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

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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.

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*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,

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[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-

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[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

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[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

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[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 apportions 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

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[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

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[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

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[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

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[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 aburdity 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.

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[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. Retributivsts 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

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[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

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"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

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[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%20Freed om%20and%20the%20Self-1964.pdf;sequence=1
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[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

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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

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[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

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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

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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.