatherer lifestyle, supplemented by occasional low-intensity agriculture, allowed early humans a significant amount of free time and geographic mobility.¹⁴ Social units were also small: The consensus view, supported by the genetic work we rely on here, holds that humans were generally organized into populations of around 100 or 200 individuals. Cities, nations, and states were unknown.

Such societies might seem to have little need of warfare. Possessions were few. Land was in low demand because agriculture and mining were rudimentary. Violent ideologies, like nationalism or communism, did not exist. And yet prehistoric men seem to have filled their abundant free time with murder. As Steven Pinker memorably asked, “What is it about the ancients that they couldn’t leave us an interesting corpse without resorting to foul play?”¹⁵

Presumably one thing lurking behind all that foul play were fights over women, who were treated as valuable chattels. The disparate reproductive lives and the forensic evidence of prehistoric violence can both be parsimoniously explained using a small set of social institutions that are familiar to us from recorded history: The first warfare was conducted in significant part for the possession of women. The victors enjoyed sexual access thereafter, and they excluded all others. Men of this type were largely successful for thousands of years. This hypothesis is confirmed in light of prevailing sexual arrangements among hunter-gatherer populations that survived to the era of modern anthropology; in these populations, high-status males still reproduce more frequently, and polygyny is still prevalent.¹⁶

Meanwhile the low-status men implicit in the genetic evidence present one of the most poignant vignettes in all of deep history. These

¹⁴ See James C. Scott, *Against the Grain: A Deep History of the Earliest States* (New Haven: Yale University Press, 2017), for a book-length summary of the recent literature.

¹⁵ Steven Pinker, *The Better Angels of Our Nature: Why Violence Has Declined* (New York: Penguin Books, 2011), p. 3.

¹⁶ Gary R. Lee, *Family Structure and Interaction: A Comparative Analysis* (University of Minnesota Press, 1982), p. 76.

men's lives have left almost no evidence at all. We can only discern them owing to an absence that they have left: Their failure to reproduce has created a lack of diversity in men's uniquely transmitted genes relative to women's. Until only a few years ago, we had little inkling of how ubiquitous such men were, or that they even existed at all. It is difficult to imagine a more complete yet still legible effacement from the record.

And for all the labors of the prehistoric patriarchs, they likewise left a mostly illegible (and decidedly ironic) legacy: Thanks to them, and to the many women whom they kept in various forms of bondage, women's uniquely transmitted genes are more diverse today. Yet among all known cultures that have practiced female seclusion and/or polygyny, these institutions also left a gender imbalance among potential marriage partners that created a significant social strain. Historically this imbalance has been mitigated by recourse to warfare, in which the surplus of frustrated, unmarriageable young men is liquidated, and in which the gender ratio among living adults will usually incline toward women.¹⁷ Polygyny in recorded history has been shown to increase intrastate social conflict; this conflict is hypothesized to be prompted by the surplus of unmarried young men, and "the primary motives for engaging in warfare in the ancestral environment were most likely reproductive."¹⁸

How, then, were prehistoric and early historic men and women of reproductive age kept loyal to a system that appears to have viciously exploited most of them for the benefit of a few powerful men? Both in the present day and in the ancient world, normative accounts of politics often serve to reconcile populations to intolerable social conditions. Like humanity itself, political philosophy may have been born in the harem. In the earliest written accounts of politics, the functionalist imperatives of harem-keeping can and should be discerned, along with a normative apparatus enabling them. Later political theory does much to obscure these questions, though curiously it preserves the

¹⁷ Douglas R. White, "Rethinking Polygyny: Co-Wives, Codes, and Cultural Systems." *Current Anthropology* 29, no. 4 (August-October 1988), p. 530.

¹⁸ Satoshi Kanazawa, "Evolutionary Psychological Foundations of Civil Wars." *The Journal of Politics* 71, no. 1 (January 2009), p. 26.

functionality of some key aspects of the harem, which continue to exist to the present day. We will explore the implications for historical political theories in greater detail below. For now, let us take a brief tour of some ancient literature.

2. The Homeric Epics, Clio, and the Gendered Politics of the West

As mentioned above, in Book 1 of the *Iliad*, King Agamemnon claimed the concubine Briseis from Achilles; Briseis had previously been given to Achilles as a reward for his valor. Agamemnon had claimed the girl Chryseis in a parallel manner, showing that such actions were not unusual. But the god Apollo intervened in the case of Chryseis and forced Agamemnon to return her to her father. Agamemnon then took Briseis for his own. The resulting conflict animated the rest of the epic.

Agamemnon declared his entitlement to Chryseis, in the following terms:

The girl—I won't give up the girl. Long before that,
old age will overtake her in *my* house, in Argos,
far from her fatherland, slaving back and forth
at the loom, forced to share my bed!

Now go,

don't tempt my wrath—and you may depart alive.¹⁹

But Agamemnon could not keep her. Achilles reminded him that he might get three or four other women in the event of victory—apparently a standard practice—but it did not help.²⁰ Agamemnon himself later made a similar promise to all the Argives²¹ and

¹⁹ Homer, *The Iliad*, trans Robert Fagles (New York: Penguin Books, 1990), 1.30-40.

²⁰ *Ibid.*, 1.140-150.

²¹ *Ibid.*, 4.270-280.

specifically to the archer Teucer.²² Among the Trojans, Paris brought back women from Sidon;²³ and indeed, whenever the *Iliad* mentioned the spoils of war in any context, women were almost always among them. But in this case Agamemnon was not content to wait for more women later; instead he seized Briseis, who had already been apportioned to Achilles.

Given the *Iliad's* antiquity, it is reasonable to read these episodes in light of the genetic evidence discussed above. And indeed, this paper is hardly the first to have considered that evolutionary biology was at work in the Homeric epics. Jonathan Gottschall's 2008 book *The Rape of Troy* does likewise, and more recent genetic evidence seems to have both confirmed and broadened the applicability of its thesis that Homeric violence owed chiefly to a shortage of marriageable women, which prompted fights between men all across the relatively fragile and undeveloped societies depicted in the epics.²⁴ It was not only the Homeric world that suffered the shortage; it was a *pervasive* shortage, one that endured for many thousands of years. Whereas Gottschall is concerned primarily to demonstrate this dynamic within the Homeric texts, here we are interested in what those texts suggest to us about political theory in particular, and about the continuing, if unobserved, legacy bequeathed to us by this type of chronically unbalanced society.

Within the *Iliad*, Agamemnon clearly occupied the role of the reproductively successful male of deep history. Notably for us, his name literally meant "ruling mightily," and he already had a mate and children. Agamemnon's actions in Book 1 relegated the unmarried and childless Achilles to the role of a reproductively unsuccessful male. It was a common fate, but one that seemed grossly inappropriate to the author(s): Given Achilles' exceptional valor, he should presumably have received a sex slave-wife, and perhaps more than one, as a reward. Through much of the *Iliad*, Achilles' loyalty to the social order remained in the balance precisely because this reward was denied him.

²² *Ibid.*, 8.320-330.

²³ *Ibid.*, 6.340-350.

²⁴ Jonathan Gottschall, *The Rape of Troy: Evolution, Violence, and the World of Homer*. (Cambridge: Cambridge University Press, 2008).

Achilles' assent to a dangerous and perhaps celibate future was necessary for his social order to continue. An ideology was needed to make him fight for this order, one that otherwise treated him poorly. That ideology was also found in the *Iliad*. It was expressed in the Greek term *kleos*, meaning the glory earned in battle, from whom the muse of history, Clio, derives her name. As everyone knows, Achilles did meet a violent death, shot in his vulnerable heel by Paris. Achilles would die without children, but he would have as his substitute the glory of being recounted in history—an immortality that is not genetic but intellectual, founded in iconography and poetry. Achilles' fame after a childless death made him a key archetype of the warrior in western political thought: family life was abandoned, and with it genetic immortality. Historical immortality would take its place, ensuring him the honor that was purportedly his due.

The *kleos* of Achilles also purportedly sustained the very social structure around him, making it an ideology in the most political sense of the term. We know this from one of the *Iliad*'s most beautiful and striking passages, Book 18's extended description of the shield of Achilles. That shield, the work of the god Hephaestus, bore a fantastically intricate series of images, one that is often and I believe correctly interpreted as a microcosm—a depiction of Greek society as a whole, including its natural surroundings as well as the human works of war, agriculture, commerce, and law.²⁵ As described, the shield's imagery was extraordinarily complex, but one thing is clear from its symbolism: Society itself purportedly needed warriors like Achilles, that is, it needed young men willing to trade their reproductive success for *kleos*. Achilles may be no father of children, but he is in a sense a father to his people; without his *kleos*, they cannot endure. The Myrmidons' otherwise unexplained terror on first beholding the shield of Achilles makes sense when we understand that they faced a similar bargain: They too were asked to sacrifice their offspring, and their lives, for *kleos*. No wonder when they beheld the shield, "each fighter shrank away."²⁶

²⁵ P. R. Hardie, "Imago Mundi: Cosmological and Ideological Aspects of the Shield of Achilles," *Journal of Hellenic Studies* 105 (1985), pp. 11-31.

²⁶ *Iliad*, 19.18.

Kleos may have begun as a motivation for celibate fighting men, but it was soon found to motivate married men as well. *Kleos* went on to become a constant and decisive force in the political theory of Greece and Rome, in which the martial virtues are constantly described as foundational to a good polity. To give just one example, Herodotus counted the Athenian Tellus as the happiest man of all time *only after* his otherwise successful life had concluded with a heroic death in battle. The crowning happiness of Tellus was *kleos*.²⁷

From Rome, the idea of a manly, heroic power that rules by its own strength would be translated to the present day through Machiavelli's notion of *virtù* and through classical republicanism. Indeed, the belief that valor undergirds all of human society has transplanted quite well into the present day: "Love your freedom?" asks a popular contemporary slogan. "Thank a veteran," it concludes. Communist and fascist polities likewise made a cult of military service, a cult that most of us obviously cannot accept in a like manner. And yet valor seemingly remains a key motivator for the kind of self-sacrifice that, when combined with various technological advances, makes large-scale politics possible, if not necessarily ethical.

In retrospect we can speculate that the prehistoric and early historical search for immortality through conquest—offered as a substitute for mating and forming a family—has birthed a vicious circle of grudges and collective defensive alliances. These were later dubbed *polities*. If this speculation is correct, then political organizations are a key legacy of human prehistory, and they survive owing to the successful transplant and widespread appeal of *kleos*. The spell of Clio has been a nightmare from which we have been trying to awaken ever since.

Within the *Iliad* two individuals stand out as particularly disaffected: Achilles, whom we have already discussed, and Helen of Sparta, whose treatment paralleled that of Briseis. Like Briseis, Helen had been won as a prize by a powerful man, Menelaus. But then she was claimed by another, Paris. Some of the most poignant passages of

²⁷ Herodotus, *The Histories*, trans. Aubrey de Sélincourt. (New York: Penguin Books, 1954) book I, 30-31.

the *Iliad* arrive when Helen ponders her fate. Clearly it wracks her with guilt and revulsion, as when she confronts Aphrodite, whom she blames for her troubles:

Maddening one, my Goddess, oh what now?

Lusting to lure me to my ruin yet again?

Where will you drive me next?

Off and away to other grand, luxurious cities,

out to Phrygia, out to Maconia's tempting country?

Have you a favorite mortal man there too?

But why now? —

Because Menelaus has beaten your handsome Paris

and hateful as I am, he longs to take me home?

Is that why you beckon here beside me now

with all the immortal cunning in your heart?

Well, go to him yourself—*ou* hover beside him!

Abandon the gods' high road and be a mortal!

...suffer for Paris, protect Paris, for eternity...

until he makes you his wedded wife—that or his slave.²⁸

Perhaps the gods should also take part in the system they made, a gesture toward an idea of fairness that political theorists should readily recognize. Achilles and Helen, the system's most notable victims, both reveal its fault lines. Neither can be entirely loyal to a social order that treats them so.

That disloyalty is articulated in Helen's reproach to Aphrodite and in Achilles' refusal to return to battle, not even after Agamemnon's emissaries offer him a series of extraordinary gifts:

²⁸ *Iliad*, 3.460-480.

Seven tripods never touched by fire, ten bars of gold,
twenty burnished cauldrons, a dozen massive stallions...

Seven women I'll give him, flawless, skilled in crafts,
women of Lesbos—the ones I chose, my privilege,
that day he captured the Lesbos citadel himself...

...and along with them will go

the one I took away at first, Briseus' daughter,

and I will swear a solemn, binding oath in the bargain:

I never mounted her bed, never once made love with her...

I will even honor him on a par with my Orestes...

Three daughters are mine in my well-built halls—

Chrysothemis and Laodice and Iphianassa—

and he may lead away whichever one he likes.²⁹

Achilles refused, saying ,

Will Agamemnon win me over? Not for all the
world...

No, what lasting thanks in the long run

for warring with our enemies, on and on, no end?

One and the same lot for the man who hangs back

And the man who battles hard...

Agamemnon... would take it all

he'd parcel out some scraps but keep the lion's share...

From me alone, Achilles

of all Achaeans, he seizes, he keeps the bride I love...

²⁹ *Iliad*, 9.150-180.

I loved that woman with all my heart,
though I won her like a trophy with my spear.³⁰

Agamemnon and Achilles are clearly not keeping to the same set of sexual mores. And although Achilles won Briseis through conquest polygyny, his actions point the way to that system's eventual demise. For this we turn to the *Odyssey*.

Where the *Iliad* begins with a captive woman, the *Odyssey* begins with a captive man, the title character. The *Odyssey* is ultimately a paean to the marital bond—while preserving high-status men's continued sexual access to other women. This social model, which I will refer to as monogamy-plus, brings us uncomfortably close to the present day.

The *Odyssey*'s central struggle is the voyage of Odysseus back to his wife and marriage bed—while avoiding the snares of various foes, many of them female and highly sexualized. His wife Penelope faces a counterpart struggle, in that she is pursued by no less than 108 suitors, each of whom wants to marry her in Odysseus's absence. She resists them, and Odysseus braves many dangers, until ultimately they are reunited, at which point Odysseus kills all of them.

Odysseus's sexual temptations were many, and he certainly did not resist them all. They began with the nymph Calypso, to whom he had already capitulated when the story begins. Calypso held him captive for seven years. His captivity was apparently a pleasant one, though it was not entirely welcome. Calypso would have made Odysseus her husband—directly reversing the gender polarity of conquest polygyny—but Odysseus refused. Various adventures then brought him, crucially, to Circe. Circe once again possessed a powerful and untamed female sexuality, one that was inherently dangerous and that threatened the mind and the manhood of all men who drew near. Her power was even more a gender-swapped image of Agamemnon's, for she collected men exactly as he collected women:

'Come, sheathe your sword, let's go to bed together,
mount my bed and mix in the magic work of love—

³⁰ Ibid., 9.380-420.

we'll breed deep trust between us'

So she enticed

but I fought back, still wary. 'Circe, Circe,

how dare you tell me to treat you with any warmth?

You who turned my men to swine in your own house and now

You hold me here as well—teeming with treachery.³¹

The cunning of Odysseus consisted in large part of governing women and of subjecting them, and himself, to sexual disciplines that maintained the power of upper-class men. In Circe's case, he used a drug, the mysterious *moly*, and a vow to the gods, both of which restrained her. In this there was a recapitulation of monogamous Greek political and sexual life: Men of the upper class made some sacrifice in order to enjoy monogamy-plus, in that they could not openly keep extensive harems any longer. But the payoff for their society as a whole was that men of lower classes had greater reproductive success, which ensured their greater loyalty to the system and may also have helped to populate it. And the upper-class men certainly continued to enjoy enhanced sexual access, as Odysseus did with Circe.

The character of Odysseus effectively encouraged high-status men to minimize the consequences that might befall them for their capricious sexual behavior, just as Odysseus himself escaped (or was delivered from) the lures of Calypso, Circe, and the sirens. It is difficult to imagine Agamemnon employing similar strategies, but craftiness was required of high-status men in the new sexual regime of monogamy-plus, in which control over women was not usually so brutal or direct. The payoff was that the specific discontent of Achilles would not arise anymore. The form of dominion over women known as monogamous marriage was insofar as possible to be share and share alike; this arrangement was likely optimal for securing men's loyalty to the social system, though it was not always optimal for loyalty to their mates.

³¹ Homer. *The Odyssey*, trans Robert Fagles (New York: Penguin Books, 1996) 10.370-380.

Taken together, the *Iliad* and the *Odyssey* form an extended commentary on sexual and gender ethics. The *Iliad* addresses the inherent problems of conquest polygyny: It entails constant warfare over women, who are nonetheless portrayed as guilty, inconstant, and dangerous. There was every cause, and every incentive, for women actually to have been so. Conquest polygyny likewise tempted kings to mistreat not only women but also their male subordinates. Subordinate men risked their lives for an uncertain access to women, a fact of which they were keenly aware. Men's loyalties were constantly in doubt, and *kleos*, while appealing, was always a fairly uncertain reward.

Although monogamy-plus brings its own challenges, it at least somewhat credibly promises a family life to the men whose societies practice it. Domesticated women become a constant and a known quantity. Men experience less sexual deprivation, and women's loyalties are not automatically in doubt. The archetypal woman is no longer Helen, but Penelope; no longer inconstant, but legendary for her fidelity; no longer a prize of war, but a helpmeet and a place-keeper: Penelope never leaves Ithaca at all. The *Iliad* and the *Odyssey* thus represent a transition from one sexual governance regime to another, from conquest polygyny, which originated in a hunter-gatherer lifestyle, to monogamy-plus, which was more appropriate to the newly sedentary societies of intensive grain cultivation and the specialized household labor that accompanied it.

3. Conquered Women as Cultural Ambassadors and Unifiers

Hebrew scripture complicates the thesis at hand, in that the Israelites are not described as actually practicing conquest polygyny. Deuteronomy 21:10-13 admittedly authorizes it in the following words:

When you go to war against your enemies and the Lord your God delivers them into your hands and you take captives, if you notice among the captives a beautiful woman and are attracted to her, you may take her as your wife. Bring her into your home and have her shave her head, trim her nails and put aside the clothes she was wearing when captured. After she has

lived in your house and mourned her father and mother for a full month, then you may go to her and be her husband and she shall be your wife.³²

Curiously, though, the most detailed accounts of the Israelites' conquests, found in the Book of Joshua, do not describe them as acting in this way. Throughout the book of Joshua, foreign women were almost invariably killed, and they were certainly not married. The women of Jericho, Ai, Makkedah, Debir, and numerous other cities were subject to this treatment. Tellingly, Rahab the prostitute of Jericho was the only foreign woman who was so much as given a name in the whole book of Joshua.³³ Rahab aided the Israelites, and a later tradition even claimed that she married Joshua, but this, while authorized, would have been highly unusual. Besides Rahab, Aksah was the only woman ever mentioned by name in the entire book of Joshua. Aksah was the daughter of Caleb, who offered her as a prize to whichever warrior could capture Kiriath Sepher—an offer that was altogether consistent with the behaviors of high-status men in the *Iliad*.³⁴ The exceptional case in Judges 19-21, in which the Israelites did practice conquest polygyny, in delivering conquered women to the tribe of Benjamin, appears to have arisen when the only alternative was the extinction of an entire tribe from among them.³⁵

What can explain this behavior? Although the Israelites are familiar to modern western audiences, they were highly unusual for their time: At least their scribal class feared foreign cultural contamination so much that they described femicide as preferable to concubinage, and in so doing, they adopted a much bloodier rule than the one found in Deuteronomy. The scribal view of intermarriage with foreign women was made clear in the book of Joshua:

But if you turn away and ally yourselves with the survivors of these nations that remain among you and if you intermarry with them and associate with them, then you may be sure that the Lord your God will no longer drive out these nations

³² Deuteronomy 21:10-13 (New International Version).

³³ Joshua 2 (New International Version).

³⁴ Joshua 15:16-17 (New International Version).

³⁵ Judges 19-21 (New International Version).

before you. Instead, they will become snares and traps for you, whips on your backs and thorns in your eyes, until you perish from this good land, which the Lord your God has given you.³⁶

The scribes' view was not uniformly obeyed, however. In 1 Kings 11:1-10, King Solomon infamously violated this rule:

But King Solomon loved many foreign women, as well as the daughter of Pharaoh: women of the Moabites, Ammonites, Edomites, Sidonians, and Hittites—from the nations of whom the Lord had said to the children of Israel, “You shall not intermarry with them, nor they with you. Surely they will turn away your hearts after their gods.” Solomon clung to these in love. And he had seven hundred wives, princesses, and three hundred concubines; and his wives turned away his heart. The Lord became angry with Solomon because his heart had turned away from the Lord, the God of Israel, who had appeared to him twice. Although he had forbidden Solomon to follow other gods, Solomon did not keep the Lord's command.³⁷

Solomon behaved as a high-status male of his era usually did; he impregnated many women, including women won through conquest and/or tribute. The scribal class did not approve. They were eager to preserve the Israelites' distinctive culture, and with it their class prerogatives, and so they saw foreign women as a dire threat.

If the scribes' fears were justified, it tells us that ancient women on the wife-concubine-slave spectrum were vectors of cultural transmission. Women thus occupy an intriguing role in deep history: They were the bearers of culture, its creators and sustainers, even as men oppressed them; ironically, the men often benefited from the culture that the women preserved and transmitted. In this paradigm, it is not the case that gender oppression resembles class oppression; rather the opposite is true: Gender oppression was the *original instance* of class oppression, in which a male warrior class oppressed a female creative class. To be conquered, or to be of a subaltern class, is rhetorically a feminized condition, giving rise to derisive and highly

³⁶ Joshua 23:12-13 (New International Version).

³⁷ 1 Kings 11:1-10 (New International Version).

gendered terms of abuse. But conquered or subaltern status may have begun literally as a gendered condition as well, and the latter may explain the former.

It is thus notable how the Homeric epics so often praise women not only for their beauty and fertility, but for their skills. Foreign women of exotic accomplishments are especially prized. The transfer of such women among high-status men would have knit together ancient cultures and extended them into something larger than a hunter-gatherer band. Syncretisms of religion, art, craft, and language across sometimes quite long distances would have been mediated by captured women. Such connections would have frequently emerged among groups who practiced conquest polygyny on one another. The lore that women transmitted would have been polytheistic almost of necessity; whenever a woman was stolen from a group with different gods, she might have brought them with her. Conquest polygyny therefore sits awkwardly with monotheism, at least when tutelary gods are common.³⁸ Later scribes, who were almost certainly more rigorously monotheistic than the historical figures they sought to depict, were probably aware of this difficulty.

Ancient Rome had few compunctions about foreign gods, and the story of the Sabine women represents an obvious case supporting our argument: Shortly after its founding, Rome purportedly faced a shortage of women; the Romans held a festival to which they invited the members of nearby tribes:

Great numbers of people assembled, induced, in some measure, by a desire of seeing the new city... especially the whole multitude of the Sabines came with their wives and children. They were hospitably invited to the different

³⁸ The thesis offered here is similar to but distinct from the one advanced by Leonard Shlain in *The Alphabet Versus the Goddess: The Conflict between Word and Image* (New York: Penguin Books, 1999). In particular, this paper makes no claims about brain function, alphabeticity, or their relationships to the character of human individuals or societies. All that is argued here is that, in the case of Israelite society, two specifically gendered vectors of cultural transmission were in competition: the scribal vector, whose messengers were male, and whose message was monotheist; and the conquest polygyny vector, whose messengers were female, and whose content was potentially polytheist.

houses... When the show began... on a signal being given, the Roman youth ran different ways to carry off the young women. Some they bore away, as they happened to meet with them, without waiting to make a choice; but others of extraordinary beauty, being designed for the principal senators, were conveyed to their houses by plebeians employed for that purpose... The terror occasioned by this outrage put an end to the sports, and the parents of the young women retired full of grief, inveighing against such a violation of the laws of hospitality...³⁹

Romulus somehow managed to persuade the women “to soften their resentment, and to bestow their affections on those men on whom chance had bestowed their persons.”⁴⁰ As Livy put it, mutual regard often followed harsh treatment, and the husbands—presumably out of guilt—supposedly treated their wives all the better going forward.

And the Sabine women clearly played the role of inter-group peacemakers and cultural ambassadors that was previously described. When the remaining Sabines made war against Rome, and when that conflict had reached grave proportions, the women intervened to stop it:

At this crisis the Sabine women [threw] themselves in the way of the flying weapons; and, rushing across between the armies, separated the incensed combatants... The commanders then came forward... and they not only concluded a peace, but combined the two nations into one, associating the two sovereigns in the government, and establishing the seat of empire at Rome.⁴¹

³⁹ Titus Livius (Livy), *The History of Rome by Titus Livius. Translated from the Original with Notes and Illustrations by George Baker, A.M.. First American, from the Last London Edition, in Six Volumes* (New York: Peter A. Mesier et al., 1823). Vol. 1. 1/8/2018.
http://oll.libertyfund.org/titles/1754#lf1023-01_label_056

⁴⁰ Ibid.

⁴¹ Titus Livius, *The History of Rome*, at
http://oll.libertyfund.org/titles/1754#lf1023-01_label_064.

If the Sabine women were real, then they fulfilled the surprising, liminal purpose that has been described above. Although they were the victims of sexual violence, they were also agents in the system that produced that violence; their role was one of pacification, of crossing battle lines and uniting previously hostile camps. In the context of arranged dynastic marriages, European women continued to play this role even into the modern era.

We who severely punish rape, rather than treating it as a permitted cultural strategy, are allowed to find this agency incongruous and from a moral standpoint almost incomprehensible. If the Sabine women were merely legendary, their story, and their role, would remain normative to the Romans all the same, and with the support of the evidence already discussed it would indicate once again how thoroughly rape itself was integrated into ancient political and family life.

4. Gilgamesh, the First Night, the Sacred Prostitute, and the Theft of Brides

Let us turn to some of the earliest human legends ever recorded. The *Gilgamesh* epic was first translated into modern languages in the mid-19th century. It is therefore remarkable that *Gilgamesh* contained much that was familiar, including a deluge, a hero's quest forming a story arc—and, key to our purposes—the practice of *primae noctis*, under which kings and other rulers were said to enjoy sexual access to brides on their wedding night. *Primae noctis* has been much more discussed than practiced in European history, usually as a mark of an especially wicked though legendary king. The Roman story of the rape of Lucretia by the son of the last Tarquin king is a familiar example; the transition to the republic coincides with a renunciation of the king's right of sexual access. The appearance of *primae noctis* in *Gilgamesh* indicates similar anxieties about the sexual power of kingship from a very early date:

[Gilgamesh] has no equal when his weapons are brandished,
his companions are kept on their feet by his contests.

The young men of Uruk he harries without warrant,
Gilgamesh lets no son go free to his father.
By day and by night his tyranny grows harsher,
Gilgamesh, the guide of the teeming people!
It is he who is shepherd of Uruk-the-Sheepfold,
 but Gilgamesh lets no daughter go free to her mother...
Though powerful, pre-eminent, expert and mighty,
Gilgamesh lets no girl go free to her bridegroom.
The warrior's daughter, the young man's bride,
to their complaint the goddesses paid heed.⁴²

The strain of conquest polygyny again fell, unequally but severely, on both genders. Young men were forced to serve in the king's (surely martial) contests, and young women were raped. The *Gilgamesh* epic appears to record the anxieties of a civilization in transition, one that recognized the practice conquest polygyny, although the practice was perhaps to some extent in decline. It was certainly open to question, as the text itself demonstrates.

Enkidu, the wild man whom the goddesses created to check the power of Gilgamesh, has his own story to tell regarding sex and civilization. It begins not at the harem, but at the brothel—a different place of confinement for women, but one that would have left a similar genetic legacy, in that the women who populated brothels would have frequently borne children, while the men who were their clients would only seldom have fathered them. Once again, women would more often pass along their unique genetic legacy.

The brothel is a counterpart institution to polygyny, serving to satisfy male sexual desire in an environment where female marriage partners are in short supply. In the *Epic of Gilgamesh*, prostitution was

⁴² *The Epic of Gilgamesh*, trans. Andrew George. Standard version, tablet I. (New York: Penguin Classics, 1999), pp. 3-4.

closely identified with civilization itself. From a functionalist standpoint, prostitution helped perpetuate the society that practiced it by easing the tensions inherent in a skewed sex ratio. Prostitution was perhaps no one's first choice of a social institution, but it did civilizing work after a fashion: Male sex drives were satisfied even while men were kept away from other potential mates. Men's integration into the social system as childless warriors demanded no less.

One final institution bears mention as a likely survival from prehistory: During recorded history and even to the present day, grooms in many cultures often go through great trouble to stage the elaborate symbolic theft of their brides. Bride kidnapping takes place across the world and in a wide variety of otherwise quite disparate cultures. But from whom are these brides being stolen? Why is it necessary to steal them? The answer that now suggests itself is that the theft of brides commemorates or re-enacts the conditions of conquest polygyny and the transition to monogamy-plus, in which non-elite men symbolically claim for themselves that which had been sequestered, but which has become their right under the new regime: an individual bride. In some present-day societies, the kidnapping remains all too real, and what follows is by all accounts a rape followed by a coerced marriage. In other instances, it is a ritualized, festive, and essentially benign event. Yet in either case it recalls nothing so much as the union of Achilles and Briseis.

5. The Inheritance and the Dreamtime

To summarize, governance began in prehistory with millennia of men fighting for access to, and control over, women. Men sequestered these women and exchanged them as the spoils of war. Women in early human societies were treated as property, and yet they were also the creators and the sustainers of much ancient culture. They were probably peacekeepers and in effect diplomats as well. Low-status men reproduced relatively rarely; *kleos* was offered as a substitute. But *kleos* has drawn a vicious circle ever since; "politics" is the name we sometimes give to this vicious circle. As an inheritance from prehistory, politics remains with us today, along with persistent gendered structures of domination.

This fact pattern squares quite well with certain critical accounts of government, particularly those based on the conquest theory of the state. A fuller account of the development of the state across all of history (and prehistory) is impossible to give here, but a re-orientation of our thinking now seems in order: What if we approached more recent political theory with the understanding that implementing and disciplining a harem was at least initially the thing that governance was about? There have certainly been changes in the meantime, including the rise of normative monogamy, along with its many exceptions. Yet so much remains the same.

Our re-orientation should begin by noting that in all recorded political arrangements, from republican equality to absolute monarchy, powerful men have always retained, and still retain, sexual access to less socially powerful women. This access has been particularly discussed in the United States recent years, as well it should be, in the high-profile sexual misconduct cases of men as diverse as Anthony Weiner, Bill Cosby, Harvey Weinstein, and Donald Trump—a man whose career has gone from conducting beauty pageants to serving as the President of the United States. Nor was Trump the only such president; many before him have had affairs even while in office, of course, including Bill Clinton, John F. Kennedy, and—shall we say—a few others. All have been sometime beneficiaries of the social expectation that holds that high-status men get enhanced sexual access to women. What has been unusual, and quite recent, has been the resistance to this expectation.

Less socially powerful men have likewise retained their traditional obligations; as in Sumer, low-status men are “kept on their feet” by conscription, from which they are lucky to escape. The fallen still get *kleos* as a consolation; we are still told that civilization itself continues only because of their sacrifices. The warrior class still appears to believe it. And until very recently, women were still overwhelmingly excluded from politics. Naturally so: If politics was about distributing women to men, what possible role could women play? It remains an open question whether the era of women’s political participation will further erode the legacy of conquest polygyny, but we should certainly hope that it does.

Many other existing and/or familiar cultural and political institutions may stand in need of reconceptualization in light of our paradigm. Chattel slavery in the United States, for instance, is certainly an example of the conquest of individuals and even whole cultures, along with their transportation to the land of the victors. In addition to coerced labor, chattel slavery also provided sexual access for those of high status within the dominant culture. In some crucial ways, the legacy of conquest polygyny remained the business of government even when that government was purportedly dedicated to Enlightenment ideals. Government was not initially meant to be a contract, and the institutions and mores that first created governments continue to incline them away from contractualism and toward something else entirely.

Other accounts of politics, and particularly those that cast the state as a form or an idea akin to the homestead and/or the nuclear family, must also be treated with skepticism, or at least with a better sense of what they may entail. Feminists and anarchists should consider that harem-keeping was once and in many ways still remains exactly what states are for. Ideologies, meanwhile, still serve to reconcile populations to an otherwise unpleasant set of objective facts; these facts must be understood to include a set of sexual norms whose heritage is tens of thousands of years old. Having traveled a certain path, political theory and political practice both conceivably remain dependent upon it, and we should interrogate them accordingly. We are less removed from the harem than we may care to imagine, and politics remains its primary instrumentality.

Let us close on a bold note. From our vantage point, the era of conquest polygyny has lasted tens of thousands of years longer than the era of monogamy-plus. We have every reason to believe that conquest polygyny is a resilient social structure. Rapid technological and social changes now mean that monogamy-plus may be drawing to a close, and it remains an open question what might replace it. The risk of recrudescence may seem slight, and yet the reappearance of conquest polygyny must not be ruled out. After all, it would constitute a reversion to the mean.

The economist and futurist Robin Hanson argues that modernity represents a sort of dreamtime - an era that is relatively

wealthy and unconstrained when compared to the twin abysses of economic subsistence in the past and also in the future, when the diminishing marginal returns to everything will eventually meet the non-diminishing human tendency to reproduce. To Hanson, both of these eras of subsistence, past and future, are necessarily characterized by a lifestyle relatively more in harmony with humanity's evolved social psychology, which developed under severe economic constraint. It is the dreamtime—that is, the present day—that constitutes the exception, at least for the wealthy among us. In the dreamtime, we are relatively free to imagine things as they might be, and to work toward those ideals.

To those of us in the dreamtime, conquest polygyny appears gravely immoral and objectively immiserating. Occasional voices that we still have from that era, like Achilles and Helen of Sparta, agree. The return of conquest polygyny would be the return of a misery and an evil, one that makes the inequities of monogamy-plus seem small by comparison. In particular, the low-status men who complain of lack of sexual access today should think very carefully about their claims, and about the fate of similarly situated men, in a neo-primitive future.

Considering our era, Hanson writes:

Our delusions may [lead] us to do something quite wonderful, or quite horrible, that permanently [changes] the options available to our descendants. This would be the most lasting legacy of this, our explosively growing dreamtime... before adaptation again reasserted a clear-headed relation between behavior and reality.⁴³

Let us consider doing something quite wonderful, or at least something quite audacious: Let us ponder whether and how to remove conquest polygyny from our psychological repertoire, such that even when our dreamtime ends, conquest polygyny does not return. Let us consider foreclosing this option, if we possibly can. It is not clear how we might achieve this end, but revisions to mores, social structures, and even our genetics may be in order, dangerous as these may be. It

⁴³ Robin Hanson, "This Is the Dream Time," *Overcoming Bias*, September 28, 2009, <http://www.overcomingbias.com/2009/09/this-is-the-dream-time.html>.

has perhaps become a commonplace that we should take lessons from some of our nearest evolutionary relatives, chimpanzees and bonobos, as we reconsider human sexual mores today. Yet some consideration of their behaviors may indeed be in order. It is probable that humans bear some genetic propensities that, in the context of appropriate cultural cues, can result in social formations akin to theirs.

Chimpanzees appear to exhibit patterns of violence and sexual competition that are at least roughly similar to those of prehistoric though biologically modern humans. As with early humans, chimpanzee males commonly initiate violence to secure and/or restrict sexual access to fertile females. Bonobos, by contrast, have adopted radically different patterns of sexual and violent behavior. Their social structures are usually dominated by groups of genetically nonrelated females, and while the popular perception of bonobos as highly sexualized creatures who spend most of their time copulating is false, still, bonobos' patterns of sexual behavior are quite different from either of their two closest evolutionary relatives, chimpanzees and humans. In particular, bonobos appear to resort to sexual contact, notably female-female contact, as a signal that violence is *not* intended. Sexual contact is often initiated, for example, to signal an intent to share a newly discovered resource, or to end a conflict between groups.⁴⁴

None of this is to say that we should straightforwardly imitate bonobos and thereby shed our chimp-like behavior. Indeed, the use of free sexual access to females so as to mitigate group conflict strikes us also as morally repellent; bonobos offer no acceptable solution to the problem of human hostility. The lesson to my mind, rather, is that we should recognize that while sex and aggression are common to all human societies, and to both of our nearest evolutionary relatives, the relationship between sex and aggression can and will vary within the primate world.

⁴⁴ Cawthon Lang KA. "Primate Factsheets: Bonobo (*Pan paniscus*) Behavior." *Primate Info Net*, December 1, 2010. Accessed April 23, 2019, <http://pin.primate.wisc.edu/factsheets/entry/bonobo/behav>

It is not clear what sort of control abstract thought and symbolic communication may exert over these primal instincts over the longest of long terms; indeed, this is one of the enduring questions about the civilizing process itself. Yet it seems manifestly improper, when confronted with a problem like this one, to settle for the lot of the chimpanzee. Or for that of the Homeric sex slave. We should certainly aim higher. If we succeed, there will not be another Helen of Sparta, not another Achilles. Our descendants, both men and women, may thank us for that. We, the heroes of the dreamtime, may deliver our descendants from the harem, and from Clio's vicious circle, and perhaps from politics as well.

Review Essay

Erin Kelly's *The Limits of Blame: Rethinking Punishment and Responsibility*

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1. Introduction

Moosbrugger, the insane, alleged sex murderer of Robert Musil's *The Man Without Qualities*, frustrates the enlightened impulses of the Austrian aristocrats and intellectuals assembled in judgment. Years on the margins of society and survival, combined with a feeble mind, make Moosbrugger an awkward candidate for the punitive force of a civilized legal system. Proposals proliferate, and moral bemusement prevails. Among the intelligentsia,

[t]here was a tendency to agree on the familiar definition that termed "of sound mind" those criminals whose mental and moral qualities make them capable of committing a crime, but not those who lacked such qualities; a most extraordinary definition, which has the advantage of making it very hard for criminals to qualify, so that those who do would almost be entitled to wear their convict's uniform with the aura of an academic degree.¹

¹ Robert Musil. *The Man Without Qualities, Vol 1: A Sort of Introduction and*

Thoughtful people today continue to be bewildered by the question of how to assess the blameworthiness of the criminal whose crime does not issue from unalloyed evil. In *The Limits of Blame: Rethinking Punishment and Responsibility*, Erin Kelly offers a sophisticated gloss on the modern tendency to distance crime from the wrongdoer's character.² Her approach is to pry the criteria for imposing criminal sanctions apart from those for imposing moral blame. The philosophical notion of blame adds defined and substantial stakes to our common-sense concept of responsibility for bad behavior. Moral blame is a response to an individual's act of wrongdoing, which typically includes rebuking her character and restructuring our subsequent interactions with her.

As Kelly (justly) characterizes it, the U.S. criminal justice system blames offenders. It treats the convicted as personally deficient and stigmatizes them *en masse* as a contemptible class. It does so by imposing lengthy prison sentences and denying them basic rights and entitlements, such as the franchise, housing, and employment. Kelly shows that the U.S. criminal justice system does not carefully consider offenders' mental and moral qualities relevant to blame. Instead of reforming the law to consider those qualities, Kelly argues that we should eliminate blame from criminal sanctions altogether. Her proposal, she claims, still takes seriously the offender's act of wrongdoing, but without judging her character.

Kelly's book offers a sophisticated, but ultimately disputable, argument against her typical interlocutors. They, like her, guard our notions of blame and responsibility—embodied in our criminal justice system—against the *full* force of the contingency of birth and upbringing.³ Kelly attempts to respond to this contingency by fixing

Pseudoreality Prevails, trans. Sophie Wilkins and Burton Pike (New York: Vintage Books, 1996), pp. 586-87.

² Erin Kelly, *The Limits of Blame: Rethinking Punishment and Responsibility* (Cambridge, MA: Harvard University Press, 2018).

³ For arguments that the contingencies of birth and upbringing undermine our practices of praise and blame, see Galen Strawson. "The Impossibility of Moral Responsibility," in *Free Will*, 2nd ed., ed. Gary Watson, (Oxford: Oxford University Press, 2013), pp. 212-28; Galen Strawson, *Freedom and*

the application of blame within the common moral philosophy framework.

However, Kelly is unable to problematize blame adequately on these terms. Moreover, these terms lead her position to risk absolving those too fortunate to be excused from blame. This untenable implication results from a long-standing tension at the core of the common moral philosophy framework. Eliminating blame from our legal practices requires rejecting this mistaken model and instead relying on humanistic grounds. Indeed, Kelly's book proposes an attractive moral and conceptual blueprint for a criminal justice system that rests comfortably on our best humanistic self-understanding.

I begin by articulating Kelly's analysis of blame as being scalar and optional. Next, I describe Kelly's argument that criminal justice systems operate inconsistently with blame's nature as well as her proposal for a criminal justice system without blame. Next, I describe how proponents of blame in the law may defend its continued presence. Then, I demonstrate the inadequacy of Kelly's arguments that states exceed their mandate by blaming offenders. Finally, I examine the meta-ethical foundations that leave Kelly's opponents their fortress and how she might raze it to construct her proposed alternative.

Belief (New York: Oxford University Press, 1986); and Derk Pereboom, *Living Without Free Will* (New York: Cambridge University Press, 2003). Strawson argues that our concept of moral responsibility requires, impossibly, that a person be a *causa sui* (at least in certain crucial mental respects). Pereboom argues that human action, even when satisfying traditional criteria for responsibility, shares the problematic aspects of action issued under conditions of manipulation. Kelly implicitly rejects these arguments, maintaining that, at a minimum, a person may deserve blame so long as she could have acted well. In support of her view, she cites Susan Wolf, *Freedom Within Reason* (New York: Oxford University Press, 1990), in which Wolf holds that praise for acting well does not require the ability to have done otherwise, whereas blame does.

2. Kelly's Analysis of Blame

Moral blame involves an inference from a person's wrongful act to her bad character or ill will, her having some moral vice or vulnerability to act from unacceptable motives. This bad character or ill will usually invites negative attitudes, from disappointment to scorn.⁴ Moreover, a person's blameworthiness recommends adjusting how we relate to her: we might withdraw good faith in our interactions or shun her completely.⁵ This inference is typically understood to presuppose an individual's moral competence, her responsiveness to moral reasons for action.

Kelly argues against the common understanding of this responsiveness, namely, as a matter of satisfying a particular threshold. Ordinarily, this threshold is thought of as the possession of a minimal capacity for rationality, the general ability to pursue a course of action in virtue of it furthering some chosen end—whether it be hedonistic, prudential, or moral.⁶ However, Kelly notes that an individual's personal history or psychology may furnish obstacles that disturb her ability to comply with moral reasons. Acknowledging these obstacles—these *hardships*—reveals how it can be considerably more difficult, if not impossible, for some to meet morality's requirements. This may be the case even for a minimally rational person.

Kelly returns to the notion that our ordinary moral expectations depend on the possibility that a person could have done otherwise. Hardships upset our ordinary moral expectations by showing that the wrongdoer might not really have been able to do otherwise. Hardships,

⁴ For the centrality to blame of a distinctive set of negative emotions and attitudes, see Peter Strawson, "Freedom and Resentment" in *Free Will*, ed. Watson, pp. 72-93. Also see R. J. Wallace, *Responsibility and the Moral Sentiments* (Cambridge, MA: Harvard University Press, 1994).

⁵ For an account of blame that emphasizes adjustments to our relationships to wrongdoers, instead of moral emotions, see T. M. Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Cambridge, MA: Belknap Press, 2008), chap. 4, esp. pp. 127-29.

⁶ Kelly contrasts her proposal to Immanuel Kant's conception of minimal-rationality in Kant's *Critique of Practical Reason*.

thus, *excuse* a wrongdoer from blame, interfering with an inference from wrongdoing to bad character or ill will. Someone who has an excuse is someone “who might reasonably not have been expected to act as they morally ought to have acted” (p. 110). Moreover, excuses are scalar in nature; they “diminish accountability from a lot to a little” (p. 80). Blame is thus a scaling assessment of “how reasonable it is to expect an agent to act morally in the face of difficulties she faces” (p. 98).

Hence, it is not unreasonable to mitigate blame, and empathize instead, with a violent criminal who was born into poverty and lived with basic needs unmet when negative social pressures induced her toward crime (p. 109). Indeed, as Kelly indicates, members of a society share responsibility for the causal forces on individuals that drive crime. A minimal-rationality standard would require us to blame her or, if not, to dehumanize her as beyond the reach of right and wrong, as an object of social control.⁷ Instead, Kelly proposes that we recognize two different moral standards: one relating to an action’s rightness or wrongness and the other to a person’s blameworthiness.

Rightness/wrongness applies to act-types and concerns what a morally motivated person would and would not do. As such, they are meant to guide behavior. Blame, on the other hand, applies to individuals and depends on the fairness of expecting them to act well given their circumstances. If blame-mitigating circumstances were included in the norms related to rightness/wrongness, the latter would become bloated and indecipherable. Thus, we have a system of action-

⁷ According to the influential family of views pioneered by Peter Strawson and championed by R. Jay Wallace, blame is mitigated or excluded under two circumstances: when a person is (1) excused or (2) exempted from moral responsibility. On this picture, excuses sever the relationship between agent and action; the person’s doing does not constitute an action in contravention of moral obligations. Alternatively, blame is excluded when a person is exempted from moral responsibility altogether (e.g., young children and the insane); such a person is an object of social control beyond the scope of normal social relations. See Strawson, *Freedom and Resentment*, pp. 75-79, 85-86; and Wallace, *Responsibility and the Moral Sentiments*, chaps. 5 and 6. Kelly argues that this view cannot accommodate the idea that someone is excused from blame, but also acted wrongly, by violating a moral obligation.

guiding norms in rightness/wrongness, which, when applied to the individual, is nuanced by excuses.

Lastly, Kelly argues that blame is optional, a choice left up to individuals, with reasonable limits relating to the gravity of the moral wrong. Kelly states, “Neither the facts about a person’s wrongdoing and moral flaws, the likelihood of her future wrongdoing, nor the requirements of morally healthy relationships demand a blaming response to moral wrongdoing. In fact, the morally relevant facts do not require any particular response” (p. 114). Blame is fundamentally an interpersonal affair, which is subject to our own subjective stance and needs (p. 119).⁸

3. Problems with Blame in the Criminal Law and an Alternative

Kelly argues that U.S. criminal law does not take into account the full range of considerations that mitigate blame. Chapter one presents a compelling case. Criminal law faces practical limitations in its effort to guide citizen behavior away from certain undesirable acts. It cannot, for example, accept defenses that are arduous to falsify. The criminal law thus admits strict liability and few arguments about a person’s competence to comply with the law. This ignores an individual’s history and psychology relevant to determining her blameworthiness. Similarly, as Kelly indicates, the criminal law is not nearly as sensitive to motive as is blame (pp. 101-105). The criminal law routinely does not evaluate factors required for a comprehensive determination of blameworthiness.

Criminal guilt does not imply moral blame. Thus, Kelly concludes that it is problematic when a criminal justice system routinely blames offenders without adequately attending to the full range of factors relevant to blame. Moreover, Kelly argues that reforming the law to “calibrate punishment to moral blameworthiness” (p. 105) is not only a risky project, but also one that overreaches the

⁸ Kelly originally articulated this account of blame in “What Is an Excuse?” in *Blame: Its Nature and Norms*, ed. D. Justin Coates and Neal A. Tognazzini (New York: Oxford University Press, 2013), pp. 244-62.

bounds of law's mandate. Instead, Kelly proposes that we reform blame out of the picture.

As it is not a moral mistake for someone to opt for compassion instead of blame, there is a "morally serious" space for law to reject blaming-responses. Kelly's proposal is that we criminalize acts and sanction those who perform them according to a "principle of just harm reduction" (p. 127).⁹ Hers is a distributive conception of criminal justice, which recommends opting for the best allocation of burdens in order to protect peoples' basic rights and liberties. We opt for a scheme that allocates greater burdens to those who threaten or perpetrate unjust aggression than to the innocent. We reject those schemes that allow excessive harms to accrue to innocents by not effectively sanctioning offenders. Similarly, we reject those schemes that egregiously burden unjust aggressors by punishing them beyond the importance we attribute to preventing the proscribed acts.

Kelly claims that criminal punishment consistent with a principle of just harm reduction would not blame offenders.¹⁰ Thus, the law need not meticulously evaluate each individual's psychology and history. Instead, rejecting blame, it would criminalize less, sentence less harshly, and embrace remediation when possible. However, Kelly's analysis of blame is not sufficient to reject it in the law. Proponents of blame may coherently insist that justice demands blame.

4. Keeping Blame in the Law

Kelly's analysis of blame is intended especially to deny the long-standing, much-despised, and most prominent blame position: the

⁹ Kelly urged this revision to criminal justice previously in her "Desert and Fairness in Criminal Justice," *Philosophical Topics* 40, no. 1 (Spring 2012), pp. 63-77.

¹⁰ Kelly does not provide an explicit argument for this point. Reasonably enough, having argued that legal blame is inappropriate, she likely did not believe that this was necessary. However, in the remainder of this article, I restore for proponents of blame the resources that would make it possible to argue that just harm reduction would entail blame.

theory of retributive justice. This theory is constituted by the twin claims that (some) criminal offenders are morally blameworthy in virtue of their wrongdoing, and that they thus deserve to suffer according to their culpability.

Retributivists argue that wrongdoers are not only *acceptable objects* of blame, but that they *deserve* it.¹¹ The peculiarly philosophical concept of desert appertains to each what should come to her on the basis of some property or fact about her.¹² In the case of blame, this property is the fact of having performed a wrongful action as a morally competent person. Desert facilitates the retributivists' claim that the state should impose suffering on those who are blameworthy: they deserve it (in a cosmically normative sense).

Desert in the context of blame has traditionally relied on the type of minimal-rationality standard Kelly attacks. Kelly claims that her analysis of blame shows that desert is an unstable concept. Her position seems to be that: (i) blame cannot be deserved simply in virtue of having performed a wrongful act because blameworthiness scales in proportion to excuses, and (ii) desert does not cohere well with blame being generally optional. However, that blame scales and is optional is consistent with minimally rational wrongdoers' deserving it. The existence of the "morally serious" option to reject or mitigate blame may just be the moral space of *mercy*, which calls for lenient treatment despite a wrongdoer's deserving blame.

On this reply to Kelly, excuses call for our mercy, rejecting or mitigating blame proportionally. This mercy interpretation even allows us to see how blame is generally optional. A parallel to Christian teaching is illuminating here: although a sinner is blameworthy for

¹¹ For a modern, sophisticated retributivist account that Kelly is responding to, see Michael S. Moore, *Placing Blame: A General Theory of the Criminal Law* (Oxford: Oxford University Press, 2012).

¹² Joel Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton, NJ: Princeton University Press, 1970).

violating religious (/normative) doctrine, we may—as fellow children of God(/fellow humans or citizens)—take the extreme stance to withdraw our own blaming responses. This mercy interpretation explains as well if not better the data that motivates Kelly’s position—namely, the way that we mitigate blame from a lot to a little. Thus the view that offenders may deserve punishment is rehabilitated, with the caveat that mercy may be available.¹³

Proponents of blame must still account for the criminal law’s incomplete attention to the determinants of blame and mercy, while blaming nonetheless. However, this may not be a grave challenge either. We may find sufficient reason to blame using only the sorts of facts relevant to criminal liability. In order to blame, one need not scrutinize an individual’s history and psychology as thoroughly as Kelly suggests is necessary. I may rightfully scorn and refuse to associate with a rapist—being acquainted with neither rapist nor victim—without inspecting the rapist’s history and psychology. This blaming response is acceptable as long as I have sufficient grounds to think she is not completely unhinged. I need not search for nor admit another’s excuses. Similarly, a state may justly blame non-lunatics without an elaborate investigation into blame-mitigating factors.

Lastly, proponents of blame must grapple with legal practices that conduce to blaming those who do not deserve blame or are beyond its scope. As Kelly indicates—with respect to insensitivity to motive, strict liability, and limited defenses—the law does this in its routine

¹³ One might object that the relevant notion of desert is the one that is of the highest order. So, if mercy rather than deserved blame is demanded, this all-things-considered judgment should be reflected in our retributive theory. However, that does not seem to get the extraordinary quality of mercy right. Mercy asks us to exceed our ordinary moral concepts. This is evidenced in Kelly’s data relating to how we mitigate blame. We would be quite uncomfortable saying that mitigation is demanded in a cosmic sense (or higher-order cosmic sense) in most important cases. Neither the parent who has had a hard day and snaps at her child, nor the indigent rapist, seems to have a cosmic demand on our mercy. Nonetheless, mercy is an acceptable stance. Kelly may reply here that she wants us to revise our view against our intuitions, toward making mercy required. However, without moral intuitions in her favor (or something else to motivate doing so), this is an uninteresting basis for subsequent argument.

functioning. Nonetheless, the proponent of blame has ample resources to rehabilitate her position with reform and/or reply. The reform would have law investigate more closely those very factors that Kelly urges are under-considered. Moreover, particularly humane proponents of blame may institute reforms to include mercy while sentencing offenders. Kelly argues that these reforms would make the law inefficient and intrusive, but they are nonetheless coherent responses.¹⁴

In terms of reply, proponents of blame might note that any human system of practical standards designed to approximate an ideal will not imitate perfectly its texture and material. Admittedly, the significance of their mismatch is more grave than that of Kelly's. Nonetheless, proponents of blame can reasonably assert that there is some acceptable margin of error from the ideal that the criminal law can or does fall within. The plausibility of this stance is enhanced by the weighty ends that blame serves. A state may blame in order to communicate the wrongfulness of conduct and respect for victims.¹⁵ Or a state may blame because it is an indispensable deterrent.¹⁶ Or a state may blame simply because offenders deserve it.¹⁷ It may sound callous

¹⁴ Kelly points to the failed history of the Durham rule to demonstrate that attempts to make precise, individual psychological determinations have fared poorly. The Durham rule was an attempt to make pleas of insanity sensitive to a person's incapacity to avoid a crime rather than the impossibility to do so. Experts called to testify about individual's incapacity had trouble supporting their appraisals with reasons tailored to the individual and seemed to make generalizations and statistical claims about populations. Subsequently, this rule was overturned (pp. 60-69).

¹⁵ For examples of communicative justifications for punishment, see R. A. Duff, *Punishment, Communication, and Community* (New York: Oxford University Press, 2001); and Andrew von Hirsch, *Censure and Sanctions* (Oxford: Clarendon Press, 2003).

¹⁶ This appears to be the view in James Wilson, *Thinking About Crime*, rev. ed. (New York: Basic Books, Inc., 1983), esp. chaps. 7 and 8. Wilson does not explicitly discuss blame, but he offers a consequentialist justification for criminal punishment that is only limited on the perimeter by considerations of desert. Such a position could justify blame for its beneficial effects.

¹⁷ See Moore, *Placing Blame*.

to call deprivations and lengthy prison sentences imposed on even a small number of non-blameworthy offenders (as well as good candidates for mercy) a margin of error, but it is not untenable to do so.

In sum, Kelly's analysis of blame does not reveal that blame is fundamentally problematic in the criminal law. Nonetheless, Kelly is right to indicate that proponents of blame appear eager to blame offenders without considering hardships or having mercy. She shows that proponents of blame must either accept the criminal law as a merciless (that is, mercy-less) engine of punishment or reform it into inefficiency and intrusion. Kelly's book is an important advance for showing this. However, these options are not untenable and may be no more embarrassing than a blanket absolution of the blameworthy.

5. Last Stand: The State's Blaming as Unacceptably Intrusive

Kelly offers one more argument, inspired by her above analysis, to recommend her position over that of her opponents. She argues that when the criminal law blames, it "usurp[s] our moral prerogative to decide whether to blame, to forgive, or to engage, or not engage [with offenders]" (p. 106). This argument appears intended both (i) to foreclose the proponent of blame's reforms to more finely calibrate determinations of blame and (ii) generally to undermine blame in the criminal law. However, the force of Kelly's argument is not as strong as she seems to take it.

A more complete treatment of the way that the convicted are blamed reveals that an individual's prerogative to decide whether to blame or to forgive is not abrogated when the state blames. Someone may experience blame in two ways as a result of criminal conviction. First, individuals may decide to blame a person upon discovering she is a criminal offender. Second, state authorized entities may engage in blaming behaviors directed at the offender. It is simply not the case that when the state blames, it usurps the individual's prerogative to blame or forgive. For example, a business-owner may decide to ignore a releasee's felon status, which the state mandated she report. In this sense, the individual's prerogative is not violated by blame in the criminal law.

Someone might reply that when a state blames, it does so on behalf of individuals, thus usurping their prerogatives. A state is correctly described as acting on behalf of its citizens. However, state actions do not constitute doings by the individuals on whose behalf the state acts.¹⁸ This prerogative is thus not violated. The objection may be pushed yet further by noting that citizens are nonetheless inextricably implicated in the state's blaming. However, so long as the state has sufficient grounds to blame, this inextricable implication does not rise to the level of a problem. Implication in a state's justifiable actions contrary to one's moral preferences is part of what it means to live in a liberal state.

This argument about prerogatives cannot problematize blame (except on a different basis, like that of democratic representation). Having shown that Kelly's analysis of blame does not take it off the table, her remaining avenues are: (i) to problematize particular justifications for blame, (ii) to indicate that specific legal systems are operating inconsistently with a particular justification or outside its acceptable margin of error, or (iii) to offer a comparative analysis that favors her conception of criminal justice.¹⁹ Options (i) and (ii) are

¹⁸ There may be reluctance to recognize that state actions are not doings by individuals on whose behalf the state acts out of an understandable fear that individuals will escape responsibility for state malfeasance. This is an unnecessary overreaction. A person may be required to do something in response to an agent's actions on her behalf without those actions constituting a doing of her own. Consider an instance where an attorney acting on my behalf in a large collective-action suit does something unsavory but not impermissible by moral/legal standards. I have foreknowledge about the unsavory actions she is about to perform, but I am powerless to influence her. I think it is right to say that I am implicated in, but did not perform, the unsavory act. Furthermore, by implication in this unsavoriness, I may feel obligated either to forfeit my stake in the suit or to express pity about the unsavory behavior. However, this implication is quite distinct from my actually performing an unsavory deed.

¹⁹ Kelly could also insist on her analysis of blame over that of the mercy interpretation of the data. This would not be a particularly strong ground from which to insist on reform, considering that there is a reasonable argument that the mercy interpretation fits the data even better (see n. 13 above).

possible, worthwhile projects. Indeed, Kelly's book offers grounds to make a (ii)-style argument against the U.S. criminal justice system.

However, in terms of a knockdown of the blame-proponents' position, (iii) seems to be the only remaining option. A comparative analysis would be an ill-defined project cashing out in: (a) a calculus of absurdity and embarrassment costs, (b) what it takes to instantiate practically the ideal theory, and (c) theoretical elegance.²⁰ Nonetheless, even if Kelly's position were to win out in such an analysis, she would still face a challenge. One might ask: "This is a terrific system to deal with those folks who perform actions we particularly don't like, but what should we do about those pesky, blameworthy wrongdoers?"

6. Could Have Done Otherwise and Its Discontents

Kelly is engaged in a laudable project of injecting much-needed nuance into the common model of moral philosophy. On this model, moral obligations attach to the (rightness/wrongness) of actions, such that those who perform a wrong act have violated a moral obligation. Violating a moral obligation is a grave issue and generally induces blame. However, this crude model does not sit well with our moral intuitions about who should be blamed.

²⁰ For elaboration on each component: (a) Is it worse to be committed to merciless punishment or blanket absolution? (b) Comparing the significance of mismatched texture, what kind of reforms would be required for criminal justice and other social institutions? (c) Does the theory resolve classical dilemmas or does it look like Frankenstein? The difficulty of evaluating such a project can be seen in how Kelly tries to resolve the dilemma of justifying criminal punishment under conditions of social injustice. Retributivists typically must perform mental gymnastics to maintain the state's authority to punish and the blameworthiness of wrongdoers in such conditions. Kelly argues (with praiseworthy nuance) that her proposal is able to salvage the propriety of maintaining punishment, at least in limited scope, to acts that are morally wrong (see chap. 6). Even with this admission, it's not obvious that we should accept that answer. It may well be that immiseration and oppression completely undermine the state's authority to punish. Moral wrongs would not become permitted and it would still be tragic when they are committed. Nonetheless, that criminal punishment would be justified under social injustice is not obviously a desideratum of the best theory.

Kelly identifies that the model mischaracterizes a set of cases in which a wrongdoer was not to be blamed (completely) for performing a wrong action. Thus, she refines the standard for moral blame with an enriched account of excuses, replacing accounts that deny that a wrong or genuine action had taken place. Here, she invokes the principle of “ought implies can,” which relates the wrongness of conduct to the wealth of circumstances that inform an individual’s action. Kelly thinks of this “can” as the venerable principle that one must have been able to do otherwise: that is, the *counterfactual conceit*.²¹ Kelly’s innovation is to interpret the counterfactual conceit normatively, as a matter of reasonable expectations (to do otherwise).

The problem is that this common moral philosophy model is too crude. Act-type prohibitions that produce moral obligations, whose violation is blameworthy except in extenuating circumstances, is too reductive. Moral philosophy becomes an enterprise in qualifying each component of this formula to conceal this fundamental crudeness. Kelly’s book is a sophisticated effort to qualify a portion of extenuating circumstances.

Here, we do well to heed moral particularism’s kernel of wisdom: the complex interaction of facts out of which moral valence emerges is too complicated to sustain principles that go beyond statistical generalizations for guiding action.²² Consider an example

²¹ This is essentially the principle of alternate possibilities that Harry Frankfurt attacks in his “Alternate Possibilities and Moral Responsibility,” in *Free Will*, ed. Watson, pp. 167-76. Frankfurt argues that the ability to have done otherwise is not a necessary criterion for moral responsibility. Here, consider “counterfactual conceit” as sufficiently capacious for the dispositional reading of “ability” provided by the new dispositionalists, to whom Kelly provides her support. See, for example, Kadri Vihveli, “Free Will Demystified: A Dispositional Account,” *Philosophical Topics* 32, nos. 1-2 (Spring and Fall 2004), pp. 427-50.

²² See Jonathan Dancy, *Ethics Without Principles* (New York: Oxford University Press, 2004); and Margaret Little, “Moral Generalities Revisited,” in *Moral Particularism*, ed., Brad Hooker and Margaret Little (Oxford: Oxford University Press, 2000), pp. 276-304. How to interpret the nature of such generalities, beyond statistical incidence, remains contested. See Dancy, *Ethics Without Principles*, pp. 111-19; and Margaret Little and Mark Lance,

where blame-mitigation does not come from an agent's hardship. If I happen upon Harvey Weinstein and smack him, I suspect most would agree that blame would be mitigated, if not excluded.²³ However, we have trouble explaining this intuition. Hardships did not interfere, Weinstein has not forfeited rights not to be smacked, and the action was certainly full-blooded. Moreover, we can manipulate the situation and produce significant variability in my blameworthiness: the smack was premeditated, I lost my keys earlier in the day, it was really hot outside, etc.

Of course, it is possible for the model to accommodate all of these factors affecting blame. We could suture variables and coefficients into a formula that roughly matches our intuitions. However, this seems unnecessary once we acknowledge that there are statistical generalizations that can usefully guide action. Specifically, it is unclear why we should consecrate these generalizations as a system of obligation-producing and blame-inducing principles. Indeed, we seem to lack something to motivate transforming the solid space in our Swiss-cheese, act-type prohibitions into the basis of praise, blame, and desert.

By maintaining this model, Kelly concedes the ground for proponents of blame to insist on stigmatizing offenders and imposing

"From Particularism to Defeasibility in Ethics," in *Challenging Moral Particularism*, ed. Mark Lance, Matjaž Potrč, and Vojko Strahovnik (Abingdon, UK: Routledge, 2007), pp. 53-74. Little and Lance argue for the heightened importance of generalizations' explanatory role, offering an account of defeasible generalizations in which moral reasons play paradigmatic roles according to privileged cases. This is not clearly wrong, but it would seem that going so far is unnecessary. In order to avoid rocking the ethical boat too much, all that need be said is that reasons—and their particular functioning in particular cases—is explanatory. In either case, the point stands that these generalizations are irreducibly porous and, thus, are an awkward general basis for obligation, blame, and desert.

²³ Admittedly, some would disagree. However, I suspect that their position would bottom out in an appeal to blaming those who violate our rule prohibiting one's fist from hitting another. This is an acceptable dialectical maneuver, but it offers no argument in support of what is being challenged.

harsh sentences and deprivations. Their conceptual resources are not inconsistent with the common moral model; rather, they are its offspring. Kelly's ambition to expel blame from the law is thwarted by the commonplace assumption that general principles can be uncovered under our patchwork character assessments of the insane, mildly deranged, and more-or-less competent.²⁴ This review is not the space comprehensively to undermine centuries of moral philosophy. Rather, I will finish by showing how the counterfactual conceit, emblematic of this mistaken model, leads Kelly to absurdity.²⁵

Consider the recent case of Brock Turner, the Stanford undergraduate swimmer, convicted of sexual assault, who unceremoniously inflicted himself on his alcohol-concussed victim. It must be admitted that his acting well was prevented by significant hardships, hardships he could not reasonably be expected to have avoided or overcome. The comforts of whiteness and relative prosperity no doubt produced an unsupportable sense of entitlement. Similarly, raging testosterone and the social ideal of the athlete's brawny assertiveness contributed to his action. Moreover, he was himself awash in alcohol, twice the legal limit to drive. Turner's traumas, which undermine his psychological health and ability to live well, upset our reasonable expectation that he act well.²⁶ Kelly's

²⁴ Kelly does not explicitly describe her methodology in this way. She is interested in attending to the "scalar nature of excuses—the spectrum of considerations that diminish accountability from a little to a lot" (p. 80). Nevertheless, her argument rests on an analysis of what is varyingly present across this spectrum, which is not in unexcused, regular action. Indeed, as blame acts at home in the concepts, doctrines, and actual operation of criminal justice systems, some underlying principle must be inferred from our practices to stigmatize blame as unwelcome.

²⁵ First-order moral maxims are not the only baggage dispensed with by the moral particularist intuition. General second-order principles, such as the counterfactual conceit, are also to be disposed. This does not mean we cannot say anything at the first or second order; it just means that we have to recognize that what we are saying are statistical generalizations and should be treated accordingly in our logic.

²⁶ One may try to disqualify from being hardships Turner's impediments to acting well. As Kelly notes, "[t]he standard for what counts as a hardship is generic, though it is also controversial" (p. 111). This option is not available

reasoning would have us withhold blame from Turner, surely an absurd suggestion.²⁷

This absurd implication is a consequence of the counterfactual conceit. The conceit marshals us in pursuit of some mysterious thing that could have chosen an alternative course of action—and to identify that as the person's real character or impetus of behavior properly her own. When this sought-after homunculus turns out to be no character at all, but a dialectic of genetics and upbringing, we are scandalized.²⁸ We are left denuded with our assessments of each other purportedly revealed as naked judgments of better or worse fortune.

Accepting the counterfactual conceit leads us to despair that all character evaluations, even assessments of good behavior, are unsound.²⁹ Understandably, the sensible find this untenable. They try

to Kelly, and I think she would agree (see p. 118). Turner's impediments, if not controversial instances of hardships, are functionally identical to them. This is not just a philosophical quibble. Practically, the criteria for determining what counts as hardship should not just replicate our preferences for who we prefer to receive forgiveness, lest her proposal turn into a mere license to absolve political allies. Theory is superfluous for that.

²⁷ In admitting the possibility of a refined retributive thesis that applies only to the relatively privileged, Kelly ventures that such people might "suffer [from] more serious problems that are not obvious" (p. 118). This flirts with the possibility that we may indeed be called upon to withhold blame in Turner-like cases. The temptation to this flirtation is described in the remainder of this section.

²⁸ Some in this search have found that agents possess a fabulous faculty non-arbitrarily to interject themselves into the causal order in a fashion not subject to the laws of nature. See Roderick Chisholm, "Human Freedom and the Self," Lindley Lecture (University of Kansas: 1964), accessed online at: <https://kuscholarworks.ku.edu/bitstream/handle/1808/12380/Human%20Freedom%20and%20the%20Self-1964.pdf;sequence=1>

²⁹ See Carl Ginet, "Might We Have No Choice?" in *Freedom and Determinism*, ed. Keith Lehrer (New York: Random House, 1966), pp. 87-104; and Peter Van Inwagen, "The Incompatibility of Free Will and Determinism," *Philosophical Studies* 27, no. 3 (March 1975), pp. 185-99. Neither despairs much, however, about our inability to meet the criteria for responsibility proposed by the counterfactual conceit. Instead, they propose their own accounts of free will, which do not seem adequately to account for

to salvage some behavior as not a matter merely of fortune, but rather, behavior for which we can hold a person responsible and, in some cases, blame her. Thus, Kelly proposes the normative standard of having responsibility hook into those who can be reasonably expected to act well.

The problem with this approach is that any standard proposed to induce responsibility will diverge from a measure of good and bad fortune.³⁰ On one extreme, a minimal-rationality standard is much too strict. Some are lucid enough to wrong—self-consciously contravening moral reasons—but their ill fortune precludes a judgment of ill will. On the other, the reasonable expectation-throttling hardship standard is much too generous: it admits histories of what is common-sensibly

the contingency of fortune.

³⁰ The contingency of birth and upbringing, and specifically the argument above from fortune, are similarly relevant to those who maintain the suitability of praise and blame but reject the counterfactual conceit as a criterion for free will and moral responsibility. These susceptible positions include “mesh theories,” which condition responsibility on agreement between a person’s impetus for action and her higher-order preferences or values; see Harry Frankfurt, “Freedom of the Will and the Concept of a Person,” in *Free Will*, ed. Watson, pp. 322-36; and Gary Watson, “Free Agency,” in *Free Will*, ed. Watson, pp. 337-51. Also susceptible are reasons-responsiveness theories, which condition responsibility for action on its issuance from an agent or mechanism that is responsive to reasons; see Michael McKenna, “Reasons Responsiveness, Agents, and Mechanisms,” in *Oxford Studies in Agency and Responsibility*, vol. 1, ed. David Shoemaker (Oxford: Oxford University Press, 2013), pp. 151-83; and John Martin Fischer and Mark Ravizza. *Responsibility and Control: A Theory of Moral Responsibility* (New York: Cambridge University Press, 1998). It is also doubtful that Wallace’s rational-competence argument from the conditions required for moral responsibility in his *Responsibility and the Moral Sentiments* can withstand the significance of fortune, for reasons articulated toward the end of this section.

The argument from fortune is part of a family of challenges to moral responsibility that attend to the sources from which action springs. Strawson’s and Pereboom’s arguments described above in n. 3 are examples of such an argument. The argument from fortune more closely resembles Pereboom’s argument, as both rely on intuitions internal to our practices (see Pereboom, *Living Without Free Will*, pp. 95-100).

good fortune as excusing responsibility.³¹ This is precisely what is afoot in the Stanford rapist case. Of course, Kelly could reply that we should adopt her standard, eschew the importance of good and bad fortune, and empathize with convicted sex offender Brock Turner. However, this seems completely wrongheaded.

Our practices of character assessment, and blame in particular, do not cohere with the counterfactual conceit. The conceit does not account for the data: actual hostility toward the mad and insouciance toward the sins of the sane (especially when concomitant with wealth and fame). Nor is the counterfactual conceit to be found lurking beneath even the best instances of these practices. The divergence between any standard for responsibility and the significance of fortune frustrates any (non-question-begging) inference of the kind. It is possible that some standard for responsibility would be proposed for which we should accept the revision against fortune's significance. However, that extreme absolution and merciless chastity can both emerge as the polished principle beneath the crust of our social practices suggests that this effort is doomed.

At this point, we may seem driven to despair of any attempt to assess another's behavior as measuring something more than fortune. However, after thumbing through behavior's inputs, we have an alternative other than to conclude that our evaluations of character have missed their mark. Rather, with humility, we may recognize that there is nothing more to character than what people actually do and think.³² This recognition recommends a different approach to

³¹ Some standards are simultaneously too strict and too generous, such as Harry Frankfurt's proposed second-order-desire standard in his "Freedom of the Will and the Concept of a Person." A person is responsible if she wants to desire what she wills. An unfortunate person could have the further misfortune of being blamed for misconduct she, unluckily, wanted to will (e.g., a person whose personally-endorsed bad diet, and ensuing blameworthy bad health, issued from being born into bad circumstances). The inverse may apply for a fortunate person.

³² Kelly dismisses this view and states, responding to Michael Sandel, *Liberalism and the Limits of Justice*, 2nd ed. (Cambridge, MA: Cambridge University Press, 1998); and William Galston, *Justice and the Human Good* (Chicago, IL: University of Chicago Press, 1980), "Even if our various

understanding our patchwork assessments of character and the bundle of attitudes and behaviors associated with blame. It recommends rejecting the common model of moral philosophy.

The contingency of character asks us to reject that blame and praise are *deserved*. Moreover, this contingency is incommensurate with a notion of obligations, whose violation demands our contempt for violators. Indeed, this contingency is the source of Kelly's point that it is unfair to hold all morally competent people equally accountable. However, instead of adding further principles to make our model more equitable, it is time to recognize that our model is not just flawed as all models are, that is, constitutionally. Rather, it is leading us into serious and avoidable error. We blame excessively, deem inhumane amassment of wealth and power as deserved, and ignore the accomplishments of those who build from nothing. We have grounds to think that the model cannot be salvaged: the baby and bathwater are fetid.

Once we stop trying to superimpose principles onto our social practices, we can appreciate Kelly's insights into the nature of excuses.³³ She is right that we have the option to think that some

attributes thickly comprise ourselves, it is hard to accept that a person could deserve blame, much less punishment, for what she happens to be or to have done, whether or not she could have been or done better" (p. 48). This difficulty to accept such an outcome should spur humility, caution, and existential angst, but should not convince us to fabricate the counterfactual conceit out of whole cloth. It is doubtful, however, that a thick conception of the individual can ground the conception of desert glossed above.

³³ If we are to dispense with the counterfactual conceit, however, we must account for how sensible people could espouse it and for so long. For an explanation of the notion's origin, see Michael Frede and David Sedley, *A Free Will: Origins of the Notion in Ancient Thought*, ed. by A. A. Long (Berkeley, CA: University of California Press, 2011), esp. pp. 97-101, where Sedley diagnoses how the modern conception of a free will arose in response to certain confusions and Christian dogmas. Further argument would have to explain its endurance today. This argument would likely take the form of a psychological debunking, perhaps ascribing its endurance to the "desire to bear the entire and ultimate responsibility for one's actions oneself, and to absolve God, the world, ancestors, chance and society"; see Friedrich Nietzsche, *Beyond Good and Evil*, trans. and ed. Walter Kaufmann (New York: Random House, 1992), chap. 21. Nietzsche makes this claim in relation

wrongdoers are not bad people in light of their hardships. Moreover, she is right that some people cite reasons that sound like the counterfactual conceit. However, she is wrong to analyze this as anything except compassion. The best explanation here is not that these people are particularly discerning, but rather, that they have a commendable desire not to see people as bad whose bad circumstances contributed to their acting badly. Compassion, however, is not a moral principle commanded by the metaphysics of action; it is a choice.

In reality, when we abstain from blame, we nonetheless infer to a wrongdoer's having stable mental or moral qualities that dispose them to behave as they do. Kelly's stance breaks this inference by asking us to displace an excused person's undesirable qualities onto her past or biochemistry, undoubtedly unsuitable objects of blame. However, when we mitigate blame, we still (correctly) impute a stable, undesirable quality to the wrongdoer without imputing undesirability to her. We mitigate blame ambiguously. Those who think as Kelly suggests may find inexplicable urges to hate a wrongdoer, despite not finding in her a single detestable quality.

Abandoning the causal quest for our homunculi doppelgangers, puts us in the existentially harrowing position of brute assessments of behavior with evaluative terms that have dialectically evolved and are circularly justified. Cutting up the fruits of fortune with these utensils is an invitation to think humanistically. We find greater guidance when we engage with Fyodor Dostoyevsky's *Brothers Karamazov* or *The House of the Dead*³⁴ than in an analysis of

to being a *causa sui*, which is what, per Strawson and Pereboom, is required for our present conception of moral responsibility. They differ in that Strawson thinks being a *causa sui* is conceptually impossible (see his *Freedom and Belief*, chap. 2, esp. pp. 51-56), whereas Pereboom finds it empirically implausible (see his *Living Without Free Will*, pp. 65-88). Much of the literature appears to provide a revisionary analysis of free will—proposing the sort of freedom we indeed do have—without offering a compensatory revision to praise and blame.

³⁴ In which, Goryanchikov, the narrator, muses, “It is not for nothing that the common people throughout Russia call crime a misfortune, and criminals ‘unfortunates’”; Fyodor Dostoyevsky, *The House of the Dead* (New York: Penguin Books, 2003), p. 79.

what is lacking in the gestures of the disadvantaged that is present in the action of the affluent. Equipped with fiction and vocabulary, we may decide that we want to be people who choose compassion when available and consider blaming the unfortunate a heinous practice.

We may also condemn a government that blames criminal offenders without evaluating the reasons to suppress blame. However, we do not do so because it infringes on our right to choose how to relate to wrongdoers. Rather, a state that blames in order to express censure is sanctimonious. One that blames for its efficacy is bloodlessly calculating. One that blames without mercy is rancorous. Moreover, a state that structures its criminal justice system to (attempt to) allocate to each offender precisely her due is intrusive and deluded. Expelling blame from the law is not rationally required by some fundamental principle or the metaphysics of action. It is just what we should do if we have a modicum of compassion and a sober understanding of the human condition.

7. Conclusion

Rejecting the common moral model provides a new perspective on retributivism. Even without desert, it is perfectly coherent to think it good that (some) wrongdoers should suffer. Depending on the thought's application, it may be callous or judicious to do so. We may protest the state's rebuking a man like Moosbrugger on the flimsy grounds that all (lurid) evildoers should suffer, while wheeling out the scaffold for a plump, plush, pampered financier-turned-fraudster. Or we may reject retribution, seeing that the wiles of resentment cannot systematically be extirpated by even the best-designed institutions. It is the humanistic orientation—not the analytical one—that best intimates blame's overwhelming particularity, which cannot be circumscribed by legal procedure.

Also, stepping away from Kelly's analysis of blame best explains and illuminates why U.S. law blames as it does. Legislators, prosecutors, and judges are not guilty of conceptual error or shamelessness about exceeding law's moral mandate. If they all read

The Limits of Blame, I suspect few—even those of good faith—would act much differently. Most have already, and most likely subconsciously, done the moral calculus that blaming how we do best secures their preferred society. If the law were restructured today according to some average of the population's best inclinations to blame or forgive, it would likely blame much the same as it does (perhaps, though, drug offenders would be saved from criminal stigmatization). The problem in the U.S. is not just that the law is too eager to blame, but that we are.

This is precisely why *we* would do well to adopt Kelly's proposal for a criminal justice system constituted on a principle of just harm reduction. Unlike morality, the law is well suited to an act-type prohibition model. In order to live well together, we need brute, action-guiding standards to prohibit behavior we collectively agree is injurious to individuals or the public good. This minimal condition for good social living is best achieved by a non-blaming criminal law system. Whether we want social institutions in the business of rebuke and blame is an open question. However, without the common moral philosophy model, it is difficult to see why we should task this assignment to the monopolistic owner of force.

Kelly's book should be considered a success for what it contributes to mainstream discourse, especially showing the retributivist her options and embarrassments. Also, we should praise it for offering a philosophically and humanistically sophisticated picture of what criminal justice could (and should) be with interesting answers to punishment's disquieting dilemmas: the general justification for imposing suffering, that general deterrence uses the convicted as a means to others' ends, the place of criminal justice in the broader terrain of justice, and the permissibility of punishment under conditions of injustice.

However, the case for or against a vengeful or measured criminal justice system bottoms out in humanistic considerations about who we want to be and what kind of society we want to live in. These considerations must surely be guided by philosophy, but philosophy cannot compel us to compassion.