At The Interface
Cutting-Edge Research

Evil, Law & the State

Issues in State Power & Violence

Edited by

Istar Gozaydin

and

Jody Lyneé Madeira

Inter-Disciplinary Press
Publishing Creative Research

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Introduction: The Need For an Interdisciplinary Approach to Evil

Istar Gozaydin & Jody Lyneé Madeira

Scrutinizing the state as a source of evil through its production and application of the laws that claim our allegiance and obedience is the theme of the essays contained in this e-book, all of which originate from a conference entitled "Evil, Law and the State" organized by Inter-Disciplinary.Net at Mansfield College, Oxford in July 2004.

A quick survey of *Webster's English Dictionary* indicates that "evil" has many meanings, ranging from "qualities tending to injury or mischief" to "having or exhibiting bad moral qualities"; "producing or threatening sorrow, distress, injury, or calamity"; or "anything that impairs the happiness of a being." This multiplicity of meanings greatly complicates our task, which is to introduce this slippery concept. But we can begin by offering a very timely context to boundary our consideration of evil and evil entities: the state, as institution and as actor. Imagining the state and its powers of legislation and execution as a source of evil may seem ironic, especially when one takes into account the interrelationship between law and morality. Apart from legal positivists who argue that there is no necessary connection between law and morality, most students of jurisprudence believe that human law should have a particular aim and moral content. Adherents of the Natural Law tradition, in particular, claim that our moral rules should give a determinate and substantial moral content to systems of law. However, too often States wreak havoc in the process of legislating, producing laws that certainly are evil in the sense that they produce distress or injury, or deprive others of "goods." Yet, because of its institutional nature, it does not entirely make sense to attribute to a State as actor the sorts of human motivations to which an individual may subscribe commonly thought to exemplify "evil," such as hate, greed, madness, or revenge. Instead, the actions of a State appear to be committed in the shadows of power, for the State as an institution seems uniquely formulated to obtain as much power as possible, so that it may crush all those who may challenge its sovereignty. The hunger of the State for power is not only a matter of historical fact, but, as the essays herein attest, a current and controversial international issue.

The multiplicity of international perspectives on the State's potential to commit evils matches the multiplicity of definitions of evil itself, and the resulting complexity threatens to overwhelm the analysis of evil altogether. But one of the beauties of scholarship is its flexibility; theoretical collaboration allows researchers to address complexity by breaking down analyses into complementary pictures that together may

render a richer image of the totality of a phenomenon. Thus the need for interdisciplinary projects such as Inter-Disciplinary.Net. Evil, even within the limited context of the State as actor and institution, is too complicated an inquiry for an individual field such as sociology or political science to engage on its own. Significantly, legal scholars cannot resolve these questions alone. Instead, this topic demands a cornucopia of approaches. We can no longer afford to erect our own temples to what evil is or how it manifests itself in our world, but must create a city of approaches set in the midst of a communicative infrastructure capable of linking each edifice efficiently with others of its ilk. Fortunately, there is every indication that promising scholarship from all over the world adopts this premise and is oriented towards achieving together what we cannot hope to accomplish in isolation.

It is to these ends that those of us involved in "Evil, Law, and the State" collaborated with one another over the course of four days to make it the successful venture that it was. We must acknowledge a large debt of gratitude to Dr. Rob Fisher and Professor John Parry for coordinating this conference. Below are brief descriptions of the works that comprise this volume, organized by panel topic.

In the keynote essay, John Parry addresses the paradoxical issues of the State's efforts to control violence and the law's control over State violence in "Pain, Interrogation, and the Body: State Violence and the Law of Torture," focusing on the relationship between torture, international law, and Constitutional doctrine through the lens of landmark United States Supreme Court decisions.

The next three essays are grouped around the theme "Atrocity, Terrorism, and Accountability." In her essay "Responsibility for Atrocity: Individual Criminal Agency and the International Criminal Court", Kirsten Ainsley discusses the international jurisprudential shift in responsibility for political violence from states to individuals, particularly through the ICC, and explains why the ICC is unlikely to assist in deterring crime and promoting justice. Elena Baylis delves into the legal response to suicide terrorism in "Suicidal Impunity," and chronicles the implications that the inability to bring suicide terrorists to justice has on law and counter-terrorism policy. Finally, in his essay "Legal Pageantry and Derogation of Due Process Norms in the Trial of Saddam Hussein," Douglas Sylvester takes the question of evil as it appears in atrocity trials where unquestionably evil state officials are prosecuted, discussing how such a forum is a vehicle for expiating atrocity rather than adjudicating the defendant's guilt, directing his comments to the trial of Saddam Hussein.

Three essays make contributions to the theme of "Theorizing Crime and Punishment." Angeliki Kontou's essay, "Hegel on Crime, Evil and Punishment: Freedom and Reconciliation between 'the Individual' and 'the Social," contributes to this e-book a theoretical approach to crime and punishment. In "The Execution as Blood Sacrifice," Jody Lyneé Madeira explicates the sacrificial dimensions of the American institution of capital punishment, and applies this analysis to the 2001 execution of Oklahoma City bomber Timothy McVeigh. Finally, David Nash develops a historical framework for understanding blasphemy in the West following the Reformation, explaining how the shift from state regulation to individual rights gave rise to new definitions of evil in his essay "Blasphemous Evils and Evil Blasphemies: The Historical Context of State Action Against Religious Dissidence."

In the first of two essays addressing the theme of "The Criminal State," Ruth Miller explores political corruption in Turkey in "Corruption, Authority, and Evil: The Invention of Political Crime in the Ottoman Empire and Turkey," bringing together two seemingly unrelated events in the past decade, the 1999 earthquake and the 1996 *Susurluk* scandal. Finally, in her essay "When Bad Faith Meets Machiavelli: Abuses of Administrative Power Under the Bush Administration," M.H. Sam Jacobson chronicles the ways in which the Bush administration has systematically exercised administrative and executive powers in bad faith.

"Health Care and State Power" is the central theme of three contributions to this e-book. In his essay "Mental Health Care During Apartheid in South Africa: An Illustration of How 'Science' Can be Abused," Alban Burke indicates works on abuses through legal regulations and medical profession as a means of segregation and suppression during Apartheid in South Africa. Dani Filc & Hadas Ziv debate on Israel's policies in the occupied territories in the context of health care in their paper "The Fiction of Sovereignty and the Denial of the Right to Health Care: Israel's Policy in the Occupied Territories". Jonathon E. Lynch focuses on the physical management of patients in mental health units in England and Wales in his paper titled, "Inflicting Pain on the Mentally Ill."

Many authors examine "Evil Processes" from a variety of theoretical angles. Ruben Berrios' self revealing essay "Bureaucratic Criminality" aims to clarify Hannah Arendt's claim with respect to the banality of evil in a proper context: the notion of bureaucratic criminality. Istar Gozaydin targets a legal instrument used from 1926 to 1990 as a sanction for a crime of violence, rape, in Turkey, discussing how the

punishment was to be lessened statutorily when the rape victim was a prostitute. Finally, Martin Hebert and Caroline Aubry detail how that the linguistic and cultural biases ingrained in Mexican legal institutions emerge as a discriminative process against indigenous people in their article "Linguistic Competence, Cultural Categories and Discrimination: Indigenous People before the Mexican Court System". Shani D'Cruze scrutinizes the evil consequences of state intervention and public consent in the issue of sexual intercourse with minors, relying upon British legal history and judicial practice, in "Protection, Harm and Social Evil: the Age of Consent since 1885." Finally, in his essay "'Too Many Foreigners For My Taste': Law, Race, and Ethnicity in Early U.S. California, 1848-1851," Fernando Purcell takes us back to the days of the California gold rush to document how criminal law institutionalized discrimination towards Mexicans and Chileans.

Three essays are organized around the theme of "Human Rights and State Power." In his essay "Humanity and Inhumanity: State Power and the Force of Law in the Prescription of Judicial Norms," Robert Buonamono analyzes the concept of subjectivity within human rights discourse, explaining how human rights has been constructed within international law in relation to the formation of the modern state, and arguing that the organization of judicial norms around the concept of humanity is the product of modern state power. Tammy Lynn Castelein takes on the subject of Hannah Arendt in "'The Right to Have Rights': Hannah Arendt's Foundation of Human Rights," positing that Arendt's theories on human rights must be understood in light of twentieth century events, and utilizing a comparison between Arendt and the writings of Michael Ignatieff to illustrate the continual viability of Arendt's work. Finally, Joann Ross examines the implications of China's One Child Policy on international law and Chinese women, and suggests that the policy violates due process and democratic ideals in her essay "China's One Child Policy: Can It Be All Good or All Bad?"

Finally, two essays offer contributions to "Evil, Law, and Ethics." Bram Ieven's "The Legitimate/The Just: Ethics and Law in Deconstruction" focuses on the overlap between the ethics of John Rawls and Jacques Derrida's writings on deconstruction. And Victor Paivansalo explores in what respects a plurality of conceptions of evil is compatible with and compelled by the "reasonable liberalism" of John Rawls in his essay "Plurality of Evils and Reasonable Liberalism."

We sincerely hope that you enjoy reading these essays as much as we all enjoyed participating in this conference.

Pain, Interrogation, and the Body: State Violence and the Law of Torture

John T. Parry

Introduction

I want to talk about state violence and the law. I hope first to highlight the double character of state violence - its status as both a potential source of protection from other forms of violence and as a persistent threat to individual lives. Much of what I say will be provide a general overview of some of the themes that will emerge during this conference. But I also want to speak specifically about state violence as a method of controlling people's bodies, and more particularly, I want to talk about interrogation and torture as forms of state violence and about law's response to them.

I'd like to start with a story. Near the middle of Thomas Mann's novel, The Magic Mountain, is a chapter titled "Snow." The protagonist, Hans Castorp - whom Mann goes out of his way to describe as a thoroughly ordinary young man - has been caught throughout the novel in a debate about civilization, violence, law, and values. In the Snow chapter, he tries to leave the debate behind by going skiing. He gets lost in a blizzard, stops at a makeshift shelter, and falls into a stupor. Hans then has a vision of an ordered, egalitarian, happy, and peaceful country whose people demonstrate love, nobility of spirit, mutual concern and deference. But amidst the landscape is a complex of columned buildings and porticos - a temple, but perhaps too a place in which secular authority resides. Hans makes his way to the middle of the complex, and his vision of peace and love changes to one of horror. Two half-naked old women - crones or priestesses - are tearing a baby into pieces and eating it. Hans stumbles, falls, and wakes from his dream. He vows to remember and draw a lesson from the vision, but by the time he returns to his lodgings, he has forgotten it.

There are many ways to think about this episode. For purposes of this talk, I want to read Hans' dream as a myth about civilization, an assertion that violence and death are always present under the trappings of order and peace. Going further, the murderous crones inside the temple suggest that violence is not just present but is necessarily at the heart of our governing structures. Finally, Hans' reaction to the vision suggests that even when brought face to face with this possibility, we are unable to accept it for very long - that we forget it because we have to, because the violent foundations of civilization are too terrible to affirm.

1. Private Violence and State Violence

I'd like to grapple with these possibilities through the rest of my talk, beginning with two observations. First, state violence is an inescapable part of human civilization. Second, in many instances that is just how it ought to

be. Violence is a persistent threat in our lives. Organized state violence responds to and protects us from private violence and the violence of other states. In political theory terms, one might think of Hobbes' account of government as the solution to a state of nature in which life is nasty, brutish, and short. State violence is not, of course, the only protection we have. Custom, friendship, good faith, ideas of justice, morality, and religion - all play a role in controlling violence. But state violence or the threat of state violence is particularly effective. One reason may be that most responses to private violence implicitly or explicitly promise consequences of one kind or another, such as shunning, unwillingness to deal with that person in the future, stigma, and damnation, and so they impose a degree of deterrence. Among these responses, the threat of violent punishment is a particularly powerful deterrent.

So far, however, we have only the violence of the state opposed to private violence and the violence of other states. Left alone, the cure could be as bad as, or even worse, than the disease. State violence, after all, is just violence employed by a government. It is no better than other forms of violence except to the extent that it is useful to us. Yet precisely because it comes from the state, it will usually be more systematic, sustained, and powerful than other forms of violence. Put plainly, and as we all know, state violence raises the threat of tyranny and repression even as it holds out the possibility of protection, and the tyranny of state violence could well be worse than the anarchy of private violence. Moreover, state violence often manifests itself on the bodies of individual members of a community and even more on the bodies of outsiders. By this I mean simply that we need to remember that state violence all too frequently translates into physical pain, mental anguish, and palpable injury. The policeman's stick, the soldier's gun, and the tools of the interrogator leave visible or internal marks on people's bodies and psyches. When we talk about state violence, we must be careful to keep in mind what that violence produces. The price of our protection, and the risk we face from the violence that ostensibly protects us, can be measured in blood.

2. Law and the Effort to Control Violence

Given the tendency of state violence to support tyranny, one of the hallmarks of a good society is the development of tools to control state violence. Perhaps the most important of these tools is law.

Law holds out the possibility of regulating the state's use of violence to maintain social order. Even as it regulates state violence, however, law also depends upon it. Marsilius of Padua contended long ago that "[l]aw is a command coercive." It seeks to change human behaviour. As Robert Cover

observed, "A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life." Yet as the stakes increase in legal disputes, the less likely people are to endure an adverse result solely from a commitment to the rule of law. People obey the law for a variety of reasons, but surely one of those reasons is that the law will be enforced. As Cover said about the criminal process,

> The act of sentencing a convicted defendant is among the most routine acts performed by judges. . . . If convicted, the defendant customarily walks – escorted – to prolonged confinement, usually without significant disturbance to the civil appearance of the event. . . . There are societies in which contrition or shame control defendants' behaviour to a greater extent than does violence. . . . But I think it is unquestionably the case in the United States that most prisoners walk into prison because they know they will be dragged or beaten into prison if they do not walk.

Cover's observation holds for ordinary civil cases as well. If a defendant loses a breach of contract case and refuses to pay the judgment, that judgment will ultimately be put into effect through force. Even in the most civilized societies, law relies on guns.

I don't mean to suggest that law is illegitimate because it relies on violence. Most commonly, the link between law and state violence goes the other way. That is to say, my claim is that the state violence associated with enforcing law is presumptively legitimate, while the state violence that goes beyond enforcing law or that has no link to law is presumptively illegitimate. I want to stress the word presumption here. Later in my talk I hope to complicate that idea to some extent when I talk about the failure of law and the law of torture.

Worth noting here is that this account of law raises questions about international law. Can we even speak of international law as law if – as is often the case – there are no formal mechanisms to enforce it? Despite the lack of formal enforcement, however, most nations appear to obey international law most of the time. Indeed, the fact that international law is often obeyed despite the lack of formal enforcement creates a potential problem for my account of law. If individuals and states often obey rules because those rules claim the formal status of law, and not just because they will be enforced by violence, then perhaps law is more than just rules that are enforced. Law also includes rules that are obeyed whether or not enforced.

Note that this broader account makes law more amorphous by overlapping it with social norms, morality, and other sources of rules. In many ways, that overlap is accurate, particularly if we want to speak generally of the various ways in which social forces shape and constrain individual behaviour. Under this account, international law, which at the very least is an important source of constraining norms, easily qualifies as law.

But what happens when norms are not sufficient by themselves to produce compliance? The distinction between willing obedience and formal enforcement remains important if we turn away from the law-abiding, away from those who believe in the rule of law for its own sake, and focus instead on those who resist law. Oliver Wendell Holmes, Jr. famously asserted, "If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict." For Holmes, a statute that could not be enforced "would be empty words"; from the bad man's perspective, "[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are . . . the law."

From this perspective, consider the issue of international human rights. Do nations obey international human rights law? Oona Hathaway's recent empirical research on this issue led her to the conclusion that "noncompliance with treaty obligations appears to be common." Indeed, she was unable to find "a single treaty for which ratification seems to be reliably associated with better human rights practices." To the contrary, she identified "several for which it appears to be associated with worse practices." In other words, Hathaway was unable to find a positive correlation between law and behaviour in the area of international human rights. Many countries abide by the norms of international human rights law, but many do not, and whether or not a country follows these norms appears to have little to do with whether that country recognizes those norms as formal international law. From the perspective of the Holmesian bad man, the status of international human rights norms as law is uncertain at best.

3. The Limits of Law's Control over State Violence

So, we live in a world in which state violence is necessary to protect us but is also a danger to us. To manage state violence, we rely in part on law. Yet law depends on the very violence that it is meant to control.

We could, of course, resolve this tension by deemphasizing what we expect from law. We could resign ourselves to the fact that, historically, law has often been little more than the tool of authority, a ritual for channeling state violence rather than controlling it. Examples abound in history and the contemporary world. Indeed, much of criminal law today remains a forum for the ritualized application of state violence, albeit with greater regulation

than in the past. Perhaps, then, we should conclude that the idea of law as a significant constraint on state power is a peculiar development of western politics and political theory. A thinner or lowest common denominator account of law might not seek so insistently to tear law away from the authority that gives it its power.

I imagine, however, that most of us would reject this thin description. Law, we would insist, should do more than resolve disputes. It should – it must – regulate the state's use of violence. Yet if we hold to that view, we must also admit that we have given law a double conscience as servant and master of state violence.

Sometimes law is up to the task of mastering state violence. The decisions of the United States Supreme Court just a few weeks ago, insisting that the prisons of Guantanamo Bay are not beyond the reach of habeas corpus, demonstrate dramatically that courts can confront even military authority. Legislators sometimes craft statutes that limit the state's power to wield violence, such as the War Powers Act in the U.S., or more generally statutes that allow people to receive compensation for injuries inflicted by the state.

But law often shows itself to be the servant of the violent state. Consider the famous *Hirabayashi* and *Korematsu* decisions, in which the U.S. Supreme Court upheld blanket curfews and detentions of Japanese-Americans during war, without regard to their individual guilt or loyalty. The U.S. Congress's adoption of the Patriot Act provides a recent legislative example. Or, again in the context of U.S. law, consider the failure of federal courts to confront police violence in minority communities, failures that often are cloaked by the claim that the courts lack jurisdiction to hear claims that might force the reorganization and oversight of lawless police departments. One consequence of law's reliance on state violence for its effectiveness is that law too often defers to that violence. It cedes to the state the power to act lawlessly in some instances in order to preserve the greater power to regulate private violence and some aspects of state violence.

So far, I have been speaking of law as if it were an autonomous entity. And we sometimes do think of law this way. We say something is against the law, as if the statement would embody and invoke the person of the law. We act as if erecting a network of laws will itself protect us from the evils of state violence. Despite this tendency, we also know that it is false to think of law this way. In the United States, for example, the legal realists reminded us decades ago that law is not autonomous. It has no independent existence. It is not something that we extract from pure reason, or from fundamental, established, and knowable principles.

Law is a thing that we make, and as a result it is also something that we manipulate. Nearly every rule has an exception, and every fact pattern raises the possibility of a different result even under a uniform rule. Doctrines are constantly changing, not for the sake of progress but simply in response to social forces and skilled arguments.

The malleability and manipulation of law can be pernicious. Officials are always ready to seek, and courts are only slightly less willing to create, doctrines of emergency power. The memos drafted by U.S. government lawyers asserting nearly unlimited executive power in the struggle against terrorism and seeking to rationalize sweeping mistreatment of prisoners provide a chilling example of how far even a democratic government will reach. And all too often, when a government makes the argument, courts are willing to hear claims of necessity – that public order, the survival of the state, or protection against terrorism require or justify a particular course of conduct, with the claimed result that courts should declare the legality of that conduct.

Yet law can be manipulated in other ways as well. Ideas of morality and justice can influence decision makers. Necessity claims in this context can limit state power by ratifying individual acts that violate the law for good reasons. The problem with justice claims is that we don't always know what justice is. There is no more of an external reference point for defining justice or morality than there is for law. Indeed, one of the most fundamental skills of advocacy is to convince a judge that your side should win as a matter of justice – but when both sides can make plausible claims that justice favours them, we cannot always know who is right. All we know is that there will be a decision, not that true justice or the best legal rule will prevail.

All of this is just to say what we already know. In the face of state violence, law often fails, and it fails because it cannot help but fail, because it is a human product dependent upon human agency. We can't put our faith in legal rules or norms as such, because they are only tools, not solutions. But few if any better alternatives present themselves. To adapt Churchill's description of democracy, law may be the worst response to state violence, except for all the others.

4. Interrogation and Torture

I'd like now to use the law of torture and interrogation to provide a concrete example of my claims about state violence and law – in particular my claim that law too often fails in the face of state violence.

Interrogation is a core problem in the effort to control state violence. It presents issues of persuasion, pressure, coercion, and physical or psychological harm. Interrogation of a criminal suspect is rarely gentle even

if it appears calm and orderly. It is about extracting information, which requires control, even dominance. An interrogator is often – perhaps must be – willing to use the suspect, to approach him as a vessel to be emptied rather than as a person possessed of dignity and rights and entitled to equal concern and respect (although a skilled interrogator may disguise this attitude). The temptation too often exists to go just a step further, to get just one more piece of information, to make the interrogation just a bit more uncomfortable. When the information is important enough, the temptation even exists to torture.

The September 11 terrorist attacks on New York City and the Pentagon illustrate this dynamic fairly easily. Within two months after the attacks, federal officials were already starting to talk about the need to develop new, more lenient standards for interrogating suspected terrorists. Several commentators, myself included, explored the extent to which coercion could be justified in rare cases. And as we have seen, that conversation continued among government officials who exhibited less concern for controlling state violence and more willingness to unleash it. This approach bore terrible fruit first in legal opinions and then on people's bodies at Guantanamo and in Afghanistan and Iraq.

This discussion and practice of coercive interrogation took place against a web of international and national laws that prohibit torture absolutely. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment declares that torture is "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person" by state actors to obtain information, to intimidate or punish, or "for any reason based on discrimination of any kind." The Convention also binds signatories "to prevent . . . other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture." The Convention does not define "cruel, inhuman or degrading," but the United Nations has said that the phrase "should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental."

The Convention is not the only international law document that bans torture. The Geneva Conventions also ban torture and other coercion, and the International Covenant on Civil and Political Rights bans torture and cruel, inhuman, or degrading treatment. Several regional agreements add additional weight to the prohibition.

Most countries also ban torture under their domestic law. In the United States, for example, the use of coercion in interrogation violates the victim's constitutional right to due process and may violate her right against compelled self-incrimination. Torture allegations might also arise in the context of claims that law enforcement officials used excessive force "in the

course of an arrest, investigatory stop, or other 'seizure,'" in violation of the Fourth Amendment to the U.S. Constitution. Similarly, the "unnecessary and wanton infliction of pain" by correctional officials on a prisoner violates the Eighth Amendment's ban on cruel and unusual punishment. Victims of these violations may seek damages as a remedy for their injuries. Finally, federal and state statutes criminalize conduct that meets the Convention's definition of torture, as well as most conduct likely to qualify as "cruel, inhuman, or degrading treatment or punishment," and other statutes provide additional causes of action for victims of state violence.

The prohibition of torture under U.S. law is so clear that the U.S. State Department was able to state flatly in 1999 that

> Torture is prohibited by law throughout the United States. It is categorically denounced as a matter of policy and as a tool of state authority. . . . No official of the government, federal, state or local, civilian or military, is authorized to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate torture in any form. No exceptional circumstances may be invoked as a justification for torture. U.S. law contains no provision permitting otherwise prohibited acts of torture or other cruel, inhuman or degrading treatment or punishment to be employed on grounds of exigent circumstances (for example, during a "state of public emergency") or on orders from a superior officer or public authority . . . .

As with international law, in short, U.S. law seems to leave little room for coercive interrogation, even of suspected terrorists.

Sandy Levinson recently observed that these layers of international, federal, and state law "appear to establish a Ulyssean contract to be honoured whatever the lure of the sirens." But if we dig a bit deeper, we find greater complexity.

The first complexity – as Levinson noted – is that many of the countries that have laws against torture and that have signed multilateral agreements against torture have engaged in torture notwithstanding those laws. We now know that the United States has joined the ranks of these countries with its treatment of some detainees at the Abu Ghraib prison in Baghdad. The most plausible explanations for this kind of conduct are that policymakers in these countries do not believe that the prohibition of torture has the status of law, that they simply care little about legal niceties, or that

they believe their conduct was not torture or was justified under the circumstances.

This last possibility leads into the second and third complexities of the law of torture. There are good reasons not to like the restricted definition of torture found in the Convention. I prefer something more expansive that acknowledges the fact that torture also includes an element of escalation, or the risk of it, so that seemingly mild mistreatment can still be torture if the victim reasonably believes worse will follow. But any definition of torture and of the distinction between torture and other categories of legal or illegal treatment must be applied to specific facts, which in turn will create ambiguity and controversy.

The most famous case to examine the difference between torture and cruel or inhuman treatment is Ireland v. United Kingdom. In the early 1970s, British forces subjected suspected Irish Republican Army (IRA) members to wall-standing for hours, hooding, continuous loud and hissing noise, sleep deprivation, and restricted food and water. (Wall-standing is when the victim is forced to stand spread-eagled on one's toes with fingers on the wall above one's head, so that the body weight is on the toes and fingers.) The European Commission of Human Rights found that these practices, used together, amounted to torture, but the European Court of Human Rights reversed by a divided vote. The court found that the British practices were inhuman and degrading but did not rise to the level of torture. The court explained that the difference between torture and inhuman treatment "derives principally from a difference in the intensity of the suffering inflicted." Because torture is an "aggravated" form of inhuman treatment that carries "a special stigma," it should be reserved for practices that exhibit a "particular intensity and cruelty."

Israeli interrogation practices – prolonged standing or uncomfortable sitting positions, tight hand or ankle cuffing, loud noise, sleep deprivation, hooding, cold rooms, and violent shaking – have also been the subject of significant international dispute. U.N. officials concluded that these practices are torture, but with the exception of shaking, Israel's conduct was not much different from that of the U.K. In fact, an Israeli commission investigated the use of these practices and concluded that they were not torture, although it cautioned that interrogators should be careful not to cross the line from permissible physical force to impermissible torture.

The Supreme Court of Israel ultimately prohibited most of these coercive practices, not because they were torture, but because they were not authorized by law. The court described several of these methods as degrading, harmful, or unnecessary, but never suggested that they met any legal definition of torture. Significantly, the court also ruled that a

justification defense would be available in individual criminal prosecutions of interrogators for using these methods.

The British and Israeli cases highlight the third complexity in the law of torture. The Convention bars torture absolutely. "No exceptional circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." By contrast, the Convention requires states to "undertake to prevent" cruel, inhuman, or degrading treatment, but the "no exceptional circumstances" provision does not explicitly apply. Thus, if Britain's and Israel's former practices were not torture, an exceptional circumstances justification could be available even if the conduct was cruel and inhuman.

Put differently, the Convention sets up a classic common law matching game. Is a particular form of coercion more like torture or more like cruel and inhuman treatment? If the former, it is illegal and unjustifiable. If the latter, it is also illegal but possibly justifiable. The consequences of this distinction provide one reason why officials will consistently deny using torture while sometimes admitting to practices that are clearly coercive. So long as they are not "torturing," their conduct, however reprehensible, may be justifiable under the circumstances. The word torture thus carries not just a moral stigma, but also a very real legal consequence.

The laws of individual countries add further complexity to the law of torture. For example, in the course of consenting to the Convention, the United States Senate made two important changes to the definition of torture. Torture, according to the Senate, is not the intentional infliction of severe pain, but the *specific* intention to do so. In criminal law terms, an interrogator must do more than engage in an intentional act that causes severe pain. To engage in torture, an interrogator must act with the purpose of causing severe pain. Second, the Senate narrowed the definition of mental harm by requiring that it be prolonged as well as severe, and by limiting the kinds of conduct that could create prolonged and severe mental suffering. This restricted definition also appears in federal legislation that implemented the convention.

Finally, the Senate tried to give clearer content to the category of cruel, inhuman, or degrading treatment. According to the Senate, "the United States considers itself bound by the obligation . . . to prevent 'cruel, inhuman or degrading treatment or punishment,' only insofar as the term . . . means the cruel, unusual and inhuman treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." In other words, the Senate declared that the Convention banned conduct that was already unconstitutional.

Notably, the Senate's statement that the definition of cruel, inhuman, or degrading treatment must be tied to the U.S. Constitution gives federal courts the ultimate power to define the United States's obligations under the Convention. A series of cases assessing the voluntariness of confessions under the Fourteenth Amendment suggests that these obligations could be broad. But the Supreme Court's recent decision in *Chavez v. Martinez* suggests a much narrower approach. Chavez was a damages case arising out of a 45-minute emergency room interrogation of a severely wounded man – shot by police during a fight – who though he was dying. Three of the Court's nine justices said that a claim for damages resulting from a coercive interrogation is governed by the "shocks the conscience" test, which considers whether the conduct at issue was not only shocking but also "unjustifiable by any government interest." They declared that "the need to investigate whether there had been police misconduct constituted a justifiable government interest given the risk that key evidence would have been lost if Martinez had died [without telling] his side of the story." At least two other justices also appeared to endorse this standard although they did not say how it would apply to a specific case.

The critical point about *Chavez* for our purposes is that a majority of the Court embraced a necessity standard for judging the constitutionality of coercive interrogation. Under the shocks the conscience standard, if a sufficient government interest exists, then the victim has no constitutional right against coercive interrogation. Thus, for the second time – the first was in the distinction between torture and cruel, inhuman, or degrading treatment – we see the pressure created by necessity. At least some coercive practices that would otherwise be illegal under international law or unconstitutional as a matter of U.S. law can be justified if the state can articulate a good reason for using them on a particular person.

One last point about U.S. law. Necessity also surfaced in the infamous March 2003 memo prepared by the government's Working Group on Detainee Interrogations. The Working Group used necessity in the two ways I highlighted in my discussion of law's malleability. First, it expressly recognized necessity as a defense to criminal liability, so that an official who used torture would be able to raise a necessity defense. Second, in a long section, the Working Group contended that the commander-in-chief power vested by the Constitution in the President of the United States in effect frees the President from the irritation of federal criminal law. Put clearly, the necessity of successfully exercising the commander in chief power in time of war – including the war on terror – excuses or justifies the President, in advance, from compliance with federal law.

In short, the seemingly absolute prohibitions of torture in international and U.S. law have hidden ambiguities and exceptions, which in turn create space for argument and manipulation. The most significant of these is the idea of necessity as a criminal defense and as a justification for state violence. Despite our collective effort to bind ourselves to the mast, the siren call of torture has worked its way into the law. Even worse, and even for those, like me, who are skeptical about an absolute ban, law has failed to control the conduct of state actors.

5. Assessing Necessity

I want to finish with a few thoughts about necessity and the conduct of U.S. forces overseas. Necessity or, as it is sometimes called, justification is a well-established but perennially controversial idea. Think of it as the essential safety valve that makes the rule of law possible. Yet the safety valve proves hard to constrain. Necessity usually turns on the balance of harms and interests, and this kind of weighing is never as easy or as rule-bound as the metaphor pretends.

The application of necessity to coercive interrogation provides a good demonstration. First, we must ask whether necessity can ever justify coercion, even torture. The easy answer is "no." But I don't think the answer is so easy. In a situation in which coercion provides the last remaining chance to save a large number of lives in imminent peril, can we so easily hold to an absolute ban? What would any of us do if torture could save the life of a kidnapped parent, lover, or child? As with other crimes, the definition of torture could include the possibility, however remote, of justification in individual cases.

So much for a general answer. What about the conduct of U.S. forces in Afghanistan and Iraq? The photographs from Abu Ghraib and other reports demonstrate that much – perhaps most – of this conduct amounts to cruel and inhuman treatment and in some cases rises to the level of torture. Is there a sufficient justification for these practices?

The answer here is clearly "no," for several reasons. First, the conduct of U.S. forces had purposes that went beyond foiling future acts of terrorism, such as learning who was involved in or provided support for past attacks, destroying entities that support terrorism, and intimidating or pacifying prisoners. These purposes cannot justify torture so long as preventing imminent harm remains a requirement of necessity. The same is true of cruel, inhuman, or degrading treatment. Although the level of necessity would be lower for what international law defines as a lesser harm, general claims of need are not sufficient. The necessity argument should

attain meaningful weight only when we have information about a specific attack.

Second, even where the purpose of interrogation is to prevent future attacks, physical mistreatment can not receive a blanket justification. The future almost surely will bring more terrorist attacks on the United States and its allies, but without firm suspicion that a particular individual has specific knowledge about specific, imminent attacks, coercive interrogation should not be an option. The U.S. military appears to have adopted a policy of physical coercion that applies to large numbers of detainees who almost certainly lack specific knowledge of future attacks. We have mistreated these detainees because they *may* have significant information, because they are hostile to us, or simply – and most distressingly – because we can.

Third, even if an official believes that a prisoner has significant information, coercion does not immediately become available. Necessity also contains an idea of escalation. Except under the most extreme circumstances, coercion must be a last resort after other efforts fail, not a routine practice and certainly not a means of "softening up" a prisoner. To have any hope of being justifiable, torture must be the exception, not the norm. Yet accounts of U.S. practices suggest that cruel, inhuman, or degrading treatment was the norm and that torture became a viable option in many cases.

Finally, if we take up the broader idea of necessity as a source of state power and not just a defense, the conduct of U.S. forces remains unjustified. A great many theorists accept some form of the proposition that executive officials may act outside the law in certain instances, and this power arguably includes the ability to use torture. Yet even if that proposition is true, it does little to justify Abu Ghraib. U.S. forces did not face an emergency situation that could not be addressed in any other way. Their conduct is legitimate only if the idea of emergency power is a synonym for executive expediency. Some officials of the Bush administration have come quite close to this position, but we must reject it if we are to give law any role in constraining state violence.

Where does this leave us? We can conceive of a necessity exception to the law of torture, and we can be pretty certain that no reasonable exception could justify the conduct of U.S. forces in Afghanistan and Iraq. Perhaps, then, my discussion of necessity shows it to be a sensible approach to regulating state violence. In theory, that is, we can admit an exception to the prohibition of torture without undermining the values that support that prohibition. Yet the malleability of necessity raises the possibility of unwarranted expansion and abuse, especially when used to justify state power instead of merely as a criminal defense – as seen in the memoranda prepared by U.S. officials. The line from the rhetoric of war and toughness, to the

debates of policymakers about necessity and other doctrines, to the actions of troops on the ground, is clear to all but the most blinkered partisan of U.S. power.

If ideas of necessity as a justification for coercive interrogation helped give the green light to the horrific treatment of prisoners by U.S. forces, then we have to rethink the value of necessity. Does admitting the possibility that coercion can be justified provide enough benefit to outweigh the harm that it helps create? I worry that it does not, particularly in the context of an imperial power exercising its military might abroad. But what is the alternative? We could try to do a better job enforcing an absolute ban on physical mistreatment, but then what about cases where coercion would truly be justified? Do we sacrifice lives by adhering to the principle? If an official violates the principle and saves lives, do we brand that person a criminal? Yet if we fail to enforce the absolute principle, aren't we back to the necessity exception?

The unfortunate answer, I suspect, is neither real adherence to the principle nor a rigorous analysis of what a necessity exception should look like. Either option requires public debate and hard choices. Rather, we will be like Hans Castorp as he heads for home, his dream fading in his mind despite his vow never to forget it. We will remember Abu Ghraib as a crime, as a terrible episode, but the larger truth it tells about the violence at the heart of our societies will fade. Indeed, I suspect that the larger truth will fade from our minds because we want it to. We prefer that our coercive practices be at best an open secret, a topic for spy novels rather than for the nightly news. We prefer to be silently complicit in a corrupt bargain, letting our governments do what they "have" to do while we refrain from asking too many questions. Over time, the harm to our body politic of this approach will rival or exceed the harm to the bodies of the detainees at Abu Ghraib.

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Responsibility for Atrocity: Individual Criminal Agency & the International Criminal Court

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Abstract: This paper is concerned with the shift in international political and legal discourse away from assigning responsibility for political violence to states, and towards assigning criminal responsibility to individuals. The most significant example of this is the establishment of the International Criminal Court (ICC). The ICC is premised on assumptions that there are universal moral standards which apply to human behaviour and that through the assignation of responsibility to individuals and the infliction of punishment according to these standards, the international criminal justice system (ICJS) can deter crime, end conflict and bring about justice. The paper argues the system is unlikely to achieve these goals through the innovation of the ICC. The reasons for the likely failure of the contemporary ICJS are: the illegitimate move from state civil agency to individual criminal agency within international legal discourse; the limited and internally contradictory conception of international agency necessary to sustain this move; and the uneasy relationship between morality, politics and law conceived by the framers of international criminal law. The paper ends by considering the implications of the ICC in terms of the stated goals of the Court, particularly its role in enabling state violence through the ascription of responsibility to individuals[1].

Keywords: International Criminal Court; international law; individual responsibility; war crimes.

1. From State To Individual Agency

Past efforts by international society to control violence with law have focussed on the state as agent, however since the Second World War and its attendant moral horrors, the approach to controlling violence has changed. Rather than structuring the relationships between states to deter conflict and suffering, the focus of international law has turned to the individual. This concentration on the role of the individual has been accompanied by a move away from narrating international violence as civil wrong and towards conceptualising it as international crime. Both the moves from state to individual and from civil to criminal responsibility pose problems for the international political theorist which will be examined below.

The characteristic use of international law is to regulate the interactions between states, with breaches of the law being classed as illegal but not criminal acts – analogous to civil wrongs within domestic

legal systems. States are the originators of international law and this law can be seen as a body of rules made freely between, and binding upon, equal and sovereign bodies[2]. International criminal law is often justified in a similar way - international jurisdiction is seen as an extension, by delegation, of state power to determine criminal law norms and to punish transgressors. Sovereign states remain the originators of law and individuals its subject. The behaviour proscribed by international criminal law, according to this argument, is proscribed within all or most national criminal codes, and is recognised universally as being heinous.

The analogy between domestic and international civil legal systems seems reasonable. Civil laws govern relationships between nominally equal bodies judged to be in contractual relations with each other. The move upwards from domestic to international sees the contracting bodies change from individuals or firms to states, and the guarantor of the contracts changes from state to confederation of states or international institution enabled by states. However, the domestic and international spheres are not so easily reconciled with respect to criminal law for two principal reasons: the cultural foundations of the domestic criminal system and the necessity of a particular type of agency.

Domestic criminal law sees a vertical relationship between the subject of the law and its enforcer, and concentrates on punishing individuals for breaching societal moral codes. Criminal behaviour is an acute form of deviance (deviance being 'conduct which does not follow the normal, aggregate patterns of behaviour.')[3], judged to be so serious by the representatives of the society as to merit punishment. Punishment is needed to protect individuals or, for the communitarian theorist, to protect the common life of the community, by deterring future criminal action. Domestic criminal law therefore rests on a system of shared norms and values or an idea of natural law, and punishment is justified in terms of these norms.

The concept of international crime was until recently quite different from that of domestic crime. For centuries the term has been used to describe crimes which are 'offences whose repression compel[s] some international dimension'[4] or which have taken place in the context of international armed conflict. However, the type of crime which prompted the establishment of the International Criminal Court is different in character and much more similar to the concept of crime just discussed. New international crime is international not because of the cross-border co-operation necessary to control it, but rather due to its apparently universal moral repugnancy. International criminal law is no longer limited to covering acts committed in times of international armed conflict. According to the Rome Statute, genocide, crimes against humanity and war crimes can take place in the context of internal armed conflict, and genocide and crimes against humanity can also take place in times of

peace. A common or universal morality is therefore assumed to justify the criminalising of certain actions and the imposition of punishment by an international body. As will be discussed within section 3 of this paper, international society does not have a coherent idea of natural law or shared moral code, so it is difficult to see how it can be justified in the same way as its domestic counterpart.

Alongside this assumption of a shared cultural context, domestic criminal law envisages a particular type of agent. A traditional move from the domestic to international level would see states being punished for breaching the morality of the society of states. However, criminal law requires not just for certain actions to have taken place (*actus reus* or guilty action) but also for the perpetrator of the acts to have had a particular state of mind or intention (*mens rea* or guilty mind). Nothing in domestic criminal law allows us to conceive of states as having *mens rea* as it is a psychological property that can only be held by an agent with a mind. Thus, international criminal law requires a model of the *individual* international agent.

Having illustrated the difficulties in making the move to individual criminal agency and responsibility in the international sphere, I will now concentrate on the conception of individual agency necessary to sustain international criminal law.

2. Characteristics of Individual Agency in the Rome Statute

What follows is an examination of the Rome Statute that seeks to identify and critique the principal clauses which conceptualise the perpetrator and the victim of international crime. I argue that the Statute presents an internally inconsistent concept of the individual: at times seeing the person as a free and rational actor, independent of social role and culture, but conversely requiring that some persons (the victims) are entirely defined by their social role or group membership. The implications of this confused conceptualisation will be explored towards the end of the paper.

A. The Perpetrator of International Crime

The fact that the Rome Statute follows the Nuremburg philosophy that men, not abstract entities (i.e. states) commit crimes against international law is not in doubt. Article 25 of the Statute, entitled 'Individual Criminal Responsibility' explicitly declares that the Court shall have jurisdiction over individuals ('natural persons') and that '[a] person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.'[5] However, the nature of a person is not elaborated further, and it is necessary to look at the detail of the Statute, particularly at Part 3: General Principles of Criminal Law, to understand how the Court

conceptualises the perpetrator of international crime. I will examine the requirement of *mens rea,* the defences allowed and the rules outlining mitigating or aggravating factors of crimes with regard to punishment to establish the qualities assumed to be held by the international criminal.

As outlined in the previous section of this paper, a crime involves both a certain action (*actus reus)* and a particular state of mind or intention (*mens rea)*. Article 30 of the Rome Statute concerns *mens rea* and sets a high standard for the mental element of crimes. Article 30 specifies the requirement as follows: 'Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.'[6] Intent is defined as having two necessary parts – one which relates to conduct and another to consequence. Thus, a person has intent according to Article 30 where: '(a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.'[7] Finally, to fulfil the mental requirement, the accused must have 'knowledge' of the material elements of the crime: 'For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.'[8] Most Rome Statute crimes also have the necessary *mens rea* written into the definition of the crime. Genocide must be committed with 'intent to destroy' and crimes against humanity with 'knowledge of the attack'. Many of the war crimes listed have 'wantonly', 'wilfully' or 'treacherously' written into the definitions.

The requirements for *mens rea* are well specified within the Statute, and signal the high level of intent a person must be shown to have had in order to be convicted of an international crime. This intent is a quality closely bound up with the conception of a person as a sovereign, bounded unit, whose actions and desires are under the control of his reason – a view of the person that appears throughout the Statute. Unfortunately, proving the intent a person had at the time of an action is, in practice, tremendously difficult to do, therefore inference and legal fictions tend to be used within domestic systems to satisfy the *mens rea* requirement. For instance, it is assumed that all agents know 'the law' (Barnes notes the irony of this situation, given the inability of lawyers to agree on what many given laws mean[9]) and that all agents know whatever a 'reasonable person' would know in their circumstances. This use of inference and fiction is likely to be a feature of prosecutions under the International Criminal Court, and may either allow the concept of the perpetrator as rational, intentional being to stand unchallenged or lead to an inability to prosecute on the basis that the intent required is too extensive and specific to be satisfactorily inferred.

The defences which can be offered before the Court also offer significant clues to the type of individual the Court envisages as responsible for international atrocities. Articles 31, 32 and 33 of the Rome Statute cover defences which perpetrators can offer. Article 31, 'Grounds for Excluding Criminal Responsibility', outlines the defences of insanity, intoxication, self-defence, duress and necessity. The concept of the reasonable person is evident again very strongly here. Under the Statute, a person is not deemed to be criminally responsible if, at the time of their conduct, they suffered from a mental disease or defect that destroyed their capacity to appreciate the unlawfulness or nature of their conduct, or capacity to control their conduct to conform to the requirements of law. Equally, they are not criminally responsible if they were in a state of intoxication sufficient to destroy their capacity as above, unless they became 'voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court'[10]. A 'normal' person's capacities to appreciate the kind and quality of their conduct, and to control that conduct, are taken for granted here, and the lack of these capacities is seen as being caused by either disease, defect or drugs. Thus the default setting for the notional international agent is one of contemplation and control. This element of rational capacity appears again in the following clause, which details the range of actions allowable in self-defence. Under the Article 31 (1) c of the Rome Statute, a person is not criminally responsible if they act *reasonably* to defend themselves or another person or, in the case of war crimes, essential property, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. Essential property is limited to that which is essential for the survival of the person in question or another person, or which is essential for accomplishing a military mission. The agent must therefore make judgments on the proximity and legitimacy of the force facing them, the degree of danger posed by that force, the responses which would count as proportionate to the force, given the means available to them, and, in the case of defence or property, the importance of the property to be defended in terms of human survival or military tactics. There is no room in this clause for instinctive, intuitional or emotionally propelled action, even though the likelihood of finding time for all of the necessary rational calculations is small given the imminent nature of the danger required by the Statute.

The final clause of Article 31 (1) covers the defences of duress and necessity. Clause (d) excludes from criminal responsibility conduct which is 'caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, [where] the person acts necessarily and reasonably to avoid this

threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided.'[11] Such a threat may either be made by other persons (duress) or constituted by other circumstances, e.g. natural occurrences, beyond that person's control (necessity). Assumptions within this clause are particularly problematic. In an effort to allow for action where an agent is seen as having no viable moral choice, the drafters of the Statute set up an impossible situation where the agent must act both necessarily (i.e. without choice, deterministically), but also reasonably (i.e. under rational control) and with specific intent (not to cause greater harm than they are attempting to avoid). There is no satisfactory account of the individual that could reconcile these demands, thus the defences of duress and necessity seem impossible to apply.

Article 33 covers the defence of 'Superior Orders', a defence which was not allowed in the Nuremburg Charter, nor in the International Criminal Tribunal for the Former Yugoslavia (ICTY) or International Criminal Tribunal for Rwanda (ICTR) statutes. The Rome Statute allows for the defence in a very limited and specific set of circumstances, and then only for war crimes (and, arguably, aggression). Article 33 states first that the presumption of the Court is in favour of holding the defendant criminally responsible ('The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless …'[12]) then sets out the three conditions which must be fulfilled for the defence to be considered:

> '(a) The person was under a legal obligation to obey orders of the Government or the superior in question;
> (b) The person did not know that the order was unlawful; and
> © The order was not manifestly unlawful.'[13]

The Article then goes on to rule out the Superior Orders defence for two of the crimes covered in the Statute: 'For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.'[14] The standard of action here is extremely high, and the wording suggests that Superior Orders will rarely be a successful defence before the Court. Many actors will fulfil condition (a), but few will be able to satisfy (b) and ©, except perhaps for the less heinous of war crimes listed.

The position an individual holds in relation to their state does not offer any possibility for a defence. Article 27 makes clear that official capacity is irrelevant both to criminal responsibility and to mitigation of sentence under the International Criminal Court, and that any special rules or immunities which traditionally attach to the official capacity of a person, under domestic or international law, will not prevent the Court

exercising its jurisdiction. The drafting of this Article was uncontroversial at the Rome Conference.

The defences allowed within the Rome Statute reinforce the view of the individual gleaned from the requirements of *mens rea*. The 'ideal type' perpetrator of international crime is reasonable, rational, intentional and knowledgeable, and his actions are entirely under his volitional control. His social origin and position, particular capabilities and personal circumstances are irrelevant. Only in the discussion of punishment are these issues considered, and it is to this I now turn.

The correct punishment for international criminality according to the Rome Statute is imprisonment: Article 77 lists '[i]mprisonment for a specified number of years, which may not exceed a maximum of 30 years; or […] [a] term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person'[15] as the two principal sentencing options open to the Court. Article 78 gives the following guidance on sentencing: 'In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence (Rules), take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.'[16] Rules[17] outlines a range of possible mitigating or aggravating factors, additional to the gravity of the crime and the individual circumstances, many of which are relevant to the consideration of what constitutes an individual agent according to the Statute. Rule 145 states that the Court should give consideration to: 'the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person.' Rule 145 goes on to list substantially diminished mental capacity or duress and the convicted person's conduct after the act as mitigating circumstances, and relevant prior convictions, abuse of power or official capacity, commission of the crime where the victim is particularly defenceless or there are multiple victims, commission of the crime using particular cruelty and commission of the crime for any motive involving discrimination[18] on the basis of generalized or social characteristics as aggravating circumstances.

It would seem, therefore, that social or group factors *are* relevant in the field of punishment for international crime. The Court is instructed to take into account the degree of *participation* and the age, education, social and economic condition of the convicted person. Again, an 'ideal type' agent can be discerned – a sort of noble savage who treats his victims as equals, doesn't discriminate, doesn't abuse power, picks fair fights with victims who can defend themselves and doesn't have the age, education, class or money to know better.

B. The Victim of International Crime

In the rhetoric of the ICJS, the victim of international crime is often conceived of as humanity as a whole, with humanity then being entitled (or even required) to prosecute the perpetrators. For my purposes in this paper, it is more instructive to examine the victims as conceived within the descriptions of the Statute crimes, and in the sections on punishment. I intend to show that the victim of international crime is necessarily socially located, entirely in contrast to the perpetrator who is modelled as having no relevant social ties.

Prosecutions at the International Criminal Court will rely on evidence of harm to individual persons, yet genocide and crimes against humanity as defined in the Rome Statute *could not take place* if individuals do not have identities as members of groups. Individuals may be victims of murder or serious bodily or mental harm, but they cannot by themselves be victims of genocide or crimes against humanity. A genocide must by definition take place against a group: 'For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group …'[19] Equally, crimes against humanity is defined by the Statute as meaning any of the qualifying acts 'when committed as part of a widespread or systematic attack *directed against any civilian population*, with knowledge of the attack'[20] [italics added].

This is not to say that all groups count as relevant victims under international law. As discussed in connection with *mens rea* requirements earlier in the paper, the Statute has difficulty conceiving and defining relevant groups. A person has not committed genocide, for instance, unless the Court makes the political decision that the group the person intended to destroy was a 'proper' group. Political and social groups were explicitly rejected by the framers of the Rome Statute as possible targets of genocide, leaving a series of accepted groups that are assumed to be well bounded and stable over time, a lot like the individuals postulated as their attackers.

Characteristics of the victim can also be discerned in a reading of Rule 145 of Rules, in which the Court is instructed to consider the degree of harm caused to victims *and their families,* and in assumptions about the relevance of motive to punishment. The Rome Statute does not cover motive in detail but is likely to follow the ruling made by the ICTY in Delalic[21], in which the group membership of the victim can be seen again to be of relevance. Aggravated punishment is required when the accused is seen to be taking revenge on an individual *or* the group to which they belong, and lesser punishment is merited when the perpetrator showed compassion toward the victim *or* the group to which they belong. The relationship of perpetrator to victim is somehow complicated by group membership: the actions of perpetrator towards the group that the victim

belonged to are seen as possible to separate from the actions of the perpetrator towards the individual victim.[22]

Groups have complex roles in the Statute: national, ethnical, racial or religious groups (assumed to be well bounded and stable over time) can be the specific victims of crimes, and are in fact required to be the victim for the successful prosecution of genocide and crimes against humanity. These groups are of course comprised of individuals, yet something aside from the sum total of people, something shared between the current members of the group and their historical forebears, is seen as relevant to their victim status. The group membership of the individual victim is paramount in the prosecution of the two most important international crimes, and of relevance in the determination of punishment, yet the group membership of the individual perpetrator is formally irrelevant to the Court and judged to be irrelevant to the perpetrator when he plans his actions. This confused conception of the individual as both a pre-social criminal and simultaneously a socially embedded victim is a serious issue within the ICJS, the implications of which will be examined in Part E).

3. The Relationship between Morality, Law and Politics

During the First World War there was significant demand in Britain for 'Germany' to be punished for making war (in breach of international treaties) as well as for individual Germans to be tried for war crimes. The US was hostile to this idea, arguing that responsibility for breaches of treaties and crimes against the laws of humanity were an issue for morality and not law. This view of the limits of law is still popular with some in US politics, and with many in the field of International Relations, but has long since been superseded in the dominant international criminal law discourse by a view that law is a way to realise morality across borders. International criminal law on this view represents a universal declaration of right and wrong in the international moral sphere. This section will argue that international criminal law represents the results of negotiations between states rather than a universal moral code, and that as such it is inherently political. The discourse may seek to deny a role to the political, but it is weakened by its inability to acknowledge the necessity of politics in the field of international justice.

The International Criminal Court is located in political time and geographical space. The idea for such a Court gained popularity in the 1950s, but the configuration of the Cold War international system meant no real progress towards the Court was made for more than thirty years. Then, when the political context changed, new possibilities for international justice began to be pursued in earnest. Schabas argues that the situation in the former Yugoslavia in the early 1990s "provided the laboratory for international justice that propelled the agenda [for the

creation of an International Criminal Court] forward."[23] I will discuss briefly here the format of the Rome Conference from which the Rome Statute emerged, and highlight the political nature of the negotiations.

In June 1998 delegates from more than 160 states attended the Diplomatic Conference of the Plenipotentiaries on the Establishment of an International Criminal Court. They were joined by representatives from a range of international institutions and hundreds of non-governmental organisations. The majority of the work of the Conference was done in working groups charged with looking at aspects of the formation of a Court such as General Principles, Procedures and Penalties. Provisions of the Statute were adopted 'by general agreement' in the working groups. In an example of the disdain for politics found within international law, voting was not allowed within the groups – provisions had to be accepted by consensus. This process, however, must still be seen to be political. Provisions were negotiated; consensus was reached through bargaining and trade off. Two examples of this process of compromise are the positions taken by the conference on command responsibility and the death penalty. There was a good deal of support at the Conference for the proposal to extend the principle of command responsibility to civilian commanders, but China opposed this very strongly. The US negotiated a compromise position, with civilian command responsibility possible, but requiring a higher standard of disregard. The issue of whether or not the International Criminal Court should be able to sentence perpetrators to death was the cause of much greater conflict. A group of Arab, Islamic and Caribbean states, along with Singapore, Rwanda, Ethiopia and Nigeria argued strongly in favour of its inclusion. After much negotiation, the final Statute does not allow for the death penalty to be imposed by the Court itself, but the principle of complementarity (whereby national courts take precedence in prosecuting crimes covered by the Rome Statute if they are willing and able to do so) means that the national courts of State Parties can impose death sentences if their domestic legal systems allow for it.

The history of the crime of aggression within the Court formation process is also illuminating. The Rome Conference agreed that aggression should be part of the Court's subject matter jurisdiction, but could not agree on a definition of the crime or on an appropriate mechanism for judicial determination of whether the crime had taken place. The Conference eventually agreed that the crime should remain in the statute, and that the Court should have jurisdiction over it when it is defined and its scope designated 'in a manner consistent with the purposes of the statute and the ideals of the UN'[24]. Germany and Japan were particularly keen that aggression be included, and found it hard to comprehend the seeming demotion of a crime defined as the supreme international crime at Nuremburg, just fifty years before. As well as struggling to define aggression, the Rome Conference also had to contend with the right of the

UNSC, under Article 39 of the UN Charter, to determine situations of aggression. This suggests that an international court could only prosecute in cases where the UNSC has stated that aggression has taken place. It is clearly very problematic that a court should have to leave the determination of a central factual issue in a case – i.e. whether the crime being prosecuted has actually taken place – to a political body, yet no way around this could be found at the conference.

These examples show that the Conference was a place of politics where law was made, rather than discovered through illumination of a common moral code. The most difficult questions in the establishment of the Court, those concerning jurisdiction, the core crimes, the trigger mechanisms for prosecution and the role of the UNSC, were not even publicly debated for the majority of the conference (although a good deal of informal negotiation took place). Instead, Phillipe Kirsch, Chair of the Committee as a Whole, handled these issues personally. He drew up a proposal, but chose not to circulate it until the 17th July – scheduled to be the final day of the Conference. The gamble paid off to the extent that many supporting states were afraid that disagreement over more minor points may lead to an unravelling of the grand compromises already achieved. However, Kirsch's proposal was strongly opposed by the US, who forced a vote at the final session, thus preventing the hoped for consensual adoption of the Statute. 120 states voted in favour of the Rome Statute, 21 abstained (including several Islamic, Arab and Caribbean states) and 7 voted against. A majority prevailed and the Statute was adopted but through a political rather than legal process.

One of the most difficult questions the Conference had to face was the role of the UNSC and the relevant provisions in the Statute remain highly controversial. As noted above, the UNSC has a significant role in determining aggression. Another critical concern at the Conference was the ability of the Council to interfere with the work of the Court. States who were not Permanent Members of the Council did not want the international legal process to be politicised. Permanent Members argued that decisions over possible criminal prosecutions should not be taken at a time that negotiations to promote international peace and security were underway. The compromise reached allows the Council to prevent the Court from exercising jurisdiction by passing a positive resolution, renewable annually. This measure is called 'deferral' but appears that it could be used to permanently prevent the International Criminal Court trying a particular case, through continued renewals. The scope of the UNSC to block the work of the Court is limited to some degree by the requirement that to prevent the Court from investigating or prosecuting a case, the Council must be acting pursuant to Chapter VII of the UN Charter, i.e. they must determine the existence of a 'threat to the peace', a 'breach of the peace' or an 'act of aggression'. However, the success of

the US in forcing the Council to pass in 2002, and renew in 2003, Resolution 1422, which guaranteed that non-State Parties contributing to UN forces were exempt from the Court, by threatening to veto all future peacekeeping operations demonstrates a genuine stalemate between Council and Court. The US failed to renew 1422 in 2004, but only because they lacked leverage due to the Abu Ghraib prisoner abuse scandal.

The format of the Rome Conference attempted to factor politics out of the creation of international criminal law, but the resultant Court may be weakened by its inability to acknowledge the necessity of politics in the field of international justice. There is no shared moral code upon which to ground international criminal law, so politics is an inevitable feature of the system. It may also be a useful feature, as is only through politics that difference can be successfully negotiated (demonstrated at the Rome Conference, where an innovative Court was created through compromise and bargaining). There is a danger in treating the legal rules that resulted from a political process as if they are expressions of a universal moral understanding; somehow above the world of politics, for doing this tempts one to overlook the very real difficulties of reconciling law with power in the international sphere.

4. Implications of the Conceptualisation of Agency within the Rome Statute

Customary international criminal law since 1945 has not prevented genocide, stopped wars or ended injustice and impunity. At the time of writing, the ICTR had convicted 18 people and acquitted one, since the first trials started in January 1997. The ICTY had tried 46 accused, of whom two were acquitted by the Trial Chamber and three have had their convictions overturned by the Appeals Chamber. Considering the scale of the atrocities these tribunals were set up to confront, this number suggests that justice is far from being done. The innovation of the International Criminal Court, with its confused conception of the agent of international violence, and its fear of politics and power, is unlikely to fare any better. In the final section of the paper I will begin to explore the implications of the particular conceptions of agency within the Rome Statute as they impact of the goals of the Court.

The official website of the Rome Statute of the ICC lists the following as reasons for the establishment of an international criminal court[25]: to achieve justice for all; to end impunity; to help end conflicts; to remedy the deficiencies of ad hoc tribunals; to take over when national criminal justice institutions are unwilling or unable to act; to deter future war criminals. These are noble goals, but the problems highlighted in this paper suggest that the International Criminal Court and its attendant international criminal law will not achieve the most critical of them. The Court may remedy some financial and practical deficiencies of ad hoc

tribunals, and it may take over in a small number of cases where national criminal justice institutions are unwilling or unable to act. However, I argue below that it will not achieve justice for all: the vast majority of war crimes will remain unpunished, and it will not deter future crime.

The possibility of the Court achieving justice for all is encouraged by the illusion that the Court has the causes and perpetrators of the most serious incidents of international violence within its jurisdiction. In fact, the move from state civil to individual criminal agency has narrowed the focus of concern to exclude most suffering:

> 'By focussing on individual responsibility, criminal law reduces the perspective of the phenomenon to make it easier for the eye. Thereby it reduces the complexity and scale of multiple responsibilities to a mere background. We are not discussing state responsibility, we are discussing criminal law. We are not really discussing a crime of aggression, we are busy discussing a rape or murder. We are not really discussing nuclear weapons, we are discussing machete knives used in Rwanda. We are not much discussing the immense environmental catastrophes caused by wars and the responsibility for them, we are discussing the compensation to be paid by an individual criminal to individual victims. Thereby the exercise which international criminal law induces is that of monopolizing violence as a legitimate tool of politics, and privatizing the responsibility and duty to compensate for the damages caused.'[26]

An consequence of the development of the ICJS has been to frame violence which is seen as intolerable or 'atrocious' as the action of individuals, so rendering all violence which doesn't fall within the remit of the system, principally state violence or aggression (which is unlikely to ever be satisfactorily defined), as acceptable or legitimate. Yet it is states which bring about the situations of conflict in which much of this violence takes place.

The Court is also severely limited by its founding Statute as to the number of cases it can try. Most of the accused who appear before the Court will not be the direct perpetrators of crimes, but those who plan, organise and incite them. The Court will have to make judgments both between crimes, on the basis of gravity, and between persons, on the basis of the role they played in the crime, in order to manage its case load. The scale of the solution is far smaller than the scale of the problem.

This, however, is a backwards looking view. What of the final goal on the list – the deterrence of future crime? If the ICC is successful in deterring crime through assigning responsibility and punishing criminals

then the size of the Court machinery may in time be irrelevant. Unfortunately, the unproblematised move from domestic to international criminal law suggests that international criminal law will not prevent future atrocities, as the necessary societal conditions are not present, and the nature of international crime differs so considerably from that of domestic crime.

In contrast to domestic crimes, international crimes tend to be committed by ordinary people in extraordinary times. In the conclusion to their study of the Holocaust, Kren and Rappoport state: 'Our judgment is that the overwhelming majority of SS men, leaders as well as rank and file, would have easily passed all the psychiatric tests ordinarily given to US recruits or Kansas City policemen.'[27] International criminals cannot be identified by their dysfunction or difference to their fellow citizens. Their behaviour cannot be explained with reference to their economic or societal marginalisation. It is the circumstances they act in which are unusual. War is as far from the 'ordinary course of events' as can be imagined. Extraordinary circumstances may mean there are no guidelines or norms for individuals to apply, or that the norms applied change, and norms which promote stability or the safety of the group become more relevant. For instance, following the trial of William Calley for the My Lai massacre during the Vietnam War, a survey of the American public found that 51 % would follow orders if commanded to shoot all inhabitants of a Vietnamese village. Kelman and Lawrence (1972) who conducted the survey concluded that a substantial proportion of Americans saw Calley's actions as 'normal, even desirable, because [they think] he performed them in obedience to legitimate authority.'[28]

Finally, the International Criminal Court is unlikely to ensure that justice is done because it conceives of the individual as an international actor in a contradictory and unjust way. Victims and perpetrators of international crime are seen as different types of agent – one as socially embedded and the other as pre-social. This false dichotomy constructs our understanding of atrocities in a way that precludes us from seeing perpetrators as victims and vice versa. They are simply not constructed as the same types of human being, and this leads to conflict being viewed in dangerously simple terms: as the battle between innocence and evil. Yet the perpetrators of international crime are invariably playing particular roles, be it state representative, organisation member, follower of a particular ideology or member of the formal or informal armed forces. The Rome Statute virtually requires that the individuals it prosecutes be located in relation to others as organisers, leaders or instigators of the crimes within its jurisdiction yet denies the relevance of social roles.

I contend that it is impossible to understand any individual unless we understand his or her place in relevant groups. The idea of international criminality within the Rome Statute denies the importance of group

membership and thus misses much of the significance of the societal nature of the person – the effect of social roles; the enabling function of groups; the non-rational behaviour impelled by human social instincts.

5. Conclusion

The atrocities of the Second World War presented such a challenge to Western ideas of progress and civilisation that a response had to be found. Part of this response has been the elaborate construction of an individual international agent to hold responsible for international crimes. Necessary to support this construction is the fiction of a global moral community peopled by rational individuals who act freely according to a shared ethical code. This paper has argued that this shared ethical code is a fiction; questioned the move to individual agency; examined the concepts of perpetrator and victim within the Rome Statue; and exposed the contradictory nature of the idea of international agency contained therein.

To live successfully it seems that we do need to tell stories that explain what we see in the world and find patterns or predictability in it, and we often do this by asserting agency. If this is the case, one can certainly understand the need to develop convincing stories to explain the Nazi period in Europe and subsequent moral horrors as these events seem too terrible to be conceived of as accidental or as consequences of the normal workings of the international system. They had to be described as the work of voluntary agents, for then they could be punished and future atrocities could be avoided. Agency, responsibility and blame are thus ascribed not because it is in any way *correct* or *true* to do so, but rather because we feel it *necessary*. The contemporary international criminal justice system gives a vocabulary with which to structure and understand the world, which provides the illusion of control. This vocabulary – of the individual perpetrator doing violence to the innocent group – is seductive but ultimately flawed and, as such, will not result in the realisation of the stated goals.

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Notes

[1] This chapter is a shortened version of a more detailed work; therefore the argument is thinner in places than I would wish. Please contact the author before citing.

[2] Immi Tallgren, "The Sensibility and Sense of International Law," *European Journal of International Law* 13:3 (2002): 561-95. 562.

[3] Paul Denham, *Law: A Modern Introduction* (London: Hodder & Stoughton, 1992), 119.

[4] William Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2001), 21.
[5] Article 25 (2), Rome Statute 1998
[6] Article 30 (1), Rome Statute 1998
[7] Article 30 (2), Rome Statute 1998
[8] Article 30 (3), Rome Statute 1998
[9] Barry Barnes, *Understanding Agency: Social Theory and Responsible Action* (London: Sage, 2000) 12.
[10] Article 31 (1) b, Rome Statute, 1998
[11] Article 31 (1) d, Rome Statute, 1998
[12] Article 33 (1), Rome Statute, 1998
[13] Article 33 (2), Rome Statute, 1998
[14] Article 33 (3), Rome Statute, 1998
[15] Article 77 (1), Rome Statute, 1998
[16] Article 78 (1), Rome Statute, 1998
[17] Rules of Procedures and Evidence PCNICC/2000/1/Add.1, Rule 145
[18] Discrimination here refers to discrimination on the grounds gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.
[19] Article 6 Rome Statute 1998
[20] Article 7 Rome Statute 1998
[21] Prosecutor v Delalic et al, Judgement of the ICTY in case number IT 96-21-T (1998), para 1235
[22] It is noted that this ruling also allows group pressure as a mitigating factor. This type of pressure is not seen as mitigating within the Rome Statute.
[23] Schabas, vii.
[24] Schabas, 26.
[25] 'Overview' page on website of the Rome Statute of the International Criminal Court at http://www.un.org/law/icc/general/overview.htm
[26] Tallgren, 594.
[27] George Kren & Leon Rappoport, *The Holocaust and the Crisis of Human Behavior* (New York: Holmes & Meier, 1980).
[28] Richard Gross, *Psychology: The Science of Mind and Behaviour* (London: Hodder & Stoughton, 1991) 325.

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Suicidal Impunity

Elena A. Baylis

Abstract: Because it is obvious and inevitable that suicide terrorists cannot be tried and punished for their crimes, we tend to overlook the effect that this suicidal impunity has upon counter-terrorism policy and law. This talk explores and re-evaluates the role of law in addressing suicide terrorism in light of recent studies of the characteristics, goals and tactics of modern suicide terrorists.

Keywords: Terrorism, suicide terrorism, counter-terrorism, impunity, law, justice, September 11.

At the first public hearing of the United States Congress's commission to investigate the September 11, 2001 terrorist attacks, Abraham Sofaer testified on counter-terrorism measures by prior administrations. He told the commission:

> [T]he use of legal action to deal with terrorism led to the belief that the US was unprepared to defend itself vigorously, and could therefore be attacked with relative impunity. . . . President Bush has repeated the promise 'to bring terrorists to justice.' But he means Texas justice. . . . The notion that criminal prosecution could bring a terrorist group like Al Qaeda to justice is absurd.[1]

In the aftermath of the September 11th terrorist attacks, the United States declared itself "at war" with terrorism.[2] The U.S. government deliberately set about increasing the authority of the executive and decreasing the authority of the judiciary over terrorism, while simultaneously scaling back legal protections for civil liberties and due process as obstacles to that war. As decisions have been made about how to change the law, the influence of one factor in particular has been overlooked: the impunity of the September 11th suicide terrorists.

Because suicide terrorists inevitably have impunity from legal judgment, it seems that the ordinary criminal law has no role to play in fighting suicide terrorism. Rather, we tend to assume that the state must use either extraordinary legal means or military force to prevent suicide terrorism. But this is not true. It is a mistake about the nature of suicide terrorists themselves and about the nature of the risk they pose to the state.

Because of the particular characteristics, goals, and tactics of suicide terrorists, they can be fought with ordinary law. And furthermore, because of these qualities, the greatest threat they pose is not the immediate damage from their attacks, but two other risks. The first risk is

that the state will become involved in cycles of reprisals and counter-reprisals that are far more violent and destabilizing than any single act of terrorism. The second risk is that the state will destroy the legitimacy of its legal system by developing a system of collective blame rather than individual blame, and of punishment without judgment rather than punishment on the basis of measured judgment.

The victims of suicide terrorist attacks regard suicide terrorists as fundamentally evil. Suicide terrorists target innocent civilians, they cause mass casualties, and they are ruthless to the extent that they do not seem to value even their own lives, much less those of their victims. The natural reaction is to condemn and to seek revenge. But communities that are harmed by suicide terrorism need to look behind this image of evil and understand suicide terrorism, both so that the community can effectively oppose it and so that it can avoid falling prey to the very qualities that make suicide terrorism so horrifying.

1. Impunity

The inevitable impunity of suicide terrorists seems to eliminate any role for the law in addressing suicide terrorism. One of the law's primary functions is to deter violent acts. All terrorists, not just suicide terrorists, are undeterred by the mere prohibition of the law. Indeed, terrorists deliberately violate the law to make their voices heard. Society nonetheless maintains some hope that would-be terrorists will be deterred by the risk of punishment, if not by law's authoritative force. The suicide terrorist proves that he cannot be deterred by the threat of punishment either, for he embraces the most extreme punishment the law has devised: death.[3]

Another basic function of the law is judgment and punishment of those violent acts that it does not succeed in deterring. But unlike ordinary terrorists, suicide terrorists cannot be punished either.

Finally, the legal process is supposed to find and publicize truth. In the process of charging and trying a defendant, the state investigates and explains in public hearings what actually occurred, how, and why. This process fulfils the public need to understand catastrophic, violent public events like acts of terrorism. In the absence of such hearings, anger and frustration builds at the lack of an adequate explanation. Some September 11th victims reacted to this lapse by demanding a congressional commission, while others filed lawsuits to try to use the legal system to discover the truth.[4]

The law's failure to deter suicide terrorists, to punish them, or to provide a mechanism for explaining an act of suicide terrorism fosters the belief in the government and amongst the public that the ordinary law

cannot address terrorism. As a violent attack that is both public and political, all terrorism tends to spur a violent, and often extra-legal response from the state. Violence and the use of force seem to be more immediately effective than the law. They are also a more ordinary response to violence than is the law, which is an artificial state restraint on the natural tendency to seek revenge against those who harm. The dirty war against subversives in Argentina is but one example of state use of extra-legal force as well as extraordinary legal sanctions against those perceived as terrorists and understood to pose a threat to the state.[5]

But with suicide terrorism, extraordinary means seem to be not just the most direct way, but the only way that the state can address the suicide terrorist, since all of the methods of ordinary law have failed. Therefore, acts of suicide terrorism spur claims that the judiciary should cede power to the executive to use military or other force, and that the law should also be broadened to sweep in more potential terrorists pre-emptively and collectively. It also promotes public support for such moves. The U.S. response after 9/11 is an excellent example of these tendencies, as the Bush Administration has (albeit unsuccessfully) claimed executive power to hold designated enemy combatants indefinitely, without review by the judiciary.[6]

These changes have a particular effect on the law, and this effect is more basic than the tendency to impose restrictions on civil liberties and due process rights, which many other commentators have discussed.[7] The law punishes individuals on the basis of a trial or other process that determines guilt. It has two important characteristics: the individuality of guilt, and the imposition of punishment only after process and measured judgment. But some of the new American counter-terrorism rules and practices toy with these fundamental qualities of the law, relying on collective blame instead of individual guilt, and on immediate pre-emptive or vengeful punishment rather than punishment after measured judgment. Broadly speaking, there have been shifts in American policy to modes of conflict that are of their nature more collective and pre-emptive, such as war. More specifically, there have been changes in the law to make it more collective and pre-emptive, such as permitting indefinite and preventative detentions and targeting investigations and liberty restrictions on the basis of national origin.

But so what? When faced with a threat of this magnitude, do we really care what effect counter-terrorism measures have on our law?

2. Suicide Terrorist Organizations

Suicide terrorists are not who we think they are. They are not crazy loners driven to irrational acts by desperation and hatred. Such

unpredictable actors might in fact be unreachable by the ordinary law. They would also represent an only intermittent threat to security, whenever they happened to emerge violently from the otherwise peaceful population, and thus would also require only intermittent use of extraordinary legal and military force by the state.

But suicide terrorists are not single actors. Instead, suicide terrorists are virtually always deployed by terrorist organizations. In his study of modern suicide terrorism, Robert Pape identified 189 acts of suicide terrorism that took place worldwide between 1980 and 2001. Of those, only 186 were carried out by a terrorist organization, and not by an individual terrorist acting alone. (Pape could not ascertain who was responsible for the remaining three incidents, whether an individual or an organization.)[8] Similarly, Scott Atran identified organizational strategies, not individual psychology, as being the key dynamic in suicide terrorism in his study of the subject.[9] Who then are these suicide terrorist organizations?

First, it is important to understand that terrorism represents more than one kind of violence. Terrorism is often described as if it were chaotic, something akin to Hobbes's state of nature, and the state's responsibility to protect us from violence is similarly characterized as a need to protect us from that chaos. But this is not the only kind of terrorist violence that threatens the population and the state.

Often, terrorism is more like violent group conflict than like chaos: A group takes offence, uses violence to redress that offence, and then the other group seeks revenge. This pattern is familiar to us from other contexts: from ethnic conflicts, from mafia and gang violence, and from the blood feuds of pre-law societies. Law's purpose in trying and punishing those who kill is not only to prevent chaos, but also to forestall this organized, spiralling cycle of group revenge.[10]

Next, while there are many kinds of terrorist organizations, there are only a few that use suicide terrorism, and those are a very particular kind of organization. Ordinary terrorists fall into four broad categories: revolutionaries; anarchists and others seeking to create chaos rather than to achieve a particular goal; those fighting for a cause, such as environmentalism; and nationalists and other separatists fighting for independence for their communities, either from a larger state or from foreign occupation.[11]

Long ago, suicide terrorists used to be members of all four categories, for virtually all terrorists used to function as suicide terrorists by default. The available technology simply did not permit terrorists to effectively hit their targets unless they got close enough to run a very high risk of death. The nineteenth century Russian revolutionaries, for example,

used to set off bombs and carry out assassinations at very close range and were often killed in the process.[12]

Now, terrorists have a choice. While suicide terrorism is still more effective than a conventional attack in ensuring that the terrorist hits his target, terrorists can be very effective by detonating bombs or carrying out assassinations from afar. And now, with only one exception, modern suicide terrorists fall into the last category of independence fighters. Pape identifies seven conflicts in which suicide terrorist attacks have been used, and one more conflict has arisen since his study.[13] All but one of these involve nationalist, separatist, or anti-occupation goals:

a. In the 1980s, Hezbollah began the modern use of suicide terrorism with its campaigns of suicide attacks, as well as conventional terrorist and war tactics, in Lebanon. Its aim was to drive out the U.S., French and Israeli occupying forces. It succeeded in compelling the United States and France to withdraw, but Israel maintained troops in Lebanon for a number of years in spite of the suicide attacks.

b. The group that has used suicide terrorism most frequently and most effectively is the Tamil Tigers of Sri Lanka. Since 1987, the Tigers have carried out hundreds of suicide attacks and assassinated two heads of state with suicide bombings in their fight for independence from the Sri Lankan state. The Tamil Tigers also use conventional warfare, ordinary terrorist attacks, and political tactics. But although they have succeeded in causing immediate devastation with these attacks, they have not achieved their ultimate goal of independence.

c. In Turkey, the PKK used suicide attacks for a brief period in its fight for Kurdish independence. This wave of suicide attacks ended upon the order of Abdullah Ocalan, the PKK leader, after he was arrested by Turkey.

d. Probably the most publicized suicide terrorists are the Palestinian organizations in Israel, Hamas, Palestinian Jihad, and others, in their quest for an independent Palestinian state.

e. The Chechens have recently begun using suicide attacks in their war for independence from the Russian state.

f. Separatists have carried out suicide attacks against India in the long conflict over control of Kashmir.
g. Now widely publicized are the post-war suicide attacks by Iraqis against occupying U.S. coalition forces. There have been a few suicide attacks against U.S. forces in Afghanistan as well.

h. Finally, the last organization is the exception to the independence fighter rule: Al Qaeda.[14]

There are three key characteristics to these suicide terrorist organizations. First, with the exception of Al Qaeda, they are nationalist independence fighters or seeking an end to foreign occupation. Next, they run organized long-term campaigns aimed toward specific, tangible goals. And finally, suicide terrorism is only one tactic among many that they deploy, including conventional terrorism, political tactics, and full fledged war.[15]

3. Counter-Terrorism

These three characteristics alter the significance of suicidal impunity and have major ramifications for campaigns against suicide terrorism.

Beginning with the third quality, because suicide terrorist organizations use many other tactics in addition to suicide terrorism, there are many elements of the organization's strategy that are not directed at suicide attacks and many members of the organization who are not suicide terrorists. These members and strategies are not immune to legal judgment, but are subject to ordinary law. They can be deterred; they can be punished. An example of this is Abdullah Ocalan, the leader of the PKK. Although he had sent out many members of his organization to die as suicide terrorists, he valued his own life. When he was arrested, tried, and sentenced to death, he ordered the PKK to stop using suicide attacks in order to save his own neck.[16] While individual suicide terrorists may not be deterred by threat of punishment, they are not the ones that we need to deter. Because suicide terrorists virtually always operate from within larger organizations, it is the leaders and planners within those organizations who need to be, and can be, deterred by threat of punishment.

Next, these characteristics reveal that the primary risk posed by suicide terrorism is not the risk of the damage done by a single suicide terrorist attack, but two other risks. The first is the risk of being caught up in a cycle of reprisals and counter-reprisals. Because suicide terrorist organizations are well-established and run organized, long-term

campaigns, the state may well have a difficult time overcoming the organization even with a well-planned counter-terrorist campaign. We have seen this in the U.S. counter-terrorist effort in Afghanistan. If the state's use of force cannot quell the terrorists' attacks, it tends to spur reprisals and counter-reprisals, like those seen in Chechnya and Israel.[17]

Furthermore, because suicide terrorists are nationalists, they have a natural constituency amongst other members of their national community, as Hamas and Palestinian Jihad do amongst the Palestinians. This community may support the terrorists' goal of independence, and when the state engages in counter-terrorist activity, it is this community that will bear the brunt of the state's use of force. This collective suffering by the community also tends to promote the pattern of reprisals and counter-reprisals by producing more terrorists.[18]

Such cycles of violence and revenge are extremely destabilizing and undermine security. They also undermine the perceived legitimacy of the state. It is the state's responsibility to prevent and protect its citizens from this kind of violence, and it fails utterly at this task when it perpetuates the violence instead.

The second risk that suicide terrorism poses is the risk that the state will undermine the legitimacy of its own law, by making the law resemble terrorism in two ways. First, the state's reforms may reshape the law to make use of collective blame and punishment and to reduce the safeguards of legal process by freeing the executive to act pre-emptively. The basic claim of independence-oriented suicide terrorists is that the state is illegitimate, and that its use of state power - including the law - is an illegitimate mode of violence. If the terrorists' national community experiences a disproportionate share of the burden of counter-terrorist legal investigation and sanctions, the state will only bolster the terrorists' claims of illegitimacy.[19]

Furthermore, the way that the law operates to cut off cycles of violent reprisals and counter-reprisals like those described above is by claiming to stand outside that cycle and to offer a process of measured, neutral judgment.[20] If the law is changed to become a source of collective blame and punishment without careful process and judgment, and particularly if it seen to be a tool of the executive rather than operating independently, it may lose its credibility for that purpose and be perceived as just another mode of counter-reprisal.

These risks are not unique to suicide terrorism, but they are particularly acute in the context of suicide terrorism. This is due in part to the characteristics of suicide terrorist organizations that make them difficult to subdue and gain them community support. It is also due to the state's own reaction to its perception of suicidal impunity: if the state does

not believe that it can use the law against individual suicide terrorists, it may feel compelled to use measures that are pre-emptive and collective, spurning individual judgment for broader use of legal and military force.

4. Conclusions

Nevertheless, the state must take some action against terrorism. What options does it have? Studies of suicide terrorism suggest that no strategy is universally effective.[21] In light of this, the best approach is a measured one that is careful to avoid undermining the legitimacy of the law and the state for all other purposes, in pursuit of the elusive goal of ending suicide terrorism entirely. This means taking account of the fact that suicide terrorist organizations employ only a few suicide attackers, and primarily use other tactics and have other, non-suicidal members and leadership. It also means avoiding collective blame and punishment, particularly collective blame and punishment that disproportionately affects the terrorists' constituency community.

This leaves the state with a number of options, such as highly targeted military strikes that avoid harm to the surrounding community, carefully targeted criminal prosecutions that do not rely on pre-emptive action against categories of people, and negotiation with moderates within communities that the terrorists look to for their support in an effort to address those communities' concerns and undercut sympathy for terrorism. Finally, taking account of the fact that no action is likely to eliminate terrorism or suicide terrorism entirely, the state could create a process, such as a public truth commission, to address the public need for investigation and understanding of terrorist attacks. Each of these steps would be more difficult than collective blame and pre-emptive action, but each would also help to mitigate the risks that suicide terrorism poses to the state's security and to the legitimacy of its law.

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Notes

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[1] Abraham D Sofaer, "Statement of Abraham D. Sofaer to the National Commission on Terrorist Attacks Upon the United States," *First public hearing of the National Commission on Terrorist Attacks Upon the United*

States, 31 March 2003, (14 May 2004). <http://www.9-11commission.gov/hearings/hearing1/witness_sofaer.htm>.

[2] Note: "Responding to Terrorism: Crime, Punishment and War," *Harvard Law Review* 115 (2002): 1217-38, 1222 n.37.
[3] Panel Discussion: "The USA-PATRIOT Act and the American Response to Terror: Can We Protect Civil Liberties after September 11?," *American Criminal Law Review* 39 (2002): 1501-33, 1511.
[4] Neil R. Feigenson, Symposium: "Responsibility and Blame: Psychological and Legal Perspectives: Emotions, Risk Perceptions and Blaming in 9/11 Cases," *Brooklyn Law Review* 68 (2003): 959-1001, 971. Tom R. Tyler and Hulda Thorisdottir, "A Psychological Perspective on Compensation for Harm: Examining the September 11th Victim Compensation Fund," *DePaul Law Review* 53 (2003): 355-91, 380.
[5] *Accountability for Atrocities*, edited by Jane Stromseth (Ardsley, New York: Transnational Press 2003), 279.
[6] Hamdi v. Rumsfeld, 124 S.Ct. 2633 (2004). Rumsfeld v. Padilla, 124 S.Ct. 2711 (2004);
[7] Michael Ignatieff, *The Lesser Evil* (Princeton, New Jersey: Princeton University Press, 2003), 58-61.
[8] Robert A Pape, "The Strategic Logic of Suicide Terrorism," *American Political Science Review* 97:3 (August 2003): 1-19, 18.
[9] Scott Atran, "Genesis of Suicide Terrorism," *Social Science Review* 299 (7 March 2003): 1534-1539, 1537-38.
[10] René Girard, *Violence and the Sacred*, translated by Patrick Gregory (Baltimore: The Johns Hopkins University Press, 1979), 13-24.
[11] Ignatieff, [p. 83.
[12] Martha Crenshaw, "'Suicide' Terrorism in Comparative Perspective," in *Countering Suicide Terrorism* (New York, NY: Anti-Defamation League 2001): 21-29, 26.
[13] Pape, pp. 6-7.
[14] Pape argues that Al Qaeda is also seeking an end to occupation, specifically an end to US military forces in the Middle East and particularly in Saudi Arabia, but in my view its goals are far more diffuse and general than the other organizations he identifies, so I do not categorize Al Qaeda as a nationalist organization. Ibid.
[15] Ibid.
[16] Dogu Ergil, "Suicide Terrorism in Turkey: The Workers' Party of Kurdistan," in *Countering Suicide Terrorism* (New York, NY: Anti-Defamation League 2001), 109-33, 124 .
[17] Pape, p. 4. Girard, pp. 17-23. Ignatieff, p. 62.
[18] "Zionist Crimes," Hamas. (May 4, 2004), ,www.hamasonline.com>.

[19] "Western Justice," Hamas, (May 4, 2004), <www.hamasonline.com>.
[20] Girard, pp. 22-23.
[21] Atran, p. 1538-39. Pape, p. 14-15.

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Legal Pageantry & Derogation of Due Process Norms in the Trial of Saddam Hussein

Douglas J. Sylvester

Abstract: Law's engagement with evil is nowhere as evident as in the trials of unquestionably evil men. The imaginative range of law's response to evil may be ably captured by reviewing the major international atrocity trials of the last half-century. From Nuremberg to Eichmann, Milosovic to Akeyasu, Tojo to Barbie, these trials represent the many problems of mastering judgment, memory, justice, and vengeance inherent in conflicts where the guilt of the defendant seems far less important than the desire to expose atrocities, heal a people, and transition from old to new regimes.

The recent capture and inevitable trial of Saddam Hussein raises these same questions—and an important new one. While acknowledging the wealth of thought and response arising out of the major atrocity trials of the last fifty years, this paper asks whether Hussein and other defendants like him, may be morally, legally, or wisely denied "basic" human rights such as the right to a fair trial or due process. The paper argues that, despite theorists' concerns for slippery-slopes, a "legal pageant" that emphasizes symbolic and discursive ends is morally and legally justified and may be substantively constructed to avoid the political excesses, and concomitant domestic legal instability, that many fear will occur.

Keywords: Saddam Hussein, Genocide, Fair Trials, Due Process, Slobodan Milosevic, Nuremberg, Adolf Eichmann, International Law, Human Rights

1. Introduction

Human rights law understandably seeks the universal. Embracing the concept of rights "for all people, in all places, and at all times" the modern human rights movement brooks few, if any, exceptions to its moral and legal sweep. Marrying moral theory to positive law, the modern human rights movement proudly proclaims that no individual can or should be excepted from the scope of its protection—with generally desirable results. Modern human rights law is no small solace to those who remember the brutalities and inhumanities of this and prior ages.

As human rights law has progressed, however, so has its ambition. Prohibitions against genocide, murder, and arbitrary imprisonment now stand side-by-side with protections against unfair trials, denials of due process, and general discrimination. Increasing the scope of human rights protections has not lessened the movement's general desire for universality and non-derogation. The right to a fair trial and due

process are considered fundamentally important, either as necessary components for ensuring first-order rights against arbitrary imprisonment or killings, or in their own right as inextricably linked with moral convictions related to human equality and fairness.

Often accused of embracing an overtly idealistic approach to human rights, the commitments to universalism and non-derogation include a pragmatic element as well. A universal and non-derogable approach to human rights encompasses the idealism to believe it can be so, and the pragmatism of recognizing that any relaxation of its strictures may quickly lead to abuse. Yet one wonders whether, despite the obvious idealistic and pragmatic advantages that universalism provides, there exists the possibility that the legal protections required by human rights may justifiably be relaxed or disregarded in particular cases.

Asking this question is not to suggest that we can deny the humanity of any individual—and rights intimately linked to such status. Yet, given that some of these rights are grounded solely in positive law, is it permissible to deny their applicability in discrete circumstances? As an example, is it justifiable to say that some individuals do not deserve a "fair trial" or that, if they do, such a trial may nevertheless derogate from normal considerations of "due process?" In other words, are there circumstances under which due process and fair trial rights can or should be balanced in favor of other considerations?

This paper takes the upcoming prosecution of Saddam Hussein as a case-study to explore this difficult topic. Although greatly limited by space and time considerations, the paper asks, would it be moral, just, and smart to deny some of the basic human rights, such as "due process", to individuals such as Saddam Hussein?

2. The Trial of Saddam Hussein

The upcoming trial of Saddam Hussein provides a unique opportunity to explore the supposed universality of basic human rights such as the right to a fair trial or due process. Hussein's status as the leader of his country, the nature of his horrific crimes, and the undeniable fact of his individual culpability places him in a very limited class of possible defendants. These defendants, both symbolically important and undeniably guilty, present issues of international law and moral theory not raised in more mundane criminal matters. It is these facts that make his case an ideal one for exploring the limits of the international human rights law movement.

An initial question to ask is whether Saddam Hussein is entitled, under international law or moral theory, to a trial of any kind. In the end, this short essay concludes that Saddam Hussein is neither entitled to due

process nor is the international community bound by morality, law, or common sense to provide the full extent of those rights as generally understood in the human rights legal literature. In addition to this, admittedly, polemical conclusion, the paper explores the issue of whether we *should* provide due process to Saddam Hussein for social, cultural, or political reasons.

In short, Saddam Hussein has no right to a fair trial or to due process rights fully configured. He should be made to participate in a proceeding that, although concluding with a finding of guilt, has as its aim to serve mainly symbolic ends. To serve this symbolic purpose, several principles of "due process" should be altered including: (I) the defendant's right to mount a vigorous defense; (ii) representation by counsel of the defendant's choosing; (iii) the right to cross-examine prosecution witnesses; (iv) the ability to make evidentiary objections to prosecution evidence; and (v) the right against self-incrimination.

The remainder of this presentation paper takes up two separate tasks. The first is to provide some context for the view that much is to be gained from denying Saddam Hussein the full scope of due process rights as currently configured by international human rights law. The second task stems from the obvious fact that there are numerous and powerful objections to any proposal that seeks to limit "human rights" or to treat any single individual differently from another. Some of the more obvious objections are set forth below with short discussions of why they do not appear fatal to this proposal.

3. Motivation for Project: The Problems of Due Process

As already noted, an initial inquiry is to ask whether Saddam Hussein is entitled to a trial of any kind. International human rights law makes clear that no individual may be denied life or liberty without trial and that any such trial must be fair and include due process. Since Hussein is singled out here for exception from this universalist approach, it may appear that this focus is linked to a general American animus against Hussein and his ilk. I, and most, do not care for genocidal dictators and this may certainly play a part in the overall proposal—but the proposal is driven by a far more clinical imperative.

Interest in this question was sparked, in the main, by a general contrarian streak. As soon as Hussein was captured in December 2003, the international community began to speculate on all manner of questions regarding his prosecution. Should he be tried by an international, American, military, or Iraqi tribunal? What crimes should form the basis of his indictment? What punishments were appropriate and legal? These questions were met with an immediately discordant response from

international leaders, human rights, and international legal groups. The complete lack of unanimity on these issues was, interestingly, met with one area of universal agreement—that whatever the forum, substantive law, or punishment, the one thing that Hussein *must* be provided is a "fair trial" that accords with standards of "due process." When leaders from the United States, France, Germany, Amnesty International, the ACLU, and many other groups that seem to agree on nothing *all* agree on a single point—red flags are raised. Given the obvious range of opinion about the trial of Saddam Hussein, what is it that drives such a broad consensus on the question of due process?

One explanation is that it seems unimportant—that process is a cost for any trial and that it should be borne in these as well as any other. Since the early days of such important trials as those at Nuremberg, and those of Barbie, and Eichmann, and the (really quite sad reality) that such trials will need to continue into the future, we have seen the international arena increasingly seek to regularize international tribunals—to make them more ordinary. The motivations behind the institutionalization and routinization of these tribunals is understandable—they must deal, potentially, with large numbers of genocidal actors and, as a result of their permanence, are less dependant on the political will of the international community with regard to a specific recurrence of genocide or other grave international violation. Yet, this routinization comes at a cost—a loss of control over outcomes and, in some cases, the continuance of the harm done to victims through the ability of defendants to "work" the system to their personal advantage.

The best example of these costs can be seen in two recent occurrences at the International Criminal Tribunals for Rwanda and Yugoslavia (ICTR & ICTY). In 2000, at the ICTR, for example, the tribunal was forced to dismiss charges against one of the chief perpetrators of the Hutu-led massacre because of speedy trial and other violations. The individual in question, the ideological head of the Hutu extreme political party responsible for the massacres was held for one year before confirmation of his indictment by the ICTR. The court, in dismissing the indictment, employed a form of reasoning that is instructive for understanding the costs of formalizing process. First, it held that the existence of the rule calling for a speedy trial made it imperative that the rule be strictly applied (citing Brandeis for the view that to do otherwise would result in anarchy). Second, the court made clear its view that to hold otherwise would place the entire human rights movement in jeopardy. Finally, to rule otherwise would be a "travesty of justice," as the court viewed its legitimacy as far more important than individual justice in a given case. Legitimacy, in this case, was intimately and inextricably linked

to rigid adherence to formalized process—not the symbolic outcome of the trial for the Tutsi-Rwandans.

As disturbing as this example may be, it pales in comparison to the farce that has grown out of the ICTY. That tribunal, again adopting a rigorous set of due process rights for defendants, has been in the process for over two years of "convicting" the butcher of Sarajevo, Slobodan Milosevic, for his genocidal crimes. Milosevic's ability to call and confront witnesses and his long, rambling, time-consuming objections to evidentiary rulings has derailed the proceedings. As a result of his obnoxious manipulation of the system, Milosevic is generally regarded by many, the very masses these tribunals hope to convince of his barbarism, as a mere victim of international blackmail and intrigue. Indeed, in 2003, Milosevic won a landslide election for a seat in the Serbian legislature and his popularity has never been higher. Despite this fact, the court has been loath to restrict Milosevic's rights for fear that its legitimacy may be called into question. As we can see, due process has obvious and real costs.

Disturbingly, events of the last few months only confirm the Iraqi government's commitment to adopt these same rigorous procedures for the protection of defendants such as Hussein. The newly formed Iraqi Special Tribunal formed to try Hussein and his cohorts has explicitly declared that it will adopt the due process rights included in the ICTY, and Salem Chalabi, the newly appointed President of the Tribunal, has made clear in numerous interviews that, as an American-educated lawyer, he is sympathetic to American-style evidentiary proceedings. As of this writing, it is apparent that the Iraqi Special Tribunal will adopt due process and fair trial elements that largely conform to or go beyond the problematic sets of rights already contained within the ICTR & ICTY.

Ultimately, it is possible to bring genocidal killers to justice without granting them the full panoply of due process rights given to more ordinary defendants. It is doubly dangerous to formalize such procedures into rigid sets of rules linked to the legitimacy and founding of such institutions. That said, these problems resist systemic reformation—the costs to defendants in most criminal cases are too high to be borne and, as a result, human rights would and should prohibit the wholesale repeal of due process or fair trial guarantees.

However, it may be possible and wise to restrict these rights in individual, highly idiosyncratic, instances. The basis for this conclusion is a simple and admittedly inartful concept—the "symbolically important and unquestionably guilty" defendant. The proposal is to limit the due process and fair trial rights of defendants that embody this concept.

4. Proposal: Legal Pageantry

Consciously, and hopefully not without reason, this paper restricts the class of possible defendants by focusing, in part, on the individual's status. By "symbolically important" the class of defendants is restricted to those individuals whose convictions carry significant cultural and political value for a community or state emerging from their prior rule.

It is possible (although not within the confines of this paper) to further develop this concept employing a diverse set of rhetorical, discursive, and symbolic arrays to develop a precise, and defensible, theory of "importance" that avoids its use in inappropriate cases (intentionally avoiding its application in cases of moral outrage including serial or child killers, individual terrorists, or overly political defendants). In short, my aim is to use this approach only for individuals such as Hussein, Milosevic, Hitler, Eichmann, Amin, and, perhaps, even Kissinger. Other individuals come to mind, of course, but the class is intended to be restricted to those who were heads of state (or exercised essential and independent authority within a regime) and whose convictions today carry tremendous symbolic importance for larger cultural, political, or social purpose.

The second element for classifying an eligible defendant focuses not on the political status of the defendant but the nature of the crime and admitted guilt. Thus, when declaring such defendants unquestionably guilty the term means *unquestionably*. That is, these are individuals for whom no legal or factual justification, defense, or excuse can possibly be raised. The substantive crime of which they are accused is incapable of diminution or passing-off and, importantly, their factual guilt has been significantly documented and, in most cases, admitted by the defendant in numerous public statements. Hussein clearly fits into this category—he has committed a crime for which no legal or factual justification is permitted and his crimes have been amply documented and, on various occasions, admitted or even bragged about by him.

Hussein is accused of genocide. Under international law, genocide is the undertaking of acts with the intention of destroying a group within a polity. Although the crime speaks of "intent"—the concept is of little rhetorical or substantive value in the vast majority of cases where it is brought—including Hussein's. Given his horrific acts against the Kurdish minority and Shia majority, it is impossible to argue that the destruction of these groups, or a significant part, was not his intent. In addition, there are no legal defenses to the charge of genocide—duress, chain of responsibility, and other defenses available in other classes of crime are irrelevant to genocide indictments. Bluntly, for Saddam Hussein, there is no legal, factual, or psychological defense that could be raised at trial. Linking these legal issues with his obvious and admitted factual guilty

eliminates the practical necessity of fair trial and procedures.

Under this analysis, obviously, trials do little more than determine the guilt or innocence of the individual in question. That trials do far more than this in ordinary cases is obvious—but for purposes of human rights, the requirement of a trial is solely for this purpose—to ensure that individuals are not denied their life or liberty without a full and fair opportunity to determine their factual and legal guilt.

For this same reason, due process is only important in those cases where the guilt or innocence of an individual is at stake. Yet, I fully understand that a natural conclusion from this proposal is that Saddam could be punished and, indeed, executed for his crime of genocide without benefit of any trial at all—that nothing in international human rights law or even moral theory would require little more than the carrying out of the appropriately determined punishment (a question consciously avoided here) in whatever manner his captors deem appropriate (in his cell, out behind the Abu Ghraib prison, etc.). It is understood, of course, that numerous objections may be raised to this "thin" conception of the trial—and some of these are taken up later in the paper.

The final part of the proposal is that, even if we could both legally and morally avoid trying Hussein altogether, we may nevertheless wish to engage in a proceeding that called a "legal pageant." The point of a legal pageant is that if a proceeding against Hussein is *not* to determine guilt or innocence, as this proposal rather insists, then the proceedings should serve other ends.

Without question, a proceeding against Saddam Hussein has tremendous symbolic importance. Such proceedings provide great occasions for the kinds of social deliberation and collective reexamination of the moral values underlying new and prior regimes. To choose to do away with any and all proceedings would result in the loss of a great opportunity. Reminiscent of Ackerman's constitutional moments, these proceedings represent social/institutional moments where *choices* may be made about the future while providing an opportunity to cleanse the past.

Some view these proceedings as real chances to start anew—while others fear that, if they derogate from basic standards, they will unleash a torrent of unlawful institutions and actions that cannot be controlled. These latter concerns should be met with real skepticism—the widespread abandonment of due process rights in Europe following WWII, the suspension of habeas corpus during the American Civil War, and the internment of Japanese citizens by the US government, for example (the list could obviously be made quite extensive) are all terrible events of government-sponsored lawlessness that did not result in a wave of future anarchy and oppression. Certainly the immorality of many of these choices

makes them condemnable in their own right, but they seem slender reeds on which to base an objection against an otherwise legally and morally supportable decision such as that proposed here.

It is precisely these concerns, however, that drive the aforementioned international consensus that Hussein must be granted a fair trial. This view seems rather unreflective and dangerous. What good does it do for anyone if Saddam makes a mockery of his trial, if he emerges more sympathetic to his followers and more a victim of imperialism or some other ghost than he did before? We can imagine he will make this the "Mother of all Trials" and use everything within his power to try his accusers rather than admit his own wickedness. If that is the result, we may be better off stringing him up now and avoid the whole mess.

But that is clearly unnecessary. Instead, focusing on four important goals that are external to Hussein's guilt provides clarity on the nature of the proceeding proposed.

1. The hope for everyone involved is that Iraq will transition from the horror of the Baathist regime to a new democratic government based on law.
2. A concern that Saddam's many victims have a voice in the process—either to heal or spew venom.
3. To discredit the Baathist regime among its followers, skeptics, the Arab world and beyond—to prove that his atrocities were a cause of his downfall—rather than merely American imperialism; and
4. Saddam should pay for his crimes—and indeed, for retributivists and Kantians, his punishment and desert must be the central goal of any proceeding.

Thus, the goal of a legal pageant is to "try" the accused with more of an eye to achieving these desiderata. To my mind, and developed more substantially in the larger paper, the best way to achieve these ends is to control the theatre of the trial. Current international trials, from Milosevic to Barayagwiza, have been largely symbolic failures regardless of their final outcomes. These failures may be traced directly to the inability of courts and judges to appropriately control the symbolic presentation of trials in the face of formalistic procedural rules untied to moral or practical necessities and charismatic defendants intent on using their trials to serve their individual symbolic ends. As a result, legal pageants, unconcerned as they are with individual guilt, alter the rights of a defendant in order to better control the course and presentation of the proceedings.

Earlier suggestions included revising some basic notions of due

process for Hussein by limiting, if not wholly abrogating, his rights to: (I) mount a vigorous defense; (ii) representation by counsel of his own choosing; (iii) cross-examine prosecution witnesses; (iv) make evidentiary objections; and (v) not testify as a witness against himself. Many other rules could be altered or avoided—speedy trial, presumption of innocence, or impartial tribunal—but those are left aside here. As obnoxious as these suggestions may be to many (and dealing with these objections is part of the next section) it is important to note that these exact rights have been curtailed or abrogated in numerous genocide trials of the past.

For example, at Nuremberg:

1. Defendants were represented by appointed counsel;
2. Their right to cross-examine prosecution witnesses was greatly curtailed;
3. Their right to call witnesses was denied;
4. Evidentiary objections based on relevance or "best evidence" were disallowed; and
5. Defendants were forced to testify.

Similarly, in the Eichmann trial:

1. Eichmann was not allowed to call witnesses,
2. His right to cross-examine or confront witnesses was radically diminished, and
3. His right to remain silent was repudiated.

The fact remains that for purposes of the legal pageant, the most important aspect of Hussein's trial is, frankly, that we put on a good show. It is not to give Saddam his day in court—it is to give others their day in court and beyond. This nakedly consequentialist approach results, I believe, in the view that due process is malleable and useful only to the extent it serves these goals—for the symbolic ends of this process are the only real ends that matter (with one exception mentioned in a moment).

That said, there are a number of obvious objections to this proposal that should be addressed. Chief among these objections are various grounds for stating that we are *compelled* to grant due process rights to all defendants, whether we want to or not. These are taken up first.

5. Objections

A. International Law Forbids Legal Pageantry

Some will argue that international law requires us to grant

Hussein and similar defendants the very due process requirements this paper seeks to relax or remove. For example, the International Covenant on Civil and Political Rights does include a mandate that all signatories, of which Iraq is one, provide all defendants a "fair trial." Among the elements necessary for granting a fair trial are basic conceptions of impartial tribunals, a presumption of innocence, and the right to conduct a vigorous defense (including calling and confronting witnesses). The existence of these rights, termed basic human rights in this and other documents, would seem to compel the conclusion that Hussein be granted their protections. And, as discussed numerous times in this short paper, the entire human rights movement is based on a commitment to universalism and non-derogation. To reject these views, even if otherwise morally defensible, may call into question the legitimacy of the entire movement of human rights—a consideration I do not take very seriously, I admit.

Despite the strong rhetorical arguments for universality and non-derogation, international human rights law *does* recognize that due process and fair trial rights may be altered in certain circumstances. Indeed, the ICCPR, by its very terms, accepts that these rights may be lessened, altered, or waived both in cases of the defendant's status and to avoid diminution of other, superior, rights. Two examples make the point. First, prisoners of war and other combatants are *explicitly* excluded from the full enjoyment of these due process rights. The ICCPR concludes, it seems, that in some cases these rights are waivable by status or conduct or, quite possibly, for administrative convenience. Second, the ICCPR includes explicit provisions granting states the ability to suspend due process protections in two instances: (I) for national security; or (ii) to avoid conflict with other rights, such as protection of witnesses. Leaving aside the difficulties of invoking these exceptions, the fact remains that human rights law embraces the notion that due process rights are derogable in limited circumstances.

In short, although the ICCPR clearly reflects the importance of due process rights, there is nothing in the covenant that leads inevitably to the conclusion that they are incapable of waiver, diminution, or relaxation. This conclusion is buttressed by the Rome Statute which also provides an array of circumstances where the ICC may seek to relax certain due process standards in favor of, for example, protection of prosecution witnesses or protection of victims.

In the end, international human rights law, although ideally universal and non-derogable, does not prevent the ability of a country (in very limited circumstances) to lessen those rights in discrete circumstances. This is not to say, of course, that international human rights

law endorses the legal pageantry proposal—I harbor no illusions about the reception that human rights lawyers will give such a proposal. That said, it appears that, despite some rhetorical claims of universality and non-derogation for the full panoply of rights granted under the ICCPR, international human rights law in action does include limited provisions for altering these protections.

B. Due Process Rights Are Moral Entitlements for all Individuals

International law's vacillations on due process and fair trials notwithstanding, if it can be shown that such rights are nevertheless considered basic human rights in moral theory, strong grounds for opposing legal pageants may be raised. Numerous theorists--Mill, Dworkin, Rawls, Fletcher and many others, have argued that human rights includes such basic concepts as equality and fairness. To derogate from the norms of conduct for one individual—even if defensible based on crime or status—would nevertheless run afoul of these more basic conceptions. In other words, to treat any one individual differently from another is, itself, a violation of basic human rights.

Dworkin and others, although not specifically speaking of universal human rights, have made the case that due process norms are fundamental, non-derogable rights, necessary to fulfill more fundamental rights of equality and fairness. Thus, even for Dworkin, Fletcher and others, due process norms are clearly second-order norms. It is assumed that their derogation will inevitably result in a lessening of the protections afforded by equal treatment and fairness. Many have taken Dworkin to task for his claim that equality is a fundamental tenet of American constitutional law, much less a fundamental human right. Nevertheless, I think it is possible to demonstrate how removal of due process in some cases interferes with neither equality nor fairness.

For example, a defendant who pleads guilty to a crime is no longer entitled to due process rights to mount, a vigorous defense. Although such rights are considered "waived"—the result is still the same. Once guilt is admitted, such rights are out the door. In the case of Hussein, his unquestionable guilt works the same result as a plea—since guilt is irrelevant to the process, his rights are of very little importance. Of course, other rights continue to hold sway—a prohibition against torture, humiliation, shaming, etc. are more intimately linked to his human rights than these second-order protections and could not, legally or morally, be repudiated. Nevertheless, for all the hard cases that Dworkin notes, Hercules would find the question of Hussein's guilt and, as a result, his right to due process, a rather easy one. Rawls' original position arguments also seem an unlikely source for the conclusion that genocidal killers, and

heads of state to boot, must be granted due process.

C. Legal Pageants Violate Retributivist Ideals

Retributivism provides grounds for two obvious objections to the proposed "solution" for Hussein (the irony of this phrase is not lost on the author). First, the process seems uninterested in ensuring that Hussein be given his just deserts. Second, it is overly focused on extraneous goals, such as victims' rights, cultural healing, and social transitions and, as a result, is an impermissible addition to his appropriate punishment. That said, it would seem that retributivists would have little upon which to object to a process that gave Hussein his just deserts—provided he received those deserts—nothing more or less.

The legal pageant does anticipate Hussein being punished—it is just that consideration of his desert extends beyond the capital. As others have noted, retributivism does recognize that other goals may be achieved through the legal process. Provided the defendant is punished according to his desert, there is nothing wrong with also helping victims heal, or providing important symbols of justice to society. The larger paper argues that Hussein's punishment includes participation in a proceeding that seeks, without his cooperation, to accomplish the larger social goals set forth above. Given this intent, a legal pageant that includes larger symbolic and cultural ends neither adds to nor reduces Hussein's desert. Such a proceeding adds such goals merely in parallel to the central meaning of such a trial—to bring Hussein to justice and ensure he receives his due desert. In this same vein, variations on the Kantian objection against using one human being for the good of another are similarly satisfied. Since he is guilty, he is doing nothing more than fulfilling a part of his punishment by partaking in the pageantry on terms set by the tribunal. These arguments are, obviously, discussed in much greater detail in the larger project.

D. Legal Pageants Create Dangerous Symbols

One variant of this objection has already been discussed—as has the skepticism at the view that legal pageants will result in a diminution of law-abidingness among a population or government. A more powerful variant of this objection is that it is not enough that a trial do justice, it must appear to do justice. Over the past few years, many academic psychologists have argued that individuals are far more likely to believe they have received a "fair shake" from the criminal justice system if they have been afforded processes that comport with widespread notions of fairness. A corollary of this literature is that outside observers also base their determinations of a trial's legitimacy on their perceptions of the

fairness of procedures granted to a particular defendant.

This seems to be just plain wrong—and, luckily, new research into the psychology of legitimacy substantiates this intuition. This new scholarship, employing a concept of "moral mandates," argues that that it is the *result* that ultimately determines the level of "legitimacy" and "justice" that observers believe may be found in a given institution or proceeding. In short, and this seems quite intuitive, individuals will judge the legitimacy of process on whether they agree with the end result. The converse is equally true—where the end result is considered to be unjust, the procedures will be viewed in that same light. It is only in cases where the end result is questionable—meaning that individuals are unsure whether the right result was reached—that the legitimacy of process determines overall legitimacy. Finally, it seems somewhat ludicrous to expect that restricting Saddam Hussein's rights as I have suggested would carry a taint of illegitimacy in relation to his crimes (assuming the theatre is well done) such that it would result in bad symbols.

6. Conclusion

Let me end, because sooner or later I have to, by saying that I recognize that with the number of issues and the complexity of the theories and objections, I am giving a very cursory analysis of each—and I look forward to your questions. In the end, my proposal makes two major rhetorical and practical decisions. First, that Saddam Hussein and his ilk are unique defendants and that the question of their guilt is as close to "unquestioned" as we will ever get in any proceeding. Treating them as special defendants will not, I strongly believe, result in any slippery-slopes. Second, my idea of legal pageants is, despite its provocative title, concerned with bringing defendants to justice—just not at the expense of important symbolic and discursive opportunities.

Hegel on Crime, Evil and Punishment: Freedom and Reconciliation between 'the Individual' and 'the Social'

Angeliki Kontou

Abstract: The paper looks into Hegel's theorization of the origin and particular functions of crime and evil. It seeks to illuminate the sense in which, in the framework of Hegel's thought, the above phenomena form extreme cases of misrecognition of both self and Other - cases which can be seen, however, as moments of a broader process of actualization of individual freedom. Also, the paper offers an interpretation of the Hegelian theorization of the conditions of justification of punishment and of the reconciliatory role punishment - unlike revenge - can exercise.
In the context of the present reading, wrong is shown to spring from the arbitrary, unmediated and external character of the relation between the individual will (the principle of particularity) and the common will (the principle of rightness) - from the essential overriding of particularity. Punishment is discussed with relation to an extreme form of wrong - crime- while the foundations of its justification are identified in the assumption that a) despite his rational essence, the criminal entertains an internally divided and contradictory will and b) the broader institutional articulation of society is rational and promotes the individual freedom of its members. Likewise, evil is shown to promote the recognition of the insufficiency of individual conscience as far as the exclusive provision of normative principles of action is concerned. Adequate such principles are the ones embodied in the institutional articulation of a rational and just social order.

Keywords: Hegel, Crime, Evil, Punishment, Revenge, Reconciliation, Abstract Right, Contract, Freedom

Hegel's well-known work The Philosophy of Right contains a philosophical treatment of crime and evil that remains interesting and useful, despite the nearly two centuries that have elapsed since it was first conceived.[1] In the context of the Hegelian dialectical-experiential thought,[2] crime and evil form early moments in the will's education to freedom - moments which register the factual assertion on the part of the will of a right to express its particularity, as well as the misconceptions and limitations that are implicated in the latter.

The present paper follows Hegel's argument closely seeking to (re)construct his views on the following questions: How can crime and evil be understood from a philosophical point of view? Which are the conditions of justification of punishment and in what sense punishment

can be effective in bringing about a state of reconciliation? Which source of provision of normative principles of action can be regarded as tenable or effective and on what conditions?

Hegel identifies crime as an extreme form of wrong and traces the latter's foundation in the inadequacies that concern the sphere of abstract right. These, become obvious in the context of his discussion of the notion of contract.

Specifically, Hegel links private property to the individual's self-recognition and social recognition as a person (as a bearer of rights)[3] and claims that the implicit in it (i.e., in the element of recognition the notion of property involves) relation between two wills, becomes explicit in contract.[4] "The sphere of contract is made up of this mediation whereby I hold property not merely by means of a thing and my subjective will but by means of another person's will as well and so hold it in virtue of my participation in a common will".[5]

Contract then involves a "unity of different wills";[6] it involves the constitution of a common will, which, yet, according to Hegel's argument, is common only in terms of its appearance: it has been arbitrarily and externally posited as such, instead of becoming such through a process of transformation of the initial standpoints of the implicated parties.[7] In other words, the formal declaration of the surrender, on the part of each will, of its difference and special character takes place within a situation whereby "the absolute difference between independent property owners"[8] is in reality retained. The constitution of the identical will - the realised agreement - has as its object a single external thing[9] beyond which the established relation between the individuals collapses.[10] Particularity exists in its initial form beneath the appearance of its annihilation.

The particularity of the subjective will and the universality of the common will are not mediated in contract but exist in a relation of implicit tension. The immediacy of the posited common will - its direct derivation from the arbitrariness and contingency of particularity -[11] means that the principle of rightness expressed in it shares the same characteristics.[12] Right in contract appears, it is not yet actual, as its inner universality is present only as the common, coincident arbitrariness of the wills of the implicated parties.[13] It is therefore a matter of chance whether each particular will will correspond to the posited common one - that is whether it will correspond to the principle of rightness.[14] Contract itself lacks the specific quality (the presuppositions) that would guarantee its observance; it thus remains "at the mercy of wrong".[15]

Hegel claims that inevitably, at some point, the implicitly present tension between particularity and universality will turn into an explicitly manifested conflict.[16] Wrong is a state of things whereby the particularity of the will, or "right in its real existence",[17] comes to oppose the principle of rightness that the universal-common will embodies and represents.[18]

Wrong therefore annuls the appearance of right by putting an end to the merely external, immediate and contingent correspondence of particular and common will.

Hegel distinguishes among three types of wrong - non-malicious wrong, fraud and crime -and identifies the peculiarity of the latter type in the transgressor's total denial of the principle of rightness.[19] In the case of non-malicious wrong, wrong is defended on the mistaken but genuine conviction that it expresses the right. Non-malicious wrong springs from a dispute over the appropriate content of right. The principle of rightness is here recognised since each party believes that he acts in accordance to right and that his particular interpretation of it bears universality. Despite this mutual willing of and demand for rightness, wrong arises as the actual identification of right with a single, particular, and immediate interest and viewpoint.

Fraud -the second type of wrong Hegel discerns- is characterised by the simultaneous appearance of the observance of right and the actual infringement of it. The individual here seeks to deceive the other party with relation to his real motives and actions. Yet, the attempt on his part to conceal and disguise the conscious infringement of right still entails an implicit recognition of the principle of rightness and it is this element which Hegel finds lacking in crime: "Wrong in the full sense of the word is crime, where there is no respect either for the principle of rightness or for what seems right to me, where, then, both sides, the objective and the subjective are infringed".[20]

Hegel rests his argumentation regarding the justification of punishment as a response to this type of transgression on the assumption of a split will, whose differentiated and opposed in crime moments are seen to exist within the same personality:[21] in crime the particular will is "at variance with and opposed to itself as an absolute will".[22] Expressed here is Hegel's claim that the universal will (or, the principle of rightness) is the criminal's own implicit will; the act of opposing it involves, therefore, an essential self-contradiction and self-denial.[23]

Hegel's argument is twofold. At a first level he holds that there is a logical sense in which crime is a 'nullity'.[24] The claim to absolute independence and self-sufficiency of wrong that is expressed in crime is senseless, as wrong can have no meaningful existence outside a context of rights. Wrong is only made possible as the Other of right; hence, the latter is implicitly presupposed in the criminal's own self-understanding and in his chosen self-identity. The negation of right on the part of the criminal is a negation of the ground and conditions of possibility of his own existence as a person who wilfully chooses wrong and who defines himself on the basis of such a choice. The non-recognition and denial of the principle of

rightness, in other words, involves a contradiction in the will of the criminal and a self-denial.

The second sense in which the principle of rightness is part of the criminal's own implicit will, is a sociological one. The individual is a social member and thus linked to others. Their influence through the process of socialisation is to a certain extent unavoidably present in his personality while his continuing existence is in need of them. To the extent therefore that socialisation cannot result in absolute failure, the criminal's own implicit will, in Hegel's view, is the intersubjectively constituted common (or universal) will - its rejection would not be free of a corresponding significant personal cost.

The above lead Hegel to the tacit claim that the criminal implicitly wills his own punishment, which in turn is seen to assume as a consequence an implicitly just character.

Punishment in Hegel's view is just in yet another sense: it is "a right established within the criminal himself i.e., in his objectively embodied will, in his action".[25] Although his act is non-sensible and irrational, the criminal is nevertheless attributed a rational essence.[26] Since he practically claims for himself the right to embark on an indisputably wrongful act, the criminal, in Hegel's view, should be seen as simultaneously recognising everyone's freedom to the same arbitrariness: "... his action is the action of a rational being and this implies that it is something universal and that by doing it the criminal has laid down a law which he has explicitly recognised in his action and under which in consequence he should be brought as under his right".[27] The criminal has therefore willed and authorised his own punishment in the above sense as well; he deserves to be treated according to the law his act has established and to be thereby "honoured as a rational being".[28] To leave the particular will unpunished, despite its claim to absolute independence and self-sufficiency is, according to Hegel, to recognise it as self-sufficient and to pose it as right. Crime in his view has to be negated, not because it is an evil (not due to any moral conviction) but because it expresses a negation of right as such.[29] Punishment declares that the transgressor's act is a crime and manifests its nullity.

Hegel exposes the process through which the necessity and the reconciling role of punishment gradually become an object of consciousness for the mutually opposing parties. The clash between wrong and right is initially manifested as a conflict between the transgressor and the avenger. The former represents the particular moment of the will which, although present, was not given expression in the contractual common will. According to Hegel's dialectical approach, this moment - which is expressed in crime by means of a strict opposition to and exclusion of the Other - demands and has to be satisfied.

The avenger - the other side of the opposition - expresses within the sphere of abstract right the standpoint of the principle of rightness and takes up the annulling of wrong. The avenger, however, is not a disinterested third party who could impartially attribute justice; the potentialities of his role are therefore fundamentally limited. Hegel argues that revenge is an inadequate expression of the principle of rightness for, in terms of its form, it remains "an act of a subjective will which can place its infinity in every act of transgression and whose justification, therefore, is in all cases contingent, while to the other party too it appears as only particular".[30] Revenge is seen to acquire a limited justification to the extend that it comes to fill the gap created by the absence of law and of any institution that could administer the law on behalf of society as a whole, as well as to the extend that it is retributive.[31] Yet, by being "a positive action of a particular will"[32] it "becomes a new transgression";[33] hence, it reproduces at a different level the contradictions that lay at the heart of contract instead of resolving them through mediation.[34]

Revenge results in an endless repetition. At the same time, Hegel shows that even though it cannot on its own bring about a state of reconciliation, revenge does propel the process that leads to it. Although the conflict between the transgressor and the avenger leads to an impasse, as the injured will persistently fails to achieve the satisfaction it seeks, the burden of this "impossibility of satisfaction"[35] is the driving force behind the will's reflection into itself:

The vengeful will now examines for the first time "its abstract character of implicit being or immediacy"[36] and discovers that its desire for satisfaction - its demand for the contradiction to be finally overcome - cannot but be essentially a demand "for a justice freed from subjective interest and a subjective form and no longer contingent on might".[37] The recognition of the abstractness and one-sidedness of the universally right, that was produced as the outcome of the experienced futility of the injured will's attempt to deny and eliminate the other, amounts to the recognition of the need for a mediation between right and the particular moment that has become explicit as wrong-doing. This mediation takes place as the transition from the sphere of abstract right to that of morality and as the transcendence of the adopted abstract conception of personality by the more concrete one of subjectivity. Universality and particularity - or, at a different level, sociality and individuality - meet in the recognised (and hence, emerged) in both self and other, moral subject; or, according to Hegel's description, in the "will which, though particular and subjective, yet wills the universal as such".[38]

With relation to the criminal too, the same transformations take place, as the constant need to prove and establish his standpoint and the constant inability to ever do so, generate the acknowledgement of the

impossibility of the negation of right. The criminal comes to discover that his own standpoint implied that of the principle of rightness all along and that the non-recognition of right involves an essential self-contradiction. The experience of himself as the receiver of the act he previously related to as the vehicle and executor, is the source of reflection on the fact that the choice of wrong involves a claim for a right to this choice; a right whose exercise implies the acknowledgement of its equal validity for everyone else. The criminal becomes aware of the fact that his act has set a law as to what ought to happen and so discovers the universality of right that lies in his own particular will and not outside it. He realises that his will wills the universal and becomes conscious of his identity as a moral subject. In Hegel's technical language, the transgressor becomes "for himself" - or, in his own eyes - what he has always been "in himself" - or, implicitly and potentially.[39]

Universality and particularity thus assume in contract the appearance of a harmonious unity, whose superficial character and lack of a substantial foundation become obvious in crime (the act through which the previously suppressed particularity breaks forth and claims absolute autonomy). The generated opposition between the two, through the experience of the ineffectivity of revenge, is led to a relative resolution: the emergence of the moral subject actualises the mediation of the two poles of the antithesis, as the distinctive characteristic of the sphere of morality is its foundation upon the right of the subject to decide the content of the Good, of what transcends the particularity of private interest. The universality of right exists now in the particular will of the subject. Both the transgressor and the avenger overcome the negativity of their position by transforming their way of thinking and acting in the world and by coming to view this transformation as rational.

Hegel understands the Good to embody the subject's conviction of what ought to be obligatory to it. Its foundation is what he calls 'the right of insight' - that is, "the right of giving recognition only to what my insight sees as rational".[40] As he stresses, however, subjective moral reflection is dependent on the individual's particular circumstances and peculiarities. Hence, it is exposed to the possibility of being either 'true' - in the sense of corresponding to the current stage in the development of the rational essence of the free will, as the latter is objectified in the broader social-institutional articulation - or "mere opinion and error" - in the sense of failing to transcend its particular origin and express the rationality embodied in social institutions (in the universal). The exercise of the right of insight, therefore, involves the risk of fallacy; Hegel holds that "against it the right which reason qua the objective possesses over the subject remains firmly established".[41] Hegel makes the further claim that inherent in the subject is just as much the potentiality of willing the universality of the "absolutely good" as it is that of assuming a particular

content of which the will is aware that is in opposition to what it knows as the good. In the first case, the will might be led to error; in the second case, the will becomes evil. The two are obviously distinct in his thought, as error has its roots in ignorance which mistakes itself for knowledge, whereas evil presupposes that the good has been revealed as such to the agent but was not chosen as the guiding principle for action. Both good and evil thus, "have their origin in the will and the will in its concept is both good and evil".[42]

Hegel renounces the view that human beings are good by nature, for the further implication it carries is that the negative enjoys an independent, self-sufficient and external to the will existence. If, however, the negative is approached in this way, then the comprehension of its source and origin becomes an impossible to fulfil task.

In his view, the positive and the negative, or good and evil, do at some point in the development of the will exist in succession and juxtaposition only because they are firmly rooted in one another and only in order to be finally discovered in one another. The natural will is "inherently innocent, neither good nor bad",[43] as it lacks consciousness of the notion of freedom, while moral reflection without the presupposition of a self-conscious free agent does not make sense. Evil is the will that is aware of the good as the universal, and yet, chooses a particular content in opposition to it.[44]

"Man is therefore evil by a conjunction between his natural or undeveloped character and his reflection into himself; and therefore evil belongs neither to nature as such by itself - unless nature were supposed to be the natural character of the will which rests in its particular content - nor to introverted reflection by itself, i.e. cognition in general, unless this were to maintain itself in that opposition to the universal".[45]

Evil is the willing of the natural as the outcome of the activity of reflection. Evil represents an alternative that has to be present in order the potential for freedom that human beings - unlike other forms of life - bear, to make any sense at all. "It is only man who is good, and he is good only because he can also be evil".[46] It is only man who is free, and he is free only because he has the choice of being either good or evil. For Hegel, therefore, the inevitability of evil (which he often mentions) is not a natural one - hence, it does not release the knowing will that takes up this choice from its responsibility.[47] The nature of evil, in Hegel's words, "is that man may will it but need not".[48]

Morality thus can only perpetuate but not resolve the familiar contradiction between particularity and universality, as it results in "two directly interchanging forms",[49] the good and the evil. Both are expressions of a subjectivity which has allotted itself tasks it cannot fulfil as long as the rationality expressed in the institutional articulation of a free and just society, such as modern society in Hegel's view largely is,

remains either ignored or denied. Hegel insists that the universal, which is believed to enjoy an external to the individual existence, has to be recognised, in the context of this society, as what it essentially is: the universal within - that is, it has to be recognised as sharing in the essence of its members.[50]

Such objective conditions of an existent institutional actualisation of human freedom are finally also the ones that justify the obligatory force of positive law and, thereby, the transition from the relative justice of subjective revenge to justice as legal punishment.[51] If revenge can be seen to propel reconciliation due to accepted abstract claims of a logical and sociological nature (regarding an implicitly inseparable from the particular will universality), punishment, in Hegel's view, can bring about reconciliation by virtue of being objectively and concretely the act of the universal implicit within the particular in the aforementioned substantial sense.

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Notes

1. G. W. F. Hegel, Philosophy of Right, tr. with notes by T. M. Knox (London, Oxford, New York: Oxford University Press, 1967). The symbols 'A' and 'R' that might accompany, hereafter, paragraph numbers of the aforementioned book, stand for 'addition' and 'remark' respectively. The use of a comma separating a paragraph number from any or both the aforementioned symbols denotes that reference is made to the paragraph mentioned as well as to the addition or/ and the remark that corresponds to it.
2. For a comprehensive and succinct discussion of the experiential character of Hegel's philosophy, see Theodor Adorno's relevant article "The Experiential Content of Hegel's Philosophy" in Theodor Adorno, Hegel. Three Studies (Cambridge, Massachusetts, and London, England: The MIT Press, 1993), 53-88.
3. See Hegel, §§45, 41A, 46,A.
For a critical approach to Hegel's views on property and contract, see Seyla Benhabib, "The 'Logic' of Civil Society: A Reconsideration of Hegel and Marx", Philosophy and Social Criticism 8 (1981): 150-166.
4. Hegel, §71,R,A
5. Ibid, §71 (emphasis mine).
6. Ibid, §73.
7. Ibid, §§75, 81A.

8. Ibid, §74.
9. Ibid, §75.
10. Ibid, §81R.
11. Ibid, §81A.
12. Ibid, §82,A.
13. Ibid, §82.
14. Ibid, §81,A.
15. Ibid, §81A.
16. Ibid, §81R.
17. Ibid.
18. Ibid, §§81,R,A, 82,A.
19. Ibid, §§83,A, 87,A, 89,A, 90A.
20. Ibid, §90A.
21. Hegel asserts that in the case of non-malicious wrong, where the principle of rightness is recognised, punishment should not be imposed (see Hegel, §89A).
22. Hegel, §40 (emphasis mine).
23. Cf. Mark Tunick, Hegel's Political Philosophy. Interpreting the Practice of Legal Punishment (Princeton, New Jersey: Princeton University Press, 1992), 29-33.
24. Hegel, §97A.
25. Ibid, §100.
26. Ibid, §99A.
Tunick is right to note that in treating him as an essentially rational being even at the time of committing the crime, Hegel implies that the criminal does not really lack any understanding of the concept of right, but rather acts as if he lacked this understanding (see Hegel, §132R; Tunick, 29-33).
27. Hegel, §100 (emphasis mine).
28. Ibid, §100R.
29. Ibid, § 99,R,A.
30. Ibid, §102.
31. Ibid, §102,A. Hegel's defence of the retributive character of punishment involves the thesis that this makes sense only when the criterion for the specification of retribution is the inner 'value' of the performed action and not its mere reproduction - i.e., its formal repetition (see Hegel, §101,R).
32. Ibid, §102.
33. Ibid.
34. The contradictions referred to here, regard the relation between the common and the particular will, as well as that between the explicit and the implicit (though non-perceived) will of the transgressor.
35. Ibid, §102A.
36. Ibid, §104R.

37. Ibid, §103.
38. Ibid, §103; see also §§104, 105, 106.
Knox expresses in a clear and illuminating way Hegel's justification of the emergence of the moral subject: "... the contradiction of right by the criminal cannot be annulled by a mere regression to bare universality. Mere denial of the 'corruptive invader' will not root it out -tamen usque recurret. The only solution is to recognise the claims of the particular by allowing that the universally right must be mediated by the particular conscientious convictions of the subject". Ibid, 333 (note 94 to §104); see also the rest of the note.
39. Ibid, §§104,105.
40. Ibid, §132R.
41. Ibid.
42. Ibid, §139A.
43. Ibid.
44. "When man [as the enlightened human being] wills the natural, it is no longer merely natural, but the negative opposed to the Good, i.e. to the concept of the will" (ibid).
45. Ibid, §139.
46. Ibid, §139A.
47. "[...] a man's decision is his own act, and his own act is freely chosen and his own responsibility" (ibid).
48. Ibid.
49. G. W. F. Hegel, Encyklopädie der philosophischen Wissenschaften im Grundrisse (Heidelberg, 1817), §§511-
512, quoted (by Knox) in Hegel, 337 (note 11 to §114).
50. Evil propels the necessity of this recognition. The admission of error is only an admission that the subject was this time mistaken in its conviction; it still implies the persistence of the view that subjective conviction is in principle eligible to decide in isolation the content of the good. Evil, on the contrary, proves the inner insufficiency of the principle of subjectivism as such, by drawing it to its limits and by revealing, thereby, the contradictions that lurked in it.
51. See Hegel, §§132,R, 212, 218,R, 220.
Whether or not Hegel finally succeeds in demonstrating to the reflective individual that modern society constitutes in fact a world of freedom is, of course, a much broader issue that goes beyond the scope of the present paper and cannot be discussed within the space limits provided here. Independently of one's answer to the above question though, what is important to be stressed with relation to the particular topic that is currently being dealt with, is the fact that the social-institutional conditions of the actualisation of human freedom form, in Hegel's view, a prerequisite for the justification of the obligatory force of positive law and therefore also for the justification of punishment.

For a critical reading of Hegel's social and political thought that recognises the latter's contradictions, see Angeliki Kontou, Reconciliation and Modern Society: An Interpretation of the Thought of Hegel and Adorno (University of Essex, 2002, unpublished PhD Thesis). See also: Angeliki Kontou, "Hegelian Social and Political Thought and its Neo-Liberal Reading: Modernity, Reconciliation, Consensus," Deucalion 23 (2004), forthcoming (in Greek); Angeliki Kontou, "Adorno on the Mythological and Anti-Mythological Character of Hegel's Thought: The Aestheticisation of Philosophy," Axiologika. Special Issue: Adorno Conference –Celebrating 100 Years From His Birth (2004), forthcoming (in Greek).

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The Execution as Sacrifice

Jody Lyneé Madeira

Abstract: This essay centers upon analyzing the execution as ritual in an attempt to understand its redemptive potential, uniting René Girard's theory of primitive sacrifice in his essay Violence and the Sacred with a more nationalistic theory of execution. It first summarizes René Girard's essay Violence and the Sacred, paying special attention to the sacrificial functions of the judicial system, after which it applies this theory to establish execution as a ritual killing. Every sacrifice is founded upon redemption, and so the bulk of this essay focuses upon execution's redemptive and purifying functions, and how these functions are fulfilled by participants such as witnesses, jurors, and the media. Finally, this theoretical framework is applied to the 2001 execution of Oklahoma City Bomber Timothy McVeigh. This essay concludes by questioning whether executions are truly as 'visible' to witnesses as they first appear.

Keywords: Sacred, violence, sacrifice, judicial, execution, capital punishment, McVeigh, redemption, witness

1. The Sacred, Violence, Sacrifice, and the Judicial System

According to Girard, violence is "the heart and soul of the sacred."[1] "The sacred consists of all those forces whose dominance over man increases or seems to increase in proportion to man's efforts to master them."[2] The sacred is 'bad' when it is inside the community and 'good' when it "returns to the exterior."[3] The traditional end result of violence is spilt blood, which is universally impure unless it is sacrificial.[4] This violent impurity is contagious, and contaminates those who engage in violence, those who seek vengeance, and the areas and instruments in and by which they do so.[5] Thus, "whenever violence threatens, ritual impurity is present."[6] Contagion ceases only after a sacrificial catharsis[7] that involves more blood, this time that of sacrificial victims.

Such bloody catharses are required in times of sacrificial crisis, when the sacred intrudes into the communal center, placing a society in cultural jeopardy.[8] Each sacrificial rite is predicated on a primordial crisis, and strives to reproduce its details as closely as possible.[9] The sacrificial rite fixes the spontaneous, uncontrollable elements of the original sacrificial crisis into the formula of enacted ritual, thus generating a predictable formula that removes "all elements of chance and seeks to extract from the original violence some technique of cathartic appeasement."[10]

The sacrificial crisis that necessitates execution is the illegitimate appropriation of the state's killing authority. Violence first begins when

the citizen-enemy illegitimately appropriates the state's killing authority to commit murder. Such a brazen act violates the state by threatening its legitimacy and defying the taboos which mark its killing authority sacred and off-limits. The state, through a communal mask, executes not only to prevent an offender from committing future acts of violence, but also to purge the crisis unleashed in a capital crime. Ritual repetitions of sacrificial crises are often the center of communal festivities, marking both climax and termination.[11] Such festivals serve as a guarantor of finality and a harbinger of suture, being premised on the "assumption that there is a direct link between the sacrificial crisis and its resolution" and that at the festive culmination the crisis will unite with its suture and "become[] itself a cause for jubilation."[12] In such contexts, the reenacted sacrificial crisis becomes a sure suture-success. "The function of ritual, then, is to 'purify' violence", to cure contagion by the regular exercise of 'good' violence."[13]

A key part of the sacrificial rite is the victim. Girard discusses two types of victims: a surrogate victim and a ritual victim. The surrogate victim is both "link and barrier" between the community and the sacred and transforms a sacrificial crisis from a private into a communal concern.[14] But the surrogate victim is a member of the community even though he is sacred, and so an outsider must be found to act as the ritual victim.[15] Thus, "ritual sacrifice is founded on a double substitution": that of one member of the community for all, enabled by the surrogate victim and generative violence, and a second and the truly 'ritualistic' substitution of the ritual victim.[16] The secret behind the rite and its redemptive potential is the communal unanimity behind its enactment.

The prohibition against killing is upheld by one institution: the judicial system, which "serves to deflect the menace of vengeance."[17] The judicial system is an arm of the State, the only entity vested with the authority to kill legitimately.[18] The judicial system fulfills the functions of religion in a "primitive" society by providing a defense against socially inadmissible forms of violence.[19] It does not "suppress vengeance" but rationalizes it, limiting it "to a single act of reprisal, enacted by a sovereign authority specializing in this particular function."[20] Judicial procedures for awarding a punishing reprisal and the technologies of its infliction are encoded practices, embodied in law. Legal limitations on vengeance, taken out of the hands of the private parties who are grievously harmed, necessarily translates vengeance from a private act into a public ritual. The judicial system normalizes and thereby conceals its sacrificial functions. It also normalizes a very different kind of vengeance, a hegemonic form that mandates citizen consent to the ministration of vengeance lest citizens themselves be punished, ensuring that revenge

does not encourage the creation of new technologies of violence management.[21]

2. The Execution as Sacrifice

Capital punishment is very different from execution, being respectively a set of ritual killing practices and the actual exercise of those practices. Capital punishment as a practice stems from the perspective of the state, which authorizes its application. It is a tool of curing the sacrificial crisis that arises each time killing authority is illegitimately appropriated. The state kills the citizen who kills the state. The sacrificial crisis begins with the elimination of differences, as a citizen who is subjugated to a state becomes like that state in appropriating its killing authority. The state must remedy this critical destruction of differences by reasserting its dominance, resubjugating the murderous citizen by becoming (legitimately) murderous itself. The sacrificial crisis ends upon the reestablishment of difference.

The execution as event, in contrast, stems from the perspective of the citizen and not the state. While the state makes capital punishment available as a penal technology, it is a citizen jury that determines when it will be implemented. It has as its sacrificial crisis a specific illegitimate appropriation of killing authority. Unlike capital punishment as a practice, execution as event begins with the emergence of difference, when citizens who are superficially similar become different after one citizen seizes killing authority. Remedying the sacrificial crisis requires that these newly emerged differences become confirmed via a criminal trial that officially labels the murderous citizen "condemned," thereby validating and exhibiting the deviant.

Conceiving of an execution as a sacrificial killing requires us to move "toward an expanded concept of sacrifice."[22] Societies where the State executes are "localities where ritual killing no longer occurs," where its place has been taken by another institution of generative violence like the judicial system.[23] In execution, death ceases to become a magical crisis and becomes a set of regimented, mechanical processes. This mechanization of death is the key to the ritual process. Killing becomes ritualistic whenever the killer can anticipate when, how, and where the killing will take place, when unpredictable death becomes routine.[24] As a media execution witness once remarked, "I guess that's what makes it different—knowing how it's going to happen, when it's going to happen, where it's going to happen."[25] Both sacrifice and execution "attempt to enact under controlled circumstances the 'perfect kill'."[26]

The execution is saturated with obvious "traditional and ritualized elements" such as "the ceremonial last meal, the administration of last

rites, the last words of the victim, the covering of the head of the prisoner before death, the protection of the identity of the executioner, and the dispersal of responsibility for the death."[27] The killing site is also a highly ritualized part of the execution sacrifice. Executed prisoners are effectively staked to an immobilizing object. The region around the chair or gurney becomes an intimate circle, access to which is closely monitored and restricted to agents directly involved in the procedure. The magic circle around the execution site is sacred; witnesses are statutorily forbidden to make any permanent record of that sight to carry away.

In the nation-state, the deployment of violence is always moral. As United States Supreme Court Justice Stevens has stated, "capital punishment rests not on a legal but on an ethical judgment" and "the decision that capital punishment is the appropriate sanction in the extreme cases is justified because it expresses the community's moral sensibility - its demand that a given affront to humanity requires retribution."[28] Those who execute for moral reasons oppose themselves to barbarians.[29] Engaging in moral violence necessitates moral order. Civil order is uppermost in officials' minds in modern execution routines; a warden at Louisiana's Angola Prison "emphasizes to all witnesses . . . that there must be 'no emotional outbursts, no obscenities uttered, no undignified behavior of any kind.'"[30]

Once the execution protocol has been created, the execution, like a festival, becomes tied to the potential for finality and suture. Either it will help to establish continuity or it will culminate in a disjuncture.[31] In a sacrificially successful execution, the condemned becomes cleansed through his very expulsion and so "claims legitimacy not from his ability to disturb the peace but from his ability to restore the peace he has himself disturbed."[32]

3. Sacrifice, Redemption, and Execution

Every sacrifice is an attempt at redemption, and execution is no exception. Under the rationalistic theory of the social contract (spurned by Girard), executions renew democratic ties by cementing a feudal contract between governed and governing, confirming the efficacy of a system in which men trade their autonomy for protection from evil, giving loyalty based on faith in a state's protective abilities. In delivering a condemned to his Maker, the state fulfills its end of the social contract, extinguishing the threat. The sacrificial ritual also creates "a compact of fellowship among the sacrificers themselves."[33] Crime is a national crisis because it threatens citizen loyalties; if the state cannot eradicate a threat, then why pledge allegiance to that state? In executing, the state strengthens itself and thereby affirms its claim to citizen loyalties.

Sacrifices, then, are notable rituals with significant consequences, not the least of which is the creation of memory. "When man thinks it necessary to make for himself a memory, he never accomplishes it without blood, tortures, and sacrifice."[34] Of course, this memory is both collective memory and individual memory - cementing nationalistic compact and ostensibly resolving individual crises. The act of purging a national threat provides life in enacting death in that the short-term effect of eliminating a criminal threat enables a long-term redemptive effect.

The mechanics of redemption are no less fascinating. The execution engenders redemption when it is consumed by others - when witnesses hear of its completion, but particularly when they see it being carried out. The community consumes the condemned in two ways. The vast majority ingests the news of an execution via the mass media, and so consume the condemned textually. Witnesses, however, feast by viewing the execution.

Many phrases tie the act of viewing to eating. Lustful men "devour" woman with their eyes. Readers "consume" newspapers. We say, "feast your eyes on this!" When witnesses view executions, the image that is being consumed is that of human flesh, and therefore sacrificial. When a community selects a potential execution victim, it attempts to season this suspect into a palatable victim by making him conform to base perceptions of the poor, the uneducated, or the dark of skin.

This transformation engendered through metaphors of consumption is there for the State executioner as well as for witnesses. In 'primitive' societies, the killing of an animal scapegoat in place of a king transforms sacred royalty into royalty itself.[35] Likewise, for the State, sacred authority to kill is transformed into political power.

When citizens consume the condemned, they feast on flesh either hidden in text or concealed from the public gaze. In war, when sacrifice is publicly celebrated, the soldier body is visible, even cherished in its heroic agonies. But when the state executes, the sacrificial body is not on public display. This illustration is a distinction between two sets of practices - one "in which the body is immediately present and its relation to social action directly observed," and "disembodied, or textual practices in which the body is not only removed, but denied."[36] It is not surprising that the visible sacrificial body is the willing sacrificial body. But invisibility is not elimination, for "textually organized societies can never eliminate the body from the social order despite their efforts to move it beyond the range of awareness."[37]

Upon completion of the execution sacrifice, the body disappears, and so the execution must be communally realized through text via statements given by state officials and media press releases. Flesh

becomes textualized; we consume not the "word made flesh" but the "flesh made word." The textual body, consumed in common, creates a bond between citizen and state and quite literally "remakes the substance of the organism" in forever removing organs - members of the body politic - from the state.[38] The citizen-worshipper and his democratic god thus "communicate in the same flesh" - the body of the condemned.[39]

4. The Redemptive Role of Execution Participants

Execution participants such as juries, witnesses, and the media amplify the redemptive potential of the execution sacrifice**.** In execution as blood sacrifice, juries in capital cases become hybrids of state and citizen in that they embody the popular but assume the sovereign's task of invoking killing authority. Jurors sacrifice by renouncing their role in the social collective to literally serve the community by assuming the mantle of the state. Because juries are supposedly composed of a cross-section of the community, the body of worshippers includes the entire citizenry by proxy. Jury duty is also an act of sacrificial renouncement, because juries hand killing authority back to the state after pronouncing sentence. Sacrificial renouncement of killing authority thus becomes a democratically renewing ritual, proof that democratic citizens are a new breed of men who are so civilized that they may be trusted with the sovereign sword, wielding it against their social enemies and then returning it reverently to the state altar. This pageant proves that the democratic experiment successfully civilizes those under its rule, for citizens trusted with the most terrible of state instruments willingly surrender it.

Witnesses too affirm democracy by forging group identity through sacrifice. Even unwilling sacrifices such as the Holocaust produce "affiliative groups whose members share a sacrificial history".[40] Witnesses are "gathered in a carefully monitored setting" to "see, and, in their seeing, to sanctify, the state's killing of one of its citizens."[41] Faith in a nationalistic civil religion requires that the state be seen to act, and witnesses can confirm that the execution took place. Witnesses further legitimate the execution as a moral killing; anything bloody and barbaric is by definition unfit for sight, but a death as clinical and routinized as an execution may be viewed without effect. Thus, witnesses are the state's last effort to create a dispassionate and detached air upon the execution sacrifice.

Witness verification is most significant for triggering the nationally redemptive powers of execution. "No ultimate sacrifice can be remembered by those who gave it, for they are dead; only witnesses can re-present the sacrifice.[42] "By their presence and behavior" witnesses

"signify acceptance of the order to which they publicly conform," and confirm the generative power of the sacrifice. Witnessing becomes an act of loyalty to the state, and this loyalty "sustains and recreates the nation through fertility and connection rather than sacrifice and death."[43]

Like witnesses, the mass media normalize the execution sacrifice and testify to its clinical, routine accomplishment. Confirming that "history is what hurts," and "if it bleeds, it leads," media "become the channel through which knowledge of sacrifice moves to the nation."[44] Media coverage is crucial because the nation needs to communicate authoritative images to citizens. [45] Like the judiciary, the media assume "a priestly obligation to undertake coverage on behalf of the group," ritualistically re-presenting national acts in revelatory stories brimming with visions of citizenship and national ideals. But the fiction of objectivity as a news practice preserves the illusion that "events drive coverage, that professional mediators neither encode nor invent the news."[46] Coverage of an execution thus reduces it to an event necessitated by the condemned's behavior and consisting of his physical actions and their cessation - in essence, a moral killing.

Media presence at executions is a critical ingredient in their ritualization. Media weave the complex, fragmentary execution procedures into a seamless narrative of national authority. The mass media communicates and therefore amplifies their transformative and redemptive potential, reaffirming the nation's killing authority and fulfilling communal expectations of protection. This aids audiences in negotiating executions by placing bounds around these "perilous zones of transformation." [47] Communities rest better when they are told that their nemesis is dead, and media coverage acclimates us to the idea that future nemeses may be disposed of in the same rather undramatic cycle of catch, prosecute, and execute.

Ultimately, through media coverage, the execution ritual emerges as a clinical, routine, and moral death safely outside the bounds of the nation and its citizenry. Audiences are safely exposed to executions by routine clinical coverage of clinical execution routines. The executed body is troublesome, and because textually organized societies can never eliminate it altogether, this body must instead be tightly bound into safe media texts. Executions become normalized; media stories provide no evidence to suggest that anything unusual occurred - that is, besides death itself.[48]

5. Sacrificial Dimensions of the 2001 Execution of Timothy McVeigh

The sacrificial dimensions of execution are aptly exemplified by the 2001 execution of "Oklahoma City Bomber" Timothy McVeigh.

McVeigh and his accomplice, Terry Nichols, illegitimately appropriated the killing power of the state by positioning a fertilizer bomb outside the Alfred P. Murrah Federal Building in Oklahoma City on April 19, 1995, killing 168 people. McVeigh and Nichols successfully wrested killing authority from the United States to draw attention to the evils of its government and to gain public attention and attract others to the cause.[49] When McVeigh blew up the Murrah Federal Building, he tried to literally bring the government down.

What is particularly troubling about McVeigh as a ritual execution victim is that he had served in the U.S. Army during the Persian Gulf War, formerly demonstrating that he was willing to sacrifice his life for his country. Thus, the nation now had to remake this national savior into a social outsider. Perhaps that explains the diligent hunt for a rumored third bomber of Islamic descent, an outsider who could be safely executed. With such a manifestly obvious scapegoat, the totem could avoid arduous transformative work. But no such person conveniently presented himself, and so McVeigh's body was slowly cast outside the community through arrest, trial, and sentencing.

The nation easily sidestepped the question of killing one of its own by placing the blame for the entire procedure on McVeigh's own shoulders, safely reknitting boundaries that excluded both McVeigh and responsibility for his execution. McVeigh had, after all, shot first, branding him an outlaw.[50] Moreover, though McVeigh spoke of the Oklahoma bombing as a sacrifice of war, he did not manifest the appropriate reluctance to kill for his ideological ends.[51] Having touched and defiled the sacred, McVeigh himself became profane, unclean, and taboo.

The nation did not acknowledge the execution as a purification ritual but constructed the execution as an atonement whereby McVeigh paid for his crimes under the Kantian dialectic of free will and responsibility. Until his execution, McVeigh was held on the communal perimeter, and Attorney General John Ashcroft attempted to marginalize him further by restricting his access to media, arguably to contain his potential to incite more violence at the very moment that generative violence was about to be released through his execution.

6. Conclusion: Boundaries, Visibility, and Execution

In conclusion, encountering execution always deposits us at borders: between life and death, protection and purification, murder and execution. Borders are transformative regions that must be effectively policed; they "allocate killing authority" and "define where violence is subject to totem authority, and where it is not."[52] Clear borders organize

killing. But for sacrifice to work, borders must somehow be opened to public gaze in order to preserve and reaffirm group identity. Such transparency is essential to national legitimacy. What is seen creates the implication that this is all there is to see, that the codified law and witnessed execution are superficial procedures and not symbolic constructions. In order to keep the borders viewable, that is bloodless, ritual is necessary. But this ritual also limits visibility, somehow rendering the viewing an inauthentic experience of death. It is difficult to say, then, that executions are truly witnessed. Yet, the state retains all the benefits of authentic visibility. The state is still seen to act. Thus, the execution continues to be tangible evidence of democracy's viability, proof that the populace can be trusted with killing authority, a demonstration that "sovereignty can reside in the people," and confirmation of the effectiveness of democratic justice in restoring communal normalcy.[53]

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Notes

[1] René Girard, *Violence and the Sacred*, translated by Patrick Gregory (Baltimore: The Johns Hopkins University Press, 1979), 31.
[2] Ibid
[3] Ibid, 259.
[4] Ibid, 34.
[5] Ibid, 28, 27, 29.
[6] Ibid, 34.
[7] Ibid, 30.
[8] Ibid, 49.
[9] Ibid, 94.
[10] Ibid, 102.
[11] Ibid, 119.
[12] Ibid, 121.
[13] Ibid, 37.
[14] Ibid, 271.
[15] Ibid, 270.
[16] Ibid, 102, 269.
[17] Ibid, 15.
[18] Ibid, 23.
[19] Ibid, 20.
[20] Ibid
[21] Ibid, 18.
[22] Ibid

[23] Ibid, 297.
[24] Carolyn Marvin and David W. Ingle, *Blood Sacrifice and the Nation: Totem Rituals and the American Flag* (New York: Cambridge University Press, 1999), 132.
[25] Cynthia Barnett, "Covering Executions," *American Journalism Review* 17/4 (1995): 26.
[26] Ibid
[27] Philip Smith, "Executing Executions: Aesthetics, Identity, and the Problematic Narratives of Capital Punishment Ritual," *Theory and Society* 25 (1996): 235-261, 239.
[28] Spanziano v. Florida, 468 U.S. 447, 480, 490 (1984) (Stevens, J., dissenting).
[29] Marvin & Ingle, 12.
[30] Helen Prejean, *Dead Man Walking: An Eyewitness Account of the Death Penalty in the United States* (New York: Vintage, 1993), 105.
[31] Girard, 121.
[32] Ibid, p. 134.
[33] Orlando Patterson, *Rituals of Blood: Consequences of Slavery in Two American Centuries*, (New York: Basic Civitas, 1998), 183.
[34] Marvin & Ingle, 134.
[35] Ibid, 304.
[36] Ibid, 4.
[37] Ibid
[38] Emile Durkheim, *The Elementary Forms of the Religious Life*, translated by Joseph Ward Swain (CITY: PRESS , 1965), 378.
[39] Ibid
[40] Ibid, 90.
[41] Austin Sarat, *When the State Kills: Capital Punishment and the American Condition* (Princeton: Princeton University Press, 2001), 67.
[42] Ibid, 137.
[43] Ibid,7.
[44] Marvin & Ingle, 141.
[45] Ibid, 7.
[46] Ibid, 139.
[47] Ibid,
[48] Ibid,
[49] Ibid,
[50] Ibid, 80.
[51] Ibid
[52] Marvin & Ingle, 333.
[53] Sarat, 17.

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Blasphemous Evils and Evil Blasphemies

David Nash

Abstract: This paper investigates and elaborates a historical context for the opposing twin dimensions of state involvement in the phenomenon of blasphemy in the Christian West since the Reformation. It will suggest ways in which the state has attempted to protect populations from the perceived evil of blasphemy, and will also examine how victims in turn constructed discourses and defences which demonised the State and its actions against opinion. Here, an important dimension of the use of State power has been its relationship to public opinion and its desire for redress/revenge. The construction of the blasphemer as an evil presence and the changing duty of the law in the eradication of such offences will be considered alongside some theoretical explanations about the development of modern cultured behaviour (e.g. the ideas of Elias and Foucault). Some tentative conclusions about the nature of a state-promoted cultural project intent upon the eradication of blasphemy (as offered by the implications of these theories) will be explored. Over time the State's protection of its status as a guarantor of law and civilisation has been replaced by a duty to referee competing rights, bringing new definitions of evil onto the agenda. Only time will tell whether this is a recipe for greater interventionism or for further restraint.

Keywords: Blasphemy, Elias, civilising process, Foucault, religion, hate crime, heresy

Blasphemy has become a more obvious and strident cultural presence in recent years. It exorcises governments increasingly and the legal worlds of the west can sometimes seem in a state of panic about case law and jurisprudence. In short, this seems to leave the law and its political masters at the mercy of a dangerous triumvirate of religious/anti-religious pressure groups as well as the libertarian free expression lobbies in a number of Western countries. But blasphemy has also appeared as a motif and as a powerful idea within Western art and literature, indicating that artists actively want audiences to engage with the sacred again, taking it in many directions. Also, the concrete concerns initiated by blasphemy have been generated by the comparatively new agendas inspired by 'hate crime'. This has altered the meanings and dynamics of crimes centred on the formation and dissemination of opinion.

The rudimentary definition of the offence in all cultures has been to see it as the wilful use of language which questions the existence, nature or power of sacred beings, items or texts themselves in a derogatory

manner. The blasphemer, at this early stage was identified as an evil and disquieting presence, and there were prescribed laws for dealing with them. Blasphemy not surprisingly has a history of some antiquity emanating from the classical world whilst the biblical state of Israel explicitly used its power to identify the Jewish people with their own God.

So from where did the justification for pursuing blasphemers emerge from, and why was it pursued with such relentless vigour into modern times? From classical to early modern times the issue of state security was paramount to both rulers and governors. One role both of these had was to act as stewards over the mechanisms of reverence and respect. Blasphemers sometimes through words, actions and even lifestyles demonstrated a worrying alternative. They were frequently perceived to be individuals who had their own knowledge about things both in this world and the next.

Some historical models of blasphemy prosecution in Europe prefer to focus on the attempts by these authorities to eradicate it purely as a form of behaviour. This draws attention to dialogues about both godly and moral action which seeks to control and civilise populations. In these histories the emphasis is upon impulsive or intoxicated incidents for which individuals are made to feel remorse. It is worth contrasting this with much of the work undertaken within the English-speaking world (especially around English law). This highlights more obviously a 'history of ideas' approach to the problem in England – especially that blasphemy is produced by the pen and pamphlet rather than the tavern disagreement or the rash impulsive oath. The situation of America is perhaps an exception here since its Constitution, and commentators upon it, tried to remove the issue from the scrutiny of the state. Paradoxically, it is individuals and communities that have initiated the informal low level action to control opinion that in Europe actively inspired State action.

In profoundly different ways what both of these historiographies strongly hint at is the gradual process of crime and the law's response to it becoming recognisably modern. In this, most criminological histories portray modernisation as development which sees the state gradually appropriating control over discipline, punishment and (by implication) ideals of behaviour. These histories stress progress to tell of the coming of less violent societies. These societies display a marked decline in violent crime, which is displaced by a marked switch to crimes against property – the so called *de la violence au vol* thesis.

However we cannot trace the emergence of this process in the history of the crime of blasphemy. Indeed, the trajectory of this offence can be demonstrated to have gone in the opposite direction. At its very inception, the state was explicitly involved and was the major stakeholder

in blasphemy's evolution as an offence punishable by law. The early modern period saw this trend continue as successive formulations of the offence, through the construction of further theologically informed state apparatus. Calvin's Geneva quickly adopted a conception of blasphemy, and early modern Venice evolved (uniquely) a specific jurisdiction to try and punish offences of this nature alone. In England the state's interest and involvement in the offence of blasphemy was enshrined by the celebrated Hale judgement of 1675. This made religion 'part and parcel of the law of the land'.

All worked on the premise that the blasphemer was incorrigibly an evil presence within societies at large. Here it is worth rehearsing how the process of blasphemy was produced by the mechanism of orthodoxy. It is not always appreciated that orthodoxy in the West needed to be constructed, nor that its success was self evident nor always a foregone conclusion. It is often suggested that the varieties of Christian doctrine that flourished in the first centuries of the Roman Empire bear comparison with a variety of contemporary Christian denominations. This was only streamlined by the interested action of successive secular rulers, culminating in the council of Nicea which actively prescribed, and demanded allegiance to, an orthodox version of Christian doctrine. This action invented religious dissidence in the form of heresy and the much less widespread phenomenon of blasphemy.

But it is precisely here that an important distinction was drawn. The heretic was always an individual who had been led into error either through their own thought or the actions and preaching of others. Throughout, such individuals were generally considered to be victims of such thought. Thus the machinery of detecting and policing heresy had its roots as a vision of rehabilitating the mistaken. Clearly our history demonstrates that this imperative could be lost in individual circumstances. Nonetheless the machinery of punishing heresy was intent upon restoring the heretic to orthodoxy, even if this could only be achieved through the death of such an individual.

What we should here note is the capacity for the secular and religious authorities to conceive of the blasphemer as somehow fundamentally different and to treat them accordingly. Where the imperative with the heretic was to rehabilitate them and return them to the community, priorities around the blasphemer were somewhat different. The blasphemer was more frequently characterised as an outsider and a dangerous individual intent upon undermining the sacred beliefs of others. In choosing their actions, blasphemers placed themselves outside of society and were thus a danger to it. More often than not they were not characterised as victims led astray but as wilful individuals who claimed

superior knowledge which they would use against the society that tolerated them. Thus, they were people who had chosen their own fate.

This element of choice was further emphasised, especially in the early modern era, since many accused of blasphemy were those who exhibited economically and socially marginal lifestyles. Some of these were associated with particular occupational groups (French evidence suggests sailors and soldiers were especially guilty here). Some reached this situation from a more ideologically motivated position exhibiting libertine and alternative lifestyles that could be construed as a direct consequence of their blasphemous opinions. These were people who scoffed at authority – an attitude problem heretics didn't usually have. Thus this marginalisation implies to us as historians that frequently blasphemers were made uncivilised by their societies' reaction to them.

This issue of seeking to civilise within the historiography of crime and criminality draws on the ideas of a western civilising process as outlined by Norbert Elias. The debt to Elias is evident in the work of many recent historians of crime who have emphasised the inherently violent nature of the pre-modern world and its capacity for evil. This has inspired and motivated many social historians of criminal activity, and the responses to this are both cultural and social. A significant factor in the argument offered by Elias is that the early modern cultivation of mannered behaviour was a conscious decision by initially individual, but eventually whole, groups of people. This decision necessitated that society turn its back upon an impulsive, violent and warlike past which had, by definition, limited the lifestyle and life quality of those who had experienced it. This whole process occurred from the desire of individuals to modernise themselves and not as part of a wide social change. It is clear that this was painted as a modernist project which all could to subscribe to with the degree of enthusiasm of those writing in the 20th century. It is in some respects difficult to underestimate the enthusiasm in this and how it contrasted with pessimistic versions of the social control thesis.

According to Elias, a picture began to emerge where societies and its incorporated groups were perpetually anxious to better themselves, while those who did not subscribe to these wished-for developments were clearly on the road to their own marginalisation. While the eighteenth and nineteenth century were to see manners and prescribed behaviour as the key to social advancement, this process was well in place by the end of the early modern period, or so Elias would have us believe. Nonetheless, what this is asking us to believe is that an overarching change in behaviour swept across late mediaeval Europe. This view has influenced a number of historians of crime and the law who perceive the civilising impulse as the key to the emergence of less violent societies. This does, however, take the notion of "crime" as a whole, meaning those crimes that have not been

studied in detail, like blasphemy, are left out of the equation. This is a pity since blasphemy increasingly resembles a special case which emphatically does not bear out the consequences of the 'civilising process' thesis.

Firstly blasphemy is present from the very evolution of the modern state and does not, as Elias argued, become an invention of the late medieval quest for control and centralisation of governmental functions. Secondly blasphemy is not a mode of behaviour solely on its own terms. It relies for its power as a transgression and a statement of individual subjectivity upon its status as a binary opposite. It did not exist on its own terms but drew strength from orthodoxy. Also, blasphemy could never be eradicated as an anachronistic behaviour transcended by modern civilised modes of interest and attitude. This in itself explains the persistence of postures around blasphemy that characterises it as an enduring and pernicious evil.

Blasphemy was also a component of strong feelings around gambling, bravado, intense physical and emotional trial and around intoxication. It could never be eradicated because it existed where profane life existed. In this respect its status as an offence against individuals, sensibilities and society bears comparison with the offence of witchcraft. Here, as in blasphemy, the offence could not wholly be eradicated and persisted as a low level subculture of charm, amulet and mild incantation. Whether criminal or not, both were schemes of behaviour which cultural legal and social authorities found stubborn, and against which actions proved wholly ineffective.

The punishment of blasphemy was a fundamentally important state-sponsored sanction used from early times as a highly visible instrument of state violence long before its modern manifestations. Its link to religion and the assertion that religion underpinned the state aimed at preserving the integrity of states that operated and regulated such laws.

Michel Foucault, far from analysing the civilising process, concentrated upon processes whereby the modern enlightenment confidence in knowledge and its nature became perverted. Drawing upon Nietzsche's diagnosis, Foucault argued that humanity has not progressed from war, combat, and force to a more humane system of the rule of law, but from one form of domination to another. It is here that the persistence of blasphemy which we noted in encountering the ideas of Elias may initially be further borne out by the ideas of Foucault. Firstly, the outspoken attack of Foucauldians upon the benevolence of liberal society would appear to be well founded. Blasphemers never found an objectively more modern and civilised response to their actions. In some countries, most notably those working with English common law, there was precious little evidence of civilised attitudes to blasphemy. The offence became

'modernised' rather than wholly dispensed with as an awkward anachronism.

Certainly Foucault's era of 'surveillance' is contemporaneous with the desire throughout Europe to produce elaborate and effective codified law around blasphemy. These appeared in late sixteenth century Europe with examples evident in Spain, France, the Italian states and in England. While some European historiographies see this process as successful (notably that offered by Alain Cabantous), this scarcely takes account of more articulate protests against religion that emerge in enlightenment ideologies.[1] These went further than itinerant marginal lifestyles to be conscious choices amongst libertine and epicureans. Thus, dissolute behaviour was not 'forced' out but mutated. This transition could be traced directly to latter-day individuals whose artistic exploration of the blasphemous world owes much to these enlightenment pioneers. Most importantly, these tendencies were not successfully objectivised or eradicated as Foucauldians would argue. Here, the pessimism of the Foucauldian position is the least shaky; the Enlightenment inspired and provided machinery that enhanced the ability of blasphemy to be productive of social and cultural change.

Foucault's era of surveillance speaks of deliberation and calculation on the part of authority when confronted with the criminal presence. Thus, actions and penalties against criminal activity were determined with a precision which sought to render punitive experience commensurate with the severity of the crime, and certainly not overly severe. This was explicitly something Foucault noted as different from the early modern and medieval world, where the unregulated spectacle of punishment dominated. Such an analysis runs out of steam when confronted with blasphemy that always appears an antique presence. The defendants in such cases from the eighteenth century onwards were always able to call upon a string of arguments that indicted the crime itself for constituting a dialogue about anachronism. This was especially true in a number of high profile English and Scottish cases where guilt and punishment bore no relation to any notion of calculated penalty.

Blasphemers should, however, have a central presence in Foucault's world, and it is sometimes mystifying that they do not have one. They display subjectivity, they struggle, are occasionally successful and kick against forms of surveillance. They also have acted throughout history as a spur to forms of activism, either through sympathetic action or support for wider discourses about freedom of speech and expression. However, it is clear that blasphemers and their particular offence cannot be ascribed comfortably to the action of a single (or series of) authoritarian projects. Paradoxically Foucauldian analysis also shows its age here, since

it displays an ironically modernist attitude to the decline of religion in which it withers away at the behest of widespread irrefutable secularisation – taking blasphemy and the blasphemer with it.

Moreover the modern world has seen the re-emergence of ideas and institutions that look at odds with a Foucauldian chronology of development that should, by now, have seen them confined to oblivion. In particular, religions which have turned their back upon modernist liberalising tendencies are not playing out some game with their own subjectivity. They are sometimes re-invoking the pre-modern or sometimes surrendering the power given them by the enlightenment. In such climates, now, as always, blasphemers can perennially find themselves identified with evil.

It is this capacity for evil within the individual which has begun to fascinate the modern state, and it is from here that whole societies and legal frameworks have become interested in the genesis of 'hate crime' as a new social concern. Whilst governing authorities may be interested in the phenomenon, their path forward through it is unsure and dangerous. Whilst states may wish to protect populations, they are trying to slow and turn a ship already underway with immense momentum.

The history of the last two centuries has shown the state retreating from the display and use of power in this area. Increasingly the offence of blasphemy has come to reside significantly with the individual. This process has been aided by the measurable growth of individualism through participatory democracy, the legal recognition of individual conscience and dissent as legitimate voices. Paradoxically, the development of social, cultural and religious tolerance has also played its part in this. From this, religions of the word and of the conscience were able to develop, multiply and actively flourish. Cultural trends, while not ensuring secularisation occurred following the orthodox modernist model, nonetheless did make religion more malleable and able to survive assaults upon its claims to be a universe system of values applicable to all.

Modern offences and blasphemy cases of, say, the last 150 years have exhibited the power and intervention of the individual to restore an equilibrium unbalanced by the words and utterances of others. But up to this point there has been an urge to locate the notion of evil as a discourse spread by authority, and interested parties as a means of demonising the blasphemer. We must now end by exploring the dimension by which the actions of the state itself became characterised as evil. Many of the books and pamphlets written to support blasphemers and the positions they took tried to produce a Whig-style history of development which saw total religious toleration as the ultimate end result. States and governments which stood in the way of this could very quickly be seen as anachronistic and *ancien* regimes. Such views themselves had a distinctly modernist

tinge and we should note how much they contrast with the ideas of Foucault offered earlier.

A related criticism that would frequently surface was the suggestion that punishment for opinion was frequently unjust and inhumane. Numerous cases in England contain motifs of this nature stretching from the seventeenth through to the 20th century. Action against the Quakers in the seventeenth century demonstrates the seeds of lingering religious intolerance as well as the longevity of harsh punishment. Authority would also regularly discredit itself in its actions against individuals who displayed infirmity of mind or outright insanity. Even in 20th century Britain the imprisonment of a manifestly ailing individual (J.W. Gott in 1922) was cited as a barbaric act and was perceived to have hastened his death.

In these instances, the state was also conceived of as taking action in support of the Christian religion. As individual European states themselves became more multicultural, the emphatically biased protection for Christianity became increasingly untenable. This privileging of one particular version of what constituted 'the religious' was increasingly seen as evil by those with alternative viewpoints. In this, the state created an external 'other' amongst those who might claim they were indigenous. The West, the male, the heterosexual and the orthodox were established as norms by this law, and the writ of citizenship did not necessarily run to their binary opposites.

This then constitutes the end of our story. The devolution of power to the individual has left the state as an inevitable victim of individuals' claim to autonomy and liberty of conscience. Even strong claims of theological neutrality leave the state open to action from groups and individuals. This has occurred in America, where the State may claim it is a secular entity which contemporary society must grapple with. But it is precisely the expression of theologically neutrality which can be viewed as anti-religious. This is instrumental in creating grassroots pressure in the United States aimed at making the state absolve itself of responsibility for the secular status quo. This same nervousness within the state is also behind grassroots pressure in the UK for law against incitement to religious hatred.

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Notes

[1] Alain Cabantous, *Blasphemy: Impious Speech in the West From the Seventeenth to the Nineteenth Century*, translated by Erich Rauth (New York: Columbia University Press, 2002).

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Corruption, Authority and Evil: The Invention of Political Crime in the Ottoman Empire and Turkey

Ruth A. Miller

1. Corruption

The August 17, 1999 earthquake in western Turkey left 15,000 people dead and 600,000 homeless. It also acted as a focal point for heightened ideological debate among the Turkish population. The earthquake was a natural disaster, but it quickly became more than that. Its size, the extent of the devastation, the fact that it had happened in the "civilized" western part of the country rather than in the "underdeveloped" eastern part—where natural disasters are supposed to happen[1]—all prompted debate, discussion, and above all an attempt to endow the destruction with meaning.

In the days following the first few aftershocks, state owned and secularist television stations used analyses of plate tectonics to broadcast images of an angry Arabian peninsula—dominated by jagged arrows representing the Wahhabi Saudi state—aggressively slamming into a peaceful Turkish Anatolian plateau.[2] Islamist newspapers strongly implied that the earthquake was divine punishment for the moral depravity of the current Turkish government.[3] Liberals used the opportunity to attack a cumbersome and overwhelming state structure for its slow response to the suffering.[4] And radical nationalists—such as the neo-fascist health minister, Osman Durmuş—created martyrs to Turkish racial purity by, for example, refusing to allow blood transfusions or aid from Armenian and Greek donors.[5]

But in the midst of all of these attacks and counter attacks, the group that eventually incurred the most popular and political wrath was not the Islamists, the secularists, the state, or religious minorities—it was the building contractors. The contractors, it turned out, had been corrupt. They had bribed state inspectors, they had used shoddy materials and pocketed the funds leftover, and they had received their contracts—both public and private—via nepotism and favouritism. The result was a death toll that rose into the tens of thousands.

In the weeks following the earthquake, stories circulated of contractors set upon by angry mobs, while local authorities looked the other way.[6] Many in construction simply left the country. Finally, the state opened a formal inquiry into the relationship between its bureaucrats and the contractors—the eventual goal being to root out the corruption inherent to the building industry. At that point, the discussion in the media also switched from the contractors' role in the earthquake's carnage to their role in the corruption of state institutions.[7]

Within weeks of the earthquake, that is, the evil perpetrated by the contractors had shifted from a personal evil in which they were responsible for the deaths of thousands of individuals, to a political evil in which they were responsible for sullying the bureaucratic structure of the Turkish state. The victim of their crime ceased to be the individual, and instead became the nation. Eventually, the contractors, the evil that they had perpetrated, and the guilt that they had incurred were all co-opted by a renewed discourse of state purity.

That the contractors became the targets of popular and political anger at all is worth discussing. Yes, their dishonest or simply incompetent practices were the cause of death and misery. Yes, natural disasters and epidemics rarely occur without an immediate attempt to attribute to them (usually negative) moral value. Violence—even the arbitrary violence of an "act of God"—must have meaning, and someone must be responsible for it. Thus we see, to choose at random, Eastern European immigrants to the United States blamed for nineteenth century typhoid epidemics[8] and "Communists" or "Jews" blamed for the 1933 German Reichstag fire. But why attack the contractors specifically, and not the cumbersome state denounced by the liberals, the religious/ethnic minorities blamed by the fascists, the religious extremism targeted by the secularists or the atheist ministers condemned by the Islamists?

I would argue that the contractors, more than any of these other groups, could embody the contemporary Turkish understanding of "evil" the most effectively. By 1999, "evil"—especially in the public sphere, where the civic and the moral overlap to a large extent—had a specific meaning, tied to the purity of state institutions. And by 1999, it could be applied only to corrupt bureaucrats or to those responsible for their corruption—in this case the building contractors. This meaning, however, had been in the process of articulation over the course of a century and a half, and owed its existence to trends in Ottoman political-legal thought that existed long before the Republican Turkish state had even been imagined. It was in the Ottoman period, and not in the Turkish Republic, that both civic and moral evil had become key supports in a proto-authoritarian state structure.

2. Authority

One of the defining characteristics of power in the modern period is the rationalization and bureaucratisation of law. Legal codification, or at least debates over the merits of legal codification, became an almost global phenomenon in the nineteenth century as state power was centralized and made uniform.[9] The fact that often this rationalization, bureaucratisation, and codification occurred in a colonial or quasi-colonial context does not

detract from—and in fact underlines—the normative nature of the process. The rationalization of criminal law in particular standardized not just the concept of crime, but also the concept of evil, victim, and perpetrator. The Ottoman Empire did not escape these trends. Between 1839 and the end of the First World War, the Ottoman legal system also underwent a massive change as political power was re-situated. In the Ottoman Empire too, codes replaced what was largely a case-precedent system, liberal neologisms for concepts such as "citizen" and "public opinion" were incorporated into and legitimised by these codes, and the relationship among state, citizen, and law became self consciously rational.[10] Criminal law sought to eliminate the "deviant"—be it local power, alternative political identities, or threats to a modern, uniform, moral standard. Finally, the religious establishment began to play a new role in defining "evil," in which threats to the political or social norm became as dangerous as threats to religious orthodoxy.

As a result, criminality and evil began to occupy a new and fluid position in the Ottoman imagination. As Ottoman and then Turkish criminal law was repeatedly re-interpreted over the course of the nineteenth and early twentieth centuries, what could be defined as "criminal" or "evil" also changed. In particular, it was during this period that religious or moral evil was conflated with political or bureaucratic evil. Indeed, by the turn of the twentieth century, evil had become largely a political rather than a moral category, setting the stage for the Turkish Republic's eventual 1927-1938 adoption of Mussolini's fascist code of criminal law.[11] The abstract concept most in need of legal protection had by the 1930s become not "the individual," "God," or even "society," but "the state." A corrupt bureaucratic functionary thus posed more of a threat to Ottoman and Turkish self definition than a murderer, an apostate, or a sexual deviant.

This trend was very much a part of nascent legal modernity in the late Ottoman Empire. Between 1841 and 1859 in particular, criminality became more and more overtly an issue of threatening the bureaucracy or the state rather than the individual, society, or God. Two categories of criminality became the almost exclusive target of codes promulgated over these decades: on the one hand, legislation addressed rebellion, "banditry," revolution, and similar collective external threats to political legitimacy; on the other hand, it addressed bribery, corruption, graft, and similar discrete internal threats to uniform bureaucratic function.[12]

The state and the bureaucracy, that is, very quickly became the only "victims" that modern Ottoman criminal law sought to protect. From the outset, political crime was the crime of paramount—and to some extent sole—importance. It was the religious establishment, however, that

turned this political and bureaucratic crime into sin. The Ottoman religious establishment played a key role in the transformation and modernization of law in the Ottoman Empire. *Ulema*—scholars of Islamic law attached to the *meşihat*, or religious hierarchy—occupied many of the important posts in the late Ottoman Ministry of Justice, and made up the vast majority of the functionaries in the new legal system.[13] These *ulema* simultaneously became mouthpieces for a number of statements issued by the bureaucracy that endowed with religious legitimacy both the centralization and the rationalization of political power.[14]

The result was a uniquely modern relationship between the religious establishment and the state. Whereas in the pre-modern Empire, dialogue between the two spheres certainly existed, it was only after 1839 that the two became effectively one, with religion as a pillar of uniform state power.[15] The *ulema*—former arbiters of religious, social, and personal morality—began to operate instead in a system focused exclusively on political morality. Their role as interpreters of human evil was effaced by their role as interpreters of bureaucratic crime; sin and crime were conflated and, to the extent that crime had become solely political, sin came to mean any anti-state or anti-bureaucratic activity.

It is not, for example, an accident that anti-state activity was more often than not designated as "banditry." Everyone from political conspirators to nationalist revolutionaries to disobedient soldiers was accused of "banditry" and tried and convicted accordingly.[16] This is not just because banditry implied a collective criminality that made it feasible for a state to go after others in the "gang" without proving individual culpability.[17] Nor is it solely because attributing to a bandit the aura of martyrdom that is often attributed to revolutionaries can be difficult. In the Ottoman context, "banditry" was already a religious crime. It was one of the five "classical" *had* crimes in Islamic law, and thus the term had a tinge of sinfulness already built into it. By accusing revolutionaries and rebels of banditry rather than—or in addition to—treason or even rebellion, the state was thereby underlining the evil as opposed to criminal nature of their act.

Between 1933 and 1938, the Turkish Republican government adopted all of the salient sections of Mussolini's fascist code of criminal law.[18] The two most important of these were chapters on "crimes against the nation or race" and "crimes against the personality of the state." The first targeted for the most part "internal" threats to a uniform national or racial norm. The second targeted "external" threats to bureaucratic structures or political self definition. In general, the fascist ideology embodied in both sections self consciously sought to use the concept of

criminality to protect the state from any conceivable attack on its "life" or its "honour."[19]

The evil that had formerly been associated with violent aggression against the individual or religious morality was thus completely transformed by fascist philosophy. In both fascist Italy and early Republican Turkey, "evil" came to mean instead any aggression against the rights, honour, or safety of the nation-state. Indeed, as the first Republican Turkish Justice Minister argued, criminal law had to protect the rights of the state, the rights of the revolution, and the rights of the people, in that order. He concluded:

> Our criminal code is very harsh because the revolution is very jealous. But it is both harsh and scientific. Those who will be afraid of it, and those who have need to be afraid of it are those who are against the interests of the Turkish nation, against the rights of the Turkish nation, and against the revolution; and these people ought to be afraid.[20]

The trajectory of Ottoman criminal law, the conflation of religious evil and political crime, the coming together of personal corruption and bureaucratic corruption had all set the groundwork for this moment. Personal evil and political evil had become one.

At the same time, it must be emphasized that the rationalization and bureaucratisation of the law that led to this situation were general and largely international phenomena in the modern period. In nearly all modern criminal codes, the individual disappeared as the victim in need of protection and was replaced by an abstract collective concept such as "society," the "social body," or "the state."[21] Nearly everywhere, that is, evil had become a collective (and mildly authoritarian) issue rather than a personal issue.

What led the Ottoman Empire and Turkey in a more radically authoritarian and eventually fascist direction was therefore not so much the elimination of the individual, but the unification of the social body or society and the state. It was only when the needs, desires, and identity of "society" were manifested in bureaucratic and political institutions, when it was these institutions rather than "society" that criminal law protected, that the line between a moral or even religious "evil," and a civic or bureaucratic "criminal," disappeared. And it is the elimination of this line—the fact that political crime *had* to be evil—that can help us understand the unfortunate position of the contractors following the 1999 earthquake, as well as popular reaction to scandals such as "Susurluk."

3. Evil

"Susurluk" requires some elaboration. In November 1996, a Mercedes with a trunk full of automatic weapons crashed near the Turkish town of Susurluk, killing all but one of its passengers. Those who died included Abdullah Çatlı, a radical right neo-fascist assassin who had been sought by Interpol, Hüseyin Kocadağ, a senior member of the Istanbul police, and Gonca Us, Çatlı's common law wife. Sedat Bucak, a Kurdish tribal leader and close associate to Tansu Çiller, the former Turkish Prime Minister, survived with a dubious case of amnesia.[22] The Susurluk scandal, as it came to be called, prompted widespread discussion in Turkey about violence, authority and, in a quite basic way, evil. Stories of state violence that had been believed, but deemed apocryphal, suddenly gained legitimacy, and the "accidental" or mysterious deaths of various prominent politicians and business leaders were re-evaluated in the light of new information. Nearly ten years later, "Susurluk" remains a byword for pervasive criminality and corruption.

The sort of criminality or corruption that it represents, however, is not perhaps what one might expect. Çatlı began his career as a young, radical right militant, soon became a heroin dealer, and eventually graduated to assassin.[23] Over the course of the post-Susurluk investigations, it came out that Kocadağ had been involved in 22 cases of homicide or torture and held a major share in Turkey's illegal gambling market.[24] Us, despite her honorary title of "Miss Cinema 1991,"[25] was for all intents and purposes a prostitute. And Bucak, even given his ties to Tansu Çiller and his pro-state activities, represented an ethnic group that directly threatened the official ideology of uniform Turkish national identity. In other words, attributed to the passengers in the Mercedes, were classical or religious evil in the form of murder, torture, and prostitution, social evil in the form of drug dealing and gambling; and even nationalist evil in the form of a threatening ethnic identity.

Susurluk, however, is now associated almost exclusively with political evil. In the press, among the population, in the papers of the state investigators, the question that is repeatedly asked is how such extensive bureaucratic corruption—in the form of state ties to these criminals—could have occurred. Çatlı and Kocadağ are not evil because they killed or maimed other human beings, because drug dealing is immoral, or because gambling is theft. They are evil because these activities polluted the state structure. Us is not evil because of her deviant sexuality, and Bucak is not evil because of his deviant ethnicity. They are evil because their deviance personifies bureaucratic corruption and the entrance of inappropriate power networks into bureaucratic function. Susurluk, that is—much like the 1999 earthquake—led the Turkish

population and government to question, to attack, and eventually to correct the rationality of the bureaucracy, the purity of the state, and the honour of those associated with it. Personal evil was still invoked—but only to the extent that it highlighted the political.

Conclusion

The 1999 earthquake and the 1996 Susurluk scandal are not usually analysed in the same intellectual framework. On the one hand, we have a horrific natural disaster, that caused death and misery to thousands of people. On the other, we have a political scandal that—despite its invocation of state based violence—for the most part titillates and provides fodder for back page newspaper editorials. Evil, however, can be imagined in a variety of different ways, and so placing both under this rubric should not cause disquiet. But neither should it be surprising that when evil enters the public sphere, is rationalized as "crime" in modern legal codifications, and is standardized as "corruption" in modern bureaucracies, these two very different issues can also overlap.

The late Ottoman and early Turkish Republican understanding of criminality and state power in particular created a situation in which the spectacle of a toppled cement building, outside of which surviving family members search for the bodies of their loved ones is morally equivalent to the spectacle of Miss Cinema, 1991's relationship with a hit man on the run from Interpol. By virtue of the authoritarian and eventually fascist nature of criminal law in the Ottoman and Turkish contexts, both became spectacles of political crime, bureaucratic corruption, and that is all. The misery of a father who has lost his family is co-opted and then abstracted by the state—and the sexuality of Gonca Us is used to turn the administratively deviant into sinners.

Notes

[1] Hamit Bozarslan, "A Car Crash and Beyond: Network Building, Solidarity, and Violence in Turkey," *Occasional Paper, Abu Dhabi: The Emirates Center for Strategic Studies and Research* (1999). "The year 1975 marked a turning point in Cantürk's life; he started a bus line and got involved in tourism. The same year, however, he also faced a personal tragedy: the earthquake in Lice destroyed the whole town, killing a few of his family members. The indifference of the authorities toward this tragedy provoked his strong reaction…" p. 18. Earthquakes in the western part of the country generally attract more attention from the Turkish government than earthquakes in the eastern part.

[2] See especially the coverage on NTV. The Eurasian and African plates received little comparative attention.
[3] See Fehmi Koru's numerous articles in the newspaper *Yeni Şafak*.
[4] See the newspaper *Radikal*'s coverage especially.
[5] *Hurriyet*. 22 August 1999.
[6] *Milliyet*. 25 August 1999.
[7] See Sefa Kıdık's writing in *Hurriyet*. 22 September 1999. Also, Metin Toke's writing in *Milliyet*. 4 September 1999.
[8] Roy Porter, *The Greatest Benefit to Mankind: A Medical History of Humanity from Antiquity to the Present* (London: Harper Collins, 1991), 424.
[9] See, for example, Lindsay Farmer, "Reconstructing the English Codification Debate," *Law and History Review* 18 (2000): 397-444.
[10] See, for example, the "Hatt-ı Hümayun of Gülhane," *Osmanlı Ansiklopedisi*, vol. 6 (Ankara: Yeni Türkiye, 1995), 114.
[11] Compare Italy, *Penal Code of the Kingdom of Italy, as Approved by Royal Decree of October 19, 1930* (London: HM Stationery Office, 1931) with Turkey, *Code Pénal* (Istanbul: John Rizzo, 1939). The original 1889 Italian Code—adopted by Turkey in 1926—was "reformed" after 1931 by inserting large sections of the fascist Italian code of 1930 into its text.
[12] Ahmed Lütfi, *Mira't-ı Adalet, yahud Tarihçe-I Adliye-yi Devlet-I Aliyye* (Istanbul: Kitapçı Ohannes, 1304 (1888)), 128-141, 152-163.
[13] This conclusion is based upon information found in the following documents from the Başbakanlık Archive in Istanbul: İradeler, Dahiliye: 1402, 1836, 32168, 39013, 41072, 43291, 40072, 40040, 40067, 40870, 40840, 45005, 45893, 45932, 45448, 45587, 46008, 46152, 46253, 46700, 47122, 46945, 47443, 4991, 47366, 48866, 50612, 50508, 60705, 63291, 64263, 64444, 64161, 63583, 63712, 64080, 64631, 64690, 64700, 66797, 66449, 66568, 65875, 65163, 65164, 67692, 67997, 67832, 68860, 69323, 68783, 68124, 68459, 68006, 69394, 69718, 71287, 71404, 69857, 69573, 69442, 72036, 81477, 85244, 84119, 82674, 83461, 84989, 86560, 98813, 99860, 100466, 100367, 95480, 95149, 99204; MV: 16306, 7948, 9397, 25790; MM: 1557, 1817, 1819, 1943; AM: 1312-C-11/310, 1313-S-5/5, 1313-M-18/10, 1313-C-23/2, 1314-^-12/8, 1314-^-12/11, 1316-N-29/7, 1316-R-20/11, 1316-Za-9/8, 1323-^-24/4, 1325-R-5/17, 1325-B-1321.
[14] For example, Lütfi, 1851 Code, pp. 150-151, in which the bureaucratic goals of the Gülhane Edict are described as "mansus," or divinely authoritative—a word ordinarily used to describe exegeses of the Quran.
[15] Visitors even to the early Turkish Republic noted this modern re-imagination of the role of religion. Frederick T. Merrill, "12 Years of the Turkish Republic," *Foreign Policy Reports* 11 (1935): 190-192. The government advocated "worshipping the state in place of Islam…[whereas] the State still retains the right to interfere in religious matters, the regime has

practiced tolerance to some degree…Islam must conform to the nationalist program." p. 191.
[16] For example, Başbakanlık Archive, İradeler, MV 294.7 S.1257.
[17] Nathan Brown, "Brigands and Statebuilding: The Invention of Banditry in Egypt," *Comparative Studies in Society and History* 33 (1991): 258-281. has noted similar trends in Egypt under British rule.
[18] Turkey, *Code Pénal.*
[19] Alfredo Rocco, "Les postulats du régime fasciste dans la nouvelle legislation pénale," *Centre International d'Études sur le fascisme* 3(1930): 10.
[20] Kazim Öztürk, ed. *Türk Parlamento Tarihi: 1923-1927*. vol. 1 (Ankara: TBMM Vakfı Yayınları, 1993), 528.
[21] See Enrico Ferri, *The Positivist School of Criminology: Three Lectures*, ed. Stanley E. Grupp (Pittsburgh: University of Pittsburgh Press, 1968).
[22] Bozarslan, p. 1.
[23] Ibid, pp. 4-5.
[24] Ibid, p. 1, footnote 2.
[25] Ibid, p. 1, footnote 1.

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When Bad Faith Meets Machiavelli: Abuses of Administrative Power Under the Bush Administration

M H Sam Jacobson

When the President of the United States takes office, he (and I hope someday "she") takes an oath to faithfully uphold the laws of the United States. Implicit within that oath is the promise that those laws will be upheld in good faith, that is, for the benefit of the public as a whole.

However, under the Bush Administration, chronic and epidemic bad faith administration of the government has resulted in abuses of power unprecedented in modern American history. By "bad faith administration," I mean that the laws have been administered for the benefit of certain business interests and campaign contributors, not for the benefit of the public as a whole. This bad faith administration has occurred through manipulations of the law, through self-serving interpretations of the law, and by ignoring the law altogether, in order to serve political ends.

What makes this bad faith administration of government evil is that the bad faith exercise of administrative powers has occurred at every level of administration; that it has occurred routinely and as a matter of course - not isolated incidents, but hundreds of incidents at each level; and that it has promoted very narrow interests over the interests of the public at large, depriving most Americans of their voice in government and upsetting the balance of powers.

While abuses of power extend to all aspects of Bush's presidency, my focus is on only one of the those presidential powers, administrative powers, and my analysis concerns the abuse of administrative laws, that is, the law of government.

1. Abuses of executive powers

The policy of bad faith administration of government starts at the top and the top means the President himself. Bush has used his powers as chief executive, including presidential orders, powers of appointment, and consultations, to further personal interests and to achieve goals that he would have been unable to accomplish through other means.

A. Executive Orders

President Bush has abused his executive powers by issuing Executive Orders that impose duties contrary to law or public policy. An Executive Order is a written directive to executive agencies as necessary to perform the presidential duties provided in the Constitution, including the duties of

commander-in-chief, head of state, chief law enforcement officer, and head of the executive branch. While the President has broad discretion to issue Executive Orders, these presidential pronouncements must be consistent with the balance of powers provided in the Constitution, in that the President cannot legislate, because that power lies with Congress. In addition, these pronouncements must be consistent with any statutory grants of power, because the President must faithfully execute the laws created by Congress.

Not in the Bush Administration.

Bush has issued Executive Orders that contradict validly enacted statutes or established public policy. Executive Order 13233 is one example. It expands the authority of former and incumbent Presidents to veto the release of their public papers beyond what is allowed in the Presidential Records Act, 44 U.S.C.§§ 2201-2207 (2000). This Act provides for the disclosure of Presidential records that are not classified, but it allows a former President to hold papers for 12 years, presumably long enough to write any memoirs. Using this Executive Order, Bush blocked the release of President Reagan's documents, even though Reagan had authorized their release. Some of these records would have concerned his father, who was Reagan's Vice-President, and Reagan-era officials who now have high posts in the Bush administration.

B. Appointments.

The President also has abused executive power in the exercise of his appointment powers. The President has broad powers to appoint high-level officials in executive agencies, although it is generally understood that those appointments would serve two purposes, to implement the policies of the administration and to serve the public.

Not in the Bush Administration.

The President has appointed over 100 high-level officials who govern industries that they once represented as lobbyists, lawyers or company advocates. These appointments represent conflicts of interest, by appointing people from the industries that they would regulate in their government position, and betrayal of the public trust, by appointing people who oppose the laws that they are to enforce. Some examples include:

• Mark Rey, Under Secretary of Natural Resources and Environment in the Department of Agriculture. Formerly employed by various timber trade associations for nearly 20 years and the lead lobbyist fighting the creation of the Northwest Forest Plan and legislation protecting old

growth forests, Rey now is responsible for managing 156 national forests and other projects in 44 states. He has been instrumental in advancing the timber industry's agenda through increased timber sales and access to roadless areas.

• Steven Griles, second-in-command in the Department of Interior. formerly a lobbyist for many coal and metals mining companies, Griles was instrumental in weakening the Clean Water Act rules to allow the mining companies engaged in mountaintop removal to dump their wastes in waters. Even though he signed a Statement of Disqualification on 1 August 2001 to recuse himself from any matters involving his former clients, Griles had at least 12 contacts with coal mining interests and top Bush officials from September 2001 to December 2001. In addition, while Deputy Secretary, he has received payments from his lobbying firm, approximately $568,000 over two years.

• Daniel Troy, lead counsel for the Food and Drug Administration. Formerly a lawyer-lobbyist for major pharmaceutical firms, he spoke to several hundred pharmaceutical lawyers on 15 December 2003, offering the government's help in defending lawsuits involving claims of unexpected side effects from medications, an offer that would hurt consumers while protecting drug companies. As a lawyer prior to his appointment, he repeatedly sued the FDA to limit its ability to regulate drug companies. After becoming FDA's lead counsel, he made his office the clearinghouse for enforcement of actions for improper drug advertising. Since then the number of enforcement actions has plummeted.

These examples of industry appointments rife with conflicts of interest are merely the tip of the iceberg. Similar appointments affect every executive department, as well as the White House staff, and run deep within targeted departments, such as the Departments of Agriculture and Interior, and the Environmental Protection Agency.

C. Consultations.

Finally, the President has abused his consultation powers. Presidents and those setting policy in the executive branch routinely meet with members of the affected public to become fully informed before setting administrative policies. Congress acknowledged this practice when it

adopted the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2 §§ 1-15 (2000), a law that attempts to bring transparency and balance to these consultations by requiring open meetings, public records, and balanced membership.

However, not in the Bush Administration.

The Bush Administration has skirted not only the letter of this law, but its intent by consulting only a narrow group of interests, primarily business interests and major donors, and doing so behind closed doors. The most notorious example, but hardly the only example, concerned Vice President Cheney's Energy Task Force, a group that secretly had 714 direct contacts with industry representatives, but only 29 contacts with non-industry representatives. Not only did the industry representatives have extensive access to the Energy Task Force, their recommendations were included, sometimes verbatim, in the task force report and in Executive Order 13211, an order that essentially requires federal agencies responsible for protecting the our health and environment to evaluate the effect of their actions on oil companies.

3. Abuses of administrative powers

In addition to the abuses and bad faith exercise of executive powers by the President, the same types of abuses and bad faith are pervasive within the administration of the executive agencies. In an effective public administration, agencies implement public law in a manner sufficiently transparent to prevent abuses of power, using procedures that allow broad public participation in decision-making, provide public access to government records, apply the law fairly and uniformly, enforce the law entrusted to them, and show respect for the different views expressed. Public administration under the Bush presidency reflects none of these traits.

A. Precluding or abusing public input

An essential component of effective government administration is public participation. It provides a check on corruption and any abuses of power that may occur when decisions are made in secret, complementing the structural system of checks and balances provided in our Constitution. Two laws are especially significant to protecting the public's right to participate in government and to be informed: rule-making and freedom of information. From the beginning, the Bush Administration has sought to limit the public's access to government, by severely restricting public access to information and by restricting and manipulating public input into

decision-making.

Limiting public access to information. The Bush Administration has severely limited public access to government information contrary to the law and sound public administration. The Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2000), guarantees public access to government documents, subject to nine exceptions. The presumption is for the disclosure of records and the government carries the burden of establishing the appropriateness of any exception. All exceptions are to be narrowly construed.

Not in the Bush Administration.

Contrary to this law, the Bush Administration has fought the release of government records in every possible way, both in policy and in practice. The policy encouraging non-disclosure was expressed by Attorney General John Ashcroft in a memorandum of 12 October 2001. In that memorandum, he replaced the previous policy, a presumption of disclosure, with one where agencies are asked to carefully consider certain fundamental values, such as national security and effective law enforcement, before disclosing information. Ashcroft further stated that the Department of Justice would defend an agency's non-disclosure of information if the agency had a sound legal basis under one of the statutory exemptions.

The impact of this change in policy has been significant as confirmed by a recent GAO study in which nearly a third of FOIA officers believed their agencies were less likely to disclose information under this new policy. In fact, agencies have extended the failure-to-disclose policy to requests for information from Congress; some agencies have reclassified or retroactively classified documents already released to the public; documents have been excessively redacted, including information publicly available; and the agencies that can classify information now include the Department of Health and Human Services and the Department of Agriculture.

The failure to release government documents has not only been silly, such as the Department of Justice refusing to release copies of its press releases concerning Guantanamo detainees, but politically driven, such as refusing to provide a copy of the foreign lobbyist database until after the November 2004 Presidential election because providing the information would result in the loss of all data due to a fragile computer.

Limiting public input into decision-making. When an agency establishes how it will implement statutory authority delegated to it, it must engage in a process of rule-making that includes the opportunity for

the public to provide comments that the agency will consider before developing a final rule. Not under the Bush Administration. Instead, agencies have routinely restricted public input into the development of administrative rules by ignoring public comments and scientific evidence, and by eliminating opportunities for public input.

First, the Bush Administration has limited input into agency decision-making by routinely ignoring public comments in favor of those from the regulated industries. In fact, this administration has given the regulated industries unprecedented opportunities to review and draft agency rules and policies at the expense of public comments. Agencies have lifted wording directly from industry comments, including some line-by-line edits, in rules concerning mercury, mining waste in streams, and rat poison, just to name a few. If necessary, agencies altered the science to fit their political agenda, e.g., on mercury emissions from power plants, global warming, breast cancer, endangered species, and forest management, again just to name a few. So extreme is the "flat earth" campaign against science, that over 4000 scientists, including 68 Nobel laureates, petitioned President Bush, asking that the "distortion of scientific knowledge for partisan political ends" cease, including the censorship of scientific studies.

Second, the Bush Administration has limited input into agency decision-making by attacking the credibility of those who disagree. Consider, e.g., the manner in which the Bush Administration handles unfavorable science. In addition to ignoring or altering it, as discussed above, agencies purge, censor and blacklist those scientists and engineers whose work does not agree with the administration's policies or the views of its political supporters. Well-respected scientists have been pulled from committees and replaced with nominees that have pro-life and pro-industry stances. If the committee cannot be stacked to favor Bush's political views, committees are disbanded. And if the scientific committee cannot be stacked or disbanded, then under a proposed rule by the Office of Management and Budget, it could be blocked by a new "peer review" committee, a committee of political appointments, which would determine if the science is valid.

The attacks on individuals have been just as vicious, subjecting public employees who disagree with the Bush Administration to threats, loss of employment, or personal attacks. For example, acting under pressure from the White House, the boss of Robert S. Foster, the government's top expert on Medicare costs, threatened Foster with losing his job if he told key lawmakers about his cost estimates of the White House-backed Medicare

prescription-drug plan.

Third, the Bush Administration has limited public input by eliminating it altogether, either by delegating to private contractors who are not subject to the same requirements for public input, by "streamlining" administrative procedures to eliminate opportunities for public comments, or by ignoring procedures for public input. For example, the EPA redesigned a permit for dumping farm waste onto land or into water that would allow corporate farms to avoid getting a permit that would require public input, under the Clean Water Act and RCRA, which only exempts family farms. Similarly, the Fish and Wildlife decided that it would monitor itself to determine if the agency had complied with required environmental assessments, rather than having an independent review, one that allowed for public input.

B. Failing to enforce the law

The Bush administration has also abused its administrative powers by failing to enforce the law. Since the decision to prosecute or enforce a law lies within the discretion of the agency, a discretion which is generally not subject to judicial review, agencies have ignored enforcing laws that are not a priority under the President's political agenda. Therefore, any law that does not favor business or Republican donors is less likely to be enforced, such as the laws against discrimination or for environmental protection. The Department of Labor even gave advice to businesses on how to avoid complying with the law concerning overtime pay.

C. Robbing the public fisc

Finally, the Bush Administration has abused its administrative powers by robbing the public fisc. Examples include no-bid contracts worth $107 billion to Halliburton and other Friends of Bush; sweetheart deals, such as cost-plus contracts and contracting work for $350-$1,500 per day that soldiers do for $100-125 per day; conflicts of interest, such as government employees negotiating government contracts with future employers; and bidders rewriting bid specs, such as the Air Force giving Boeing five months to rewrite the specs for aerial refueling tankers so that Boeing would get the contract over Airbus. These examples are only the tip of the iceberg.

4. Abuse of judicial process

The Bush Administration has abused its powers before the courts. It has done this by using lawsuit settlements to revise or repeal legally-adopted rules, failing to defend challenges to legally-adopted rules, and

engaging in unethical conduct before the courts. Agencies receive legal representation from the Department of Justice (DOJ), but when the DOJ has a political agenda that is at odds with the laws those agencies are entrusted to administer, those laws or actions do not get defended.

A. Settlements

The DOJ has abused its powers through inappropriate use of lawsuit settlements. First, the DOJ has used settlements to revise or repeal legally-adopted rules. For example, after public input and years of studies costing $2.4 million, the National Park Service adopted a final rule regulating snowmobiles in Yellowstone National Park. The manufacturers of snowmobiles sued, challenging the validity of the final rule. DOJ met secretly with representatives of the snowmobile manufacturers association and negotiated a settlement of the lawsuit that effectively voided the final rule by allowing snowmobiling to continue in the park.

Second, the DOJ has used settlements to exclude intervenors from having their day in court. For example, the Douglas Timber Operators and the American Forest Resources Council filed a lawsuit, challenging the agency rules that require protection of wildlife on 24 million acres of federal forest lands. A number of groups intervened in the case, including the Association of O & C Counties as plaintiff-intervenor, and several environmental groups as defendant-intervenors. Settlement discussions were conducted in secret from the defendant-intervenors but included the plaintiff-intervenor. The result was as one would expect when the administration supports the position of the plaintiffs: the final settlement eliminated the conservation measures in the Northwest Forest Plan for rare species in old growth forests because they interfered with harvesting timber.

B. Failure to defend or prosecute

The DOJ has also failed to defend challenges to legally-adopted rules. For example, the Bush Administration failed to defend the Roadless Rule when timber interests and others challenged it in court, and did not appear before the Ninth Circuit when that court was considering the district court's preliminary ruling. In fact, the DOJ has solicited lawsuits to challenge rules that were inconsistent with Bush policy, and in a study of the first two years of the Bush Administration, the Bush Administration presented arguments in 94 of 172 cases that were hostile to NEPA, i.e., they were contrary to established law and judicial interpretations.

C. Unethical conduct before the courts

In addition to not zealously representing its agency clients, the DOJ has engaged in unethical conduct by misrepresenting the law and facts to the courts. For example, in the lawsuit seeking the release of the records from Cheney's energy task force, the District Court repeatedly chastised the DOJ for citing to authorities that did not state what the DOJ said they did, for failing to cite to controlling authority which stated the opposite of what the DOJ argued, and for citing to a dissenting opinion as if it were controlling authority.

5. Conclusion

Administrative agencies implement the laws delegated to them by Congress, using the procedures established by law to assure fair decision-making based on complete information. However, the Bush Administration routinely has ignored, violated, or manipulated the law to achieve private gains, not public goals. These abuses of power reflect an executive exercising power in bad faith, not for the good of the public but for the benefit of the well-connected few. If the sum of these abuses is not evil, it is hard to imagine what is.

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Mental Health Care During Apartheid in South Africa: An Illustration of How "Science" Can Be Abused

Alban Burke

> *"There is, however, a great difference between the democracies and the so-called totalitarian states. All are following the same road, but dictatorial states have become conscious of the possibilities of exploiting technique. They know and consciously desire whatever advantage can be drawn from it. The rule, for them, is to use means without limitation of any sort."*[1]

Abstract: The gross human rights violations in South Africa prior to 1994 are well known. Various laws were created and enforced in order to ensure that the white minority population of the country remained in power and controlled the economic resources of the country. These laws infiltrated almost all areas of society and the Medical profession was not excluded. The Involuntary Commitment Law of 1973 was an ideal vehicle with which to remove persons, place them in an unknown place without either their families or they themselves knowing where they were, and for a legally unspecified period of time. "Idle or undesirable' Black South Africans were admitted to mental institutions, for various reasons – because they 'broke curfew', were physically ill - going to general hospitals seeking medical treatment and were subsequently admitted to psychiatric hospitals or were considered dissidents. Disused mining camp was turned into so called psychiatric facilities to incarcerate thousands of Black South Africans. By 1976 admissions to private psychiatric hospitals had increased by 400 percent over a 10-year period. The extraordinary increase in admissions were due to the fact that the psychiatric institutions had become the dumping ground for the by-products of large scale social and political abuse.[2]I

Introduction

For many decades South Africa has been a country that has been in the international limelight. Due to its unique geographical position the early explorers and colonialists, such as the Portuguese, English and Dutch, were in constant battle to occupy this territory. It is also a country that has been characterised by wars to liberate it from oppression. First a war to free itself from the English colonialists and then a long drawn out battle by the black people, who were really the only rightful inhabitants of the region, to free itself from white oppression. South Africa is known for its long history of human rights abuses, repression, racial segregation, forced removals from homes and land, pass and curfew laws, violence and poverty. All the governments in this country up to 1994 have been guilty

of poor human rights policies, however, this paper will only cover the period from 1961 to 1994, the so-called Apartheid era of South Africa.

The cornerstone of "*apartheid"* (Separate development / segregation) was based on 'scientific' research, and contrary to popular belief, did not originate in South Africa as a random idea of Hendrik Verwoerd. In the late 1800's, science was embracing both the medical and physical, and moving away from the idea of man as a spiritual being. At this time racial differences and racial superiority became a focus in research, and a whole new "discipline", called eugenics was born. The term "eugenics" was first coined by Francis Galton in 1869 in his book 'Hereditary Genius'. The term came from the Greek "eugenes," meaning "good in stock". Galton claimed that judicious mating could "*give more suitable races or strains of blood a better chance of prevailing speedily over the less suitable*." In the 1900's in Germany – eugenics (the study of hereditary improvement of the human race by controlled selective breeding) and psychiatric genetics were being enthusiastically studied and taught as a new and important branch of science. There was also much resultant propaganda about this new methodology [3]. These views found its way to South Africa through a person called Hendrik French Verwoerd who has been credited as the father of Apartheid. Verwoerd was an eminent scholar. He was a lecturer in Psychology and later Sociology at Stellenbosch University. [4]From 1926 to 1927 he studied in Germany where came into contact with Binding and Hoche at the Leipzig University. It is interesting to note that official biographies of Verwoerd make no mention of this time in his life, or about his connection with eugenics. From 1928 held a chair in Applied Psychology at Stellenbosch and then left academia to become the editor of a newspaper[5]. He left this position to enter politics and served in the cabinet as Minister of Black Affairs and finally became prime minister of the Republic of South Africa in 1958. As cabinet and prime minister his racially views were turned into various discriminatory laws and acts. His views on racial issues and his eventual apartheid structure were supposedly not malicious, but appear to have been a result of his involvement in study at the time of great involvement in psychiatric genetics, and the position of the institutions and educators under which he studied[6].

1. From "science" to law

Verwoerd's polices of 'separate development' and segregation principles were according to him, a means to protect and care for 'the Native in the land of the Afrikaner'. It allowed for opportunity to develop separately and differently, but rejected any attempts at equality. This was

to promote pride and self-respect as a black South African instead of being continually humiliated as a failed and imitation white[7]. Carl Bingham in 1923 added justification to Verwoerd's concerns about the mixing of races and the feared resultant decline of (American) intelligence because of the presence in the country of the Negro[8]. Apparently Verwoerd took this together with the German's views to heart and it is little wonder that South Africa's segregation laws—so similar to German psychiatry's Racial Purity law banning the cohabitation of Aryans and non-Aryans—forced generations of Black South Africans into unemployment and poverty. Verwoerd held strong views regarding the importance of the race barrier being held in place. And his "expertise" as a psychologist gave his policies of "separate development" and "separate freedoms" the veneer of professional authenticity. Verwoerd stated in September 1943, "This segregation policy, which also means protection and care for the Native in the land of the Afrikaner, but decisively rejects any attempts at equality, gives the Native an opportunity to develop what is his own, so that he can have pride and self-respect as a Native, instead of being continually humiliated as a failed and imitation white." He stated that South Africa would be doomed if its policies allowed the native to "improve his skill, draw better wages and provide a better market within 'white' South Africa."[9] These statements contained a hidden agenda which, if understood, explains a great deal about the fate of Black South Africans in South Africa under apartheid. The application of eugenics by Verwoerd and his government, and his successors found its way into various laws and acts. The Population Registration Act of 1950 ensured that all the people in S.A were classified according to skin colour. Although this law may sound innocent enough, the racial classification would lead to either gaining or being denied certain rights. In essence your life and quality of life would be determined by your racial classification. Following on the abovementioned act, certain urban areas were set aside as "Whites Only" areas as legislated by the Group Areas Act.. Other races were only allowed into these areas if they had valid "pass books" and work permits. Forced relocations which occurred when persons were uprooted from their land, and their belongings destroyed[10]. These laws not only classified one according to race, or prescribed where you may live, but also prescribed interpersonal relationships. The Mixed Marriages Act (changed in 1989 to the Immorality Act) banned the marriage between race groups and was later altered to prohibit any intimate relationships between racial groups.

These, and many more, acts had devastating effects on the country. Throughout the world, non-white ethnic groups have suffered from the use of psychology texts which have propagated the blatantly false idea of

black inferiority through the use of culturally biased intelligence tests. According to one report, "The mental tests...point clearly to the fact that the observed inferiority of the Negro is to a large extent one which no amount of education or favourable environment can obviate." South Africa was no exception. The Bantu Education and Extension of University Education Acts were legitimized in this fashion. Verwoerd explained to Parliament during the debate of the Education Act that:

> Racial relations cannot improve if the result of Native education is the creation of frustrated people who, as a result of the education they received, have expectations in life which circumstances in South Africa do not allow to be fulfilled immediately, when it creates people trained for professions not open to them... [11].

Education in South Africa was therefore consciously designed on a two-tier system—excellent schools for the whites and less-than-excellent schools for the Black South Africans, designed solely to "keep them in their place." Separate education departments were created for the different racial groups, however, financial resources were not evenly distributed and the White Education department received the biggest cut of the budget, which resulted in inferior education for the other racial groups. Black students were also largely denied access to tertiary institutions. Universities were created along racial lines, but the white universities far outnumbered the black universities. This meant that black students were denied the opportunity to enter essential professions such as medicine, psychology and law, and many faced the prospect of entering the unskilled labour market.

As a result of poor education, many black South Africans could only gain employment as labourers for minimal wages. This resulted in wide spread poverty amongst the black population. Furthermore, due to the group areas act, little employment opportunities in the rural areas, a large component of the labour force was made up of migrant workers. Migrant labour split families, as men moved to the mining and industrial sector in attempts to find work. The hostel living environment supplied by these companies was not conducive to maintenance of acceptable mental health practices[12].This in turn resulted in the disintegration of family life, cultural practices as well as an uncontrolled of sexually transmitted diseases. Trade unions were banned (because it was seen to be a communist idea) which left these labourers without any recourse.

Health and welfare services were also divided along racial lines and the distribution of resources was skewed towards services for whites. As an example the state spent R597-00 per white, and R138-00 per black person per annum on health care.

Only white people had the right to vote and only "white" political parties were allowed to exist. So-called "black" and communist parties were banned and were only legitimized in 1993. Many South Africans were exiled or imprisoned if they dared to oppose the South African government.

Due to the exclusion of "non-whites" from main stream society, there was a strong counter reaction to government which escalated into general civil unrest and the start of an armed struggle. The banned political organizations, such as the ANC and AZAPO formed their own military wings that targeted government installations. At the same time SA was also engaged in warfare against so-called terrorist groups in South West Africa (now Namibia) who were fighting for the liberation of their country from SA. These military groups received support from mainly "communist" states which provided the SA government to sell their apartheid policy as a fight against communism. On the one side, white youth were indoctrinated against communism, and on the other side black youth were drawn into a military struggle against the SA government. From the early seventies, all white men from the age of 18 years were forced to do two years of compulsory military service. Police violence and the aftermath of post traumatic stress is well documented as a result of apartheid. The continual insecurity of being harassed by state structures also added to this[13].

Black South Africans were not divided by the adversity of apartheid. Social support systems sprang up in the form of stokvels and burial societies. The ability of those who were subjected to the constant exploitation, humiliation and insecurity to cope with this and make a liveable world for themselves and their children developed a very clear group identity, which encouraged the creation of new group strategies. Coping mechanisms also became a way to beat the system – by refusing to adopt white norms, by wearing traditional dress and attending traditional functions and by using other covert forms of resistance, defensive and offensive strategies [14].

2. The Mental Health Care Act: "Science" rears its ugly head

"Although psychiatry is expected to be a medical discipline which deals with the human being as a whole, in no other medical field in South

Africa is the contempt of the person cultivated by racism, more concisely portrayed than in psychiatry."[15]

Mental Health care during the Apartheid years had a double discrimination character. On the one side, the Mental Health care act was used as a vehicle to remove "undesirable" elements from society, and on the other side those black South Africans who needed professional services were either denied these services, or they had to be satisfied with sub-standard services.

A. "The Birth of the Asylum"

"The asylum as a juridical instance recognised no other…The old confinement had generally been practised outside of juridical forms, but it imitated the punishment of criminals, using the same prisons, the same dungeons, the same physical brutality."[16]

With millions of people facing substandard education, unemployment, no opportunities and, consequently, low morale, it is no wonder that psychiatric institutions could be established or that the justifiable and normal reactions to this oppression be further defined in psychiatric or psychological terms. And this, of course, only served to justify further oppression. The result of the Apartheid laws was widespread political and civil unrest. By the 1980's SA was involved in a conventional war in South West Africa and Angola as well as urban warfare and policing. As a result of the various laws and acts that outlawed political activities, more and more people became involved in the political struggle. Many of these people did not commit "crimes" but created a nuisance for the government. Alternative ways had to be found to "remove" these agitators and civil disobedient people from society. The involuntary commitment law of 1973 was an ideal vehicle with which to remove persons, place them in an unknown place without either their families or they themselves knowing where they were, and for a legally unspecified period of time. "Idle or undesirable' Black South Africans were admitted to mental institutions, for various reasons – because they 'broke curfew', were physically ill - going to general hospitals seeking medical treatment and were subsequently admitted to psychiatric hospitals or were considered dissidents. Disused mining camps were turned into psychiatric facilities to incarcerate thousands of Black South Africans. By 1976 admissions to these "private" psychiatric hospitals had increased by 400 percent over a 10-year period[17].

The psychiatric institution had become the dumping ground for the by-products of large scale social and political abuse; and a private company was awarded the contract for taking care of state long-term

custodial patients in ‘special’ facilities. This care was provided at a per-head payment for 90% occupancy of the institutions, which was guaranteed by the Department of Mental Health. Details of expenditure of these monies by the company for the years prior to 1994 are not available[18].

Operating yet again under the guise of "help," psychiatrists entrusted with the care and welfare of black patients subjected them to barbaric treatment and allowed them to die from easily treatable physical illnesses. The extraordinary death rate was finally labelled in the South African press in 1994 as "mental genocide".

Some of the abuses that occurred in these institutions included that up to 10 000 black people at a time were incarcerated, many were reportedly excessively drugged. The majority of the 10,000 patients slept on mats on concrete floors; dormitories were crowded. The reason given was that Africans prefer to sleep on the floor. "Squat" toilets ran down the middle of the sleeping quarters and up to 30 patients at a time shared communal showers, sometimes without hot water. Patients were not supplied with toilet paper because the Department of Health felt that patients would misuse paper block sewers. Electro Convulsive Therapy (ECT) was administered without anaesthetic, a "treatment" that can snap the spine of the unfortunate patient. Not administering anaesthetics before ECT was based on the opinions of Benjamin Rush, the father of American Psychiatry, who held a belief that black people had a morbid insensitivity to pain compared to that of whites. The reason cited by The Chief State psychiatrist in South Africa in 1976, Dr Henning, was that it was too expensive, too slow and too risky. The implications of anaesthetic use would be that they would have to double their staff[19].

Black patients died from easily treatable diseases, and either communal burials were performed or, in the case where the bodies were not claimed by family, used for “anatomical studies”. The patients were involuntarily detained in the facilities. Discharges from the hospitals were few, each one authorized only by a State psychiatrist. Although privately owned institutions, the psychiatrists who treated the inmates were provided by the Health Department. No public record existed on how monies were spent on the camps and the secrecy surrounding the institutions was almost impenetrable. They were not listed in the annual Health Department reports or the reports of other official bodies. “Patients” were hired out to companies to perform labour without pay. This labour force made coat hangers, wire brushes, rubber leg guards for miners, mats, sheets, clothes and aprons. This was called "industrial therapy."

Families were destroyed when members were removed from their families at night by the police and detained or incarcerated in mental hospital for indefinite periods and sometimes were never seen again[20].

In 1970, the Citizens Commission for Human Rights discovered the disused mining camps, and the horrific abuse that was occurring there. A report of this abuse was made to the World Health Organisation & the Red Cross. Instead of addressing the brutality and injustice, it gave in to psychiatric pressure and amended the Mental Health Act to make it a criminal offence to report on conditions in any psychiatric hospital or to photograph or sketch them. Then it also banned *Peace and Freedom* issues exposing psychiatry's abuses and stopped overseas journalists from entering South Africa if they reported on the psychiatric camps. It was a classic case of an attempt to kill the messenger. The South African Government's response was to slap a total ban on all reporting of conditions in these hospitals, taking of photos or sketching of any part or person of or in these institutions[21].

Medical professionals in the field of psychiatry were placed in the position of having to take positions of neutrality, in instances where they were not happy with the state of supply of medical treatment. If they were in agreement with the policies of the State, they did their work from a position of bias and racism, and aided the abuse that was taking place under the banner of science and acceptable practice. This moral disengagement hinged on the view that these persons were somehow 'less human' and perpetuated the practice of separation because of inequality and difference. If medical doctors spoke out against the abuse, they were persecuted, often not only by the police, but also by their peers. They were at risk of harassment, banning torture and murder. Because of this, most of the crimes of medical personnel – specifically in the case of psychiatrists – were of omission. Failure to report whippings at which they were required to be present, failure to provide adequate care and protection of their patients etc.[22]. Many health professionals ignored the problem of apartheid because they felt that it belonged with politics and not the science of mental health. "*Those who did venture onto this terrain were castigated by their colleagues. As a result there is very little psychiatric and psychological literature from the Apartheid era that examines the impact of Apartheid on mental health. The Psychological Association of South Africa never spoke out against Apartheid."*[23]. Such was the pressure on these professionals that they would choose to publish critical articles anonymously for fear of reprisals. One such a professional, states that he was concerned about the consequences of daring the *status quo* because of the ferment and mistrust in the psychology ranks, and also mentions how

the Professional Board of Psychology discriminated against him in credentialing his registration[24].

B. On the outside looking in

The forced removals and "dumping" of millions of black South Africans into small, disconnected, barren, poor reserve areas, bereft of adequate medical, psychiatric and public health services caused, amongst various other, high mental-illness rates[25]. Despite this, 75% of available funding of the Mental Health System was used for Whites, with the balance being used for the other racial groups. Townships and disadvantaged rural communities had to cope without any mental health service. While for the privileged white minority the patient to caregiver ratio was relatively on par with western countries, black South Africans did not have access to adequate, appropriate or relevant mental health services. The Mental Health Department therefore became part of the apartheid apparatus through not taking a stand on this, as well as by following government directives and practices. Access to hospitals and medical treatment was based on race, and ambulances were dispatched on racial lines. A significant proportion of people who were in dire need of treatment were excluded because of their race.

A myriad of research reviews and reports highlight the discriminatory and abusive picture of apartheid[26] [27]. The Mental Health care during this time was not in any way different and was inadequate, inaccessible (particularly for rural communities), inappropriate, and discriminatory. The imbalance in mental health provision is further evident in that the population of psychologists in SA remains predominantly white, middle class, male and Afrikaans/English speaking. They serve predominantly white, middle class clients. The mental health needs of black South Africans and disadvantaged communities have been largely neglected. From a different vantage point, the nature of the mental health services has also been criticised for being Eurocentric in its derivation, value-base and orientation[28]. The proclivity for individual curative therapy may not be culturally appropriate or comfortable for all sectors of the South African society especially for those cultures that are more group (collectivistic) oriented[29]. This preoccupation on the individual at the expense of social determinants of human behaviour and the resultant ameliorative practice of individual therapy, without examining and confronting the underlying structural societal conditions, has resulted in psychology being seen as maintaining and perpetuating an oppressive economic- political system[30], and psychologists being labelled as the servants of power and more specifically as "servants of apartheid"[31].

When dealing with people in a therapeutic context, cultural awareness and sensitivity are of paramount importance. In a multi-cultural society like South Africa, one would expect that the mental health professionals would reflect the demographic characteristics of the country, however, in South Africa, especially during the apartheid years, the psychiatrists were mainly white. These psychiatrists are far removed from the cultural milieu of their black patients and cannot even speak the language of their patients. A senior academic and , psychiatrists stated that although it is important to understand the client, but that the psychiatrist does not necessarily have to be from the same culture or language group as the patient. With this attitude, the importance of having black psychiatrists is downplayed, resulting in black South Africans being kept out of the profession, and patients not being understood[32]. The diagnosis along racial lines is, however, not peculiar to South Africa, but seems to be a common occurrence in countries where there are ethnic minority groups. Today, more than 50 percent of those treated in New Zealand hospitals for "drug psychosis" are Maori. Between 1965 and 1977 there was a 46 percent increase in the number of admissions of Maoris to psychiatric institutions. Samoans and other Pacific Islanders also represent a disproportionate number of mental patients. In Australia, Aborigines who believe they hear the voices of their ancestors are diagnosed by psychiatrists as schizophrenic. A 1991 survey of Aborigines and Torres Strait Islanders showed that 70 percent of those under treatment were diagnosed as schizophrenic or having substance abuse disorders, compared to only 43 percent of the non-Aboriginal patients. As an added note, in the US and England, psychiatrists diagnose black patients as schizophrenic between 3 and 15 times more than whites. A 1984 study found that although African Americans represented only 16 percent of the population in Tennessee, almost half of involuntarily committed patients had a primary diagnosis of schizophrenia. Yet, as Dr. William Tutman said in 1995, "*To oppress a race, and then label its reaction as a 'mental illness,' is not only morally wrong, it is criminal and a fraud*."

3. So what when wrong?

The effects of apartheid have left a harsh legacy. The National Congress Health Care Plan of 1994 reported that Black South Africans comprise 95 percent of the 18 million people existing below the accepted "minimum living level" (US $216 per month per household) with 60 percent of this group living in total poverty. Illiteracy is a major problem with an estimated 3 million adults functionally illiterate. Violence caused more than 2,000 deaths per month in 1993. And a reported 150,000 people

attempt suicide each year. This is the result of nothing less than slavery legitimized by psychiatry, a slavery that CCHR has continued to expose against enormous racial odds. It is not surprising that in April 1995, the new South African government announced a national inquiry into human rights abuses committed in psychiatric institutions throughout South Africa and also a review of the Mental Health Act. The profession, however, remains shameless. During the apartheid years psychiatrists were quick to diagnose the response of Black South Africans to their oppression as a "persecution complex." Today, in the new South Africa, these enterprising professionals see only the opportunity to establish a new market. The long and painful recovery which black South Africans face has been given another psychiatric label: "post-traumatic stress disorder". Although South Africa is celebrating its 10 years of true democracy in 2004, we cannot merely close the chapter on Apartheid and merely move on. Surely we must ask ourselves what went wrong so that we can learn from history . Karl Popper states:

> … if we are uncritical we shall always find what we want: we shall look for, and find, confirmations, and we shall look away from, and not see, whatever might be dangerous to our pet theories. In this way it is only too easy to obtain what appears to be overwhelming evidence in favour of a theory which, if approached critically, would have been refuted. In order to make the method of selection by elimination work, and to ensure that only the fittest theories survive, their struggle for life must be made severe for them. [33]

Verwoerd, a supposedly astute scholar in the social sciences, found a “scientific” theory (eugenics), which made perfect sense to him to such an extent that he translated this theory into oppressive laws under the guise of “humanism”. He must have become oblivious to all other theories that criticised and opposed the field of eugenics. He lived through the 2nd World War and the global uproar over the Holocaust and must have followed the Nuremburg trials with interest and his government had to field the criticism, isolation and sanctions of the international community. As a “scientist”, what happened to his rational and critical thinking? Although we have attributed the Apartheid system to one man, Foucault stated that:

> One doesn't have here a power which is wholly in the hands of one person who can exercise it alone and totally over the others. It's a machine in which everyone is caught, those who exercise power just as much as those over whom it is exercised. [43]

The "others" referred to in Foucault's argument would be the white South Africans. The seed for Apartheid was already planted at the turn of the previous century when whites created towns and cities as "orderly" white establishments that were isolated from the "unhygienic" standards of black people[35]. Racism was already rife and grew stronger over the years and science merely provided justification for the racism. What is even more worrying is where were the voices of all the other scientists, and more especially in this case the mental health professionals? It should be blatantly obvious to anybody who reads the history and accounts of the Apartheid era the research as well as the implementation of the results was highly unethical. However, the abuse of patients was licensed by science and "treatment" was based on scientific principles, therefore any professional who applied or supported the methods, or even stayed neutral would have been protected by their ethical codes, furthermore the research and treatment made perfect sense to them at the time. A further argument that was raised that Apartheid was a political system, not to be confused with *science.* It would seem as if, unfortunately, the critical insight of the great scientists and the moral consequences drawn from it, have been lost by equating knowledge with only one aspect of it, *functional knowledge.* It could be argued that the vast expansion of discoveries in the natural sciences, and their functional applicability, changed the scientific climate in such a way that we can speak of a *credo, which* is of moral consequence[36]. According to him the cult of scientism and technologism that grows from it, results in man's overestimation of him/herself, which lacks the Socratic, critical thinking, which should be the cornerstone of scientific thinking. This moral thinking is reflected in a letter of Albert Einstein to Sigmund Freud in 1932:

> …This is the problem: Is there any way of delivering mankind from the menace of war? It is common knowledge that, with the advance of modern science, this issue has come to mean a matter of life and death for civilization as we know it … I believe, moreover, that those whose duty it is to tackle the problem professionally and practically are growing only too aware of their impotence to deal with it,

> and have now a very lively desire to learn the views of men who, absorbed in the pursuit of science, can see world-problems in the perspective distance lends. As for me, the normal objective of my thought affords no insight into the dark places of human will and feeling. [7][3]

Unlike Einstein, scientists erroneously assume that they are value free and neutral and distance themselves from moral and political issues as if it is of no concern to them. Szasz is of the opinion that:*"…In the history of science, thinking in terms of entities has always tended to precede thinking in terms of processes"*[38]. The scientists discover new information and design new technologies, but distance themselves from the application thereof, which then paves the way for totalitarian states to abuse the science for their own means without limitation[39]. Szasz warns against this position as the prestige of the scientist can lend power to its possessor that he may be able to gain social goals that he might not have otherwise been able to attain[40]. The extent of the racial abuse that occurred in South Africa was such that it would be impossible to describe it in a single paper such as this. The pertinent issues raised in this paper are that we should not always rely on science as an "objective" framework for our actions and scientists must be circumspect in their research and the implementation of their results as they may contribute directly or indirectly to atrocities being committed in the name of science.

Notes

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[4]Gert D. Scholtz, *Dr.Hendrik Frencsh Verwoerd: 1901-1966* (Johannesburg: Perskor, 1974) 10.
[5] Scholtz, 11.
[6]Citizens Commission on Human rights, "Psychiatry and South Africa", Creating Racism: Psychiatry's betrayal, (28 April 2004). <http://www.cchr.org/racism/pasa1.htm>.
[7]Scholtz, 14.

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The Fiction of Sovereignty and the Denial of the Right to Health Care: Israel's Policy in the Occupied Territories

Dani Filc and Hadas Ziv

Abstract: The present paper uses Carl Schmitt's and Giorgio Agamben's concepts of sovereignty and the state of exception in order to explain Israel's policy in the Occupied Territories. The limitations on Palestinian's rights to health care exemplify the fact that Israel is the *de facto* sovereign and that Palestinians are *homines sacri*. The article shows that even when the state of exception becomes the rule the limits between the state of law and the state of violence become blurred. Not only the state of law appeals to the state of violence, but, in order to allow for the permanence of the state of violence there is a need to build a fiction of sovereignty.

Key Words: sovereignty, state of exception, health care, Occupied Territories.

Introduction

Since the beginning of the Second Intifadah in October 2000, the access to health care services became very difficult for the Palestinians living in the Occupied Territories. Their situation got even worse when, in April 2002, Israel returned to a full and direct occupation of the territories. While the Palestinian Authority still enjoys formal control over those areas, de facto Israel has total power over most of the Occupied Territories, controlling Palestinian's property, movement and lives, and severely limiting Palestinian's access to health care services. Moreover the Palestinian Authority meets insurmountable difficulties in managing everyday activities related to health, such as garbage disposal, the performing of sanitary actions and providing basic provisions for health care facilities. While Israel, as the occupying force, bears responsibility for the health of Palestinians in the Occupied Territories, when confronting charges concerning the Palestinians' access to health care, the Israeli administration makes the Palestinian Authority responsible. Israel argues that the Oslo agreements transferred to the latter the responsibility for services such as health care and education, even if the reoccupation of the Territories put an end to any possibility of the Palestinian Authority to actually fulfill this role.

In the present paper we propose to build on Carl Schmitt's and Giorgio Agamben's concepts of sovereignty and exception in order to show how Israel's re-invasion of the West Bank and the Gaza strip renders the state of exception permanent. However, while Israel becomes the de facto sovereign power, a fictitious Palestinian sovereignty is constructed in

order to free Israel from any concrete responsibility for Palestinians' health status.

The importance of the state of exception and its relationship with the idea of sovereignty was first posited by Carl Schmitt in his book "Political theology", where he proposed that "[S]overeign is he who decides on the exception"[1]. In the state of exception the sovereign enjoys unlimited authority and the constitutional order is suspended[2]. For Schmitt, the need to suspend the valid law is exceptional, and it is justified only as a way to protect the state from its enemies and as the only mean which will allow the restoring of the state of law.

The Italian philosopher Giorgio Agamben builds on Schmitt's concepts of sovereignty and exception, while ascribing them a different meaning. The sovereign, by installing the state of exception, produces bare life i.e. life exposed to death. In Agamben's words "the production of a biopolitical body is the original activity of sovereign power"[3]. This inclusion, however, is an "excluding" inclusion. Bare life is included in the political by its exclusion from the juridical order, by its constitution as "homo sacer". The sacred man is the one "situated at the intersection of a capacity to be killed and yet not sacrificed, outside both human and divine law"[4]. The homo sacer is included in the community as the excluded one, as s/he who may be killed and his/her killing will not be considered a murder. S/he is included within the law as s/he who is excluded from the protection of the law[5]. The sovereign is the entity which includes life within the law by its suspension, it is "the point of indistinction between violence and law, the threshold on which violence passes over into law and law passes over into violence"[6].

This form of relation which defines sovereignty, a relation in which somebody is included solely through its exclusion, is what Agamben understands as the state of exception [7].

In the state of law, the valid norm, the law, enjoys also the force of law. In the state of exception a separation is introduced between those two elements. The valid norm has no force and decisions which are not legal do have the force of law. The state of emergency "defines a regime of the law within which the norm is valid but cannot be applied (since it has no force), and where acts that do not have the value of law acquire the force of law"[8]. In Agamben's view, this space devoid of law, this anomy, is essential to the legal order itself. The law, in order to guarantee its functioning, necessarily has to relate to an anomy. The anomy, thus, is not a transient interruption of the state of law; it is always included in the latter. The state of law must constantly refer to the anomy as a condition of its functioning.

The co-existence of the state of law with the state of emergency becomes permanent in contemporary societies. As the limits between the state of emergency and the state of law become blurred, the state of exception is not more a temporally limited decision of the sovereign in order to defend the state from its enemies and eventually return to the state of law, but a permanent situation.

1. The Occupied Territories: the state of exception as the limit of Palestinian access to health care

As a result of the Oslo agreements all the Jewish settlements in the Occupied Territories remained in their place until the peace process' last step. In order to protect these settlements, several blockades and controls were established, limiting Palestinians' movement and, as a consequence, their access to health care. With the beginning of the second Intifadah, Israel erected new checkpoints and barriers within the West Bank and the Gaza Strip. The West Bank is now dissected into northern and southern blocs, and is additionally divided into regions. Each region is in turn divided into sub-regions, which may at times constitute a single village, isolated from all other villages and towns in its vicinity[9]. By the end of 2003 there were fifty-six manned checkpoints in the West Bank, as well as 607 physical roadblocks that prevent the passage of motor vehicles[10]. Moreover, most of the main roads in the West Bank are closed for Palestinians. At times, the internal closure has been accompanied by the siege of certain areas, towns or villages.

As a consequence of the Occupied Territories' internal division, a complicated system of permits and authorizations was established, in order to pass the blockades, travel from one territorial cell to another or entering Israel from the West Bank or the Gaza strip. The first step to achieve a permit is to get a magnetic card, which further allows to obtain a transit permit. The multiplication of internal checkpoints, which require transit permits during blockade, has turned the magnetic card into a life-saving card, since it is the way which ensures access to work or to health care services. Getting one is dependent on the absence of a 'prohibition on security or police grounds.' The classification of "security risk" can prevent anyone from receiving a permit, even if s/he is seriously ill 2[11]. The prohibition on security grounds is a highly arbitrary one, as demonstrated by the fact that different authorities may arrive to contradictory decisions and by the fact that the intervention of human right organizations has succeed in modifying the decisions concerning specific cases.

The denial of freedom of movement severely affects the access to health care services and causes significant damages, even bringing to deaths that could have been avoided. The system of blockades and permits does not only impede patients' access to health care facilities, but makes very difficult for the health care staff to arrive to their workplace or to the patients' homes. Since Israel's control of movement is pervasive, health care issues such as the importing of medicines and medical equipment donated or purchased abroad, and the decision to which medical center patients can be referred, are submitted to the Israeli security forces' will[12].

The internal partition of the West Bank and the Gaza strip, the establishment of internal borders and the arbitrary decisions on permits, show that Israel is the de facto sovereign in the Occupied Territories, which are under a state of emergency. The rule of law has been suspended and the state of exception became the rule. The Rejection by the Israeli Supreme Court of almost all petitions concerning Palestinians' freedom of movement or the IDF actions in the West Bank and Gaza strip, symbolizes that the Occupied Territories are a space where law has been suspended. Many of the petitions were rejected by the High Court on procedural grounds, without discussing the substance of the claims. Sometimes petitions were rejected under the claim that they were too general, even when the petitions detailed particular cases. In other occasions the Court considered itself as unable to address policies taken for security reasons, and sometimes the Court accepted the IDF explanations. The security forces, for their part, clearly consider the Occupied Territories as a space devoid of law. In its answer to the Supreme Court, following a petition by four human rights organizations against the IDF commander in the Gaza strip, the respondent argued that "in this situation [where fighting is taking place], a great caution should be taken in applying the judiciary critic on the security forces' actions. We are talking about actions that are at the limits of the judiciary audit"[13].

When the state of exception becomes the rule, the norm becomes the exception. Every action which would be considered normal under the state of law becomes an exception under the state of emergency. The mere will to stay by a hospitalized child's bed becomes an ordeal, and the authorization is granted only as an 'exception', as exemplified by the case of the Haruf family. Abed Haruf, a one-year-old baby, the son of Saed Haruf from the village of Odelia in the Nablus district, was hospitalized in Nablus for 5 days while suffering from anemia. The father wanted to visit his baby son and tried to reach Nablus, which is situated 7 Km away from his village. Due to the closure he was obliged to pass via Hawara checkpoint (south of Nablus) on his way. He was not allowed to cross into

Nablus since he had no permit. He applied to the Israeli DCO at Hawara for a permit, and was refused. Mr. Haruf was officially denied passage within the West Bank, due to "security reasons"[14]. After the intervention of PHR and a Parliament member, Mr. Haruf was allowed, as 'an exception', to stay at his son's bedside.

Free access to medical care is possible also only as an exception. The "Procedure for the Handling of Residents of Judea and Samaria who Arrive at a Checkpoint in an Emergency Medical Situation", makes the IDF policy concerning Palestinians' access to emergency care explicit. The second article states:

> As a rule, the checkpoint commander will allow a person to cross the checkpoint to obtain medical treatment, even if the individual does not have the requisite approval, if an urgent medical emergency is involved, such as a woman about to give birth, a person suffering from massive bleeding, or a person with a serious burn injury arrives at the checkpoint[15].

However, in all non-urgent cases the 'resident' must obtain the approval of the local DCO (District Coordination Office). Free access to health care services, which should be the norm, is possible only as an exception, in an emergency. All other cases are submitted to the control of the coordination offices.

Under the state of exception all Palestinians become homines sacri, whose life is reduced to bare life and its taking is not a crime. This is clearly exemplified by their lack of access to health care services. The blocks and check posts make access to health care services, even in emergencies, extremely difficult. Figures from the Palestinian Red Crescent show that ambulances are able to reach their destination only on thirty percent of the cases. Before the second Intifadah broke out, ninety-five percent of Palestinian women in the West Bank gave birth in hospital. By September 2002, that figure was less than fifty percent[16]. Testimonies given to human right organizations indicate that in many cases, soldiers delay ambulances even in cases of "urgent medical emergencies," do not consult with medical officials and do not give the benefit of the doubt to the sick person as they should have according the army's own written procedures.

The conversion of the Palestinians into homines sacri is reflected also in the attitudes of Israeli soldiers and authorities. In many occasions soldiers relate to Palestinians as lives that may be spared. When asked by PHR staff members why drivers were waiting under the sun, the check post, commander said that the soldiers would "leave them there… Let

them dehydrate, let them die."[17]. The very fact that the decision whether a medical condition is urgent enough in order to pass the check post without previous coordination is taken by a soldier lacking any medical training, reflects the approach to Palestinians as lives which can be spared.

The situation in the Occupied Territories corresponds to Schmitt's definition of the state of exception. As in Schmitt's description, the state of exception in the Occupied Territories results from Israel's arbitrary (in the sense that it does not logically results from the application of the norm) decision. The Israeli government is, thus, the sovereign, since it is the one who decides on the state of exception. The Israeli government has all the attributions of the sovereign; it takes all decisions, draws borders and decides over lives. This power does not stem from any legal norm, but results from sheer force. However, Israel does not perform all the sovereign's tasks. For Schmitt the sovereign is bounded by the formula Protego ergo obligo (I can impose my decision since I offer protection). Protection is the sine qua non counterpart of sovereignty, but the Palestinians in the Occupied Territories are totally unprotected. Israel's re-occupation of the Territories since September 2000 did not lead to its taking any responsibility for the needs and the protection of the Palestinian population.

Thus, Schmitt's definition of sovereignty is not enough to explain the situation in the Occupied Territories, and we should appeal to Agamben's definition of the term. Palestinians are for Israel homines sacri, which can be killed but not sacrificed. As in Agamben's definition of the concept homo sacer, Palestinians are not killed as the result of the application of the law but as a consequence of the suspension of the law and the blurring of the limits between norm and violence. Moreover, as Agamben argues against Schmitt, in the Occupied Territories the state of exception is not the temporary suspension of the law in order to protect the state of law. The exception has become permanent and the law exists only in the form of its suspension. The situation in the Occupied Territories conforms also to Agamben's claim that in the state of exception the force of law is isolated from the law itself. The norm (the Palestinian Authority's rule) is valid but has no force, and military rule has no legal validity, but has "the force of law". The Occupied Territories have become "a zone of anomy dominated by pure violence …"[18].

The relation between Israel and the Occupied Territories fits Agamben's claim that the state of law needs the constant appeal to anomy and violence. He claims that

> [F]or one reason or another, this space devoid of law seems so essential to the legal order itself that the latter makes every possible attempt to assure a relation to the former, as if the law in order to guarantee its functioning would necessarily have to entertain a relation to an anomy [19].

In the Occupied Territories the Israeli law is indeed a constant appeal to anomy and violence. But the case of the Occupied Territories illustrates that the necessary link between norm and anomy functions both ways. Not only the state of law constantly refers to the state of exception, but the state of exception needs the fiction of a legal cover. The Israeli Supreme Court acts as if a fictitious state of law applied to the Occupied Territories. The President of the Supreme Court himself claims constantly that Israel's occupation must comply with humanitarian and international law. The violence of the state of exception needs the referral to a fictitious state of law.

Also when discussing the provision of health care services, Israel appeals to the Palestinian's authority fictitious sovereignty (fictitious, since the Palestinian Authority is de facto deprived of any real authority). In a response to the Supreme Court concerning a PHR's petition, the Attorney General's office argued "As stated in the agreements between the State of Israel and the Palestinian Authority, powers and responsibility in the field of health were transferred from the military government and the civil administration to the Palestinian Authority." Israel's responsibilization of the Palestinian Authority for providing health care to the Palestinian population shows that even in the state of exception there is a need to appeal to some sort of legal cover. When the state of exception becomes the rule, it builds on fictitious sovereignty. Israel declines responsibility for providing health care services to Palestinians referring to a fictitious sovereignty and a fictitious state of law. While Agamben speaks about a "fictitious state of emergency", in the Occupied Territories the state of emergency is real and the role of law (the rule of the PA' law) is a fiction. The appeal to the Palestinian Authority's fictitious sovereignty allows the IDF and the Israeli government to separate between the two terms in Schmitt's Protego ergo obligo formula. Sovereignty (in the sense both of the decision about the exception and as the entity for whom men and women are homines sacri) does not require protection (nor in the sense of protecting the lives of Palestinians, since they are all sacer, nor in the sense of providing basic services). The PA's sovereignty is fictitious since while it has the validity of the law, it lacks the force of law. However, this fictitious sovereignty enables the perpetuation of the state of exception,

covering for the fact that the Israeli government and the IDF do not provide for basic services and needs. The appeal to the norm which lacks force functions as a way to deepen oppression, since its fictitious validity exempts the sovereign power (that which decides on the exception and for whom Palestinians are homines sacri) of the duty to provide even a minimum degree of protection.

In sum, the situation in the Occupied Territories conforms to Agamben's claim that Schmitt was wrong in positing a temporal and spatial separation between the state of law and the state of exception. The state of law refers always to the anomy of pure violence and naked life. The Occupied Territories became "a zone of anomy dominated by pure violence", where the exception is the rule and the norm is exceptional. However, the ways in which the Israeli government deals with health care issues in the Occupied Territories show that indetermination is really reciprocal, since not only the law refers to the state of anomy, but the sovereign's raw power gains in effectivity by appealing to fictitious sovereignty. The fictitious sovereignty and the appeal to a fictitious state of law contribute to making the state of emergency permanent.

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Notes

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[3] Agamben, Giorgio, *Homo Sacer: Sovereign Power and Bare Life*, (Stanford Ca., Stanford University Press, 1998) 6.
[4] Ibid 73.
[5] Ibid, 82.
[6] Ibid, 32.
[7] Ibid, 18.
[8] Agamben Giorgio, "The State of Exception", lecture given at the Roland Barthes Center, 2002, 20/04/04, http://www.generation-online.org/p/fpagambenschmitt.htm.
[9] Ziv Hadas, *A Legacy of Injustice*, (Tel Aviv, Physicians for Human Rights, 2002).

[10] Swissa Shlomi, *Harm to Medical Personnel*, (Tel Aviv, Physicians for Human Rights-B'tzelem, 2003).
[11] Ziv Hadas, *At Israel's Will: the Permit Policy in the West Bank*, (Tel Aviv, Physicians for Human Rights, 2003).
[12] Ibid.
[13] Supreme Court Protocol, HC 4764/04:3.
[14] Ziv Hadas, 2003.
[15] Swissa Shlomi, 2003:8.
[16] Ibid.
[17] Ziv Hadas, 2002: 11.
[18] Agamben Giorgio, 2003.
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Inflicting Pain on the Mentally Ill

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The focus of this paper is the physical management of patients in mental health units in England and Wales. Allegations of abusive and unlawful practices can be found in numerous settings where power imbalances occur, and health care environments are no exception to this. At times, some individuals may be (or may be considered) 'aggressive', disturbed or simply uncooperative. Subsequently, though it should always depend upon the situation and circumstances, mental health professionals may be required to manage these incidents in professional, ethical and lawful ways. These responsibilities lie in particular with Registered (mental health) Nurses and at the heart of the matter lies the contentious issue of physical force.

Those who are required to undertake the physical management of others are often employed and regulated by the state. Police officers form the most obvious protagonists, though prison officers may also be major players in the legitimate use of force. As well as the somewhat rigorous vetting that takes place before one can work in such capacities, regulation post-recruitment is, at least in theory, similarly stringent when compared to the vast majority of occupations, and is exceeded only perhaps by service in the armed forces. Policies, guidelines and rules ostensibly provide blueprints for actions in certain circumstances, and these lines of demarcation are reinforced through training. Mental health nurses may seem incongruous alongside these professionals, but there is a clear overlap in relation not only to state employment (as most work for the British National Health Service), but an occupational function that might be identified with social control. Nurses are recruited primarily on the basis of their professional, clinical and caring skills, although there have been highlighted concerns about macho ideals and heavy-handed practices.[i] Nevertheless, few would consider themselves agents of the state, or as anything other than health professionals.

Throughout history, a minority of mentally ill people have acted in dangerous, harmful ways, though it is still surprising that stereotypes of weapon-wielding, frenzied individuals with super-human strength have persisted. A serious examination of the situation shows that people with serious mental illnesses are far more likely to harm themselves than others, especially strangers. Indeed, the stranger-killer hypothesis has been challenged by focused research as well as professional opinion.[ii] However, despite innovations in care and treatment there are occasions when attacks are made on members of staff or other patients in mental health units.

Intervention is unavoidable in some cases, so although prevention of violence and aggression is the preferred option, and physical contact is generally a last resort, it is probably impossible to argue that manual restraint, which is a form of physical force, can be eliminated entirely from practices. Physical restraint can be fraught with difficulty, and both those intervening and those 'being managed' are at risk of physical injury and emotional distress. It was principally due to this that regulated and specified team-restraint procedures were sanctioned by the Home Office and introduced into the prison service in the early 1980s.[iii] These restraint techniques formed one part of a broader training programme known as *Control and Restraint*, or *C&R*, which encompassed three levels of training and stipulated skills: 1. breakaway techniques, which are essentially personal safety skills that can enable one to escape if grabbed, for example; 2. manual restraint by a team, usually involving three people, one of whom holds the person's head while the others take an arm each; 3. further team interventions involving use of protective equipment such as shields and helmets, as might be required to apprehend a person wielding a weapon, or to manage an episode of concerted disorder. The team-restraint element was considered successful in the prison service, where recorded injuries to officers were reduced and assault-related sick leave was also seen to fall.[iv]

After serious concerns about staff and inpatient safety, and the management of difficult situations overall, *Control and Restraint* programmes were introduced into some secure mental health care facilities for mentally disordered offenders later in the 1980s. Though modified to some extent, many of the first programmes did include training for health care staff in the use of protective equipment such as shields and helmets. In health care, the use of this equipment has been questioned over the years, and now seems to have been eradicated from most if not all mainstream mental health care training programmes.[v vi] An important difference between the introduction of training into the prison service and its subsequent adaptation by the health services was that the Home Office formally approved and oversaw the prison programme. This extended to not only standardisation of course contents, including pain-compliance techniques, but regulation of trainers or instructors. By contrast, an official and publicised Departmental line was missing in the case of health care, and there was little in the way of scrutiny and/or guidance from the regulatory bodies of health care professions. This is somewhat startling given that their function is to protect the public, and the Nursing and Midwifery Council produces the *Code of Professional Conduct* for this very purpose.[vii] In the prevailing laissez-faire climate, a panoply of courses appeared and developed. Many used the name *Control and Restraint* although contents were not at all similar to those of the training manuals in the prison service. Some courses included pain-compliance components, others did not; but another important issue was that some of the people who provided training had never worked in a health care setting themselves. This was perhaps

unavoidable in the earliest days, and most trainers now have relevant backgrounds, but an inability to empathise with trainees/nurses and their responsibilities towards patients, was surely open to question, especially in cases where trainers had never worked in any capacity where a professionally-rooted duty of care was owed to others. Several recommendations were made over the years but it was not until 1999, and the third version of the *Code of Practice* for the Mental Health Act 1983, that the Department of Health and the Welsh Office [as it was then] offered a little clarity: trainers' preparatory or qualifying courses should be 'designed for health care settings and preferably validated by' health care bodies.[viii]

In health care, the most controversial aspect of the prison restraint training programmes that was retained was the intentional infliction of pain on patients. Though use of this was not taught as a first resort, it remained an option in many programmes taught to professionals in the Mental Health and Learning Disability fields. The principal mechanism through which pain was inflicted was flexion of the wrist joints until they were 'locked', which then made it very difficult to move the joint at all: applying further pressure to the flexed wrist constituted the pain-compliance technique. The intention was to induce compliance -such as cessation of resistance or aggressive acts- by hurting the patient. Generally, this intervention was used after failure of a verbal request or instruction to stop/comply, and was often followed by a non-triumphal acknowledgement to convey that pain would not recur so long as the specified behaviour was not repeated.

Given the nature of the settings, it is arguable that pain-compliance techniques should be more controversial than they are. There is some consensus that mentally ill people are very often vulnerable, and British scandals concerning abusive practices can be found in both the recent and distant past.[ix]Painful interventions have been questioned and challenged.[x] [xi]Furthermore, there is anecdotal evidence of mental health nurses refusing to complete training courses that they believe to contain 'abusive' practices. However, the nettle has never really been grasped by the government nor the leading bodies, and it could be argued that this constitutes a form of state negligence of publicly proclaimed goals such as quality care and protection of the vulnerable.[xii] Of course, each individual nurse remains accountable for her/his own actions.

On the issue of force, a standard minimum line in the relevant policies of many organisations is that a person can use force as long as it is reasonable in the circumstances. To borrow the words of the late Steven Box, this may well be true, but it is not all of the truth.[xiii] In fact, it's not even all of the sub-section from which, it would appear, the words are taken. Covering England and Wales, Section 3(1) of the Criminal Law Act 1967 states that a person may use such force as is reasonable in the circumstances in the prevention of crime or in effecting or assisting in the arrest of offenders, suspected offenders or persons unlawfully at large. If force is used

it should be 'necessary', and not 'excessive', because this might not be reasonable. The vague issue of reasonableness overlaps with key issues in the use of force in (English) common law, and variations on these words are to be found in documents ranging from erudite legal texts to leaflets on the subject of self-defence.

If a patient is being escorted to another part of a building while under restraint, it is still possible for her/him to kick those who are restraining the head and arms. Perhaps then, this is an example of a criminal act, a harmful act, and one for which the use of force might be justified in legal terms. But what about the issues of passive resistance, such as refusing to walk, and general non-compliance with requests? Such actions are not likely to constitute criminal law infraction, so Section 3(1) may not be reliable as a defence for the infliction of pain. There may well be an argument that the event that led to restraint occurring in the first place was such that further caution is both warranted and appropriate. Yet situations such as this show how the use of force by mental health nurses differs very much from use of force by the police, the state's most frequent participants in the field of force application. Much use of force by police officers, including physical restraint and pain compliance interventions, is undertaken in non-controlled environments. Many physical interventions are related to arrests that take place in public space and the initial destination of priority might be the police vehicle rather than the station. In these circumstances, police intervention is primarily, not incidentally, to uphold the law. There may be small numbers of officers, so episodes of police use of force are often quite different from the somewhat contained, managed environments of mental health units, and prisons for that matter.

If three people have already restrained someone, it might be argued that they are in the process of exerting some sort of control, so inflicting pain may be less convincing if explained as a 'last resort'. Informed, perspicacious dialogue is conspicuous by its absence, revealing a dark apathy concerning when the intentional infliction of pain on mentally ill people might be justified. Yet if National Health Service Trusts chose to seek advice, to whom is it that they could refer on this issue? The Department of Health and Welsh Office's *Code of Practice for the Mental Health Act 1983*, which is a statutory document, also omits mention of pain-compliance techniques.[xiv]

The latest *Code of Professional Conduct* for Nurses and Midwives, issued by the Nursing and Midwifery Council (2002), makes no specific mention of the management of violent or other challenging incidents, never mind the issue of pain infliction, although other guidance has been offered to those in mental health care settings. The *Code*'s 7 main points make it clear that patients should be afforded the highest standards of care possible, and that nurses should act professionally, remain up-to-date with practices, respect patients and obtain consent to the treatments given. On the surface, these might appear to be matters with which pain-compliance techniques are inconsistent. The inadequacy of professional, critical, investigative enquiry

into this matter has resulted not in a lack of persuasive arguments and independent perspectives, but in the establishment of climates of uncertainty. Some nurses have been subjected to disciplinary proceedings after restraining patients, others (often trainers) have been involved in civil proceedings, and some have been summoned before inquiry teams. In these instances, some have reported feeling unsure, undermined or simply vulnerable because previous 'certainties', about moral, legal and professional justifications had been shown to be open to question and difficult to defend in the face of fierce questioning. Though fewer than might have been expected, there *have* been some pertinent analyses of legal matters relevant to restraint.[xv] [xvi] [xvii]Though more rare, there is useful consideration of the ethical issues surrounding the physical management of aggression by patients, but these do not come from regulators nor important bodies.[xviii] [xix] [xx]Articles and conferences help by informing those who explore the question, 'where do we stand?'; but they do not and cannot provide official lines that are supportive by virtue of their clarity. Yet if this is a shortfall that leaves nurses feeling exposed, where does it leave patients?

Mental health nurses are not above the law, and their accountability extends not only to employers and the professional regulatory body but also to the public and individual patients. It has to be acknowledged that some in-patients have expressed distrust and fear of their carers, including concern that physical restraint is used too readily by some.[xxi] This issue should be significant to professional bodies and individuals alike. The care received by patients from Afro-Caribbean backgrounds recurs frequently in discussions about the use of force, and they are not only over-represented as detained patients (under Mental Health legislation) but in publicised serious untoward incidents and inquiry reports, some of which resulted in death during or soon after physical restraint. *Numbers* of such deaths are low but it was reported that in one hospital some such patients suggested that the authorities were 'killing them off'.[xxii] One study found that patients referred to team-restraint procedures as 'being jumped', and found this to be painful and even traumatic.[xxiii] Another reported ambivalence among restrained patients, though anger and anxiety were common major themes.[xxiv]Explorations of whether health or discipline should be prioritised can benefit both the 'care 1st/management 2nd' and 'management 1st/care 2nd' agencies.[xxv] Contentious themes must be worthy of further scrutiny and guidance so that both those subject to restraint and relevant professionals might be protected.

If we were to search for 'pain' in the literature of general health care, we would find many entries, but, of course, they would refer to the pain of the sufferer, the unwell person. Mention of the *infliction* of pain would not be found. In mental health care, references are scant, though a small number of specialised articles or chapters allude to the issue. Looking further a field, we could find a comparatively voluminous literature in the distressing, often horrific field of human rights abuses, and of 'torture' in particular. This may

seem incongruous; absurd in fact, but this is where the subject of pain infliction is to be located. Torture can be complex and difficult to define, and it is not suggested here that nurses torture their patients, nor that the employees of other agencies routinely use pain-compliance techniques to torture those they are required to manage. However, if there is any place for pain-compliance interventions in the work of those required to carry out the physical management of others, further exploration is required of 'why', 'when', and 'how'. Many believe these techniques are required, but complex matters need to be unpacked, unravelled and addressed openly.

The National Institute for Clinical Excellence (NICE) works on behalf of the National Health Service and makes recommendations on treatment and care using available evidence. Its recent draft consultation documents have been most welcome in mental health, striving to provide a comprehensive clinical guideline for the 'short-term management of disturbed/violent behaviour in adult psychiatric in-patient settings'.[xxvi] [xxvii] Scholarly, lengthy, indeed meticulous in comparison to previous guides, the final version is due out in December, 2004. The draft clearly accepted that pain-infliction occurs, and although it was stated that this 'is only permitted in exceptional circumstances', there was no mention of what form these might take.[xxviii] Yet perhaps this title reveals the matrix of the problem in mental health care, implying that 'disturbed behaviour' is much the same as 'violent behaviour'. This blurring of boundaries and/or issues is a fundamental flaw, exposing once more the appalling shortfalls that exist in regulating the regulation of the mentally ill. For example, can the infliction of pain on a 'disturbed' person really be considered little different from such an action against a 'violent' person? And how should the *mens rea* concept affect the contents of training and understandings of lawful excuse?

As Cohen remarked, the erosion of the walls between the disciplinary and the therapeutic is a significant feature of contemporary social control, and this is whether one 'sees' 'help' for prisoners or the 'medicalization' of deviance.[xxix] And if courts and prisons can import therapeutic discourses into disposals and management of inmates respectively, perhaps it should be no surprise that methods of physical management could be exported through the same channel to another province within the state's jurisdiction.[xxx] Allegations of human rights abuses often tend to involve states (or their agencies) and relatively vulnerable people, and among those mentally ill people who do use violence, some might feel unable to complain about the infliction of pain on their bodies. Considering the reasons why many crimes are 'hidden' and go unreported, some patients could think that what happens to them is considered trivial or simply does not matter to others, others could fear reprisals, and as is the case with many socially excluded people, some could have had experiences that led them to conclude that contact with the authorities is best avoided.[xxxi]

There is a sound argument that the state is neglecting to provide clear guidelines and regulation on the use of force. Though many might disagree with Box's suggestion that some hospital staff brutalize and torture persons in their care, few of the unbelievers will have been subjected to the intentional infliction of pain in such settings. The contradiction of pain-compliance techniques in health care is a stark one for many, yet the ethical dilemmas have hardly been deliberated by the regulatory bodies or by the key stakeholders such as nursing and health unions. Praise is certainly due for recent Nursing and Midwifery Council initiatives (and for one or two individuals in particular. [xxxii]Nevertheless, the non-interventionist stance of a regulatory body created by statute is increasingly conspicuous for growing numbers of nurses. However, perhaps the fact that the use of force is sanctioned, without much controversy, for suspected or convicted offenders, and for the mentally ill is itself a significant point given that many in these groups are among the most vulnerable and/or marginalized in society.[xxxiii] As Skolnick and Fyfe pointed out, being mentally ill may increase the likelihood of being subjected to excessive force by the police.[xxxiv] Moreover, mental ill health features frequently in cases where legal analyses have deemed use of force excessive. [xxxv] Protective and supportive guidelines are long overdue.

Notes

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Bureaucratic Criminality

Ruben Berrios

Abstract: The aim of this paper is to clarify Arendt's claim with respect to the banality of evil in its proper context: the notion of bureaucratic criminality. The first part of the paper deals with Susan Neiman's recent misunderstanding of Arendt. For Neiman, to call evil banal is, firstly, to call it boring so that its appeal will be limited, and, secondly, to offer a theodicy. Arendt's claim, however, is not meant to gesture towards evil's alleged tedium, but rather to emphasize its occurrence in that which is terrifyingly normal. It is conspicuously the case, in addition, that Arendt does not provide an explanation or theory of evil - and so, *a fortiori*, not a theodicy - but rather an account of a particular evil from which one could learn a lesson.

In the second part of the paper, an attempt is made to begin to provide an account of the concept of bureaucratic criminality - and, consequently, of the banality of evil - in relation to the following considerations. Where a bureaucracy is understood as the administrative intermediary between sovereign and subject, Arendt specifies two minimum conditions for bureaucratic criminality in the context of Nazism. Firstly, the open purpose of government - a purpose that originates with the sovereign and is sanctioned by law - is the unprecedented crime of the elimination of a people. Secondly, thoughtlessness on the part of the members of the administrative body. Understood variously as remoteness from reality and systematic mendacity, thoughtlessness is exemplified in Eichmann's sustained appeal to law, duty, orders, and obedience in his defence.

Key Words: Arendt, banality, bureaucracy, criminality, evil, Neiman, theodicy, thoughtlessness.

Arendt famously claims that evil is banal.[i] The principal task of this paper is to begin to clarify Arendt's claim in relation to the concept of administrative or bureaucratic criminality.[ii] My task proceeds from the view that the notion of bureaucratic criminality provides the proper context for, and so serves to delimit the scope of, the Arendtian claim. I take this view to be uncontroversial. It has been resisted, however, by Susan Neiman in her recent book *Evil in Modern Thought*.[iii] Variously hailed as "remarkable" and "challenging" by its most learned reviewers,[iv] Neiman's study contains a pivotal engagement with Arendt. So - in the first half of the paper - I argue that, although Neiman takes us through some fascinating territory, her reading of Arendt is flawed; this is followed by an outline of the key aspects

of Arendt's account of the particular type of evil that Nazi bureaucracy made possible.

Neiman understands Arendt's claim with respect to the banality of evil in two ways. The first and more specific way relates to the issue of evil's power and potential appeal; the second concerns much wider questions that pertain to theodicy. I will discuss each of these in turn, and, because of the limitations of space, present my objections in a rather cursory manner.

Neiman writes:

> Calling evil banal is a piece of moral rhetoric, a way of defusing the power that makes forbidden fruit attractive. Since Sade became presentable, the inclination to aestheticize evil has grown ... once evil becomes aesthetic, it's not far from becoming glamorous ... [Neiman then concludes] The diabolic can be ambiguous; the ridiculous is not. To call evil banal is to call it boring. And if it is boring, its appeal will be limited.[v]

Neiman's thought is that diabolical evil is ambiguous. This helps to explain our ambivalence towards it - we are both appalled by and attracted to it. We are attracted (if that is the right word) to its unflinching articulation of extremity, to its power of subversion and ultimate transgression. According to Neiman, then, when Arendt calls evil banal she employs a form of rhetoric in order to strip diabolical evil of its power and potential glamour. Because of its power, diabolical evil possesses some aesthetic appeal, but banal evil is powerless and so has limited appeal, if any at all.

Arendt does indeed think that (1) Eichmann embodies a non-diabolical form of evil. And (2) that in his identity as moral agent and bureaucrat, Eichmann is banal and normal, and so could be construed as being without appeal - at least for the connoisseur of diabolical evil.[vi] With respect to these two points, then, Neiman's account is sound. It is Neiman's central claim, however, that is problematic: the claim that Arendt's statement that evil is banal is an attempt rhetorically to render evil impotent. Both parts of this claim are false.

When Arendt calls evil banal, she attempts to capture as concisely as possible - and as best as she can - the phenomenon before her eyes: Eichmann. The phenomenon, that is, of an ordinary individual who was an essential part of a bureaucracy directed toward racial extinction. The juxtaposition seems clear: Eichmann - the banal - and unprecedented wrongdoing - the evil. Eichmann, in Arendt's alternative formulation, is "terrifyingly normal."[vii] That Arendt's claim is a genuine attempt to report the

facts, rather than to indulge in rhetoric, finds confirmation in her postscript which is included in the revised edition of *Eichmann in Jerusalem*. She writes: "when I speak of the banality of evil, I do so only on the strictly factual level".[viii] We should not, of course, take Arendt's view of her own work as unconditionally authoritative. But, in this instance, she happens to be spot on.[ix]

Now that we have ascertained that Arendt's statement is non-rhetorical, we can ask: does it defuse the power of evil - evil's glamorous transgressiveness? Yes and no. As mentioned earlier, for Arendt, Eichmann is banal, and so he does lack the supposed aesthetic appeal of diabolical evil. However, it does not follow from this that Eichmann, and those like him, are to be construed as impotent - as lacking in the subversive power of evil. Neiman's error in this context is to assume that power - including, of course, the power of evil - possesses, at least potentially, an aesthetic appeal. But, quite evidently, not all power is glamorous. The power of diabolical evil might be, but the power of banal evil is not, but it is a form of power nonetheless - and in the case of Nazi bureaucracy, a devastating power. The power of banal evil, Arendt writes, is a power that can "wreak more havoc than all the evil instincts taken together".[x] So, for Arendt, and contrary to Neiman, banal evil - precisely because of its normality - is a more subversive force than diabolical evil. Here, the non-glamorous bureaucrat eclipses the Marquis de Sade's most perverted exponent of cruelty.

I want to turn now to the second part of Neiman's reading. She calls *Eichmann in Jerusalem* the "best attempt at theodicy post-war philosophy has produced."[xi] Neiman illuminates her general conception of theodicy as follows: "[t]heodicy, in the narrow sense, allows the believer to maintain faith in God in face of the world's evils. Theodicy, in the broad sense, is any way of giving meaning to evil that helps us face despair."[xii] Neiman thinks that Arendt offers a theodicy of the second sort - that is, not a traditional, but a secular theodicy. Secular theodicies set out to do two things. (1) They give meaning to evil - or "make evil intelligible"[xiii] - in such a way that (2) we are allowed "to go on in the world."[xiv] We can put the last point slightly differently: Neiman conceives of evil as that which "shatters our trust in the world".[xv] The ultimate purpose of a theodicy, then, is to help to restore that shattered trust.

Neiman fits Arendt into this general picture with the following remarks:

> To call evil banal is to offer not a definition of it but a theodicy. For it implies that the sources of evil are not mysterious or profound but fully within our grasp. If so,

> they do not infect the world at a depth that could make us despair of the world itself.[xvi]

My reply to Neiman's second thesis is threefold. Firstly, Neiman confuses banality with superficiality. She writes that to call evil banal is to imply that evil is not deep, but superficial. And if evil is superficial, according to Neiman, then we may console ourselves with the thought that the world in all its profundity does not contain any evil. This thought helps to negate despair and so to restore our trust in the world. But banality does not imply superficiality. There is a very real sense in which the banal possesses a depth of its own.

We can put this point in different terms. To call evil banal is certainly to deny that evil is deep in the diabolical sense, but it is not to deny that evil lacks depth *per se*. This leaves open the possibility that banal evil is not superficial. It possesses the depth, indeed, that leads Arendt to label those who embody it "terribly and terrifyingly normal".[xvii] On the assumption, then, that that which is terrifying possesses depth, when Arendt calls Eichmann terrifyingly normal she gestures towards the depths of his banality, the non-diabolical depths out of which his evil emerged. I return to this point at the end.

I have attempted to show that Arendt does not offer the sort of theodicy that Neiman demands of her. My second point is that Arendt is not in the business of providing (or attempting to provide) a theodicy at all. Arendt, in fact, provides an account of a particular evil from which one could learn a "lesson".[xviii] That is, she does not provide a theory of evil as such, but a report on one type of evil. So with respect to non-banal evil, for example, Arendt would have little to say. This is hardly the stuff of world-embracing theodicy.

The word 'lesson' - just to finish this second point - is of particular importance to Arendt. The phrase 'the banality of evil' makes only one appearance in the body of the text of *Eichmann in Jerusalem*. Following a brief account of the "grotesque silliness" of Eichmann's words immediately prior to his execution, Arendt writes: "[i]t was as though in those last minutes he was summing up the lesson that this long course in human wickedness had taught us - the lesson of the fearsome, word-and-thought-defying *banality of evil*."[xix] Arendt is concerned, then, to educate us with respect to a type of evil, not to restore our trust in the world in relation to all evils.

There is no space to pursue my third point, but it is worth mentioning. Neiman understands the project of theodicy as part of the wider "problem of evil".[xx] But is there a secular - a non-theological - problem of evil? Bernard Williams articulates the concern that underlies this question

with characteristic incisiveness; in the context of a discussion of Greek tragedy, he writes "there is a 'problem of evil' only for those who expect the world to be good".[xxi]

The preceding account notwithstanding, Neiman's book has much to recommend it. But Neiman manipulates Arendt's *Eichmann in Jerusalem* out of all recognition in order to fit it into a wider - though admittedly compelling - philosophical-historical narrative. The expression the 'banality of evil' is not about defusing evil's power (i.e., reducing it to manageable size) nor is it about rendering evil epiphenomenal (i.e., attempting to make it not really real). Its actual meaning is more limited and bleaker than that.

As was mentioned at the outset, to call evil banal is to make reference to a specific type of wrongdoing that is best understood in terms of the notion of bureaucratic criminality. Government bureaucracies can and do commit all sorts of acts that are transgressive in various ways. But we are speaking here of evil, and so by definition of ultimate transgression. My claim, then, is simple. For Arendt, bureaucratic criminality in its most extreme form gives rise to a new form of evil - an evil that is imbued with the quality of banality. It is not less evil for its banality, but arguably more so.

For the sake of convenience, I reduce the concept of bureaucratic criminality down to two components. Where a bureaucracy is understood as the administrative intermediary between sovereign and subject, Arendt specifies the following minimum conditions for bureaucratic criminality in the context of Nazism. Firstly, the "open purpose" of government is the "unprecedented crime" of the elimination of a people.[xxii] This purpose originates with the sovereign, as well as those in higher offices, and is sanctioned by law. (So the crime in question - the Final Solution - is criminal for us, but was legitimate policy for the Third Reich). The second component of bureaucratic criminality is "thoughtlessness" on the part of the members of the administrative body.[xxiii] In the remainder of the paper, I will briefly discuss these two conditions.

The unprecedented crime of the Final Solution is, of course, the crime against humanity. I want to clarify precisely the sense in which, for Arendt, the perpetrators of the Final Solution were not only committing criminal acts, but also evil acts. Arendt makes reference to two distinctions that can help us in this context.

Arendt remarks upon, firstly, the fundamental discontinuity between murder and mass murder. This is what she writes:

> Just as a murderer is prosecuted because he has violated the law of the community ... so these modern, state-employed mass murderers must be prosecuted because they violated the order of mankind ... Nothing is more

> pernicious to an understanding of these new crimes ... than the common illusion that the crime of murder and the crime of genocide are essentially the same[xxiv]

For Arendt, then, the crime of murder violates a particular community, whilst the crime against humanity violates community as such - the community of mankind. The Final Solution, however, is directed not only to genocide, but also to ideological genocide - that is, the extinction of a particular ethnic group. It is this, no doubt, that leads Arendt to conclude that the Nazi crime against humanity is distinct from all other crimes "not only in degree of seriousness but in essence".[xxv]

Evil in this context, then, is that which violates the order of mankind. That much seems obvious in the present case. But if we generalise for a moment, and take the foregoing to be a more wide-ranging characterisation of evil, then we can say that that which does not violate the order of mankind is not evil. This would appear to impose some constraints on the use of the concept of evil; indeed, a lot of things that it is currently fashionable to designate as evil would, on this view, not be evil at all. But given the earlier critique of Neiman's assumption that Arendt attempts to characterise evil as such, this move must be justified or else abandoned.

The most straightforward way to challenge the conception of evil that we have just extracted from Arendt is, firstly, to demand some kind of account of the 'order of mankind'; and, secondly, to go further and to question the very notion of an 'order of mankind' (and relatedly of an 'essential human nature', or a 'natural law'). But there is no space to reopen the debate between philosophical essentialism and anti-essentialism.

Arendt's second distinction is between the "war crime" and the "crime against humanity".[xxvi] This can also help us to illuminate the evil of Nazi criminality. War crimes - for example, the "shooting of partisans, the killing of hostages", or else Hiroshima and Nagasaki - are crimes that can be explained by, as Arendt puts it, a "utilitarian purpose"[xxvii] such as "military necessity".[xxviii] The Final Solution, by contrast, cannot be so explained. As Arendt observes, it was "independent of the war" and "announced a policy ... to be continued in time of peace."[xxix] Moreover, Arendt continues, "its commission actually conflicted with and hindered the war's conduct".[xxx]

We can make some sense of the grotesque reality of this situation with the contrast - fundamental to value theory - between instrumental and intrinsic value. The perpetrators of war crimes can attempt to justify their crimes in terms of their instrumental value - such crimes, it could be argued, are valuable as a means to bringing wars to an end. The perpetrators of the Final Solution have no recourse to such justification. If the policy of ethnic

extinction was pursued in the knowledge that it undermined the possibility of military victory (and so of the survival of the architects and executors of the policy), then it would appear to follow that the policy was valued over and above life itself. It was valued, that is, intrinsically - as an end in itself. The obvious objection here is to argue that the Final Solution was a means to the fulfilment of the Nazi world-view or ideology. But, once again, there is no space to pursue this objection.

Before beginning my concluding remarks let me summarise what we have learnt about Arendt's view of evil. In the case of Nazism: evil is a violation of the order of humanity that is pursued as an ultimate value.

It is commonplace to assert that *Eichmann in Jerusalem* brings evil uncomfortably close to home, and makes us all potential perpetrators of evil acts. Despite its being commonplace, it is a statement that is worth repeating. It is the most straightforward lesson that Arendt's course in human wickedness teaches us. I will conclude by sketching the background to an idea that underlies Arendt's lesson: the notion of thoughtlessness.

Eichmann's banality can be characterised as follows. His identity as a private moral agent and public bureaucrat merge seamlessly. Arendt observes that Eichmann is committed to what she calls the "little man's mentality"[xxxi] - he is the perfect "law-abiding citizen" who exemplifies an ethos in which the moral concepts of "duty" and "obedience" to "orders" function as unquestionable principles.[xxxii] It is this that constitutes his normality. But then evil enters the picture. Once the Final Solution is appropriately legislated as the open purpose of the state, and the various executive offices have been organised in accordance with the most efficient realization of this purpose, Eichmann carries out his role of deportation as best he can, as well as infamously doing his best to climb the bureaucratic ladder.

The mechanism through which ordinary individuals become willing instruments in the perpetration of evil, Arendt calls thoughtlessness. She writes, without elaborating, on the "strange interdependence of thoughtlessness and evil".[xxxiii] In contrast to thoughtfulness, thoughtlessness is simply a lack of thought - it is an absence, a species of passivity. To refer back to my commentary on Neiman, I will hypothesise that it is precisely in relation to thoughtlessness that we can begin to understand the depth of banal, or non-diabolical, evil. The 'terrifying normality' of Eichmann, in other words, is constituted most significantly by his thoughtlessness. Thoughtlessness is normal because it is an everyday - an all-too-human - phenomenon. It is terrifying, in this case, because of its context.

But, to speculate further, the depth of banal evil does not reside simply in the absence of thought itself, but rather in the ethical condition - to employ that term in its widest sense - that gives rise to it. So: quite apart from

the spatio-temporal distance from the commission of horrific deeds, the enclosure within bureaucracy, and the commitment to duty, what are the ethical conditions from which thoughtlessness, in the context of evil, emerge? That, I believe, is the key question. And I do not pretend to have an answer to it.

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Notes

[i] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (London: Penguin, 1994).
[ii] The concept of bureaucratic criminality is derived from Arendt's various descriptions of the Final Solution: "bureaucracy of murder", 172; "unprecedented crime", 267; "administrative massacres", 288.
[iii] Susan Neiman, *Evil in Modern Thought: An Alternative History of Philosophy* (Princeton, NJ: Princeton University Press, 2002).
[iv] Jonathan Rée, "A Mean and Rootless Fungus," *Times Literary Supplement*, 18 October 2002; Mark Lilla, "The Big E," *The New York Review of Books*, 12 June 2003.
[v] Neiman, 302.
[vi] Arendt writes: "with the best will in the world one cannot extract any diabolical or demonic profundity from Eichmann", 288. He was not, according to Arendt, a "perverted sadist" nor an "abnormal monster", 276.
[vii] Ibid.
[viii] Ibid, 287.
[ix] Neiman simply dismisses Arendt's self-assessment. She writes: "Arendt's claim that [*Eichmann in Jerusalem*] was just a long piece of reporting was disingenuous", 299.
[x] Arendt, 288.
[xi] Neiman, 300.
[xii] Ibid, 239.
[xiii] Ibid, 8.
[xiv] Ibid, 239.
[xv] Ibid, 9.
[xvi] Ibid, 303.

[xvii] Arendt, 276.
[xviii] Once again, Arendt's self-assessment is revealing. She writes of "the lesson one could learn in Jerusalem", and emphasises: "But it was a lesson, neither an explanation of the phenomenon nor a theory about it", 288.
[xix] Ibid, 252.
[xx] Neiman writes: "The problem of evil can be expressed in theological or secular terms, but it is fundamentally a problem about the intelligibility of the world as a whole", 7–8.
[xxi] Bernard Williams, *Shame and Necessity* (Berkeley: University of California Press, 1993), 68.
[xxii] Arendt, 267, 277.
[xxiii] Ibid, 288.
[xxiv] Ibid, 272.
[xxv] Ibid, 267.
[xxvi] Ibid, 275.
[xxvii] Ibid.
[xxviii] Ibid, 257.
[xxix] Ibid.
[xxx] Ibid, 258.
[xxxi] Ibid, 137.
[xxxii] Ibid, 135.
[xxxiii] Ibid, 288.

Rape, Prostitution and Law in Turkey

Istar B. Gozaydin

This paper is primarily concerned with a legal instrument used as means of "sanctioning" for a crime of violence, rape, in Turkey for almost a period of 65 years (1926-1990). The punishment for the crime to be lessened statutorily depending on the fact that the victim of the case to be a "prostitute" is my muse to be a representation of (de)construction of "modernity" and "womanhood" in Turkey. In order to evolve my argument I focus on the "story" of article 438 (abolished in 1990) of the Turkish Penal Code

The argument I put forward runs as follows:

In terms of good and evil, modernity has been perceived as "good" by the founding elite of the Republic of Turkey. "Women" were introduced as a backbone of modernisation process. Indeed within the emerging Kemalist (official state ideology of Republic of Turkey named after the founder of the Republic, Mustafa Kemal Atatürk) paradigm, women were to be bearers of Westernisation, carriers of secularism, actresses in the public realm and would therefore incite a shift of civilisation; however deconstruction of womanhood in Kemalist discourse reveals that a woman earns to be an esteemed one only if she achieves to be an asexual creature whom at least happens to be able to conceal her sexual self.

Law was another very important instrument for modernising both in late Ottoman and Republican times. In order to reach the ends of modernity safely, means of altering the structure of, not only the public sphere but also the private one was preferred as reception of Western codes. After the source legislation of Italian Penal Code of 1889 (Codice Zanardelli), Turkish Penal Code of 1926 provided protection only for "virtuous" women preferably positioned primarily as a wife and a mother. In this approach, women that had a profession like prostitution was not in a position to deserve protection

1. Concerns for Women in Ottoman-Turkish Modernisation Process

It is a well known fact that the Ottoman modernisation experience started in the state strata in order to stop the crucial military defeats of the period. The Ottoman ruling elite, who was feeling as inheritors of the brilliant and great Ottoman Empire, was under the influence of a deep anxiety, which was created by the economic, politic and military regression. Additionally the influence of a new ideology that was strongly rising was shaking the origins of the empire and mobilizing the ethnical groups in order to create their own countries: nationalism. So, in order to escape from coming to an end and to

"be modern" the Ottoman decision-making elite started some 'official' modifications such as opening new technical schools, and reforming the military system.

Meanwhile a new *intelligentsia* namely 'Young Ottomans' was emerging. These early intellectuals such as Namık Kemal, Şinasi, Tevfik Fikret and Ziya Paşa were somewhat pioneering figures for the Ottoman society. They were trying to reconcile the traditional values such as Islamic life patterns, monarchy and the crucial role of the state with the western ideas such as liberty, democracy and development. Their ideology was kind of a pendulum that represented the traditional Turco-Islamic way of life and western libertarian ideas, which were under the influence of the French Revolution. The new emerging intelligentsia that was almost completely male was deeply interested in the women issues. For instance, Celal Nuri positioned against polygamy, and Halil Hamit in 1910 advocated for voting rights for women[i] One another earliest objections of male intellectuals was against the traditional way of marriage adjustments in the Ottoman society. Men and women were marrying without even meeting/knowing each other and the marriage adjustments were usually made by the decisions of the parents. It is striking to observe that to improve the women's social statue and to make some radical changes in issues regarding marriage were of a priority and some sort of a crucial demand for these men. This 'male feminism' can be interpreted as an influence of the new western libertarian thoughts, or as a general secularisation ideology, or as the influence of the emerging Turkish nationalist ideas but it should not be overemphasized[ii]. This critic of the traditional marriage was a very common theme in this 'male feminism' line. Şinasi wrote a play as 'The Marriage of a Poet' (Şair Evlenmesi) that was completely satirising the classical Ottoman marriage, and Tevfik Fikret, after the tragic death of his sister, wrote a poem on the obligatory marriages that make the Ottoman people unhappy. In my opinion, the critic of the marriages and the *status quo* of the women draw both the potentialities and the handicaps of this 'male feminism' coevally: women's liberation movement was not a goal in itself, the solution of the 'women question' was to modernise and to progress the Ottoman society.

This perspective is quite coherent with the young Turkish Republic's modernist elite. The Kemalist elite needed women's mobilization in many aspects: a new nation state was building and every faithful nationalist, including women, were welcomed. Nilüfer Göle claims that specifically the role of women in Kemalist policies, like making of modernity in early Republican China, is a point of differentiation between western modernity and non-western modernities. Unlike, in the West, which formed its public sphere first as a bourgeois sphere excluding the working classes and

women[iii], "... in Muslim contexts of modernity, women were the markers of public space"[iv]. Characterising this phenomenon as "extra-modernity", Göle asserts that, "... more than the construction of citizenship and human rights, it was the construction of women as public citizens and women's rights which made up the backbone of Turkish modernism. The taking off of the veil, the establishment of compulsory co-education for girls and boys, civil rights for women (such as electoral eligibility and voting), and lastly the abolishment of "Sharia", the Islamic law, and the adoption of the Swiss Civil Code (as Turkish Civil Code) (1926) guaranteed the public visibility and citizenship of women. In other words, women's corporal, social and political visibility defines the public sphere. The grammar of Turkish modernisation can best be grasped by the equation established between national progress and women's emancipation. In a Muslim context, women's visibility and the social mixing of men and women would endorse the existence of a public sphere" [v]

The ruling elite of the early republican era used a rhetoric of equality and liberty for women. The fight against the *ancien regime* continued also in women rights area. The status of the women was a question of prestige for the new ruling elite. For the Turkish Kemalist Revolution in 1923, the central agents of modernism were women. Every revolution redefines the attributes of an "ideal man", yet the Kemalist revolution celebrates an "ideal woman". However, just like their Ottoman ancestors women's emancipation was not a goal for the nationalist ruling elite, it was a means and a sign of modernity and national development; and also the constructed "womanhood" in Kemalist sense was indeed an asexual / sterile one.

Within the emerging Kemalist paradigm, women were to be bearers of Westernisation, carriers of secularism, actresses in the public realm and would therefore incite a shift of civilisation. Ayşe Kadıoğlu qualifies this phenomenon of the early 20th century in Turkey of women to be with modern costumes, and with dominantly Western behaviour, but with traditional role self-perceptions especially in relations with men and in inter-family encounters as "simulation of modernity"[vi]) Indeed women were both the icons of the modernism and the indigenous Turkish culture, so the borderlines of this image were clearly drowned: honourable teachers of the Turkish nation without any obvious sign of sexuality. The ideal type of woman for the nationalist ruling elite was clearly explained in the very popular novel of the early republican era: *Çalıkuşu* (gold crest kinglet/nickname of the heroine) written by Reşat Nuri Güntekin. In this novel the author tells us the story of a young woman who is deeply in love with her cousin. When she gets informed about her cousin's "betrayal" just before their wedding, she leaves her house and becomes a teacher to be sent to the lost and undeveloped villages of Anatolia. After some complicated adventures some years later she comes

back home, to Istanbul, as a virgin and she marries to her cousin, the love of her life. The story of Feride is quite explanatory in various aspects: she is a high school teacher as a nationalist metaphor teaching tomorrow's adults, she is a devoted monogamist whom keeps on being in love with 'the right man', and she can easily conceal her sexuality when it is necessary.

This *asexual* image of women was a crucial myth of Turkish official nationalism. A good Turkish woman should never forget that she was on the service of her nation first of all as the teachers/virtuous role models of the nation. It is true that the young Turkish Republic mobilized a great number of women for the service of modernization process but their discourses stayed similar to determinant approach of the state strata. The perception of an independent women's liberation movement and the definition of a feminine sexuality have been problematic domains of the ruling elite all the way, until today.

2. Story Of Article 438 Of The Turkish Penal Code

The Swiss Civil Code was the first set of norms to be received by the new Turkish Republic (17 February 1926). Adopting a western set of legal provisions reflecting totally a different way of life by regulating fields as family affairs, heritage and ownership conditions, the founding elite of the Turkish Republic explicitly expressed their intention of not to alter only the public institutions but to transform the private sphere as well. After the reception of the Civil Code and Code of Contracts as a whole body, other major codes got translated from various Western sources and put into power.

French Penal Code of 1810 was already in force since late 19th century. However, the new Republican decision-making elite preferred the Italian Penal Code of 1889 (Codice Zanardelli) for reception. Main consideration for the new preference was announced by Mahmut Esat Bey, the Minister of Justice, to be the need of a penal system for a new republic. French one was qualified to be regulating a royal and absolutist system whereas the new Republic was said to be a most populist and secular regime. [vii]The Turkish Penal Code was recepted as a whole on 1 march 1926, and got into force on 1 July 1926. Italian Penal Code got amended on 19 October 1930, and Turkish Penal Code was amended as well on 11 June 1936 in accordance with the new legislation (Codice Rocco)

Nevertheless, eighth section of the Code regulating "crimes against public manners and family establishment" remained the same. Rape, kidnapping for carnal abuse, deception for prostitution, adultery were crimes regulated in this section. Article 438 provided a statutory cause to punish the crime in a lesser extent:

> Acts of rape and kidnapping to be done to a woman whom adopts prostitution as a profession, punishment gets lessened in 2/3 ratio to the punishments determined in the related provisions.

This provision was an inconsistent regulation even in its existing general legal system. Primarily, prostitution was a profession acknowledged by the legal system. Major legislation concerning prostitutes was General Hygiene Act of 1930 and due to maintenance of hygiene it was required in the Act to issue a regarding administrative regulation. Thus article 15 of this specific regulation provided a definition for prostitution as a profession: "women satisfying professionally the sexual needs of others for a benefit is a prostitute" and in order to perform her profession these women had to have work permits. Moreover, an amendment to the Social Securities act provided social securities as professional disease pension, health pension, motherhood pension, old-age pension and death pension to women performing prostitution with work permits.

In comparative law crimes of rape and kidnapping for carnal abuse are regulated in one of four ways:

1. systems that do not have any consideration for the style of life that the victim conducts. Thus no punishment of a lesser degree is valid here. Almost all contemporary laws have such regulations;

2. systems that do not consider act of rape a crime in case the victim to be a prostitute. This used to be an *ancien*t regulation. In accordance to Germanic legal system of the 19th century, only if the victim happened to be a virtuous woman, the act considered to be a crime;

3. systems making differentiations between a woman that happens to be a prostitute and one that is not. Accordingly punishment gets lessened absolutely (Italian Penal Code 350; Turkish Penal Code 438);

4. systems that give the discretion to the judge for lessening the punishment to a certain degree 1975 Federal German Penal Act, article 177/11.

Article 438 of Turkish Penal Code got applied to several cases for years. In 1988 the issue got taken to the Constitutional Court. On 12 January 1989, the Court examined the case and verified that the provision was constitutional by a voting of 7 to 4. The decision was published in the Official Gazette, and

it made an intensive echo. Various women's organisations and political parties reacted against the decision and it got largely covered in the media mostly by being criticised (*Cumhuriyet*, 11 January 1990; 12 January 1990; 16 January 1990; 19 January 1990; *Milliyet*, 12 January 1990; *Tercüman*, 13 January 1990; *Güneş*, 16 January 1990), but also being agreed to (*Türkiye*, 13 January 1990).

In the majority opinion, it was claimed that in case that a virtuous woman happened to be a victim of rape or kidnapping for carnal abuse, her honour, her respectfulness in the society and in the environment she lives gets damaged more than a woman who performs prostitution as a profession. It was thus asserted by the majority vote that the provision was verified before the principle of equality before law (article 10), nature of fundamental rights and freedoms (article 12/1), personal inviolability, material and spiritual entity of the individual (article 17/1), personal liberty and security (article 19/1).

In 1990, the feminist campaign against article 438 took place spontaneously in the enthusiastic atmosphere of "golden times" of the movement. In 23 January 1990 a group of women went to the famous street of brothels in Istanbul to manifest the Penal Code. Their major slogan was, "neither virtuous nor non-virtuous, we're just women". Feminists were particularly underlining the parallelism between two official documents: marriage certificate and work permit to perform prostitution. There was quite a consensus among feminist groups to resist against the concept of the" non-virtuous women deserving to get raped". The mere discussion was about the representations of the prostitutes. Some feminists argued that in demonstrations it was the feminists that talked in the name of the prostitutes and asserted that this was wrong. According to these feminists, power was exercised when some women talked and acted in the name of the other women. The issue there was to question the fact 'acting in the name and for the rights of the other'. However the majority of the Turkish feminists thought that it was legitimate to make demonstrations against article 438.

A second demonstration was held on 18 February 1990 and more than 2000 women protested against article 438. Women were once again claiming that the 'virtuous and non-virtuous' differentiation among women was completely unjustifiable and every crime of rape was equally guilty. This demonstration named as "all women against article 438" got wide coverage in the mass media. Women's liberation movement hence was able to create a public opinion against the Provision. Even women who were not politicized and mobilized as the militant women of women's liberation movement supported this demonstration and the feminist reaction against this sexist clause. Finally on 21 November 1990, article 438 got abolished by the Grand

National Assembly. This was the first legal achievement of the feminist movement after the 80's in Turkey.

To conclude, as Kim Stevenson mentioned in her paper titled, "Evil Counsels, Perspectives on Recent Legislative Initiatives" presented during this Conference, devil comes in all shapes and sizes. In the case I have exemplified here, it came from patriarchal (needless to say, patriarchy can also be exercised by women) decision-making and adjudicating elites of the Turkish Republic. The consequence of this procedure was to legally victimise one who had already been victimised through rape. This is not adding insult to injury but adding injury to injury.

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Notes

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[ii] Deniz Kandiyoti, *Cariyeler, Bacılar, Yurttaşlar* (Concubines, Sisters, Citizens) (İstanbul: Metis, 1997), 174.

[iii] Jurgen Habermas, *The Structural Transformation of the Public Sphere* (translated by Thomas Burger with the assistance of Frederick Lawrence) (Cambridge: Polity Press, 1989).

[iv] Nilüfer Göle, "Gendered Nature of the Public Sphere" *Public Culture* 10/1 (Fall 1977) 61-81.

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Linguistic Competence, Cultural Categories and Discrimination: Indigenous People before the Mexican Court System

Martin Hébert & Caroline Aubry

Abstract: The present paper outlines the dynamic relationship between the indigenous peoples of Mexico and the Mexican judicial system. Focusing on the specific case of the Tlapanecs of Guerrero, we first examine the important social suffering that comes to indigenous people as a result of institutional biases ingrained in this system. Building on these observations, we make a contribution to the current theoretical debates over structural violence by introducing the notion of "parallel structure" to account for the fact that, often, indigenous people confronted with the discriminatory effects of the official legal structure of their country have made considerable efforts to establish parallel court systems that function in Native languages and whose workings are based on the principles of traditional law. The constant expansion of the domain of "traditional law" among the Tlapanecs will be conceptualized and explained here as a form of conscious resistance against the institutional biases of the official Mexican court system. The backlash that the shift in symbolic power associated with the use of traditional law, and especially with the use of Indigenous languages in legal proceedings will also be examined and, in conclusion, will be situated within the dynamic of the emergence of parallel structures countering structural evils.

Key Words: Mexico, Indigenous People, structural violence, language, law

The linguistic and cultural biases ingrained in the Mexican legal institutions constitute a set of factors that have significantly contributed to the marginality of Indigenous people in that country over the centuries. Starting from a discussion of the concept of structural violence and its implications for the study of legal systems, this presentation will examine the many ways in which standards of linguistic competence implicit in legal procedures bear directly on the outcomes of litigation.

Grounded in interviews and direct observations made in the state of Guerrero between 1998 and 2004, the present paper takes as a point of departure the experience of Indigenous Tlapanec people in Spanish-speaking Mexican courts. The first characteristic of this experience that strikes the observer is the Kafkaesque ordeal that many Indigenous people face by living through the complexities of being tried, or of filing a suit, in a language that is not their own, but which takes place in their own State. Beyond these important linguistic factors, Tlapanec people dealing with the Mexican legal system are confronted with modes and principles of dispute settlement that

are counter-intuitive to somebody accustomed to the consensual nature of the traditional law system used at the community level. A third unusual stress associated with dealings within the official court system for the Indigenous people of Mexico is the unusual severity of the punishment that even a short prison sentence can bring to people who are peasants, and for whom even a absence of a few weeks from the field can mean loosing crops that are essential for subsistence and even one's land. The considerable social suffering that comes to Indigenous people as a result of these institutional biases is both lived and, often, perceived as an "evil" by them.

Secondly, this paper attempts to make a contribution to the current theoretical debates over structural violence by introducing the notion of "parallel structure" to account for the fact that, as in many parts of the world, Indigenous people confronted with the discriminatory effects of the official legal structure of their country have made considerable efforts, with a certain level of success in the case of Guerrero, to establish parallel court systems that function in the Tlapanec language, and whose workings are based on the principles of traditional law practised at the community level for centuries in Guerrero. The constant expansion of the domain of "traditional law" among the Tlapanec will be conceptualized and explained here as a form of conscious resistance against the institutional biases of the official Mexican court system.

Thirdly, we will examine how the Mexican government and various officials react to the existence and the functioning of a parallel Indigenous traditional justice system, which they perceive as undermining the institution of the national justice system and, more broadly, as a dangerous "illegal" institution undermining the national order established and upheld by the Mexican government.

1. Mexican Law as Evil Process

Law has always been one of the most important controlling processes of the State over its population, but as Laura Nader pointed out[1], law has played an especially important role in that regard in the context of colonial societies where domination over large portions of the population had to be institutionalized and bureaucratized. In the history of Mexico, the setting up of tribunals in charge of imposing the colonial law on Indigenous populations comes remarkably early. Tellingly enough, it comes right in the footsteps of the initial military conquest of Indigenous peoples and is contemporary with the creation of missions geared toward the conversion of these populations to Christianity. One could say, in fact, that in Mexico, as in most of the colonial world, the Sword, the Church, and the Law were the

three pillars on which was originally founded a domination system which has caused important suffering in Indigenous communities to this day.

Among these pillars of domination, the Mexican legal system is remarkable in two respects. First, contrary to the role of the Church, which has been put into question in Mexico since the XIXth Century, the importance and influence of the Mexican legal apparatus has steadily grown since the Colonial period. Secondly, and contrary to the open and blatant military repression of Indigenous populations, the resort to courts as means of bureaucratic control over marginalized populations has generally been portrayed as a "benevolent" and "enlightened" practice by the Mexican government and has been generally accepted as so by the international community. According to the Mexican Constitution, as with any liberal constitution in the Western world, Indigenous people, as any other citizens, must subject themselves to the legal system and appear before court whenever they are called to by official authorities.

However, over the last years, Indigenous populations have become more and more vocal about the fact that they consider this legal system as going against their own belief system. Their attitude may seem strange and rebellious to most Mexican citizens and to many outsiders, but it is firmly grounded in the experience that Indigenous people have had of Mexican courts over the centuries and on the realization that the Mexican legal system does not respect their values, their lifestyle and finally their language.

When confronted with this system, the Indigenous people of Mexico encounter many obstacles that prevent them from ever being successful. These problems have deeper roots than it seems. They should be explained, in part, by the policies and expectations that the Mexican government has toward its Indigenous groups. Mexico has fifty-two different Indigenous groups, most of them still speaking an Indigenous language as their first language. In its official discourse, and in contrast with the Colonial era, it appears that the modern Mexican State is proud of its distinctive and varied Indigenous heritage and that it is making tremendous efforts to preserve this distinction and diversity. For example, one of greatest accomplishments claimed by the Mexican government over the last fifteen years has been the creation of a program for bilingual and bicultural education which exists, in principle, to promote Indigenous languages and cultures.

In reality, the Mexican State possesses a second set of priorities which happens to clash, at times directly, with the will to value and embrace cultural diversity within its borders. The Mexican government is indeed very proud of its Indigenous heritage: the ruins, the artefacts, the arts and crafts because those things are beneficial for the country in a number of ways. They attract tourists and generate important revenues for the country and provide a

common symbolic heritage for the Mexican Nation. However, this very idea of a Mexican unified national identity means that even though Indigenous cultures can be claimed as part of a common past, they are seen as an obstacle to the common present. In this light, the wide cultural diversity of Mexico is, at the very least, difficult to sustain. For instance, a bilingual education system functioning in over fifty Indigenous languages can be very costly to maintain, especially when parts of it benefit only a small number of people. The same could be said of a multilingual judicial system. As it turns out, the bilingual-bicultural programs, especially the Indigenous education programs, serve more of an acculturating and assimilating function of the Indigenous groups to the national language and culture than a true national multiculturalism.

Because of its more or less explicit policy of assimilation of Indigenous groups to a unified Republican and Spanish-speaking national culture, the Mexican government does not allow for legal proceedings in a language other than Spanish in its judicial court system. In consequence, Indigenous peoples have to be tried and judged in a language that they do not always master and often can't even rely on a competent interpreter to improve their chances of understanding the legal processes they are subjected to.

However, the stigma of Indigenous languages runs deeper in Mexico than a mere communication problem. The direct and explicit ties made by the Mexican legal system between itself and the ideals of the Enlightenment have led its officials to perpetuate the Colonial notion of Spanish as a superior language, more logical and more able to reflect accurately human thought than Indigenous languages.

Throughout the post-conquest history of Mexico, Indigenous languages, as well as the individuals who speak them, have been portrayed as illogical and irrational. People speaking them are frequently regarded by the Mexican bureaucrats as less intelligent and slow-witted mostly because they sometimes speak Spanish more carefully and unhurriedly than native Spanish speakers. This slowness of speech is unfortunately stigmatized as a slowness of mind. In consequence, Indigenous accents are discredited by many people inside, as well as outside, the courtroom. This stigma brings a real disadvantage to Indigenous defendants, since they have to overcome prejudices regarding their accent, and in some cases have to overcome their inability to speak Spanish proficiently enough to participate efficiently in their own defence. An Indigenous defendant does not only have to prove his/her innocence like any other defendant but also that s/he is not stupid, irrational and illogical. Even if they have access to a Spanish-speaking lawyer, those defendants need to communicate in Spanish with them, a language that they do not necessarily master well enough to be understood

with ease by the person who is supposed to help them most. We should not be surprised that because of the language barrier Indigenous people feel especially alienated by the Mexican court system. And of course by not allowing proceedings in Indigenous languages, the national justice system is only maintaining this situation. It is indeed more than a problem of translation, since we are in fact witnessing a real problem of attitude in Mexico toward native languages in general. Of course, attitudes that are so widespread can be very problematical to change.

Another solution from the point of view of the Indigenous people would be to become perfectly bilingual and learn to speak an unaccented Spanish but it is very difficult to achieve when you have, like too many Indigenous people, only access to a mediocre and indifferent formal education.

2. Resisting to an Evil Process

Evil in a legal system need not be intentional. In fact, one could argue that the Mexican constitution and legal system, both inherited from the Mexican Revolution and its democratic (and even at times equalitarian) principles are quite intent on justice. By the standards of democratic societies these are "good" documents. It is clear that the practice tied to these documents is problematic, but the documents, in themselves, are quite good examples of what a just constitution and legal code should give and guarantee. However, the general soundness of principle of these documents does not make the additional barriers to proper representation, the discrimination, and the ostracism experienced by Indigenous people any less real.

The fact that maintaining a court system *functional* in fifty different languages is not a viable option in a country where resources are as scarce as they are in Mexico also seems like a poor excuse when compared with the social suffering brought about by inadequate legal representation and its consequences.

What, then, are the options for a group that finds itself victim of such structural violence, of an evil that exists under the trappings of a democratic law and order? Integrating the dominant discourse and adapting to the structure seems to be one option. We have seen that assimilating to the Spanish language and adapting the dominant cultural codes has often been, despite the poor quality of the educational system in Indigenous areas, somewhat of an option for Indigenous people in Mexico. However, the devaluation of one's own cultural capital, and more specifically the devaluation of one's language as a valid tool for administering justice is probably, in itself an evil suffered by the group as a whole at least as

considerable as the evil suffered by individuals at the hand of a court system to which they are foreigners.

The second option, theoretically present in a democratic system, as Mexico proclaims to be, is of course to change the structures that generate evil. Amendments to the Mexican constitution recognizing the rights of Indigenous people have been a major stake of political debates in that country over the last decade. Starting with the Indigenous uprising in the State of Chiapas in 1994, a series of changes to the constitution have been debated in the country. However, even though the contribution of Indigenous people to the diversity of the country has been explicitly added to the constitution since, the implication of these amendments for the day to day functioning of the State's institutions have certainly not been felt by the Indigenous populations.

Adaptation and reform being apparently two avenues that will not address the suffering and discrimination lived by Mexico's First Nations some of them, like the Tlapanecs of the State of Guerrero, have come up with alternative non-violent ways to deal with the structural evil they were facing. Judging that the court system did not work for them, confronted with the suffering and social fragmentation arising from improper legal protections and proceedings, they decided to create what one might call "parallel" social structures and, most notably in this particular case, a "parallel" legal and judicial system. These Indigenous people feel less alienated and more respected in such a system. They also believe that justice is rendered more efficiently and justly when they can defend themselves and be judged in their first language.

From a cultural perspective, the national legal system can appear very foreign. In many Indigenous cultures, the traditional legal system is not based on punishment of the perpetrator(s), but on consensus and the preservation of social harmony. The national system does not take into account the consequences that certain sentences could carry for the community of the individual being judged. These consequences are just not taken into consideration, they do not factor in into the process of sentencing an individual. If an individual might loose her/his crop for the year because s/he has to spend crucial months in prison, this will be of no concern to a Mexican court. It will not care if the family of the individual convicted might starve as a result of the sentence. It is one of the reasons why some Indigenous people perceive the Mexican court system as inhumane and evil since it does not care about the larger social consequences that a prison sentence might carry. It is only concerned about administering the proper punishment for the crime being committed.

Indigenous legal systems are different. They favour consensus and social harmony over the Western idea of a disincarnate justice. In cases of litigation consensus is highly favoured over punishment and retaliation. According to the Indigenous people of Guerrero, the practice of the law of consensus is one of the traits that distinguish them from the national culture since it is based on values different from those that shape Mexican law. To them, a judicial system that promotes severe punishments and does not take into consideration the long term well-being of all parties involved in the dispute is considered instrumental in creating durable conflicts between individuals or families within the community. For them, this exacerbation of tensions has the possibility to lead, in a worst-case scenario, to the formation of factions that would permanently divide the community. Since conflict and factionalism are the antithesis of the harmony ideology held by this Indigenous group, the law of consensus does not only serve as a tool to administer justice, it is also a way to ground a collective identity and sense of political agency.

For example, in one of the cases that we studied the daughter of a man who had embezzled money from members of the community had to answer before the community assembly for the crimes committed by her father four years earlier. The father had fled with the money and was nowhere to be found. The daughter, who was still living in the family house, was thought to be "benefiting" from her father's crime by having access to his house and his fields. The people of the community were, thus, expecting her to offer reparation for the crime committed by her father. This issue was creating considerable tension within the community. On the one side, the embezzled people felt that they deserved justice and that they had a claim to the fugitive's properties, from which reparation could be obtained. On the other side, the daughter, her brothers, and a substantial portion of the population that had not suffered directly from the theft, thought that is was unfair to make the daughter pay for a crime she did not commit. After all, they said, having been abandoned by her father, she was perhaps the person who had suffered the most from this whole affair.

During a community assembly convened to discuss this question, a consensus regarding what course of action should be taken slowly built among the people present. When the *comisario* (more or less the “mayor” of the community) felt that the assembly had implicitly agreed on a number of points, he became much more involved in the discussion and started to voice these points of agreement in the form of concrete proposals. His final recommendation, which was little more than the agreement the assembly had come to after several hours of debate, was that the daughter had to pay back two thirds of the 8400 pesos taken by her father. The first step toward the

reparation of the injured parties would be made through an initial payment of 2000 pesos, which would be taken from the income generated by the selling of the coffee harvest from the father/daughter's fields. The harvest was already under way, so this payment would be made in no more than two or three weeks. This payment, however, would not take all the coffee income away from the daughter. In 1999, the typical Barranca Tigre 1000-1200 kg coffee harvest was expected to bring an income of around 7000-8000 pesos. Even by considering these predictions as optimistic -which they turned out to be- the payment agreed on would not represent more than 30% of the daughter's coffee income. She would certainly feel the pinch of the 2000 pesos payment, but -and this was important for the assembly- she would not be impoverished to the point where her subsistence would be threatened. Similar arrangements were anticipated for a number of coffee harvests to come.

The reasoning in the assembly was that the people who had lost money as a result of the father's actions had managed to feed their families without it for four years and, thus, were able to wait a few more years for complete (interest free) reparation. In a word, it was not thought that anybody needed this money so badly that it would justify bringing a woman to starvation to get it.

In order to further alleviate the burden of the sentence imposed on the daughter -who, the *comisario* reminded the audience, had not committed the crime- and to help her re-establish her name in the community, the *comisario* strongly encouraged the inhabitants of Barranca Tigre to go and buy drinks and other goods at the little convenience store held by the daughter. The more money people would bring to her store, argued the *comisario*, the faster the reparation to the aggrieved parties would come. The members of the assembly considered this final proposition satisfying. The consensus they had been building toward was voiced, and each party received at least partial satisfaction. Interestingly enough this solution now gave an incentive to the aggrieved coffee producers to frequent the *tienda* of the daughter of the man who embezzled them. This incentive, framed in economic terms (i.e. the more money the daughter earns, the more she will give back to them) also comprised a thinly veiled social incentive to achieve reconciliation. Indeed, frequenting a *tienda* in Barranca Tigre implies a substantial degree of social interaction between the owner and the patron.

Inhabitants of Barranca Tigre, as well as inhabitants of the other Tlapanec communities of the region, value this way of settling dispute and imparting justice. Many believe that imparting justice by consensus is an important dimension of being Tlapanec. In discourse, and often in practice, harmony and peace are valued over attribution of guilt, punishment and

immediate compensation. Consensus law involves all members of the community who wish to participate in the resolution process and opens the possibility of seeing a given offence from multiple points of view represented in the community, including those of the victims and the offenders. By shunning adjudication and relying on consensus, it becomes possible to achieve a resolution that maintains, at least to a certain degree, the social relationships between the parties. This practice, according to Tlapanec informants, is one that makes for an important part of their identity as Tlapanecs and, conversely, of what makes them different from the *mestizos*.

3. Evil Processes Reacting to Parallel Structures

It is important, as the preceding section shows, to underline the fact that individuals and groups submitted to evil processes are not passive and might look for ways to establish parallel structures that will seek to circumvent, if not short-circuit these processes. Such is the case with the creation of a regional traditional justice apparatus by the Indigenous populations of the State of Guerrero. However, such alternatives are bound to trigger a number of responses from the dominant "official" institutions. In the case of Mexico, these responses from violent structures trying to maintain themselves in the face of challenge have ranged from violent repression against members of the autonomous Indigenous police, to bureaucratic stalling in addressing the injustices brought to light by the Indigenous protests, to a discursive re-casting of the situation that portrays the parallel structures *themselves* as bearers of greater evils than the flawed existing official institutions are. Even though there have indeed been important attempts made by the government to intimidate the leaders of the Indigenous judicial system by harassing them and throwing them in jail for periods of time, here we will describe two scenes which illustrate more subtle attempts made to keep in place the evil process described earlier. In doing so, we should keep in mind that these actors, who are generally agents of the government, do not view themselves specifically as maintaining in place an evil process and a system of discrimination. Quite the contrary, they generally believe that they are defending a benevolent and enlightened process. The process, some of them might confess off the record, might have erred or might have been misapplied. But as the sample we present here will show, they firmly believe in the soundness and goodness of the process they are defending, and see it as their main task to make sure that they communicate to the Indigenous people the "enlightened" principles on which this system rests.

Seeing the grievances expressed by Indigenous people as unfounded *in principle* and as generally reflecting a lack of understanding in need to be

corrected, and undertaking to "explain" to the aggrieved why a system they perceive in their own flesh and in their own lived experience as unjust and discriminatory will be viewed here as so many attempts to establish (or re-establish) what Bourdieu has called symbolic domination. This type of domination, frequent in colonial settings, occurs when a marginalized population adopts the norms, values and categories of the dominant group even if such adoption reinforces, in practice, the relationship of domination.

For example, here is a quote from the assistant district attorney (*fiscal*) in charge of the region where the Indigenous police has been created in which this official outlined his view regarding the kind of training that the members of the Indigenous police should undergo in order to stand a chance of being recognized as a serious actor in the Mexican judicial system:

> " [...] when we are talking about the Indigenous police, we must keep in mind that not even 10% of the members can read or write and that we are talking about a long training process which might take five or six years. They must begin by learning how to read, they must begin by learning how to write. When they know how to read and write, we need to teach them the Constitution. After that we need to teach them what kind of offences our penal legislation prosecutes. After that we need to teach them their duties as police officers. After that we need to teach them who they report to, who are their immediate superiors. Imagine, they would have to go through all this process to become our colleagues. How much time would that take?
>
> If they are really serious about being an Indigenous police, and if they really want to put an end to delinquency, we must put an end to [their current way of operating] which is causing more delinquency, more offences"

One could hardly argue with the fact that police officers need proper training. However, the process described here is one of assimilation to the already existing State apparatus rather than one that will lead to the creation of a genuinely Indigenous judicial system. The huge emphasis put in this "functional program" on reading and writing, in Spanish rather than in an Indigenous language, of course, is a clue that points to the nature of a proper training as envisioned by a Mexican official. Outside of this assimilation to the dominant language and values, this official sees only a grim future for the local populations brought about by their attempts at self-organization:

> "Imagine, he says, a group of armed people, who are irrational, without knowledge, and not controlled by the government. We are talking here of a real breeding ground for criminality, as Napoleon Bonaparte once said it."

Here, the assumptions behind the discourse of Mexican officials are clear: Rationality, knowledge, and control lies on the side of the government, and it would be better for Indigenous populations to suffer injustice at the hand of this system than to try to organize without proper intellectual and institutional tools. Of course, such racist observations miss the point entirely by not recognizing that it is the very definition of these "proper tools" that is at stake in the acts of resistance by Indigenous people. Evil, for them, is in the process as we have seen, but its roots are in the assumptions that define and shape this process. A good illustration of how deep this perception goes among the Indigenous people of Mexico is to be found in an episode in which a delegation of Mexican officials composed of district attorneys, judges, and police brass[2] decided to attend a meeting organized by the Indigenous police. The message of the officials was crystal clear: they wanted to let the Indigenous populations know that their new alternative judicial system was illegal. As one journalist present wrote: "the officials insisted that the Indigenous police free its detainees, or arrest warrants would be issued for the Indigenous leaders, who would be charged for illegal privation of freedom and abuse of power."[3]

As one would have expected in such a loaded political conflict, the Indigenous leaders reacted with indignation to such threats saying that "they were not outlaws" and that "if the government wants to put us in jail, let it put in jail all the community leaders to see if we can all fit!"[4]. But the most telling reaction came from the detainees themselves. Even though the government officials were, in effect, calling for the immediate release of the twenty to thirty Indigenous detainees currently serving sentences under judgments passed by the parallel Indigenous penal system, these detainees refused to side with the government. They affirmed that they had to pay for their mistakes in the very communities they had wronged, a position clearly in line with the reparative rather than punitive principles underlying Indigenous traditional law.

The detainees argued that being taken in the custody of the official judicial authorities did not bring any suitable outcome for them. Either they were tried in a system that was foreign to them in a language in which they did not feel competent to express their version of facts, or they were released without further trial. In the first case they were almost certain of being convicted due to poor quality of representation and sent to a prison where

they would be further discriminated against because of their ethnicity. In the second case, if they were simply released, it would be impossible for them to reintegrate their native community with dignity now that everybody was aware of their illegal activities. In other words, the detainees made it clear that the "official" system, enlightened as it might be to the eyes of those in charge of reproducing it, had nothing to offer them except suffering, Kafkaesque experiences, and permanent alienation from their community. Notice that these preoccupations had nothing to do with whether or not they would get a "fair" trial in a Mexican court or whether their constitutional guarantees would be respected.

Conclusion

Evil processes, resistance to evil processes, and the inertial reactions of the former to the later form a complex dynamic, whose examination in cases such as the political struggle between "official" and "parallel" judicial systems in Guerrero reveals at least three things.

First, it reminds us that even groups that live under tremendous marginality and have been subjected to evil processes and all forms of dominations for centuries are not passive. A discussion of evil should, thus, go hand in hand with a discussion of resistance to these processes.

Secondly, and perhaps as a caveat to the preceding observation, we note that resistance to an evil process can, and often does, intensify the violence of that process. Things certainly get worst before they get better. An uncontested evil process, or a process where resistance remains mostly covert[5], may very well operate with little direct and manifest violence, but when active political resistance emerges, and especially when alternative social structures and institutions are created by marginalized people to address the structural violence generated by the dominant order, the existing institutions get more repressive and show their teeth. This repressive violence need not necessarily be physical, as the symbolic attacks made on the Indigenous leaders by a Mexican official who abandons the politically correct public discourse of the government and calls them "irrational" and "ignorant" clearly shows. When the discursive gloves come off, the racist assumptions underlying a justice system become apparent.

Finally, the present research tells us that one important tipping point in the dynamic between evil processes and resistance occurs when the symbolic domination on which the evil process rests, and by which it justifies itself, starts to come apart. It is a point at which the marginalized groups no longer accept the assumptions and cultural categories on which the system of oppression and discrimination rests. This observation reintroduces the issue of linguistic competence under a new light into the equation. The erasure of

Indigenous languages in the workings of the State apparatus curtails the authority and currency of Indigenous categories and knowledge in the shaping of these institutions. In that context, the imposition of a dominant, and foreign, language becomes a way to force a conceptually and historically loaded *lingua franca* on Indigenous people.

It is not by coincidence that one of the most subversive characteristics of the parallel judicial system set up by Indigenous people in Guerrero is the almost exclusive use of indigenous languages in legal proceedings. It shifts the balance of symbolic power in favour of Indigenous people – as was spectacularly demonstrated in the few cases where non-Indigenous people were brought before this judicial system because of crimes committed against Indigenous communities. But apart from this shift in power, the use of Indigenous languages to "structure" social structures allows a radical rethinking of fundamental categories such as "crime", "blame", "justice", "settlement", "law", "enforcement", and so on.

In short, a shift in symbolic power within a process that generates evil has the potential to turn this process on its head by restating the very concepts, categories, and assumptions on which it rests. In a consideration of the relationship between Evil, Law, and the State, such an observation, supported by the real transformations witnessed in the last ten years among the indigenous people of Mexico, should come as a ray of hope.

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Notes

1. Laura Nader, *The Life of the Law* (Berkeley, California: University of California Press, 2001)

2. Maribel Gutiérrez "Aplican 'justicia indígena' en la Costa Chica y la Montaña," *La Jornada*, 21 april 1998, p. 23
3. Ibid p. 23
4. Ibid
5. Such as is often the case in instances of "everyday" forms of resistance first theorized by James C. Scott or in forms of resistance that have been termed more "psychological", as those explored by Foucault

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Protection, Harm and Social Evil: the Age of Consent since 1885

Shani D'Cruze

Abstract: The 1880s moral panic around child prostitution resulted in an increase in the age of consent. Although these campaigns themselves have received much scholarly attention, comparatively little work has explored the legal history and judicial practice around of the age of consent in cases involving the sexual activity or (more commonly) the sexual assault of teenagers and adolescents. Identifying the 'evil' or 'outrage' in such cases was problematic; 'evil' appeared sometimes in the provocative sexuality of the young person, sometimes in the man (or very occasionally woman) accused, but was often more diffusely located. Age of consent legislation was intended as much to address wider conceptions of 'social evil' as much as harm to young people and children. Such cases contested and negotiated contradictory conceptualisations of the child as sexually innocent or as sexually knowing; in need of care and protection or in need of discipline and control. Judicial responses differentially emphasised both punishment and welfare. This paper considers the period between the Criminal Law Amendment Act of 1885 and the 1930s. It identifies changes and continuities in the discursive frameworks framing expert, judicial and popular knowledges about sexuality, youth and consent.

Keywords: law, history, sexuality, consent, gender, evil, crime, child.

1. Sex, Violence, Power and Age

The law has used the categories of rape and indecent assault to criminalise certain kinds of violence in sexual encounter. It has generally been most convinced where that violence was demonstrably physical and in its deliberations over consent has often looked for physical resistance (in other words a violent response) from a prosecutrix. The law has also criminalised certain sexual practices and object choice that legislators and courts have deemed reprehensible in themselves. One of these areas has been sexual activity involving people below certain stipulated ages. Historically, the age of puberty has had no strict correlation with the statutory age of consent.[1] This paper asks how far sex-with-minors has been of itself seen to involve violence or whether such practices have been criminalised because (like (and not like) bestiality, buggery and, after 1885, gross indecency between males) they involved an inappropriate object choice.

I argue that the law found itself with certain definitional and in-practice problems that were frequently addressed through (contested) rhetorics of 'protection'. Discourses of protection actively constitute

vulnerabilities in their objects.[2] The threatened harm was itself a sign with unstable referents. The recurrent moral inflection of such discourses render social harm as 'social evil', a category far less measurable in any utilitarian sense and thus less susceptible to diminution through control. Such rhetorical moves acquired shifting inflection through the discursive and institutional trends into the twentieth century, which have been labelled as penal-welfarism. Constituting the numerous persons who came to the attention of the criminal justice system in such cases as objects in need of protection, potentially invoked misrecognitions and produced subaltern subject positions that had perforce to be occupied to mobilise the protection of the law. Feminist (and other) scholarship has demonstrated how limited such protection might be and how judicial, criminal and even welfare intervention has perpetrated its own violences on those already vulnerable.[3] Therefore, who is a 'child' in need of protection,[4] exactly what might be the relationships between pleasure, desire, and 'adultness' or its absence, and what exactly has 'consent' amounted to before the law in the area of sex legislation? The answers are complex and contingent. There is not, and never has been, a unitary 'age of consent'. English law has banned certain activities, sexual and other, and categorised people by age for particular treatment in diverse areas. Such age stipulations have changed over time, are not necessarily consistent with each other and have varied by gender. This paper addresses just a segment of these big issues. It concerns heterosexual sex involving adolescent girls from the mid-nineteenth century to the 1930s. As such it is a re-crossing of ground already traversed by women's historians and other scholars with different – or differently formulated – questions in mind.

2. Victorian legislation

When Victoria came to the throne, the age of consent for girls was effectively 10.[5] The 1861 Offences against the Person Act was a major consolidating statute, part of the legislative and judical process that Weiner sees as disciplining men's violence across Victorian England.[6] Section 48 reiterated the crime of rape as a felony. Overall this Act was concerned with physical violence, and this association as well as the expectation of demonstrable 'resistance' underlined a legal understanding of sexual violence as physical violence. The context of the clauses prohibiting sex-with-minors was therefore one preoccupied with violence in its most legible form. In enacting that it was 'no offence to have sexual intercourse with a girl under 12 who 'freely consented' however ignorant', the 1861 Act maintained the age of consent at 10, two years before the age of valid marriage. Consent (from a 10 year old) thus negatived violence. Although 'carnal knowledge' with girls under 10 was a felony, evidence of 'valid consent' by such a girl effectively meant that the charge was reduced to the misdemeanour of 'attempted carnal knowledge'.[7] If

consent, which presumably enabled carnal knowledge to be the more fully gained, produced a charge of the attempt rather than the accomplishment, could such force procure consent from girls under 10 as much as from adult women. Who (or what) 'evil' and what was to be protected?

The Contagious Diseases Acts of the 1860s focused on the adult woman prostitute and sought to regulate this 'social evil' through medicalised disciplinary technologies.[8] These laws implicitly acknowledged prostitution as a necessary outlet for the sexual imperatives of (initially, though of course not exclusively) the military – a potentially disorderly male population with a significant working-class component. The furore about child prostitution in the 1880s however, had led to the 1885 Criminal Law Amendment Act (CLAA) which raised the age of consent to 16. Thus the response to concerns about sexual abuse of female adolescents was to legally re-position the boundaries of feminine sexual innocence. 'Protection' implied that adolescent girls were not fully in control of their nascent sexuality. Although this Act also criminalised gross indecency between men through the Labouchère Amendment, this was an afterthought and the predominate representation of the wrongs of child prostitution was of the sexually innocent female child, sold by corrupt working-class parents and violated by the adult (middle or upper class) male. Such representations bundled together anxieties about class, sexuality and the symbolic role of normative constructions of family as guarantors of a wider social order.

The 1885 CLAA established the legislative framework of the forthcoming century. [9] It enacted the felony of sexual intercourse with a girl under 13 irrespective of consent, and the misdemeanour of intercourse with a girl between 13 and 16 irrespective of consent but outside lawful marriage. The anomaly that a girl could marry at 12 but not consent to sexual intercourse outside marriage until 16 remained in place until the Marriage Act of 1929.[10] Girls were therefore capable of consenting to *marital* sexual intercourse at 12, since agreement to marriage established a woman's ongoing consent to her husband's sexual access. Hence, it was less any direct, physical or psychological harm to an adolescent girl caused by sexual intercourse *per se* that was at issue. The 'evil' was moral and was to do with loss of sexual chastity. Late nineteenth-century social purity campaigners regarded many sexual practices as socially and morally contaminating. Regulation of sexuality up to the First World War was heavily driven by such activists. The 1880s scares over 'white slavery' and the trafficking of English teenagers to Belgian brothels, though exaggerated and alarmist, framed regulation in questions about nation, state and the implied depravity of foreigners.[11] Girls subjected to sexual assault were implicated in a far more extensive 'social evil'. Both feminist and conservative social purists addressed a wrong that was wider than individual harm to the adolescent girl. Above all it was through her

sexual chastity that a woman or girl established her moral (and thus her social) value. Once activated, female sexuality meant her ready resort to prostitution and seduction.[12] The sexual precocity of 'fallen' girls meant temptation not only for themselves but signally for men. Social purists asked (British) men to reign in their sexual impulses, rather than questioning the nature of such desires.

3. Tyrrell – the provocative child

Legitimate, manly desire was valorised for its ability to 'conquer' its object against obstacles and chaste feminine refusals. Hegemonic masculinities contained the implicit contradiction that, even while normative male sexual desire was considered wide-ranging and insistent, the 'reasonable man' combined agency with self-control and the ability to manage desire. Feminine sexualities (and by elision the feminised charms of the homoerotic other) were by their nature disorderly and an ever present temptation. Louise Jackson draws attention to an eroticisation of 'littleness'[13] – the sexually innocent girl was both a miniaturised woman and always already on the point of loss of innocence. The eroticisation of the forbidden necessarily contributed to the contradictory status of the female adolescent as a problematic object of both sexual innocence and of desire. The case law that followed the 1885 CLAA illustrates how these assumptions came to be written into law through judicial review and appeal.

In September 1893 the Central Criminal Court convicted Jane Tyrell (13 years and 8 months) for 'aiding and abetting' and also for 'soliciting and inciting' Thomas Ford to commit a misdemeanour, to whit of having 'carnal knowledge' of herself. It was proved in evidence that she had solicited the sexual contact; such proofs were not infrequently taken as plausible at law. The conviction was overturned on appeal, the grounds being that since the relevant provisions of the CLAA had been drafted for the purpose of 'protection', it would be a '*reductio in absurdem'* if the act was relied upon to underpin a prosecution of an under-aged girl. Jane Tyrrell lacked the necessary *mens rea* but was nevertheless accepted to have the sexual and social capacity to initiate sexual contact. Chief Justice Ld Coleridge saw the CLAA as having 'the objective of protecting women and girls against themselves' (i.e. rather than against the men involved) indicating both the fragility of their sexual chastity and their diminished capacity for rational consent. Dominant constructions of femininity saw these two things as not unrelated. The prosecution also argued that irrespective of whether it was an impossibility for an individual to incite an offence against themselves '…it was an offence not merely on herself, but against the State.'[14] The collectivity of respectable citizenry as much as Jane Tyrrell were victims. In different ways the Court of Appeal accepted that a 13 year old was entirely capable of initiating consensual

sexual intercourse but also subsumed the harm (if any) done to Jane Tyrrell in wider formulations of social danger. In Sumner's formulation, there is more here of the violence of censure than the censure of violence.[15]

4. Competing interwar discourses

Age of consent was next reviewed, though not changed, between the wars. Parliamentary Committees on England and Scotland reported in 1925 and 1926. Sexology had by then emphasised the inevitability and pleasure of desire as well as its potential variety but had also given a new kind of scientific legitimacy to dominant models of male insistence and female submission.[16] Social-psychology gave a fresh array of reasons why premature sexual activity was deleterious to an adolescent's future development; 'not only unfortunate impressions but severe neurosis may persist in later life'. This Freudian concern for psychological harm is still, however, morally inflected. Early sex will ' confound (a child's) sense of right and wrong'.[17] Anxieties about sexuality and social stability, heightened during the First World War and epitomised in the post-war persona of the 'flapper', were confronted by this rather different set of discourses and structures. Without taking on uncritically all of Garland's formulations, the interwar proliferation of institutions and expert opinion around the child certainly looks like penal-welfarism. Pamela Cox has shown how the formula of 'care and protection' enabled the institutionalisation of an array of both victimised and delinquent girls whose deviance was attributed in both newer medical and older moral discourses to premature or excessive sexual development.[18]

The perceived increase in illicit sexual activities during wartime had been challenged in part by the heavier policing of women and the imposition of curfews in military towns. Public health rather than moral arguments were deployed: a notorious provision under the Defence of the Realm Act, 1918 (40D) had authorised the forcible removal for treatment of any woman known to be a source of venereal infection.[19] 1920s teens could buy into a racy, sexualised leisure culture. A good deal of casual and sexy dating stopped short of intercourse, but nevertheless, the sexual knowingness of the flapper, able through paid work to delay marriage, seemed alarming in a number of quarters.[20] Between the wars, amongst the cases it decided around sexual consent, the Appeal Court was exercised several times by appeals arising from the operation of the Criminal Law Amendment Act of 1922.

The 1885 Act had established a defence to a charge of 'carnal knowledge' where the girl had consented and the defendant could prove he had a 'reasonable belief' that she was 16 or older. The 1922 legislation removed this (by now notorious) 'reasonable belief' defence, but made an exception for young men defendants under 24 years old on a first charge.

The practice had grown up of adding an indictment for indecent assault to one of carnal knowledge.[21] This covered the eventuality of the evidence not supporting the greater charge, but also positioned sex-with-minors as assault. Where young male defendants after 1922 relied successfully on 'reasonable belief', because the facts of the intercourse had necessarily been proved, they were finding themselves automatically convicted of indecent assault. The Appeal Court decided against young men who were physically violent or who hunted in packs;[22] such stories matched known paradigms of rape. However, where defendants appeared respectable, reliable and moderate in their sexual practices, the model of sexual relations invoked became a romance narrative of normal courtship gone a little astray. The girl, though under-aged, had necessarily to be represented as an unharmed, fully consenting party to intercourse, not the victim of sexual assault.

The 21-year old defendant in R v Keech (1929) was of the 'highest character'. He had intended to marry 15 year old Lily Bird, but had been prevented by the 1929 Marriage Act. She was pregnant and he was paying her a voluntary 10/- per week maintenance. On appeal his 1 month's sentence was reduced to 1 day and he was discharged. 'Reasonable belief' called for evidence of an adolescent girl's capacity to consent and often found it in her appearance. Lily Bird's mother had testified that she 'looked eighteen'. The capacity to consent was read off from bodily clues that signed premature female sexuality which, though in other contemporary circumstances indicated irrationality and delinquency, here were taken to evidence rational consent. Gender, says Gatens, is 'a material effect of the way in which power takes hold of the body…'[23] The appearance of sexual maturity in an adolescent was held to shape her sexual behaviour and thus her social identity. The judgement in R v Maughn (1923) mitigated a 19 year old youth's sexual responsibility; he was …a boy who is tempted and induced to have carnal knowledge of a girl who misrepresents herself to be over sixteen, and who appears to be so….' This was a wilful pass, in terms of claiming legal identity but its vehicle was an embodied sexuality which both psychological and moral discourses naturalised.[24] Respectable young men (boys) like Keech and Maughn were vulnerable to temptation because of their youth, and so themselves acquired a limited amount of protection from the law. They could be explained by both Victorian moral restraint and by modern sexology, as exhibiting the right kinds of manly desire, but making fairly minor mistakes in its management. In the courts, expert witnesses may increasingly have expressed views shaped by social psychological or medical knowledges. Nevertheless given the constraints of precedent and the fuzzy drafting of statute, when imagining what happened to bodies, courts decided specific cases by working between new knowledges and more longstanding legal logics.

Despite anxieties about rising juvenile delinquency in the 1920s, the professional and discursive parameters of welfare as the appropriate response to youthful disorder continued to expand. The 1933 Children and Young Persons Act gave juvenile courts jurisdiction over children and 'young persons' aged under 17 who were categorised as neglected or abused or as offending. Rehabilitative objectives bound 'protection' with 'training'; its goal the production of (gendered) citizens. The Appeal Court in 1937 was willing to categorise as 'child' a 13 1/2 year old who had accepted a ride in a lorry and gone off to the woods with Ronald Harling who there (with her 'consent') had 'carnal knowledge' of her. Equivalent behaviour had in 1895 evidenced the sexual initiative of 13 year old Jane Tyrrell and put her at risk of judicial punishment[25]. The interwar juvenile justice and welfare systems blurred definitions between deprivation and depravity and saw both as linked causes of moral (sexual) danger to adolescent girls. The 'weakling' girl assaulted by Harling was herself likely to be institutionalised. The 1933 Act also brought more mid-teens girls, including 16 year olds, into the penal welfare net as in need of 'care and protection', effects it seems not unconnected with the stability of statute and case law on age of consent. Disciplinary regimes had clearly shifted /though the substratum of sexual abuse which they 'discovered,' may not have.

Notes

[1] Matthew Waites, "Equality at last? Homosexuality, Heterosexuality and the Age of Consent in the United Kingdom," *Sociology*, 37 (2003): 637-655; "Inventing a 'Lesbian Age of Consent'? The History of the Minimum Age for Sex Between Women in the UK," *Social & Legal Studies* 11, (2002): 323-342; "Regulation of Sexuality: Age of Consent, Section 28 and Sex Education," *Parliamentary Affairs* 54 (2001): 495 et seq.

[2] S. D'Cruze and A Rao, "Violence and the Vulnerabilities of Gender" in *Violence, Vulnerability and Embodiment, A Special Issue of Gender & History*, 16, S. D'Cruze and A. Rao eds. (2004) (forthcoming).

[3] Harry Ferguson, "Cleveland in History: the Abused Child and Child Protection 1880-1914," in *In the Name of the Child: Health and Welfare 1880-1914*, R. Cooter ed., (London: Routledge, 1992), 146-173; E. Stanko, "Introduction," in *The Meanings of Violence*, ed. E. Stanko (London: Routledge, 2003), 12;, S. D'Cruze and A. Rao.

[4] A flurry of debate as the 2003 Sexual Offences Bill went through Parliament asked whether the act would criminalise consensual sexual activity short of intercourse by people under 16. John Carvel, *The Guardian*, 11 July 2003; David Batty, *The Guardian*, 24 November, 2003; Miranda Sawyer, *Age of Consent*, Channel 4, 19 November, 2003.

[5] For earlier legislation on sexual offences with children, see Anthony Simpson, "Vulnerability and the Age of Female Consent: Legal Innovation and its Effect on Prosecutions for Rape in Eighteenth-Century London," in *Sexual Underworlds of the Enlightenment*, eds. G. S. Rousseau and R. Porter (Manchester: Manchester University Press, 1987). 182-185.

[6] Martin J Weiner, *Men of Blood: Violence, Manliness, and Criminal Justice in Victorian England*, (Cambridge: Cambridge University Press, 2004).

[7] Kim Stevenson, "'Ingenuities of the Female Mind': Legal and Public Perceptions of Sexual Violence in Victorian England, 1850-1890," in *Everyday Violence in Britain, c 1850 c 1950: Gender & Class*, ed. S. D'Cruze (London: Longman, 2000). 96.

[8] Judith Walkowitz, *Prostitution and Victorian Society* (Cambridge: Cambridge University Press, 1980).

[9] The age of 12 had been raised to 13 by the Offences Against the Person Act 1875.

[10] L. Radcinowicz, *Sexual Offences* (Cambridge: Cambridge University Press, 1959), .329.

[11]Frank Mort, London: *Dangerous Sexualities: Medico-Moral Politics in England since 1850*, 2nd edn, (Routledge, 2000), 102-6; Lucy Bland, *Banishing the Beast: English Feminism and Sexual Morality, 1885-1914*, (Harmondsworth: Penguin, 1995), Ch 3; *Daily Telegraph*, 3 April 1885; "English Girls Being Systematically Entrapped," *The Sentinel*, March 1880, 1; *ibid*, April 1880, 4: Deborah Gorham, 'The Maiden Tribute of Modern Babylon Revisited' *Victorian Studies*, 1976, 353-79; Judith Walkowitz, *City of Dreadful Delight*, (London: Virago, 1992).

[12] Society for the Rescue of Young Women and Children, 18th Annual Report yr ending 31.3.1871, published 1872, 23; *ibid* p 22: "It is not that there is a large amount of open criminality amongst female juveniles, as a means of giving a livelihood, but that a large number at a very youthful age, are led astray from virtue, and having fallen, become an easy prey to subsequent temptation."

[13] L A Jackson, *Child Sexual Abuse in Victorian England*, (London: Routledge, 2000). 122-3.

[14] QBD 710 R V Tyrrell Dec 16th 1893; *Times* 18 December1893, 14.
[15] Colin Sumner, 'Introduction: the Violence of Censure and the Censure of Violence', in *Violence, Culture and Censure* ed. C. Sumner (London: Routledge 1996). 4-5.
[16] M Jackson *'The Real Facts of Life': Feminism and the Politics of Sexuality, c 1850-1940* (London: Taylor and Francis, 1994).
[17] Cmd 2561, 1925, xv 905; L. A, Jackson, 153.
[18]David Garland, *Punishment and Welfare* (1985), *Punishment and Modern Society* (1990), *The Culture of Control* (2000); Pamela Cox, *Gender, Justice and Welfare: Bad Girls in Britain, 1900-1950* (Palgrave 2003), Ch 6.
[19]S. D'Cruze, 'Crime', in *Women in Twentieth Century Britain*, ed. I. Zweiner-Bargielowska, (London: Longman 2000); A. Woodeson, "The First Women Police: a Force for Equality or Infringement?' *Women's History Review*, 2, (1993), 217-232; Lesley Hall, *Sex, Gender and Social Change in Britain since 1880*, (London: Macmillan, 2000), 95.
[20]Hall, 99; S. D'Cruze, 'The Villa Madeira and the Eastbourne Foxes: gender, murder and compromised respectability in two inter-war English seaside towns,' unpublished paper to Social History Society Conference, Leicester, January 2003.
[21] Radzinowicz, 331. Carnal knowledge of a girl between 13 and 16.
[22] Compare R. v Blackman, 21 Cr App R, p. 132 (1929). Compare S. D'Cruze, *Crimes of Outrage: Sex, Violence and Victorian Working Women* (London: UCL Press, 1998).
[23] 21 Cr App R p. 125 (1929); M. Gatens, *Imaginary Bodies: Ethics, Power and Corporeality*, (London: Routledge, 1996), 66
[24] 17 Cr App R at p. 103; (1923) 2 K B at p. 404. See also Lawes 1929 21 Cr App R 45, and Forde 1923; Cox.
[25] H. Hendrick, *Child Welfare: England 1872-1989*, (London: Routledge, 1994), 183-185; Victor Bailey, *Delinquency and Citizenship: Reclaiming the Young Offender, 1914-1948*, 165, 167; R v Harling (1937) 26 Cr App R 127; (1938) All E R 307; R v Donovan (1934) 2 KB 498; 25 Cr App R 1.

"Too Many Foreigners For My Taste": Law, Race and Ethnicity in early U.S. California, 1848-1851.

Fernando Purcell

Abstract: This article examines law and justice during the California gold rush and its relationship with foreigners. The paper will illustrate how law became a source of discrimination when applied to certain foreigners including Mexicans and Chileans. Legal procedures against them embraced a strong sense of racial and ethnic discrimination since punishment of Anglo Americans and "white" foreigners had different connotations. Even after the organization of California as State in 1850, legal authorities were surpassed by extra-legal organizations and even the State took actions to discriminate legally against non-white foreigners. Behind all these legal practices was a clear and widespread discriminatory racial ideology.

Keywords: Race, ethnicity, immigration, California, law, punishment.

In 1855 Hinton R. Helper published a book entitled *The Land of Gold: Reality Versus Fiction*. In his work, when referring to California's population at that time, he stressed the idea of California as an unharmonious society by presenting the following question: "Will a panther from America, a bear from Europe, a tiger from Asia, and a lion from Africa, organize in peace and good feeling around the body of a fresh slain deer? If not, will the Americans, English, French, Germans, Chinese, Indians, Negroes, and half-breeds, greet each other cordially over a gold mine?" Hinton R. Helper's analogy recognizes the cosmopolitan feature of California during the Gold Rush and addresses how different and anxious peoples from all over the world gathered with the same goal in mind: the accumulation of gold. California society after the beginning of the Gold Rush in 1848, however, was not only unharmonious because of the competition for gold. Conflict and violence that resulted from racial and ethnic tensions also contributed to the creation of an unharmonious environment.

In this paper I will examine dramatic incidents during the California Gold Rush that illuminate the ways in which legal procedures and the exercise of justice allowed Anglo-Americans to both feel and help impose a racial agenda that discriminated against Mexicans and Chileans. The fact that law became a source of evil for non-whites is clear when considering lynching for example. Lynching was predominantly directed against "non-white" foreigners and was usually legitimized by extralegal populace-appointed judges and juries in the gold fields. These extralegal tribunals

appeared because of many authorities' lack of legitimacy and power in the gold fields or simply because they did not exist. The State of California also found legal ways to discriminate against non-whites including the imposition of the discriminatory Foreign Miner Taxes of 1850 and 1852, and the denial of the right to testify to non-whites in court.

During the California Gold Rush, Anglo-Americans felt upset by the incredible number of foreigners who were "stealing" their gold and threatening their predominant position in the newly conquered territory of California, acquired after the Mexican American War of 1846-1847. In a letter written to his wife, John Baker, an American physician in Jackson, California, referred to this place as a good and decent camp with, "some very good buildings, but decidedly, too many foreigners for my taste."[1] Baker's statement shows a sense of dissatisfaction which was shared by most Anglo-Americans at that time because of the presence of "undesirable" peoples on American soil. This dissatisfaction took violent forms in many instances, especially against non-whites. According to David A. Johnson, between 1849 and 1902 there were 380 cases of lynch law justice in California and approximately half of them occurred during the short period of the gold rush between 1849 and 1853.[2] In those crucial years of racial formation in California, Johnson states that "non-whites, primarily Hispanics, composed a dramatically disproportionate percentage of those who experienced the wrath of the 'people.'"[3] To make my argument more specific, I will now concentrate on two of these lynching cases that affected Mexican and Chilean people.

On the afternoon of July 5, 1851, Josefa, a Mexican woman from Sonora, was taken to the gallows in the small mining town of Downieville. At the place of the execution she was received, as witness David Barstow pointed out, by the "hungriest, craziest, wildest mob standing around that I have ever seen anywhere."[4]

Josefa is the only known women hanged during the California Gold Rush, and she was Mexican. She was executed for stabbing Anglo-American miner Frederick Alexander Cannon, early on the morning of the same 5th of July. According to Josefa's testimony, which was discredited by most Anglo-Americans during the short and expedite trial, she had stabbed Cannon to defend herself after Cannon had forced the door of her home with the intention of taking sexual advantage of her. In the trial Josefa testified: "I had been told that some of the boys wanted to get into my room and sleep with me; a Mexican boy told me so and it frightened me so that I used to fastened the door and take a knife with me to bed."[5] During the trial, however, it was believed that that Cannon had fallen against the door of Josefa's house because he was drunk and that the door gave way because it was frail. However, Josefa's testimony, which during the trial was supported only by

her Mexican paramour named José - who was also being accused of participating in the murder - was supported ten days later by the *Sacramento Times & Transcript.* This newspaper included a report based on witness John S. Fowler's observations that coincided with Josefa's statement. According to this newspaper, "she had stabbed a man who persisted in making a disturbance in her house, and had greatly outraged her rights."[] In other words, the story of the drunken man accidentally falling against the door of the house where one of the few women - and coincidentally a Mexican - lived in Downieville prevailed over Josefa's testimony.

The sentence for Josefa was ready as soon as she committed the crime. Early that morning the populace embraced the general cry of "hang them [Josefa and José]. Give them a fair trial and hang them!'"[] In other words, the mood of the populace favoured using a legal trial to legitimize a decision that had been made as soon as they knew a Mexican woman had killed Cannon. The excitement in town was impressive and by one o'clock on the same day as the stabbing, the people of Downieville had organized a Court with John Rose as Judge and another twelve people as jurors. The informal and sporadic jury created that day to judge Josefa found her guilty and condemned her to be executed. José, her paramour, was ordered to leave the town.

The jury's decision to hang Josefa was not only based on law, but also on the evil belief of Mexican racial and ethnic inferiority. This is why the possibility of interpreting Josefa's action as self-defense was not even considered by the jury. Testimonies during the trial, for example, expressed the idea that there was a propensity among Mexicans to commit these kinds of crimes. Josefa, according to witness John R. McFarlan, "presented more the appearance of one who would confer kindness than one who thirsted for blood; but the propensity of her race was truthfully developed not only by the entire testimony, but by her own statement and that of her paramour."[] This speaks for itself in terms of the behavioural assumptions commonly made at that time, when taking into consideration the racial and ethnic background of people, and in this case, Mexicans. Hence, an important aspect influencing Josefa's execution was her origin, not only the fact that she killed an Anglo-American miner. The extra-legal authorities nominated by the town to judge Josefa clearly brought their racial prejudices to the trial and acceded to the call of the anxious populace who asked and pressured for a hanging.

The importance of law and justice as a tool for Anglo-Americans to impose racial supremacy becomes even more clear when examining the so-called 'War of the Calaveras' that occurred in the Calaveras area, 150 miles east of San Francisco, in December 1849 and early January 1850. This incident originated after a group of Chilean miners refused to obey the order

of Anglo-American miners to leave the area. As witness John Hovey wrote in his diary, these Anglo-Americans felt it was their duty to form a code of "just laws" to maintain the privilege of exploiting what they considered their own land. As a result, a group of miners met on December 9, 1849, to "make laws to have our rights as American Citizens," and as Abraham Nash pointed out, to expel the "D'd copper hides every one of them."[10] In that meeting they also chose L. A. Collier as District Judge and elaborated a series of laws. The first one established that no foreigners were going to be permitted to work out the mines of Calaveras after the following day.[11]

Chileans continued working in the mines and Anglo-American miners, under the leadership of their newly elected Judge Collier, captured and fined the Chileans because of this. After their release, a group of Chilean miners departed to the nearby town of Stockton where they complained to the local authorities against Judge Collier, saying that they had not been treated fairly by him. Interestingly, the Chileans were able to obtain a warrant from the Stockton authorities.[12] The warrant stated that the Chileans were authorized to arrest and bring to Stockton "either freely or by force all of the individuals residing in Calaveras who have defied the legal authority of this sub-prefecture and who have recognized Mr. Collier as a judge."[13] The arrest order was put in the hands of Chilean miners, providing them with an unusual judicial prerogative. Justice in the mines was used throughout the Gold Rush not only as a way to impose "order" but also as a consistent and conscious form of establishing Anglo-Saxon racial superiority in the recently conquered and foreign-crowded territory of California. In this case, this racial agenda, carried out to a great extent through the exercise of justice, was turned the opposite way.

With the warrant in their hands, the Chileans returned to Calaveras where they arrived on December 26th. There they asked Calaveras Judge Scollen to authorize them to execute the arrest order. Scollen, who was the area Judge recognized by Stockton authorities, did not authorize the execution of the order. At that point, the Chileans decided to take justice in their hands. Eighty armed Chileans went to the Anglo-American camp in the area. Once there, they went through the different cabins, killing several people and injuring others. After the attack, the Chileans bound some of the Anglo-Americans to trees with ropes and took sixteen prisoners to Judge Scollen's cabin.[14] Scollen refused to see the Chileans because he did not want to become involved in the incident. As a consequence of this, the Chileans decided to march toward Stockton with the prisoners. On their way to Stockton the sixteen prisoners were rescued and the Chileans passed from being captors to captives.[15] The Chileans were brought back to Calaveras on December 30 and the following day Anglo-American miners empanelled a

Jury of twelve men and found all of the Chileans guilty of murder in the first degree.[6] Meanwhile as John Hovey wrote in his diary, "the news had spread like wildfire through the different mines," and hundreds of miners made their way to Calaveras in the following days in order to witness the execution of the Chileans, to see several other Chileans punished.[7] One Chilean was sentenced to have his ears cut off and three of the leaders were to be shot. The execution of the sentences took place on January 3, 1850. As Argentine Ramón Gil Navarro wrote, the cutting of Ignacio Yanez's ears

> was followed by a cry of pain such as one might hear in the last agony of a martyr. The ear with a part of the cheek was in the hand of the executioner who, after a moment, threw it aside and went after the other ear with the coldest insensitivity. A sea of blood inundated the face and clothing of the poor fellow, giving him a look more horrible than you can imagine . . . . Finally Terán, Damian Urzúa, and Francisco Cárdenas were tied to oak trees . . . then shot from a distance of fifty feet, not all at once but one after another.[8]

The same day of the execution, the astonished editor of the *Pacific News* in San Francisco could not believe what his correspondent had written when reporting about the origins of the incident:

> If we understand our correspondent right, the warrant was issued by the American authorities, and placed in the hands of *Chilians*, for the arrest of American citizens. If this was the case, such a course was undoubtedly wholly injudicious in itself, and likely to produce the calamity which has arisen. We trust, however, that there is some mistake in this, and that the matter will be satisfactorily explained hereafter.[9]

In reality, there was no such a mistake as the editor expected. The incredulous editor continued by blaming Stockton authorities and stating that there was

> culpable carelessness somewhere in this matter. Why send a party of *foreigners* to arrest Americans - especially foreigners who could not speak the English language, and who even did not take with them an interpreter? [...]

> Shameful, indeed, is it, that an American was not sent to make the arrest, if there was any need of it."[10]

The outcome of the event was specifically related to the fact that these Chileans contested two sacred principle shared by most of the Anglo American miners. One was the belief in their exclusive right to extract gold from their own territory. But to make things even worse, Chileans had the audacity to try to make justice by themselves, something that was simply unacceptable for Anglo-American miners who, as I have explained before, attached a racial connotation to their laws and legal procedures in order to impose their racial superiority in the newly conquered territory of California. In a time when Anglo-Americans in California had not yet establish their racial hegemony extensively through labour control, lynching and law became powerful ways to impose Anglo-Saxon racial hegemony.

Public executions had been progressively banned in the states from which most of the so-called '49ers' came. By 1845, all of the New England and mid-Atlantic states had eliminated public executions. This was not the case in the slave-based south-eastern states nor in California where the "danger" of "undesirable" inferior people was present. This explains why public executions in California remained legally accepted in the state until 1858, when the California Legislature moved executions inside county jails, requiring at least 12 respectable citizens as witnesses.[11]

As Philip J. Ethington points out "by extinguishing a human life in public - leaving the body for view and sometimes abusing it - crowds and their leaders intend[ed] to transform the individual [victim] into a collective symbol."[12] In fact, the non-white victims examined became collective symbols of racial inferiority for the thousands of people who witnessed their punishments and for California society in general. At the same time, the motives for these lynching were eminently public and had a function of communication linked to a strong racial ideology. Hence, the Anglo American witnesses of these lynching had the chance to testify against non-whites as well as to make the establishment of racial and ethnic hegemony more tangible. When discriminating against non-whites, Anglo-Americans developed a sense of accomplishment regarding their positioning as rulers of California.

The role of the state of California, in terms of legislating and supporting measures against non-white people, is a clear example of the broader framework in which law and justice, in relation to race and ethnicity, operated in California during the Gold Rush. The first Foreign Miner Tax was passed by the California legislature on April 13, 1850, and it imposed a monthly fee of twenty dollars on every foreigner working in gold extraction.

This law sought the expulsion rather than the exploitation of certain foreign miners.[3] It responded directly to the needs of many miners working in the gold fields who had enacted their own informal "laws" with the same purposes, as in the case of the 'War of the Calaveras.' Even though the law mentioned all foreigners, the Foreign Miner Tax of 1850 targeted almost exclusively Mexican and Chilean miners, whereas an 1852 tax law was directed against Chinese miners. The 1850 law legitimized the previous expulsion of non-white miners from the gold fields. Hence, it is possible to argue that the California state, after its creation, had an important responsibility in terms of legitimizing previous discriminatory legal practices against non-white foreigners.

Another example that reveals the important role of the State of California in establishing racial supremacy is the California law that prohibited certain non-white people from testifying in Court. In the two cases examined here, non-whites who were not directly involved in the incidents were not allowed to testify. Blacks and Indians were denied the right to testify in Court in 1850. Chinese were denied the right to testify in 1854. Only in 1863 Blacks were allowed to testify in California Courts, even though California was created as a free State in 1850. Indians and Chinese had to wait for the right until 1872.[4] The denial of the prerogative to testify is probably the ultimate expression that shows how law and justice, with the sanction of both the people and the State, became sources of evil and a fundamental tool for imposing Anglo-Saxon racial supremacy in California. The California case examined here reminds us that racial and ethnic discrimination have been historically attached to many processes of State formation. Hence, the California process of state formation is not an obscure and hidden event lost in time but an interesting case to compare how other states in the past and present have dealt and still deal with ethnic and racial minorities at the moment of their establishment.

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Notes

[†] I want to thank the support of UC MEXUS for this project.
[1] Hinton R. Helper, *The Land of Gold: Reality Versus Fiction* (Baltimore: Henry Taylor, 1855), 38-39.

[2] Letter of John Baker to his wife (Jackson, California, December 10, 1854). *John Baker Letters* in Bancroft Library.

[3] David Johnson, "Vigilance and the Law: The Moral Authority of Popular Justice in the Far West," *American Quarterly* 33 (1981): 560.
[4] Johnson, p. 573.
[5] David Pierce Barstow, *Recollections of 1849-51 in California* (Inverness, California: The Press of Inverness, 1979), 23.
[6] *The Steamer Pacific Star* (San Francisco, July 15, 1851).
[7] Republished in *Alta California*, San Francisco, July 14, 1851.
[8] *The Steamer Pacific Star* (San Francisco, July 15, 1851).
[9] John McFarlan, *Journal of a Voyage to California via Cape Horn in 1850 [aboard the ship "California packet" trip to Oregon, and life in the mines at Downieville California]*. Unpublished journal in Huntington Library, 159.
[10] John Hovey, "Historical Account of the Troubles between the Chilians and American Miners in the Calaveras Mining District, commencing Dec. 6 1849 and ending January 4, 1850," in *Journal of a Voyage From Newburyport, Mass to San Francisco, California*. Unpublished diary in Huntington Library, 85, 88.
[11] Ibid, p. 85.
[12] *We Were 49ers! Chilean Accounts of the California Gold Rush*, ed. Edwin A. Beilharz and Carlos Lopez (Pasadena: Ward Ritchie Press, 1976), 120-124. Hovey, p. 79.
[13] *We Were 49ers!*, p. 125.
[14] *Alta California*, San Francisco, January 2, 1850.
[15] *Pacific News*, San Francisco, January 3, 1850; James J. Ayers, *Gold and Sunshine. Reminiscences of Early California* (Boston: The Gorham Press, 1922), 52.
[16] Hovey, pp. 81-82.
[17] Ibid, p. 80.
[18] *We Were 49ers!*, pp. 145-149.
[19] *Pacific News*, San Francisco, January 3, 1850.
[20] Ibid.
[21] Philip J. Ethington, *The Public City. The Political Construction of Urban Life in San Francisco, 1850-1900* (Berkeley: University of California Press, 1994), 100.
[22] Ibid, 98.
[23] Richard Peterson, "The Foreign Miners' Tax of 1850 And Mexicans in California: Exploitation or Expulsion?," *The Pacific Historian* 20 (1976):

267.
[24] Shirley Ann W. Moore, "'We Feel the Want of Protection': The Politics of Law and Race in California, 1848-1878," *California History* 81 (2003): 118-120.

Humanity and Inhumanity: State Power and the Force of Law in the Prescription of Juridical Norms

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Abstract: This paper interrogates the question of subjectivity within the discourse of human rights. The analysis proceeds from the framework of the paradox of human rights: namely, that while the individual bears rights simply by virtue of his or her humanity, such rights presuppose political relations among individuals. This leads to the principal question of how the subject of human rights has been constructed. The question is considered first in light of the development of human rights at international law, including the attempt to define the notion of 'humanity' within international criminal law; and second, in relation to the history of the modern liberal state, in which the principles of the rule of law and political equality merged to create the liberal-democratic ideal.

Keywords: human rights, subjectivity, state, sovereignty, international law, humanity, humanism, rule of law, liberalism, democracy, political power, juridical right, juridical norms.

1. Introduction

One of the curious aspects about the history of human rights is that history has always been a problem for rights discourse; by which it is meant that rights discourse has always tried to erase its own history, certainly to marginalize it.[i] In medieval law, rights that expressed the will of a legislator were accorded a prehistorical source in divine law, while the ancient rights and liberties of the people were often expressed to be immemorial, grounded in a mythical past that transcended history, even if carried through the vehicle of rulers and customs. With the development of the doctrine of natural rights, from the writings of late medieval canon and civil lawyers right through to its apogee in seventeenth century political philosophy, the ahistoricism of rights was reified through the concept of nature in order to lend legitimacy to the claim of their universality, their application to all people at all times. Arguably, this aspect of human rights has not changed, and in fact has been amplified as modern society has come to replace natural law as the source of rights with the secular human being itself. In many ways, my current research into the history of human rights is nothing more than an attempt to analyse the problem that history creates for the discourse of human rights. This paper is merely a prologue to that analysis.

2. The Paradox of Human Rights

Let us begin with consideration of an inherent conceptual tension that marks the idea of human rights. It has been remarked that an essential paradox of human rights is that while the individual bears rights by nature, simply because he or she is human, and independent of his or her role or place in society, these rights presuppose an already instituted community or society, since their function is to govern relationships between individuals.[ii] Already in Kant's *Doctrine of Right*, part of the *Metaphysics of Morals*, the conceptualization of an innate right is dependent upon a thesis of sociability as man's highest end. Kant declares that the only innate right, that is, the only right that need not be acquired and which is internal to human being, is that of freedom. By 'freedom' he understands the "independence from being constrained by another's choice," "insofar as it can coexist with the freedom of every other in accordance with a universal law."[iii] This internal and indivisible right is an original right belonging to every man by virtue of his humanity. It is composed of three capacities or spheres of action: innate equality, defined as independence from being bound by others to more than one can in turn bind them; the quality of being one's own master (*sui iuris*); and the authorisation to do to others anything that does not in itself diminish what is theirs. It is clear that each of these expressions of freedom implies a relationship with other individuals who possess the same right to freedom. From then on in the *Doctrine of Right*, all further discussion of man's external freedom and the possibility of acquiring rights through the imposition of external laws revolves around this paradoxical axiom: that the internality of innate freedom only gives rise to moral laws, rights and duties because of the existence of external relations among individuals who are already bound to one another by this primordial right. In the end, this paradoxical relationship of right is perhaps a reflection of the general thesis, apparent from reading the *Critique of Judgment* together with the minor works, that sociability is the origin and essence of man's humanity, rather than its goal.[iv]

Karl Marx also alludes to this paradox of human rights, though he does so by reversing the Kantian analysis. In *On the Jewish Question* he makes the claim that rights, far from being the premise of social behaviour and communication, are a cause for the individual's separation from his community, which leads to the individual's separation from himself. The argument is that the right of man - importantly, man is conceived as already a member of civil society - manifests itself as the right of the 'restricted individual', the individual who, separated from his community, is withdrawn into himself. Right recognizes man's private interest and desires, reflecting the authenticity of the egoistic, unpolitical and natural individual. For Marx,

rights are created by a state that has emerged separate from civil society, and that is nothing more than the form of organization which the bourgeois necessarily adopt for the mutual guarantee of their property and interests.[v] So, the right of man to freedom is based not on the association of men but on man's isolation from the collectivity, a separation that is self-divisive, its practical application being the right to private property.[vi]

Though Kantian and Marxist philosophy assume antagonistic positions on the political function of human rights, they both acknowledge, in different ways, that human rights are conceivable only within the framework of a theory of human sociability, a political theory. Thus, in the discourse of human rights, at least from the nineteenth century, the bearer of rights is a ghost-like figure: either, as Marxist critique would have it, he is isolated and monadic to the point of having no actual social identity, or, as suggested by Hannah Arendt, he is an empty form, an abstraction, a creation of post-Enlightenment thought whose aim is to provide protection against the new sovereignty of the state and the new arbitrariness of society. So, says Arendt, '[f]rom the beginning the paradox involved in the declaration of inalienable human rights was that it reckoned with an "abstract" human being who seemed to exist nowhere, for even savages lived in some kind of social order.'[vii]

3. Humanity as the Subject of Rights

The obvious, seemingly intractable question that arises from this paradox is how to define the subject of rights? Or, to be more precise, knowing that it is the human being that is the subject of human rights, what meaning do we ascribe to the signifier 'human', or that of 'humanity'? At one level, it might be argued that the answer to this question lies in metaphysics: that the question of the subject in the discourse of human rights is essentially part of the broader philosophical enquiry into the metaphysics of subjectivity that we have inherited from the phenomenological tradition, in particular from Heidegger and his followers. Indeed. Heidegger's challenge to modern humanism can quite easily be directed specifically towards juridical humanism. For Heidegger, the valorization of the human subject is the product of a form of subjectivity that conceives of being only through the reference of man; and so, humanism is essentially an anthropology, an interpretation of man that already knows fundamentally what man is and hence can never ask who he may be.[viii] Juridical humanism therefore presents an ahistorical thesis of human rights. It prevents us from asking questions about the historico-political conditions that gave rise to the idea of humanity as the subject of rights. Such questions would inevitably reveal the

historically contingent foundation of the discourse, and ultimately undermine its fundamental premises - the inalienability and universality of human rights.

Let us, therefore, suspend the metaphysical claims that the discourse makes for itself, and instead inquire as to how the subject of rights actually has been constructed and for which purposes. Arendt's analysis in *The Origins of Totalitarianism*, which associates the end of the rights of man with the decline of the nation-state, proceeds from an historical study of the events surrounding the treatment of minorities and refugees in the early twentieth century.[ix] The proclamation of human rights was to protect individuals who were no longer sure of the estates to which they were born or of their equality before God as Christians. Human rights were eminently suitable to this task, since they proclaimed themselves to be inalienable, situated outside the political order and irreducible to other rights or laws. Such needs brought the juridical principle, man as the source of human rights, into a direct relationship with the political principle, the people as sovereign in government. Through this relationship the question of human rights was inextricably blended with the question of the emancipated sovereignty of the people, so that the representational figure of man within human rights gradually faded to reveal the face of the people. Henceforth, rights could be claimed not by an individual as a distinct political being, but by an individual who could identify him or herself with a sovereign people.

The Minority Treaties that emerged after the First World War, largely as a result of the redrawing of territorial boundaries, were so dependent upon the idea of national sovereignty that they had the effect of empowering nation-states to either assimilate or force beyond their borders populations which had not been identified as sufficiently governed to warrant self-determined nationhood. The problem for the masses of stateless persons that were created by the two world wars was that it became difficult for them to claim their human rights once they lost their political status as citizens of a state. In other words, the declaration of human rights was of no use to persons who had fallen into the state of rightlessness, given that human rights had been conceived of in purely political terms. Arendt explains the practical effect of the paradox of human rights in this incisive passage:

> The conception of human rights, based upon the assumed existence of a human being as such, broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships - except that they were still

> human. The world found nothing sacred in the abstract nakedness of being human.[x]

The coupling of 'man' and 'citizen' in the title of the French Declaration of 1789 already heralds the fact that the naturalness of man must give way to the teleology of political association, which the second article affirms, and that the true form of political association, in which sovereignty resides, is the nation.

Of course, since the American and French declarations in the eighteenth century, there has been a perpetual challenge to the equality of rights. The citizen of a nation has become the international citizen. The rights belonging to man generally have been extended and adapted to women and children specifically. The political rights of the citizen have been augmented by the economic rights of the worker, and the citizen's right to civic participation has been supplemented by the social right to welfare. Finally, in a challenge to the Eurocentric tradition of valorizing the individual, we have come to recognize the special rights of peoples. The question of equality that continues to haunt the contemporary discourse on human rights, has, in a way, diverted attention from the theoretical problems of subjectivity. It is a fact that so many human rights scholars are absorbed with the principle of equality, in arguments on whether, and the extent to which, the universality of human rights may be reconciled with cultural and religious relativism, that the question of the subject of rights is evaded.

Considering the relatively rapid multiplication of rights in international law, and the impressive array of institutions and legal machinery concerned with their enforcement, it is easy to ignore the process of the progressive generalization of the subject of rights. This process is perhaps more clearly observable in the development of international humanitarian law, particularly in its new concern with international crimes. The concept of crimes against humanity, which we have inherited from the Charter and the judgment of the International Military Tribunal at Nuremberg[xi], has from its inception struggled to define the humanity that it seeks to protect. In the decision on the *Erdemovic* case, the International Tribunal for the Former Yugoslavia defined 'crimes against humanity' in terms of serious acts of violence that harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health and dignity. However, it continues:

> Crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of

> humanity as victim which essentially characterizes crimes against humanity.[xii]

Unfortunately, with this definition we are no closer to understanding the 'humanity' that is the object of the crime, or how it is that humanity is negated. After all, we rarely justify our national criminal laws on the basis that an assault on an individual is an attack on or deprivation of humanity. In the end, the formulation and application of crimes against humanity must turn towards some analysis of the factual state of affairs and psychological conditions of the perpetrator rather than a determination on whether the victim has been deprived of his or her humanity. So, the Rome Statute of the International Criminal Court defines crimes against humanity as acts 'committed as part of a widespread or systematic attack directed against any civilian population.'[xiii] The crime depends not on whether humanity has been the victim of the aggression but whether the acts can come within the rubric of a systematic policy directed against a civilian population that is identifiable as a group.[xiv] The anomalous legal position that is created is that the person who murders twelve individuals in some psychological state of rage, where the victims do not share any particular relationship that has been targeted by the murderer, may be considered a criminal under national laws but would not be considered to have attacked humanity in its essence; whereas the person who, motivated by racial, political or cultural aspirations to hegemony, plans and executes an attack on twelve members of a particular minority, will have committed an international crime that has transcended the harm caused to the individual victims.

Notwithstanding the indeterminacy that rests with the process of subjectification, modern humanitarian discourse is committed to the idea of humanity as a victim of certain international wrongs. And where there is not even the role of the perpetrator to fall back on, as with the emerging rules on humanitarian intervention, then other principles of the sacredness of human life need to be invoked. In the case of humanitarian intervention, humanity is represented by the pure experience of human suffering. If the innocent woman, child or family that is deprived of food, shelter or medicine as a consequence of a civil war is deserving of humanitarian assistance, it is because we - that is, the international community of states - have decided not to tolerate some human suffering: namely, suffering that is a by-product of a type of violence which, because it is directed internally, undermines the integrity of the state. On the other hand, it cannot be ignored that the concern with human suffering at the level of international law, and the apparent willingness of state actors to sacrifice their territorial and jurisdictional

sovereignty in humanitarian matters, coincides with the emergence of what we may call, borrowing from the work of Michel Foucault,[xv] the new biopolitical concerns of the state: an interest in biological life, in particular, in sustaining and managing life, as a way of exercising power over individuals.

4. The Liberal State and Juridical Humanism

Allow me to make some cursory remarks on the relationship of the liberal conception of the state to human rights. The liberal tradition of human rights, which extends as far back as the *Habeas Corpus Act* of 1670 and the *Bill of Rights* of 1689, revolves around the assumption that the division between the state and society cannot be reconciled, and thus that it is the task of politics to manage the relationship so as to refrain as much as possible from interference with the individual's liberty. The assumed antagonism between society and state is no doubt grounded in the socio-economic theory of the nineteenth century, but the terms of this debate may be traced back to the seventeenth century, when the theory of sovereign power was being formulated as a problem of the balance of political authority and the individual's natural rights. Thomas Hobbes' preoccupation with the English civil war lead him to insist that the creation of a body politic, in the guise of Leviathan, entailed the surrender of individual rights. However, because this surrender had as its sole rationale the maintenance of the personal security of each individual, the right to personal security was proclaimed as the one right that could not be alienated. Thus began a tradition of theorising sovereignty in terms of individual rights that would be transformed into civic rights upon the state coming into existence in order to temper the instability of natural society.

If politics was henceforth a matter of constructing a social space that would preserve the integrity of the individual's freedom, this freedom was increasingly viewed in civic or political terms, in other words, in relation to the theory of sovereign power. The neo-republican idea of liberty in early Modern England emphasized the collective aspect of freedom. Influenced as they were by Machiavelli's discourses on Roman republican ideals, writers such as John Milton, Marchamont Nedham and Algernon Sidney understood by liberty not the individual's sphere of independent action, but the state of living under the rule of law rather than the arbitrary coercion of another, which they compared to the condition of slavery.[xvi] This particular interpretation of civic liberty lost much of its force when the emerging social sciences, particularly political economy, separated the notion of society from the doctrine of the state of nature, thus revealing its complex interplay of

personal economic interests with the existence of multiple forms of social organisation.

Nonetheless, the idea that the rule of law is the vehicle through which individual rights can be reconciled with the survival of a body politic, which was bequeathed by the early Modern theory of civic liberty, came to form an integral part of later liberalist thinking. Let us not forget that when John Locke proposes that the individual has a natural right to property, he makes it clear that the right itself is of little value without the political institutions to guarantee it - on its own, natural right is merely the vanishing point from which political society must be constructed.[xvii] What is truly essential to human existence is less the natural right to property than the values associated with the productivity of labour and the economic utility of that right. Hence, for Locke the pre-eminent institution of political society is the legislative power, which, as an extension of the individual's natural legislative power, submits the latter to the rule of law.[xviii]

When, during the eighteenth century, the ideas of political equality and popular sovereignty began to dominate political philosophy, liberal ideology looked to the concept of democracy to provide an artificial means of overcoming social inequalities and the political effects of disparities in wealth. As a legacy of the feudal economy, these social inequalities stood in the way of the theory of liberty based on the security of the individual's economic interests. The legal fiction of democracy, far from dismantling inequalities and social differences, transposed them into legally recognised relationships, predominantly contractual in form. The importance of this legal fiction, particularly for the American colonies which relied on a rationalist conception of freedom to found their independence movements, was that the state was reduced to a purely structural mechanism for protecting the natural laws of the circulation of commodities and social labour. Consequently, the rule of law came to serve the democratic principle that instituted artificially equal relations among individuals.

The legacy for the modern discourse of human rights is twofold. First, human rights have been stained with the assumptions of liberalism, and the association of freedom with enlightened self-interest remains to be properly severed. Second, it has become virtually impossible to conceive of human rights outside of the system of democratic government, though this is an historical rather than philosophical equation.

Unfortunately, this paper has only touched upon the thesis that drives my current research into human rights. That is, that the prescription of juridical norms around the concept of humanity is not a benign development of a humanistic ideal that proclaims the sacrosanctity of human life. Nor is it

the final exposition of a philosophical position on the liberty of the individual against the intrusive effects of state sovereignty. Rather, it is a product of the form of power exercised within the institutions of the modern liberal state and through the instrument of international law.

Notes

[ii] Pierre Manent, *An Intellectual History of Liberalism*, tr. Rebecca Balinski (Princeton: Princeton University Press, 1994), xvi.
[iii] Immanuel Kant, *The Metaphysics of Morals*, tr. & ed. Mary Gregor (Cambridge: Cambridge University Press, 1996), 30.
[iv] See Hanna Arendt, *Lectures on Kant's Political Philosophy*, ed. Ronald Beiner (Chicago: The University of Chicago Press, 1982), Thirteenth Session, 72-7.
[v] Karl Marx & Frederick Engels, *The German Ideology* (Moscow: Progress Publishers, 1976), 99.
[vi] Karl Marx, On the Jewish Question, in *Early Writings*, tr. Rodney Livingstone & Gregor Benton (Harmondsworth: Penguin Press, 1981), 229-231.
[vii] Hannah Arendt, *The Origins of Totalitarianism* (San Diego, New York & London: Harcourt Brace & Co., 1975), 291.
[viii] Martin Heidegger, 'The Age of the World Picture', in *The Question Concerning Technology and Other Essays*, trans. William Lovitt (New York: Harper & Row, 1977), pp. 133, 153.
[ix] Ibid.
[x] Arendt, 299.
[xi] Charter of the International Military Tribunal, 1945, Article 6(c). The principles in this instrument were affirmed by the UN General Assembly in Resolution 95(I) of 11 December 1946, entitled 'Affirmation of the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal.
[xii] Decision of 29 November 1996, UD Doc. IT-96-22-T; cited in Edoardo Greppi, "The Evolution of Individual Criminal Responsibility Under International Law," *International Review of the Red Cross* 835 (1999): 531-553.
[xiii] Article 7.
[xiv] See Jacques Ranciere, *Disagreement - Politics and Philosophy*, tr. Julie Rose (Minneapolis: University of Minnesota Press, 1999), 129-30.
[xv] See Michel Foucault, *The History of Sexuality: An Introduction*, tr. Robert

Hurley (Harmondsworth, Penguin Press, 1978).
[xvi] Quentin Skinner, *Liberty Before Liberalism* (Cambridge: Cambridge University Press, 1998), 'Free States and Individual Liberty.'
[xvii] John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988).
[xviii] Manent, 50.

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'The Right To Have Rights': Hannah Arendt On Human Rights

Tammy Lynn Castelein

Abstract: In this paper, the author elaborates upon Hannah Arendt's foundation of human rights, with special regard to the historical circumstances in which Arendt developed her arguments. The author argues that the foundation for Arendt's claims needs to be sought in the ethical and the historical events of the twentieth century. The relevance of Arendt's foundation of human rights for contemporary debates on the issue in the field of political philosophy is assessed through a comparison with the recent work of Michael Ignatieff. In concluding, the author argues that Arendt's philosophical foundation of human rights as well as her concept of community remain of great value when studying the contemporary debate on the issue.

Keywords: 'the right to have rights', human rights, human action and agency, community, Hannah Arendt, Michael Ignatieff.

1. Introduction

In this paper I intend to inquire into the nature of Hannah Arendt's theory of human rights, and on the influence her ideas on human rights still have in the contemporary debates on human rights, more in particular in the work of Michael Ignatieff.

In *The Origins of Totalitarianism* Arendt describes the failure of the Declaration of the Rights of Man and of natural law as the basis for human rights. According to Arendt the intertwinement of the Rights of Man and the modern nation state made the rise of totalitarian regimes possible. As an alternative to the Rights of Man she proposes the "right to have rights". The "right to have rights" is based on the idea that through political organisation human beings can establish a community of equals in which everyone's rights are safeguarded. I will argue that Arendt's theory of human rights springs from her reflections on history and historical facts, more in particular the history from the Declaration of the Rights of Man until the holocaust.

Towards the end of her study on the Eichmann trial, Arendt makes a plea for the constitution of International Human Rights. Arendt starts out from her reflections about the 'new' crime of genocide and the 'banal' nature of evil. Instead of establishing a definition of human rights that is based on negative freedom (such as the right not to be tortured etcetera) she pleads for

an International Human Rights which has the task to guarantee the subsistence of life, for individuals as well as groups. She argues that given the failure of the nation state – as a model of 'human organisation' - it is the task of international law to secure the well-being and equality of all human beings. In her opinion, the nation state has failed in its task of protecting its people, and therefore an international order of right is required in order to prevent the recurrence of genocides, such as the Holocaust on the Jews in World War II.

To conclude I will try to demonstrate that Arendt's theory of human rights is still present in the contemporary debate. In the work of Michael Ignatieff many of her ideas return, although there are certain significant matters on which their theories differ.

2. The Origins of Totalitarianism

In *The Origins of Totalitarianism* Hannah Arendt describes the history of the 'Rights of Man' from its declaration at the end of the eighteenth century. It is her contention that with the proclamation of the rights of Man, something crucial changed. From then on, Man replaced God as the single source of Law. Arendt writes:

> Since the Rights of Man were proclaimed to be "inalienable", irreducible to and uneducable from other rights or laws, no authority was invoked for their establishment; Man himself was their source as well as their ultimate goal.[i]

This means that the Rights of Man was a very abstract notion, as it was linked to nothing other than the notion of Man: Man as source and Man as goal. It served as the basis for all other laws, and being the basis of all laws, the Rights of Man had no foundation itself. Thus, no law was considered necessary to protect the Rights of Man. The Rights of Man however, as the source of all other laws, was also the basis for the sovereignty of the people. It was in this way, Arendt argues, that the Rights of Man became entangled with the right of the people to self-government. But this implies, Arendt concludes, that

> man had hardly appeared as a completely emancipated, completely isolated being who carried his dignity within himself without reference to some larger encompassing order, when he disappeared again into a member of a people.[ii]

So, in the 18th century, the Declaration of the Rights of Man was not founded in the nation state, it was founded in Man, after God no longer served as the ultimate foundation. But then the Rights of Man became linked to the sovereignty of the people, because the Rights of Man, as the fundament of all other laws, became also the Law that formed the basis of the right to self-government of the people. At this point the Rights of Man were secured in the right to sovereignty of the people and hence in the nation state.

This shift is very important. For, as Arendt argues:

> The Rights of Man, after all, had been defined as "inalienable" because they were supposed to be independent of all governments; but it turned out that the moment human beings lacked their own government and had to fall back upon their minimum rights, no authority was left to protect them and no institution was willing to guarantee them.[iii]

Since the Rights of Man can only be guaranteed as the rights of citizens, that is as members of a nation state, the nation state can exclude certain minorities[iv] from these rights as citizens and thus their Rights of Man. The problem here is that there exists no higher institution than the nation state to guarantee the Rights of Man to all. Thus, to sum up, on the one hand the Rights of Man were almost immediately subsumed under the rights of citizens, and so becoming the responsibility of the nation state. On the other hand there existed no higher authority that was able to force the nation state to respect the Rights of Man. The nation state was unable to guarantee the same rights to all of its citizens, such as minority groups, which is contradictory to it's principle that all citizens should have equal rights. In a state where some people have more rights than others, it is Arendt's contention, it is easy for a totalitarian regime to emerge, which step by step deprives all its citizens of rights. As a result it became possible for a nation state to wield a genocide on certain minority groups without these minorities having the possibility to revert to their Rights of Man. This, Arendt concludes, is exactly what happened in Nazi Germany.

In *The Origins of Totalitarianism* Arendt refutes the idea of the Rights of Man as it was proclaimed in the Declaration of the French Revolution, since an abstract notion of the Rights of Man that is founded in Man alone, quickly turns over into the rights of people. Therefore Arendt suggests an alternative to the Rights of Man: the right to have rights. This means that every human has the right to have rights by merely belonging to the human species. This, of course, was also the idea of the Rights of Man,

but as we have seen, the Rights of Man quickly became indistinguishable with the rights of the citizens of a nation state. These rights of citizens are defined by Arendt as the right to freedom and justice. But freedom and justice are not the most important things, according to Arendt. The right of belonging to a community is far more fundamental. People who are deprived of their Rights of Man, are deprived "not of the right to freedom, but of the right to action; not of the right to think whatever they please, but of the right to opinion"[v], Arendt writes. To Arendt belonging to a community means having the right to action and to opinion within that community. I will come back to this notion of action later on. If a person is deprived of all his so-called Rights of Man, Arendt contends, he still has his dignity. Arendt states: "Man, it turns out, can lose all so-called rights of Man without losing his essential quality as man, his human dignity. Only the loss of a polity itself expels him from humanity."[vi] This shows just how important the right to belonging to a community is to Arendt. To her belonging to humanity and belonging to a community are very closely linked. An organised community, to Arendt, is the place where human beings produce equality[vii] through their political activity,

> because man can act in and change and build a common world, together with his equals and only with his equals. [C] We are not born equal; we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights.[viii]

In a community equality can be produced, and in this equality between human beings equal rights can be established. In Arendt's formulation of "the right to have rights", belonging to an organised community is the foundation of all other rights. In an organised community of human beings the rights to have rights is the right to equal rights between human beings who are equals.

In *The Origins of Totalitarianism* Arendt remains rather vague about what the function of an international law could be for the safeguarding of human rights.[ix] Almost fifteen years later Arendt addresses this matter of an international law again in *Eichmann in Jerusalem*.

3. Eichmann in Jerusalem

Her presence at the Eichmann trial in Jerusalem 1961 inspired Arendt to write her controversial book *Eichmann in Jerusalem. A Report on the Banality of Evil*. The subtitle of this book has caused a lot of consternation. It is Arendt's conviction that Eichmann was not a Iago or some kind of demonic figure. To her he was merely a person without any imagination whatsoever. He was not a criminal and he was not stupid, he was thoughtless, and this thoughtlessness[x] lead him to commit and allow such horrible deeds. Her consternation about the horrible fate the Jews suffered lead Arendt to reflect on the nature of these atrocities. It is Arendt's opinion that the crimes perpetrated against the Jews by the Nazis cannot be captured by the term 'murder', because the crimes against the Jews were "different not only in degree of seriousness but in essence".[xi] What happened in the concentration camps was not mere murder, since it aimed at the total annihilation of a whole people, not because they were traitors to the regime or something similar, but simply because they existed as this specific people, as one way of existing in all of 'human diversity'. Therefore Arendt demands that this sort of crime, unknown to man before - in her opinion -, be called by the term 'genocide'. Moreover, it is Arendt's conviction that the crime against the Jews in Nazi Germany should not be conceived of as a crime against the Jewish people. Instead, it should be regarded as a crime against humanity, as a crime directed against the very nature of mankind, as a crime against the human status, that was "perpetrated upon the body of the Jewish people".[xii]

Furthermore, Arendt claims that "it is in the very nature of things human that every act that has once made its appearance and has been recorded in the history of mankind as a potentiality long after its actuality has become a thing of the past."[xiii] So Arendt contends that now that a genocide such as the one on the Jews in Nazi Germany has taken place it might well happen again, and any people in the world might be the victim. Therefore every genocide is a crime against humanity as such, and not merely a crime perpetrated against a certain part of humanity. Due to the fact that genocide in this sense is a 'new crime', it needs a new legal definition as well, as Arendt writes: "[C] if a crime unknown before, such as genocide, suddenly makes its appearance, justice itself demands a judgment according to a new law; [C]".[xiv] According to Arendt, only the installation of an international law can be a safeguard against genocide, since "if genocide is an actual possibility of the future, then no people on earth – [C] – can feel reasonably sure of its continued existence without the help and protection of international law."[xv] So it is Arendt's goal to describe the possibility of an international law, which must differ from normal penal law. The reason for this lies in the fact that a

single nation state is not capable of judging over crimes against humanity in Arendt's opinion. In the words of Arendt:

> It is quite conceivable that certain political responsibilities among nations might some day be adjudicated in an international court; what is inconceivable is that such a court would be a criminal tribunal which pronounces on the guilt or innocence of individuals.[xvi]

In *Eichmann in Jerusalem* Arendt rejects the idea of 'collective guilt'. If the whole German nation is equally guilty as Eichmann, then nobody is guilty, or everyone is equally guilty as the other. That is why the government of the state should take responsibility, *political* responsibility. In *The Origins of Totalitarianism*, as I have tried to explain, the community of human beings produces equality through political organisation, and in the community of equals everyone has equal rights. But when, as was the case in Nazi Germany, a totalitarian regime prevents not only minorities, but everyone from having any rights at all, the state has failed. Therefore Arendt proposes the idea of an international community, which is regulated by an international law, to guarantee the rights of everyone in every 'national' community. This international law should not be a criminal law that punishes individuals. It should be a law that safeguards the equal rights within a community, from the standpoint of an international community that is regulated by an international law.[xvii]

4. Human Action versus Human Agency (Arendt versus Ignatieff)

To conclude, I would like to make the leap from Arendt's theory of human rights to the present day debate on human rights. In the contemporary debate on human rights Hannah Arendt's ideas are still important. I intend to look into the way in which Michael Ignatieff's theory of human rights is based on certain ideas of Hannah Arendt's, although there are also some important differences.[xviii]

The Holocaust is to both Arendt and Ignatieff the starting point of their theory on human rights. They both reject a human rights policy that is based on natural law. Ignatieff recalls that the Declaration of Human Right of 1947 is a return to natural law, as it states that "all men are born free and equal in dignity and rights". Ignatieff sides with Arendt that when a person has been robbed of all his civil and political rights cannot fall back upon his so-called Rights of Man. He quotes Arendt, in that "it seems that a man who is nothing but a man has lost the very qualities which make it possible for other people to treat him as a fellow man."[xix] Instead of foundation of human

rights in natural law, which is in solidarity and pity for the naked human being without any civil or political rights, Ignatieff pleads for a theory of human rights that has its foundation in human history.[xx] Whereas Arendt stresses the importance of the subsistence of life in human rights, Ignatieff makes "negative freedom"[xxi] the cornerstone of his human rights policy: "All that can be said about human rights is that they are necessary to protect individuals from violence and abuse, and if it is asked why, the only possible answer is historical."[xxii]

Arendt stresses the importance of a community of equals. Through political organisation equality is created. The politically organised human community of equals, or the *bios politicos*, is based on 'action', which Arendt calls "the political activity par excellence".[xxiii] Ignatieff uses the notion of "human agency".[xxiv] He defines his notion of human agency as follows:

> By agency, I mean more or less what Isaiah Berlin meant by "negative liberty", the capacity of each individual to achieve rational intentions without let or hindrance. By rational, I do not necessarily mean sensible or estimable, merely those intentions that do not involve obvious harm to other human beings. Human rights is a language of individual empowerment, and empowerment for individuals is desirable because when individuals have agency, they can protect themselves against injustice.[xxv]

This agency, which Ignatieff calls a moral – and sometimes a liberal – individualism which must enable people to come up for themselves must be warranted by internationally agreed standards. In Ignatieff's theory the nation state is the chief protector of human rights. Ignatieff recognises the importance of international law and agreements concerning human rights, but he remarks that these laws are often experienced as infringements on national democracies, as in the United States. According to Ignatieff the role of the United Nations, for example, is that it, in its criticism of states who do not respect human rights, forces these states to adapt their human rights policies from within, because they otherwise will no longer receive state loans, economic and military support etcetera. It is in this vein that Ignatieff states that

> Arendt teaches us, [C], that rights cannot be protected by well meaning movements of global cosmopolitanism, appealing to moral universals held to be true everywhere, but only by legitimate and democratic nation states, which

> guarantee rights as part of their constitutional architecture and which provide clear remedies in law and a guarantee of civic inclusion to all its members regardless of origin.[xxvi]

As I have tried to demonstrate, however, it is my opinion that Arendt defends a human rights policy that is based in the organised community of human beings, who through action and opinion constitute that society which she calls a community. Although Ignatieff agrees with the critique that Arendt formulates on natural law and the nation state, he still seems to see the nation state as the chief protector of human rights. Moreover, he claims that Arendt taught him those views. I think, however, that Arendt's criticism on the nation state runs much deeper than Ignatieff wants to see.
Thus, in this paper I have attempted to demonstrate that Arendt's theory on human rights still lives on, but that certain points of her criticism on the nation state as protector of human rights have again been shoved aside.

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Notes

i Cf. Hannah Arendt, *The Origins of Totalitarianism* (San Diego/ New York/ London: Harvest Books, 1994 (1951)), 291.
ii Ibid, 291.
iii Ibid, 291-2.
iv Arendt remarks that after World War I the nation states signed the so-called Minority Treaties, which were intended to secure the rights of minority groups within the nation states. Although most nation states signed these treaties under protest and never ratified them as laws, they were to a certain extent respected, according to Arendt, because they were guaranteed by an international organisation, the League of Nations. These Minority Treaties however, were based on the principle of the Rights of Man, so *de facto* they were reduced to the laws of the nation state. When millions of stateless people emerged the ineffectiveness of the Minority Treaties became apparent. The idea of the right of asylum was one of the main pillars of the Rights of Man, but since it conflicted with the nation state's right of sovereignty it was quickly abolished. It was not mentioned in the covenant of the League of Nations. It is Arendt's contention that the 'transition' of the nation state into a

totalitarian regime can be measured by its attitude towards "emigration, naturalisation, nationality and expulsion": "Theoretically, in the sphere of international law, it had always been true that that sovereignty is nowhere more absolute than in matters of "emigration, naturalisation, nationality and expulsion"; the point, however, is that practical consideration and the silent acknowledgements of common interests restrained national sovereignty until the rise of totalitarian regimes.' (Ibid, 278) The stateless refugees who could not be harboured by the nation states were not given the same rights as the citizens of the nation state, although the principle of the nation state is equality of rights to all citizens. In this climate totalitarian regimes could emerge, in which not some, but all citizens were deprived of their rights.

v Ibid, 296.

vi Ibid, 297.

vii Ibid, 301. In *The Origins of Totalitarianism* Arendt already distinguishes between a private and a public sphere. The private sphere is based on the law of 'universal differences and differentiation'. In the private sphere every individual is infinitely different from any other person. In the public sphere, however, we are all equals. This equality is something which must be achieved through political organisation. The sphere of the private, as the sphere of differences, poses a constant threat to the public sphere of equality, according to Arendt.

viii Ibid, 301.

ix Ibid, 298: '[C] contrary to the best-intentioned humanitarian attempts to obtain new declarations of human rights from international organizations, it should be understood that this idea transcends the present sphere of international law, which still operates in terms of reciprocal agreements and treaties between sovereign states; and, for the time being, a sphere that is above the nations does not exist.'

x Hannah Arendt's close friend Mary McCarthy has on several occasions warned Arendt that she should not make the English language mean things that it does not mean. McCarthy observes that *thoughtlessness* in English would mean "heedlessness, neglect, forgetfulness", and that Arendt should come up with a synonym like "inability to think". Cf. Seyla Benhabib, *The Reluctant Modernism of Hannah Arendt.* (Oxford: Rowman & Littlefield Publishers, 2003), 173.

xi Cf. Arendt, *Eichmann in Jerusalem* (Harmondsworth: Penguin, 1991), 267. Arendt could not stress this enough: 'Nothing is more pernicious to an understanding of these new crimes, or stands more in the way of the emergence of an international penal code that could take care of them, than the common illusion that the crime of murder and the crime of

genocide are the same, and that the latter is "no new crime properly speaking". Ibid, 272.

xii Ibid, 7 and 269.

xiii Ibid, 273.

xiv Ibid, 254.

xv Ibid, 273.

xvi Ibid, 298.

xvii One could ask oneself in this respect whether the International Court in the Hague would be what Arendt had in mind. Her idea seems to resemble more closely the notion of the United Nations, but then with more power?

xviii Last year Ignatieff received the Hannah Arendt Prize in Bremen. Surprisingly, in his lecture on that occasion, it appears as though he does not think too highly of Arendt altogether. In this lecture he accuses Arendt of not having a sense of humour – at least not in her written work; he calls *Eichmann in Jerusalem* a popular magazine article (which to a certain extent is true since it did appear in *The New Yorker* as a series of articles, but in the end it still is a very thorough philosophical reflection), and worst of all, he sides with one of her most severe critics, Isaiah Berlin (whom he calls 'another intellectual mentor of mine'), in stating that she was cruel, and lacked empathy and that she had no right to judge Jews who in World War II participated in the destruction of their own people. Ignatieff admires the emphasis that she puts on the notion of responsibility throughout her work, a notion that in the work of Arendt always means personal responsibility, but still, he deems her too radical in her pursuit of this responsibility, in the moral sense of the word, in terms of the responsibility of Jewish perpetrators in World War II, who were of course first and foremost victims themselves, as well as in the sense of the philosopher's responsibility to pursue and live up to the truth.

xix Michael Ignatieff, Amy Gutmann, ed., *Human Rights as Politics and Idolatry.* (Princeton: Princeton University Press, 2003 (2001)), 79.

xx Ignatieff pleads for an anti-foundationalist human rights policy, since "foundational beliefs of all kinds have been a long-standing menace to the human rights of ordinary individuals." Ibid, 86. He rejects religion, (secular) humanism, natural law, and so on as a foundation for human rights theory, because these possible foundations may "justify inhumanity on foundational grounds." Ibid, 88. History as a foundation of human rights means, in Igantieff's theory, that the only thing that can be a ground for human rights is the idea of deliberation, of listening and talking to one another. Deliberation, he claims, is not based on the idea of people respecting one another; that

would be a foundation of natural law. The basic necessity for deliberation is "merely negative toleration, a willingness to remain in the same room, listening to claims one doesn't like to hear, for the purpose of finding compromises that will keep conflicting claims from ending in irreparable harm to either side. That is what a shared commitment to human rights entails." Ibid, 84.

xxi Although he does mention that the notion of 'human agency' is vital for the subsistence of life: "[c] human beings are at risk of their lives if they lack a basic measure of free agency [c]." Ibid, 55.

xxii Ibid, 83. Arendt, like Ignatieff, rejects natural law as a basis for human rights theory. Ignatieff bases his theory on human rights on history. It could be argued that Arendt also builds her ideas about human rights on history and historical events, more particularly on the Holocaust, as does Ignatieff. But Arendt writes that we are past nature and history: "History and nature have become equally alien to us, namely, in the sense that the essence of man can no longer be comprehended in terms of either category." Arendt, *The Origins of Totalitarianism*, 298.

xxiii Hannah Arendt, *The Human Condition*. (London: University of Chicago Press, 1998 (1958)), 9. In *The Human Condition* Arendt writes: "Action, in so far as it engages in founding and preserving political bodies, creates the condition for remembrance, that is, for history." Ibid, 8-9. Arendt bases her theory of human rights in the political organisation of human beings, in action, and action and history are closely related in her theory.

xxiv Cf. Ignatieff, *Human Rights as Politics and Idolatry*, 57. Human agency and freedom of speech go hand in hand according to Ignatieff. Ignatieff agrees with Amartya Sen that the right to freedom of speech is the precondition for having any other rights at all. I do not agree with this at all. Freedom of speech implies that everything can be said, even discriminatory things. A discriminatory speech act might lead to actual discrimination. That is why I think that freedom of speech is a very ambiguous First Amendment. The first article of the constitution states every person must be respected and that no one may be discriminated against. The French constitution with its notion of 'égalité, liberté et fraternité' also tries to exclude discrimination, but here the nationalistic idea of fraternité (liberty for the 'nationals') may prove to be discriminatory after all.

xxv Ibid, 57.

xxvi Michael Ignatieff, "Arendt's Example," 7. Lecture held at the 'Hannah Arendt Prize Ceremony' in Bremen, 28th November 2003. Available from: http://www.ksg.harvard.edu/cchrp/pdf/arendt.24.11.03.pdf (28 August 2004).

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China's One Child Policy: Can It Be All Good or All Bad?

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Abstract: In 1979, China announced its "One Child Policy," limiting couples to one child in violation of fundamental human rights. This paper discusses the Policy's international legal implications and its impact on women in China. I will explore attempts by the Chinese government to justify its policy, taking into account cultural relativism, the male-child preference of Confucianism, Communist ideals that promote individual sacrifices for the greater good of the country, and international documents relating to women and family planning. Ultimately, I will argue that the enforcement of the Policy offends the ideals of liberty, privacy, equality, and autonomy.

Keywords: China, One Child Policy, child, human rights, Communism, Communist, women, family planning, privacy, population

1. China's Policy on Population

China's One Child Policy (OCP) was a reaction to the socio-economic instability that has been attributed to overpopulation. The purpose of the Policy was to reduce the total number within the population, thereby improving the quality of life for all citizens. To achieve this goal, the Chinese Government would, over the next fifteen years, pass a series of laws and directives giving local officials direction for implementing the Policy. The 1980 Marriage Act made family planning an obligation of couples,[1] promoting later marriages and births and raising the legal age for marriage to twenty-two for men and twenty for women.[2] The1982 Constitution of the People's Republic of China stipulated that the entire country should promote family planning and making the practice of birth control the obligation of all couples.[3] Additionally, the Constitution explained that the Communist Party has absolute power. With no checks on the Party's power, it may enforce policies as it sees fit.[4] Furthermore, Article 51 of the Constitution provides that "the exercise by citizens of the People's Republic of China in their freedoms and rights may not infringe upon the interests of the state, of society and of the collective."[5] Thus, individual rights and autonomy are perceived as inferior to the interests of the collective society and the Constitution cannot be viewed as a document that guarantees that citizens will be protected from the encroachment of the state.[6]

Also in 1982, a joint directive was issued, ordering provincial governments to adopt strict methods of policy enforcement.[7] This policy

intended to put financial pressure on couples who resisted the directive and had multiple children. Initially, such pressure was in the form of "a deduction of ten percent of a family's salary [being] taken for each child after the second."[8] Despite such efforts, the population was still rising. In 1991, a second joint directive was issued, *encouraging* local governments to tighten enforcement of the One Child Policy.[9] As a justification, the government expressed that the alternative to population control was poverty, malnutrition, and an elevated level of infant mortality. The 1991 directive included such provisions as quantitative birth quotas, which related to the number of births permitted each year for a particular community.[10] Government officials in each area became responsible for making sure that annual quotas were met. Achievement of such limits were rewarded, while a failure to maintain birth quotas was viewed as grounds for demotion, fines, or the loss of bonuses.[11]

In 1992, China enacted the *Law on the Protection of Rights and Interests of Women* (LPRIW). This Act provides, in pertinent part, "women have the right to child-bearing in accordance with relevant regulations of the State as well as the freedom not to bear any children. Where a couple of child-bearing age practise family planning according to the relevant regulations of the state, the departments concerned shall provide safe and effective contraceptives and techniques, and ensure the health and safety of the woman receiving any birth-control option."[12] The Act's acknowledgment of a woman's right to abstain from procreating is commendable. However, it is clear that a woman's right to bear a child and to receive competent medical treatment for obstetric and gynaecological matters is wholly dependent upon her compliance with the State's fertility policy.

China's 1994-95 *Maternal and Infant Health Care Law* (MIHCL), often referred to as China's eugenics law, has been fraught with controversy. Despite denials by Chinese officials, MIHCL has been denounced as proposing Nazi-style eugenics.[13] Initially instituted to promote the health of women and infants, the law includes controversial sterilization provisions.[13] Among its provisions is the required sterilization or long-term contraceptive use for individuals known to have certain hereditary disorders.[13] "In addition, genetic testing is compulsory during pregnancy, and foetuses with serious disorders may be aborted. Although according to the law sterilization or abortion requires the woman's consent, many report that consent is not required in practice."[13] Understandably, the Act has been the subject of international criticism since its inception.

2. Enforcement of the One Child Policy – Infringement of Privacy and Property Rights

In China, the objective of population reduction is being achieved by means that western nations, as well as citizens of other lands, would consider violations of individual human rights. Reproductive self-determination may be denied by both direct and indirect regulation. Direct regulation by the government has taken the form of forced contraception, abortion and sterilization. Indirect intervention by the government has often taken more subtle forms, under the guise of incentives and disincentives. Government incentives include economic subsidies, educational grants, and other perks and benefits. In contrast, disincentives have manifested themselves in the form of legal and monetary penalties, like the reduction of wages and employment benefits; loss of status within the community; severe increases in taxation; and, coercive measures, including psychological intimidation, public criticism, and the monitoring of menstrual periods.

The One Child Policy does not specifically prefer males over females. Traditionally, however, Chinese society has held a male child preference. In a society which traditionally and even today lacks a pension security system for more than 80 percent of the population, it is not surprising that elderly parents came to rely on sons to provide for them in old age.[14] Viewing their sons as more valuable assets, rural families generally invest more financial resources and personal time in raising and educating sons than daughters.[15] To use a family's limited resources on a girl who will marry into her husband's family is seen as wasteful. From this perspective, it can be deduced that male preference in China is the result of both cultural ideals and economic practicalities.[16]

The corollary of the male child preference is that female children have historically been devalued, neglected, and even killed for the simple reason that they were not born male.[17] A resurgence of Confucian views that establish women as the property of their husbands, has insured the economic, physical, and psychological control of men over their wives and daughters. Unfortunately, this control has led to widespread physical violence against women, the worst form being the kidnapping, trade, and sale of females. In this sense, women in many areas of China have been reduced to a sexual commodity. In 1993, for example, more than 15,000 cases of abduction and sale of women were reported, with the women being sold to men who could not other wise find wives. The average number of reported abductions in the

early 1990s fell between 15,000 and 20,000 each year. Realistically, however, the actual number could be as much as twice these figures, as many cases are never reported.[18]

Additionally, because of the strict enforcement of the One Child Policy, many families, particularly those in rural areas, have fallen victim to practices in which female infants are subject to drowning, abandonment, starvation or negligent postnatal care, resulting in death by infection, disease or malnutrition. Most heinous are sex-selective abortions and female infanticide, widely known to be the most exploited method of family planning in China.[19] Even the smallest rural communities seem to be equipped with ultrasound machines.[20] Legally, doctors are barred from revealing the gender of a foetus, but reports show that healthcare providers are not above accepting bribes to reveal the sex.[21] In the years following the implementation of the One Child Policy, estimates by one international group suggest that on the average half a million female infants and foetuses were being killed each year.[22]

The long-term effect of such activities has been the emergence of a disproportionate male population. Recent statistics assert that among youths there are 120 males for every 100 females, resulting in a deficit in prospective wives for millions of Chinese men.[23] In some rural areas, the numbers are so skewed that men out-number women 10 to 1.[24]

3. Does China's One Child Policy Violate International Human Rights Instruments?

"The potential for a population programme to conflict with enunciated rights depends on how its formulation and implementation impact fertility. Whether a collective good is achievable with population control, without also impairing women's human rights, depends on the degree of invasiveness of the policy and the likelihood for the responsible exercise of those rights."[25] There is potential for a state-ordained population policy to become coercive: To be deemed coercive, however, there must first be a right that has been infringed.

Family planning has only recently been granted the status of being a human right, being based on the principles of freedom and entitlement.[26] Two distinct, yet related reproductive rights, which have been formally recognized by the United Nations are (1) the freedom to select the number of children to have, and (2) when (or even if) to have them.[27] Full exercise of these rights

require both the knowledge of them and the means by which to take advantage of them. It has been suggested, however, that "from a theoretical point of view, the economic inducements which constitute an essential component of the PRC's population policies do not in fact violate international human rights law relating to a couple's procreative rights. Reproductive rights, like many other types of 'human rights,' are not totally unrestricted."[28]

A. The Universal Declaration of Human Rights

Adopted by the United Nations General Assembly in 1948, the *Universal Declaration of Human Rights* was originally intended to be a non-binding, aspirational document. This is made clear in the preamble to the document: "The General Assembly Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations." The Declaration was not intended to be viewed as a set of legally binding obligations, and in fact, provided no enforcement mechanism.[29] However, some scholars have argued that it has now evolved into customary international law and is therefore legally binding.

Article 16 of the Declaration identifies the family as the natural and fundamental group unit of society, entitled to protection by society and grants all individuals the right to marry and to found a family, regardless of race, nationality, or religion.[30] Reading Article 16 in isolation would suggest that a couple wishing to marry and start a family, either by procreative measures or adoption, would have the right to do so without fear of government interference. Article 29, however, asserts that individuals living in society have a duty to that community.[31] Individuals must, therefore, respect the rights of others within the community and understand that the government may impose regulations on personal freedoms if doing so will benefit the public good. Viewing Articles 16 and 29 together, it is reasonable to conclude that the rights or freedoms granted in Article 16 to bear children are narrowed for the benefit of society at large by the language in Article 29.[32]

While this interpretation may be viewed by Westerners as an obvious violation of an individual's fundamental right to procreate,[33] in Chinese culture, it makes perfect sense. Chinese culture support the idea of promoting the common good, rather than individual good, even when endorsing practices abhorred in the Western world.[34] Indeed, officials in China "view these practices as more favourable than allowing uncontrolled population growth which they fear would lead to poverty, high infant mortality rates, and malnutrition."[35] In a classical Malthusian technique, the Chinese government

defends this position by setting forth a proverbial choice – implementation of the One Child Policy or allowing the blind growth in births. Set forth in this manner, there is only one logical conclusion: the first will allow children to grow up in better living conditions, while the latter will result in the shortage of food, clothing and other necessities.[36]

B. The Convention on the Elimination of All Forms of Discrimination Against Women

The *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), adopted in 1979, was the first legally binding, comprehensive treaty that addressed the human rights of women. As of November 2, 2003, 174 countries have ratified CEDAW; however, many like China have done so with significant reservations.[37]

Articles 1 through 3 of CEDAW define discrimination against women and assert that nations should condemn discrimination against women in all its forms, should take appropriate measures to eliminate such bias, and should actively work to advance women's equality with that of men.[38] Article 5 requires that governments take all appropriate measures to modify social and cultural patterns of conduct, with a view to eliminating prejudice that is based on the stereotyped roles for men and women.[39]

A complete reading of CEDAW demonstrates that it was the intention of the Convention that there be substantive equality between the genders, not just a theoretical appearance of equality. The implementation of China's One Child Policy, however, is gender-biassed against women. This is illustrated by the following examples: (1) the majority of sterilizations are performed on women, while less than 15% of men use contraceptives; (2) women are penalized more harshly than men for violating the Policy; (3) women are often required to attend classes on family planning, while men are not; and, (4) the regular monitoring of menstrual cycles of women is not balanced with corresponding education of men on the use of condoms.[40] Such behaviour on the part of the government is not only in violation of the terms of Article 1 of CEDAW, but also violates Articles 12 and 16.

Article 12(1) provides that states "shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning."[41] Article 16(1)(e) provides a woman the "rights to decide freely and responsibly on the number and spacing of [her] children and to have access to the information, education

and means to enable [her] to exercise these rights."[42] In addition, CEDAW General Recommendation No. 19, introduced in 1992, mandates that nations protect women from forced abortions and sterilizations.[43] International criticism has been issued against China for violating all three of these provisions. There have been reports of reproductive health violations, including late abortions, coercive sterilization, and the forced insertion of intrauterine devices. In addition, public officials and birth planning workers who monitor the menstrual cycles of women have been known to terminate unauthorized pregnancies, even in the later stages of foetal development. Also disturbing is the fact that the medical procedures forced upon Chinese women are often performed under unsanitary conditions by those without the training and skill to do so. Infections and serious medical conditions may be the result – a far cry from the adequate medical care guaranteed under Article 12(1).[44]

The Chinese central government imposes birth quotas for each province, but without specifying and enforcing the proper methods by which to implement the quotas. The absence of such direction may be seen as and indirectly condoning and endorsing the actions of local officials who perform the coercive measures on women, systematically violating the provisions of CEDAW. This de facto endorsement is further supported by the absence of enforced laws that would prohibit the violation of a woman's human rights as defined by international human rights instruments. Even when laws are enacted that prevent gender-selective abortions, forced sterilization, and coercive abortions, the central government simply will not enforce them. Violations of privacy and personal liberty are not vindicated: the political officials and medical personnel who perform such heinous acts are not subject to punishment for the part they play in denying women the rights guaranteed them under domestic and international law.[45]

On December 29, 2001, China enacted a "New Law" that addresses elements of the OCP that went into effect in 1979. The New Law acknowledges that the One Child Policy resulted in disparate treatment of females when applied within preexisting cultural and social norms and attempts to deal with these problems. Article 22 prohibits discrimination, maltreatment and abandonment of baby girls, as well as discrimination against their mothers.[46] Article 35 addresses the abusive use of ultra-sound machines and prohibits the use of such technology for sex- selective abortions.[47] Article 39 provides for sanctions against family planning workers who inflict bodily harm on women while implementing the Policy.[48]

On first blush, the New Law would appear to comply with CEDAW in terms of voluntary compliance with family planning, informed consent and access to medical treatment. What it fails to do is to specifically address the privacy interest involved. As a result, actions that are both invasive and coercive are still at play within communities.[49] It would be easy to condemn this attempt by the Chinese government to right the wrongs imposed by the implementation of the One Child Policy. However, a more productive view would be to acknowledge that it is a move in the right direction. Further progress is certainly needed.

4. Proposed Solutions

It is possible to bring about a voluntary reduction in birth rate, and as a result, a reduction in the population by using education and economic equality for women. Article 10 of CEDAW asserts that states "shall take all appropriate measures to eliminate discrimination against women in order to ensure them the equal rights with men in the field of education."[50] The provision provides for the same conditions for career and vocational guidance at all levels of education; for access to the same curricula, the same examinations, the same teaching staff, and equipment of the same quality; for freedom from gender-stereotyped societal roles; and for the same opportunities to benefit from scholarships and other study grants.[51] Currently in China, female children are often looked at as useless baggage that will eventually marry and move with her husband's family. As a result, the vast number of Chinese girls receive only rudimentary education at best. Families see it as a waste of limited resources to educate a female child who will not be around to provide for the economic needs of the family. Changing this belief would not be an easy task. To implement Article 10, the Chinese government would have to break through centuries of cultural bias, Confucian teaching and male child preference. If government officials and members of the general population would look to the future, they would see that by educating females, society as a whole would benefit. Educated women could move into cities to obtain employment at higher wages, allowing them to provide financially for their families.

Article 11 of CEDAW addresses the right of women to find sufficient employment. The Article provides that states "shall take all appropriate measures to eliminate discrimination against women in the field of employment."[52] The rights enumerated under this Article include the right to

the same employment opportunities, the right to freely choose a profession and employment, the right to job security and the same benefits provided to men, the right to equal remuneration, and the right to social security in relation to retirement, unemployment, personal leave, and sick leave.[53] By granting the women of China educational and economic equality, it is more likely that other forms of discrimination would come to an end.

To demonstrate the way that education may play a role in voluntary reduction of population, it is possible to look at the Kerala region in India, a country that is also faced with a population crisis. Kerala is a region in India that has experienced economic developments and social achievements, but without the use of coercive family planning methods as is seen in China. The women of Kerala receive a high level of education, female schooling, and health care at levels that slightly exceed those in China's more developed areas.[54] In addition, Kerala has other favourable features for women's empowerment, including a history of greater legal recognition of women's property rights.

It is notable that Kerala's birth rate is lower than that in China, and that this has been achieved without compulsion. Because the low fertility rate has been achieved voluntarily, there have been no adverse side effects as have resulted from the coercive enforcement of China's One Child Policy – i.e. heightened female infant mortality and the widespread abortion of female foetuses.[55] While it may be asserted that a coercive policy like China's would bring about a more rapid decrease in birth rate, the statistics from Kerala simply do not support that theory. In fact, the birth rate in Kerala in the 1950s was 44 per 1,000 and had dropped to 18 per 1,000 by 1991, a reduction as great as that experience in China.[56]

In contrast to the results in Kerala, regions in the northern heartland of India have much lower levels of education for women and lower levels of health care. As expected, they also have much higher birth rates, between 4.4 and 5.1 per family, despite heavy-handed attempts at family planning.[57] Thus, it can be seen (in India at least) that voluntary family planning by more educated women has a much greater effect on the reduction of birth rate than do coercive means. If China was to implement a similar policy of female education and employment on par with that provided for men, it is likely that women would voluntarily plan to have smaller families. Women who are more educated usually have greater access to health care services that provide information on responsible family planning.

5. Conclusion

This paper has attempted to explore the legal and ethical implications of China's one Child Policy. In researching this topic, I have wavered several times in my position. With the One Child Policy, what is ethically right and wrong is not as clear as I thought that it would be. China is a country with an astronomical population, a population that is hard pressed to provide for the basic needs of its citizens. Arable land is scarce, yet the vast majority of the population still resides in rural communities. The One Child Policy was intended to reduce the social and economic strain by gradually reducing the overall population of the nation. From an environmental and an economic perspective, this goal makes sense. Unfortunately, the methods used to achieve the reduction in population border on the barbaric, may be viewed as torturous conduct, and certainly violate the human rights of the female population. As a result, any benefit intended by the Act is over-shadowed by the evils compounded by the men and (surprisingly) the women who enforce the Policy.

Notes

[1] The paper that I will be presenting today is an excerpt from a much longer work that was completed in my final semester in law school. In preparing this presentation, I have removed much of the historical background and limited my analysis to cover only two international human rights instruments — the Universal Declaration of Human Rights and CEDAW. In addition, I have restricted by resolution section to one proposed solution — the empowerment of women though education and economic equality. I wish to thank the Human Rights & Human Diversity Initiative at the University of Nebraska, Lincoln whose support has made it possible for me to attend this conference.

[2] Xiaorong Li, "License to Coerce: Violence Against Women, State Responsibility, and Legal Failures in China's Family-Planning Program," *Yale J. L. & Feminism* 8 (1996): 145-192; Lisa B. Gregory, "Examining the Economic Component of China's One-Child Family Policy Under International Law: Your Money or Your Life," *J. Chinese L.* 6 (1992): 45-87; Gail Rodgers, "Yin and Yang: The Eugenic Policy of the United States and

China: Is the Analysis that Black and White?" *Hous. J. Int'l L*. 22 (1999): 129-168.
[3] Shalev, 132.
[4] Li, 150-51.
[5] Gregory, 50; Rodgers, 142.
[6] Gregory, 64.
[7] *Ibid.*
[8] Ellen Keng, "Population Control Through the One-Child Policy in China; Its Effects on Women," *Womens' Rts. L. Rep*. 18 (1997): 205-213.
[9] Shalev, 132.
[10] Li, 155.
[11] *Ibid*
[12] Shalev, 133-34.

14. The earliest theorists of eugenics conceived the betterment of the human race. One philosopher described it as " a more of a social movement than a science in that it 'attempt(s) to improve the biological character of a breed by deliberate methods adopted to that end.'" The practice of eugenics can be divided into two forms. Positive eugenics "attempts to improve the race through selection and maximization of 'socially desirable' genes." In contrast, negative eugenics "seeks to eliminate those 'bad' or 'undesirable' genes or traits from the gene pool. The most infamous example of negative eugenics was Hitler's attempt in the Lebensborn Project to produce 'good babies.'" Rodgers, 154-55.

15. Rodgers, 154.

16. Shalev, 133. It should be noted that China is not the only country that has had such laws. In fact, the United States, over the courses of history, has attempted to bring about an improvement in society by introducing eugenics legislation. It was once believed that all social ill was hereditary and as such could be eliminated from society by preventing the genetic transfer of those traits. As a consequence, sterilization efforts were practiced in penal and mental institutions across the country. By 1925, twenty-three states had some sort of sterilization statute. The seminal case for the eugenics movement was *Buck v. Bell*, 274 U.S. 200 (1927), in which a sterilization statute was upheld on the grounds that such sterilization would "prevent the parenting of 'socially inadequate offspring.'" Eventually, many of these statutes, which ignore

individual rights, were held to be unconstitutional. First in *Skinner v. Oklahoma*, 316 U.S. 541 (1942), the Supreme Court held that procreation was a fundamental right and any statutory limitation on this right was subject to strict scrutiny. In *Griswold v. Connecticut*, 318 U.S. 479 (1965) the Court defined reproductive rights in terms of privacy rights. Finally, in *Roe v. Wade*, 410 U.S. 113 (1973), the right to privacy to procreate was expanded to include the right to an abortion. Rodgers, 135-40.

[13] Rogers, 154.

[14] Sharon K. Hom, "Female Infanticide in China: The Human Rights Specter and Thoughts Towards (an) Other Vision," *Colum. Hum. Rts. L. Rev*. 23 (1992): 249-314.

[15] Patrick T. C. Hui, "Birth Control in China: Cultural, Gender, Socio-economic and Legislative Perspectives in Light of CEDAW Standards," *Hong Kong Law Journal* 32 (2002): 187-205. In his article, Hui asserts that the causes behind female infanticide are more socio-economic that cultural in nature. He proposes that males are viewed as more valuable because they are physically stronger and can provide greater economic stability for the family. While this author understands Hui's reasoning, it is difficult to separate the underlying cultural male preference from the economic system that links performance with productivity and intrinsic value.

[16] *Ibid.*

[17] It should be stressed that this gender bias is not a new phenomenon; however, with the prolific resurgence of violence against females following the institution of the One Child Policy in 1979, the male preference became a familiar topic in the debate over international human rights.

[18] Cathy Cardillo, "Violence Against Chinese Women: Defining the Cultural Role," *Women's Rts. L. Rep*. 19 (1997): 85-96; Ann D. Jordan, "Human Rights, Violence Against Women, and Economic Development (The People's Republic of China Experience)," *Colum. J. Gender & L*. 5 (1996): 216-272.

[19] Lynne Marie Kohm, "Sex Selection Abortion and the Boomerang Effect of a Woman's Right to Choose: A Paradox of the Skeptics," *Wm. & Mary J. Women & Law* 4 (1997): 91-128.

[20] Rodgers, 144.

[21] *Ibid.*

[22] Cardillo, 89.

[23] Felicia Lee, "Engineering More Sons Than Daughters," *New York Times*, July 3, 2004. http://www.nytimes.com/2004/07/03/books.
[24] Cardillo, 89.
[25] Diana D. M. Babor, "Population Growth and Reproductive Rights in International Human Rights Law," *Conn. J. Int'l L.* 14 (1999): 83-121.
[26] Babor, 98.
[27] *Ibid.*
[28] Gregory, 46. Gregory's conclusions are confined to the policies of the People's Republic of China as set forth in legal instruments and articulated in official statements by government representatives.
[29] Article 8 of the Universal Declaration of Human Rights delegates the responsibility of enforcement to the individual member nations. Additionally, it is up to each nation to provide a remedy through which individuals may be compensated for violations of the rights granted to them by the Declaration. The Universal Declaration of Human Rights may be found on the United Nations' website at http://www.un.org.Overview/rights.html.
[30] The Universal Declaration of Human Rights may be found on the United Nations' website at http://www.un.org.Overview/rights.html.
[31] *Ibid.*
[32] Gregory, 66.
[33] *See Skinner v. Oklahoma*, 316 U.S. 541 (1942) (where the Supreme Court held that procreation was a fundamental right and any statutory limitation on this right was subject to strict scrutiny); *Griswold v. Connecticut*, 318 U.S. 479 (1965) (where the Court defined reproductive rights in terms of privacy rights); and *Roe v. Wade*, 410 U.S. 113 (1973) (where the right to privacy to procreate was expanded to include the right to an abortion).
[34] Rodgers, 161.
[35] Rodgers, 142.
[36] Elizabeth Spahn, "Feeling Grounded: A Gendered View of Population Control," *Envt'l L. J.* 27 (1997): 1295-1321.
[37] This information was found on the United Nations' website at http://www.unhchr.ch/pdf/report.pdf. Of note is the fact that the United States, while instrumental in the drafting of CEDAW, has not ratified the Convention.

In ratifying CEDAW, the People's Republic of China noted in a reservation that it did not consider itself bound by paragraph 1 of Article 29 of the Convention , which states "[a]ny dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court." The text of CEDAW is available at http://www.unhchr.ch/html/menu3/b/e1cedaw.htm. A list of state reservations to the Convention are also available on the United Nations' website at http://www.unhchr.ch/html/menu3/b/treaty9_asp.htm.

[38] The text of CEDAW is available at http://www.unhchr.ch/html/menu3/b/e1cedaw.htm.

[39] *Ibid*.

[40] Hui, 190.

[41] The text of CEDAW is available at http://www.unhchr.ch/html/menu3/b/e1cedaw.htm.

[42] *Ibid.*

[43] Hui, 189-90. CEDAW General Recommendation No. 19 was introduced by the Committee on the Elimination of Discrimination Against Women during its eleventh session in 1992.

[44] Shalev, 144. Such actions violate not only the provisions of CEDAW, but they also "amount to cruel, inhuman, and degrading treatment by persons acting in official capacity, if not 'torture' within the definitions of Article 1 of the Convention Against Torture."

[45] Hui, 190.

[46] Hui, 202.

[47] *Ibid*.

[48] Hui, 203.

[49] Hui 202.

[50] The text of CEDAW is available at http://www.unhchr.ch/html/menu3/b/e1cedaw.htm.

[51] *The Convention on the Elimination of All Forms of Discrimination Against Women*, Article 10(a), (b), (c), and (d). http://www.unhchr.ch/html/menu3/b/e1cedaw.htm.
[52] The text of CEDAW is available at http://www.unhchr.ch/html/menu3/b/e1cedaw.htm.
[53] *The Convention on the Elimination of All Forms of Discrimination Against Women*, Article 11(1)(b), (c), (d), and (e). http://www.unhchr.ch/html/menu3/b/e1cedaw.htm.
[54] Amartya Sen, "Fertility and Coercion," *U. Chic. L. Rev*. 63 (1996): 1035-1061.
[55] Sen, 1057.
[56] *Ibid*. Similar results have been evidenced in Tamil Nadu, another Indian State in which social and economic conditions are similar to Kerala.
[57] Sen, 1058.

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On the Content of a Violent Force: The Relation between "Legitimacy" and "Justice", According to Rawls and Derrida

Bram Ieven

Abstract: In this article, the author analyses the role the concept of legitimacy plays in modern theories of justice. More specific, the author shows how the concept plays a crucial role in the works of both John Rawls and Jacques Derrida. While first uses this concept top establish a clear concept of 'formal justice', the latter questions the concept of legitimacy in order to develop a deconstructive critique of violence, finally leading us to an 'undeconstructible justice'.

Key Words: Legitimacy, justice, deconstruction, Rawls, Derrida.

Introduction: Legitimacy and Modernity

The problem of *legitimacy* - a concept that serves to justify the coercion of the law - lies in its *emergency*. In fact, the notion of legitimacy has a fairly short history within the philosophy of law and politics.[i] It was Saint Thomas who, in his treatise *De Regno ad Regem Cypri* (*On Ruling*)[ii], written during the second half of the thirteenth century, made a distinction between 'legitimate force' *(legitima potesta*) and tyranny - thereby implying that while the force used in a kingdom is a justified, legitimate force, the force used in tyranny is an unjustified, *illegitimate* force. However, it was only during the sixteenth century that the noun *legitimacy* came into use and thus began to play an increasingly important role in modern justification of the law. Montaigne, for example, used the noun *legitimacy* in his essay "On experience" (*de l'expérience*). As Montaigne puts it, the legitimate is nothing but a fiction that serves to found the *truth of justice*. Montaigne writes: "and it is said that even our laws are legitimate fictions upon which the truth of their justice is based."[iii] It is interesting to know that in his essay *Force of Law* (*Force de loi*), Derrida quotes this highly complex remark by Montaigne, to elaborate upon the difference between justice and law. Derrida asks himself: "what is a legitimate fiction? What does it mean to found the truth of justice?"[iv] These questions, along with the quote by Montaigne, prepare the reader for Derrida's complex interpretation *of the force of law* and the concept of justice. In my paper, I will take a closer look at Derrida's concept of justice and legitimacy, and I will argue that Derrida undermines the distinction that is usually made between justice and the law, between justice and legitimacy. But before doing so, let me briefly return to the classical meaning of 'legitimacy'.

The concept of legitimacy, from modernity onwards begins to play a role in the foundation of the law. At the same time, however, the concept of legitimacy was so diverse in meaning that the use of this word often gave rise

to more problems than it could solve. Nevertheless, I believe it is fair to say that the concept of legitimacy is most often called upon in order to *justify the violence of the law*. In this sense, we can interpret Montaigne's remark as an argument holding that even if the legitimacy of the violence used by the law is indeed a fiction, it is a fiction that is necessary to maintain - and thus, *found* - the *justice* that it serves. The concept of legitimacy expresses the belief that, as Goyard-Fabre puts it, "*in* the exertion of force there must be something that lies *beyond* force itself and that founds and justifies this force."[v] Supposedly, then, the legitimate would function as the bridge between the exercise of violence and the justice this violence serves - legitimacy points us towards the *content* of a violent force.

How would we call such a justified violence? In the view of John Rawls, a distinction must be made between violence, on the one hand, and coercion on the other hand. It is interesting, I believe, to study John Rawls' theory of legitimate force before we go on to an analysis of Jacques Derrida's views on the matter.

1. John Rawls and the Coercion of Law.

Whatever the history of the concept of legitimacy can learn us, John Rawls has his own conception of legitimacy, well imbedded in his theories about justice and about the 'rule of law'. To be able to speak upon the legitimacy of the law, Rawls needs to leave aside some of the well-known principles that he brought forward in *A Theory of Justice*. [vi]For, while Rawls' inquiry into the nature of justice is a purely philosophical and moral inquiry, the problem of legitimacy is a political problem. In the preface of his more recent work *Political Liberalism*, Rawls explicitly argues that the problem with *A Theory of Justice* lies in the fact that the theoretical approach that was taken in the first two parts of this work did not comply with the exposition of a well-ordered society brought forward in the third part of *A Theory of Justice*. The difference between *A Theory of Justice* on the one hand, and *Political Liberalism* on the other hand, is that in the first "a moral doctrine of justice general in scope is not distinguished from a strictly political conception of justice."[vii] In the latter, then, Rawls tries to deal with a strictly political foundation of justice. *Political Liberalism* thus

> supposes that there are many conflicting reasonable comprehensive doctrines, each compatible with their conception of the good, each compatible the full rationality of human persons, so far as that can be ascertained with the resources of a political conception of justice.[viii]

The question for us, then, is whether this shift in focus carries any implications for Rawls' foundation of *violence enacted by the law*. After all, if it is true that in *Political Liberalism* Rawls deals with justice from a strictly political perspective, one might assume that the concept of legitimacy will play an increasingly important role in this book. First, let us look at what Rawls says about the legal system and its justified coercion in his earlier work *A Theory of Justice*.

In *A Theory of Justice*, Rawls defines the legal system as "a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation."[ix] According to Rawls, it are the people themselves, or at least a body representing the people, who need to decide which rules are to be imposed in order to guide us in our social conduct. He writes that the authority to determine the laws and the social policies connected with them "resides in a representative body selected for limited terms and ultimately accountable to the electorate."[x] This body has what Rawls calls "lawmaking power."[xi] The question crucial to our case, then, is what this lawmaking power involves. Can we say that the laws are *just* - or rather legitimate - since the laws that are created where created by a democratically elected body that adequately represents the people? - Surely not. The legitimacy of the laws must be found elsewhere still.

Legitimacy does not directly concern the power of the state for *making* laws, but rather serves to *justify* the power used by the state to *enforce* its laws. A law can only exist as a law if we can enforce it. The enforcement of the law is therefore a necessary precondition for any rule to be a law. Thus, there is a certain power, and even a certain violence, inherent to every law - just or unjust. According to Rawls, a law can be legitimate or it can be illegitimate - and thereby its enforcement can either be just (in which case we speak of *coercion*) or it can be unjust (in which case we speak of *violence*). Legitimacy here serves to draw the distinction between an unjust use of violence and a just use of violence - that is, not violence but - the coercion of the law. But what is the relation between the just, or justice, and the legitimate in this? It is this relation, I argue, that is crucial and often most problematic in the foundation of modern law.

Rawls argues that "when these rules [that are made up by the representative body of the people] are *just* they establish the basis for a *legitimate* expectation."[xii] Rawls here makes a transition from *justice* (or the just) to the *legal order* (or the law). The question is how to accomplish this transition. Rawls succeeds in making the transition by, first, maintaining a *formal* concept of justice (as opposed to a *substantive* concept of justice), and second, putting the legitimate in between the idea of justice and the rule of law, making it into - indeed - a fiction that serve the truth of justice.

Formal justice, implies an "impartial and consistent administration of laws and institutions, whatever their substantive principles (C)."[xiii] The transition from justice to the legal order is then made through what Rawls calls "the rule of law": the idea (and in fact nothing more but the belief) that the "conception of formal justice, the regular and impartial administration of public rules, becomes the rule of law when applied to the legal system."[xiv] It is clear that Rawls believes that when it comes to the legal system, all that needs to be done is to apply the principle of formal justice. If this principle of formal justice is followed, the laws that are made will be just and the coercion used will be legitimate. The legitimate hovers between law and justice, and has an essential relation to the force used by the laws derived from formal justice.

If we now take a look at Rawls' more recent work, *Political Liberalism*, we can see that when it comes to linking law and justice together through the principle of legitimacy, not much has changed. Although the idea of justice that, in *A Theory of Justice*, was attained through a philosophical reflection is now redefined to fit the contemporary political context, the justification of the coercion of law has remained largely the same.

What has changed in *Political Liberalism*, is the principle that serves as a guideline for a just society: instead of a philosophical idea of justice, Rawls now reverts to an 'overlapping consensus' that can be found in a whole set of 'non-comprehensive reasonable doctrines'. The political liberalism that Rawls now supports, maintains that in modern society there are a number of comprehensive doctrines that all claim to be true - while contradicting each other. This need not be a problem, however. For Rawls argues that as long as these pluralistic conceptions are *reasonable*, it will be possible to find a sort of central democratic core in them, a sort of overlapping consensus. This is what Rawls calls reasonable pluralism - "reasonable pluralism" he writes, "- as opposed to pluralism as such -, is the long-run outcome of the work of human reason under enduring institutions."[xv] And "the advantage of staying within the reasonable," he continues, "is that there can be only one *true* comprehensive doctrine, though as we have seen, many *reasonable* ones."[xvi] It is this reason and reasonability that will now serve as the criterion for just laws, and thus for the legitimacy of the laws.

To conclude our treatise on Rawls, let us return to the problem of legitimacy again. The legitimate will now have to relate itself to the overlapping consensus that is attained through the reasonability of the different non-comprehensive doctrines. Ideally, the outcome of the overlapping consensus would be the formation of a *constitution* for government. This constitution would consist of some democratic core values upon which all reasonable people would be able to agree. Rawls concludes

that - and this brings us back to the heart of the matter we are dealing with here, the problem of legitimacy:

> together these values express to the liberal political idea that since political power is the coercive power of free and equal citizens as a corporate body, this power should be exercised, when constitutional essentials and basic questions of justice are at stake, only in ways that all citizens can reasonably be expected to endorse in the light of their common human reason.[xvii]

2. Jacques Derrida and the Force of Law.

In Derrida's philosophy, the concept of a common human reason is questioned, and along with it Derrida attempts to redefine the concept of justice. More specific, within the last fifteen years, Derrida has tried to rethink the issue of law enforcement and the distinction that is usually made between law and justice.

According to Derrida in his essay *Force of Law*, the expression 'to enforce the law' is marked by

> a direct and literal allusion to the force that assures us from the inside that the law is always an authorised force, a force that justifies itself or that is justified in its application, even if this justification might be judged unjust from another perspective or in another situation.[xviii]

As Derrida sees it, the force that is manifested by the law, cannot be extracted by the law - this force, and the authority that is connected to that force, *is* the law. However, the force that is exerted by the law remains a very precarious force and even surreptitious perhaps, since, as Derrida avers, it can be legitimate of illegitimate, depending on the context and the point of view from which we look upon the matter.

It is clear that from this point onwards, Derrida is out to question the concept of legitimacy - even although this is not his final goal, as we will see in a moment. Is it possible, he asks, to draw a clear distinction between the legitimate violence of the law - what we might call coercion - and an illegitimate violence - which should rightly be called violence? "What difference does there exist," Derrida writes,

> between, on the one hand, the force that can be just or in any case legitimate (not simply as an instrument to the service of the law, but as an exertion and accomplishment

> of the law itself, and even of the essence of the law) and, on the other hand, the violence that is always considered unjust? What is a just or a non-violent force?[xix]

The problem with legitimacy is that it brings violence and justice extremely close to each other. Saying that a use of violence is legitimised, is to say that it can be justified. And in the end, the laws that are enforced were created to serve a certain justice - the laws that are maintained by coercion, relate to a certain form of justice. The question then arises whether we can ever conceive of a form of justice that would be completely unrelated to any form of law and the enforcement that these laws necessarily entails. It seems to be the contention of many philosophers that this should, in principle of course, be possible. Arguing, as Rawls does, that the concept of justice stands on itself and that this concept should subsequently be *applied* on the making of law is a case in point. And, if we look at the matter from this perspective, we can safely say that not much has changed in *Political Liberalism*: even although Rawls reframes his theory, he still elaborates a principle of reason that comes first and then (in the second place) serves to justify the laws and the violence the imply. Derrida, however, wants to rethink the concept of justice in such a way that violence does not remain exterior to it. - How does he do that?

On the one hand, Derrida wants to keep the concept of justice far from the space of law. Law, for him, is the space of the calculable, the space where there can be reckoned and in which every singular thing is measured with the same desingularising norm. In this sense, Derrida believes that there is nothing more deconstructible than the law. As he writes in *Force of Law*,

> the law is *essentially* deconstructible, be it because it is founded, that is to say constructed on textual grounds which are interpretable and transformable, (c) be it because the ultimate foundation is not founded.[xx]

This also immediately informs us that Derrida does not believe in any absolute foundation of the law. Justice, thus, can never function as an absolute foundation. How does Derrida conceive of justice, then? Even although justice can never be taken as an absolute foundation for the law, and even although it is always already contaminated by a certain violence that is inherent to the law, justice is that which *differs* from the law. This means to say that justice, in its attempt to be open to the singularity of all things, must always make sure to differ itself from the violence that it always runs the risk of enacting. It is this process of differing that Derrida has proclaimed the basis for every deconstruction and in this sense - and this is to conclude -, we

could truly say that justice itself cannot deconstructed. Justice, Derrida writes in *Spectres de Marx*, always presupposes the "irreducible excess of a disjuncture (c) an *Un-Fuge*, a sort of dislocation 'out of joint' in being and in time"[xxi] and to do justice, it must always run the risk of becoming evil.

Thus, to conclude, we might perhaps conceive of law as a legitimate fiction, as a bias for justice - but this justice must then always already be conceived of as the truth that tries to mend the fiction that necessarily preceded it.

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Notes

i. For a brief history of the concept of legitimacy, see Simone Goyard-Fabre, "légitimité" in *Dictionnaire de Philosophie Politique*, eds. Philippe Raynaud and Stéphane Rials (Paris: Presses Universitaires de France), 388-393.
ii. Thomas Aquinas. "De Regno ad Regem Cypri", *Opera Omnia*, book 42 (Compedium Theologiea) (Rome: San Thomaso, 1979).
iii. Michel de Montaigne, *Essais III*, chapter XIII, "De l'expérience". (Paris: Pléiade, 1962), 1203: "(c) et nostre droict mesme, a dict-on, des fictions legitimes sur lesquelles il fonde la verité de sa justice." (My translation.)
iv. Jacques Derrida. *Force de loi*. (Paris : Galilée, 1994), 30. (My translation.) Unless stated otherwise, all translations are mine.
v. Simone Goyard-Fabre, "Légitimité", 388. (Translation and italics mine: "Il faut donc qu'il y ait dans le Pouvoir quelque chose qui soit au-dela du Pouvoir et qui le fond et justifiant.")
vi. John Rawls, *A Theory of Justice*. (Cambridge, Massachusetts: Harvard University Press, 1971 (1999)).
vii. John Rawls, *Political Liberalism (With a new introduction and the "Reply to Habermas").* (New York: Columbia University Press, 1995), xvii.
viii. Ibid, 135.
ix. John Rawls. *A Theory of Justice*, 207.
x. Ibid., 194.
xi. Ibid., 195.

xii. Ibid., 206.
xiii. Ibid., 51.
xiv. Ibid., 206.
xv. John Rawls, *Political Liberalism*, 129.
xvi. Ibid., 129 (italics mine).
xvii. Ibid., 139-140.
xviii. Jacques Derrida, *Force de loi*, 17.
xix. Ibid., 18-19.
xx. Ibid., 34-35.
xxi. Jacques Derrida, *Spectres de Marx*. (Paris : Galilée, 1993), 55.

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Plurality of Evils and Reasonable Liberalism

Ville Päivänsalo

Abstract: The plurality of human goods is a fundamental assumption in liberal political theory. John Rawls emphasized in *Political Liberalism* that pluralism is no accident in a free democracy. If the state does not use its power oppressively, rational persons end up with different conceptions of good. If we accept this, should we also accept the permanent plurality of evils in the liberal society? Should we talk about the plurality of rational conceptions of evil? Or should we expect the plurality of irrational evils to emerge? If there were not enough signs of the properly qualified plurality of evils, we would strongly suspect that the state (covertly) favours one "thick" conception of evil. Even if the liberal state managed to approximate the neutrality about the deep conceptions of good, it could hardly aim at similar neutrality in the case of deep evils. Rawlsian reasonableness might still be regarded as an important moral criterion in either case. At least at the level of rhetoric, however, "evil" may have deeper roots in the comprehensive (Christian) schemes than mere "reasonableness" or "injustice" does. In order to clarify the conceptual problems involved, there is a need to articulate classifications that supplement those of Rawls'.

Keywords: Pluralism, reasonableness, liberalism, democracy, justice, evil, good, rationality, freedom, and Christianity.

1. Introduction: A Challenge to the Rawlsian Approach

The plurality of human goods is a fundamental assumption in liberal political theory. John Rawls (b. 1921, d. 2002) emphasized in *Political Liberalism* that pluralism is no accident in a free democracy. If the state does not use its power oppressively, rational persons end up with different conceptions of good.[i] If we accept this, should we also accept the permanent plurality of evils in the liberal society? Should we talk about the plurality of rational conceptions of evil? Or should we expect the plurality of irrational evils to emerge? If there were not enough signs of the properly qualified plurality of evils, we would strongly suspect that the state (covertly) favours one "thick" conception of evil.

In this presentation I ask: *In which respects a plurality of conceptions of evil could be (1) compatible with and (2) implied by Rawlsian reasonable liberalism?* I say *Rawlsian* instead of *Rawls',* because I will discuss certain possibilities to develop Rawls' approach.[ii]

Recent discussion on the concept of evil provides a challenge to Rawls' conception, or justice as fairness. This does not mean, necessarily, that many things in it should be rejected. Susan Neiman has even said that Rawls and Habermas have theorized in terms of the reasonable and the

rational "perfectly well." Nevertheless, the concept of evil still carries certain "resonance" with the pre-modern (Augustian) tradition.[iii] But Neiman does not turn to the pre-modern. She aims at elaborating the concept of evil in modern thought. The 1755 earthquake of Lisbon shock the pre-modern thinking about evil. The classical theodicy became most seriously questioned; how could good and omnipotent God allow as horrendous suffering as that? The extreme crisis of modernity is Auschwitz, Neiman compares. How could it be humanly possible?[iv]

Writing for the Augustinian tradition, Charles T. Mathewes is pessimistic about the possibilities of the modern approach to face the question of evil properly. He suggests that for the modern thinkers questions related to evil have been too ugly. The moderns have often dismissed these "through some form of ironic alienation, muscular moralism, or (if you can imagine it) some combination of the two."[v]

Would this kind of a critique hit Rawls? Indeed, Rawls proposed that we should detach ourselves (ironically) from our particular viewpoints in order to argue in a way that could be reasonably acceptable for all. Relying on this kind of public reason, we should construct principles that would set limits within which we may rationally strive for our conceptions of good. But upon the closer consideration, Rawls was not willing to detach himself from his own most firmly considered judgments. Instead of making them ironic, he used them as the "fixed points" in the construction of theory. In order to reach reflective equilibrium, we should be able to describe an impartial theoretical approach so that the constructed principles cohere with our firmest pre-theoretical considered judgments.[vi]

For the ethical thought of late modernity the great evil of Auschwitz is a fixed point. It is *the* fixed point, even. However, plenty of other horrendous evils took place during the twentieth century. At some point the normative judgments are bound to become more diverse. Moreover, the views about the *roots* of evils in contemporary world are diverse. How far we might still call the plurality of evils reasonably liberal?

2. Plurality of Pre-Theoretical Evils

Rawls repeatedly referred to certain examples of evil, or great wrongs. Among these are slavery and religious intolerance. In the question of slavery he even quoted Abraham Lincoln's saying "If slavery is not wrong, nothing is wrong."[vii] In addition, the gradual overcoming of religious intolerance marks a new historical era in which the politically liberal society may be possible. When Rawls started to reform justice as fairness after *A Theory of Justice*, he emphasized: "It is far better to regard the notion of a

well-ordered society [of justice as fairness] as an extension of the idea of religious toleration than of the idea of a competitive economy."[viii]

In the new introduction to *Political Liberalism* Rawls refers to the Holocaust as "the manic evil."[ix] Martha C. Nussbaum has counted this as one example of Rawls' pre-theoretical approach, in which he does not expect us to bracket our moral emotions in making our judgment.[x] But Rawls also says something about the reasons for the collapse of the Weimar's constitutional regime at the eve of the Holocaust. He points out that "none of the traditional elites of Germany" were willing to support the regime: "They no longer believed a decent liberal parliamentary regime was possible."[xi] In *The Law of Peoples* Rawls called Hitler's view "demonic" and regretted that a "persecuting zeal" occurred at the times of the Wars of Religion. Rawls did not, however, see the need for straightforward comparisons. "Great evils are sufficient unto themselves."[xii]

Although Rawls did not compare the great evils systematically, it seems that his approach implies a distinction between *the fixed points at the first* and *at the second level*. The Holocaust and other instances of systematic, horrible violations of human rights would be the fixed points beyond question - fixed points at the first level. The darkest periods of the religious persecution of the past would belong to this category. From the twentieth century, we might include Stalin's violent rule and a few other infamous dictatorships.

The fixed points at the second level are not that straightforward. Although a person affirms that slavery is wrong, she or he may admit that this conviction is somewhat dependent on other considerations. Recall that Aristotle and great many thoughtful persons after him supported slavery. From the liberal pioneers, for example Thomas Jefferson was willing to accept decent forms of it.[xiii] Hence, to expect a firm consensus about the absolute condemnation of slavery simply as a matter of considered judgments would be unrealistic. Even if we took it as one fixed point in the construction of the realistically utopian conception for today, we would have to admit that many thoughtful persons have judged slavery to be a decent arrangement in the face of even worse alternatives.

In the article "Fifty Years after Hiroshima," Rawls discussed the dropping of the atomic bomb there on August 6, 1945 and the preceding fire-bombings of the Japanese cities. He maintained that these bombings were a "very great wrong."[xiv] It is worth noting, however, that Rawls argued for this claim systematically with reference to the reasonable principles of the doctrine of just war and to the facts of the case. He did not take for granted that the bare considered judgments would solve the case. For short, we may say he relied on three fixed points: (1) horrifying bombings are

pre-theoretically great wrongs almost categorically, (2) they are great wrongs according to the reasonable principles almost categorically, and (3) they may only be justified in an extreme crisis. Because the United States was not in an extreme crisis, these horrifying bombings lacked justification. Similarly, Rawls clearly condemned the fire-bombings of Dresden by the Allies in 1945. But under the heaviest rush of the Nazis - until the autumn of 1941 or somewhat beyond - the extreme crisis exemption was in force for the British who were virtually alone at that time.[xv]

As Jonathan Glover has pointed out, in the middle phase of the war the arguments for and against the heavy bombings of the German cities are hard to balance. The defeat of the Nazis became evident gradually.[xvi] But my main point here is that Rawls (and Glover) leaned on *both* the involved pre-theoretical judgments *and* the principled considerations. This implies that the pre-theoretical judgments about single cases of horrifying bombings might not be enough to condemn them absolutely. But let me next turn to the question about the plurality of evils in Rawls' ideal theory.

3. Reasonable Pluralism of Evils

The concept of reasonable pluralism was central in justice as fairness according to *Political Liberalism* and following works. The broader variant of the concept is the pluralism of *reasonable comprehensive doctrines*. The narrower one is the pluralism of *rational conceptions of good* - within reasonable limits. But why could not a wide variation of *thoughtful conceptions of evil* be one assumption to start with, too?

Richard J. Bernstein, for example, discussed in his recent book the conceptions of evil by Kant, Hegel, Schelling, Nietzsche, Freud, Levinas, Jonas, and Arendt.[xvii] We might expect that in a free society there are thoughtful followers for any of these authors, as well as thinkers inspired by pre-modern Western and non-Western sources. At this level, it is hard to describe the richness of the diversity among the comprehensive doctrines in general and the related conceptions of evil in particular.

When we look at the big picture, however, some currents of thought dominate over others in particular societies and cultural spheres. The modern comprehensive doctrines dominate the pre-modern ones in the West. Postmodernists, too, are probably still dominated by the moderns in political thought. If this is so, what could we say about it? The approach of Rawls' reasonable liberalism would suggest, among other things, that *comprehensively* liberal doctrines should not become too dominant in the public culture.

Sometimes the line between comprehensive and political liberalisms is hard to draw. Think of Charles Kimball's *When Religion Becomes Evil*. In

the book Kimball specifies five signs of the danger that a religion is becoming evil. These are (1) "Absolute Truth Claims," (2) "Blind Obedience," (3) "Establishing the 'Ideal' Time," (4) "The End Justifies Any Means," and (5) "Declaring Holy War."[xviii] Many of Kimball's arguments start with the descriptions of violent religious persons and groups. In arguing for the connection between absolute truth claims and religions becoming evil he refers, for example, to Michael Griffin (who killed an abortion doctor in 1993), Hizbollah, Osama bin Laden, and Junípero Serra (a Catholic Father and colonizer of the Indians in the 18th century).[xix] In the case of blind obedience there are others.[xx] As the violent establishers of ideal time Kimball discusses certain Jewish and Palestinian extremists, but he also argues that such advocates for "Christian America" as Hal Lindsay, Jerry Falwell, and Pat Robertson come all too close.[xxi] Overall, Kimball wishes to show that the five warning signs can often be recognized in the American Christian movements as well as in varieties of religious movements around the globe.

It is clear that any Rawlsian politically liberal approach would accord with many of Kimball's points. Blind obedience (2), justifying any means by ends (4), and declaring holy war - literally understood - (5) particularly contradict the fundamentals of justice as fairness. But the cases of the absolute truth claims (1) and establishing the ideal time (3) are not so clear. Rawls aimed to construct the politically liberal conception without fundamental reliance on the notion of truth. For example, in "Reply to Habermas," Rawls stressed that his view leaves plenty of room for the comprehensive doctrines to make claims of truth as they see it.[xxii] Earlier Rawls even said that truth belongs to the concept of religion that it binds "absolutely."[xxiii] Hence, Rawls wished not to connect the *absolute truth claims as such* to the wickedness of religious or any other comprehensive doctrine. We may add: different reasonable doctrines would propose that we should watch different signs of danger.

Establishment of the ideal time (3) is another sign of Kimbal's that may predict violent behaviour. But how strong is the connection? And what about the numerous other factors that may lead persons to commit extraordinary evils?[xxiv] We may expect that in a reasonably liberal society people would maintain widely different doctrines about the roots of cruelty. While many of them would tend to be comprehensively liberal, others would claim that too much liberty is among the causes of destruction.

Peter Koslowsky has compactly articulated the latter view as related to the stories of paradise and the Fall. Liberty is worrying, these religions teach, because in freedom human beings tend to choose evil. So it happened to Adam and Eve and so will it happen repeatedly.[xxv] A reasonable supporter of the approach might claim that a major sign of danger is that this truth is

forgotten. The gates are thus left open to inherent human wickedness and the related violations of human rights. The pessimistic anthropology involved could also be accepted by those who do not believe in the God behind the story.[xxvi]

4. A Combined Rawlsian Approach on Evils

It seems proper to expect that there would be plurality of reasonable conceptions on both good and evil in a reasonably liberal society. At some points, however, there would also be consensus. Rawls proposed that the consensus would include his famous principles of justice and the related account of the primary goods.[xxvii] But Rawls did not develop justice as fairness far in the direction of primary evils or the like.

I have suggested that in elaborating Rawls' conception we may distinguish two levels of fixed points in the pre-theoretical considered judgments. The Rawlsian approach also implies thoughtful conceptions that are, level by level, increasingly plural. Accordingly, fixed points and thoughtful conceptions can be specified at four levels as follows.

First level: (1) Pre-theoretical judgments of thoughtful persons on single practices (akin to Auschwitz) as extreme evils.

Second level: (2a) Pre-theoretical, almost categorical judgments of thoughtful persons on single practices (akin to the horrifying bombings and slavery) as great wrongs. (2b) Core principles of the non-ideal reasonable liberalism (akin to the central human rights and the extreme crisis exemption) that thoughtful persons use to organize their almost categorical judgments.

Third level: (3a) Thoughtful, realistically utopian conceptions with stronger variants of reasonable, liberal, democratic, etc. principles than at the second level, and the related accounts of the primary goods. (3b) Thoughtful conceptions on the signs of danger, the roots of evil, etc. that should be taken into account in order to avoid the (extremely) non-ideal circumstances.

Fourth level: (4a) Thoughtful, more or less comprehensive conceptions on good, evil, right, wrong, truth, etc., often grounded independently of the fundamentals of reasonable liberalism. (4b) Thoughtful conceptions on the connections between the fixed points, the related principles, and the related views.

The fixed points at the first level clearly propose certain absolute limits to the plurality of views about evils. At the second level somewhat broader pluralism is expected. Much would depend on which considered judgments and which principles of non-ideal theory thoughtful persons would emphasize most. But in the Rawlsian approach the efforts of balancing are not rejected as futile.

At the third level there is the familiar Rawlsian challenge of clarifying the sufficiently ideal criteria of reasonable liberalism in relatively favourable circumstances. However, we might talk about a kind of social primary evils in this sense: They are the signs of danger and the roots of evil that the society should take seriously. Characteristically, different comprehensive approaches would imply highly different views about what actually should be included in the primary evils. But this does not imply that it would be reasonable to give up the task.

At the fourth level there is a great variety of (partially) comprehensive doctrines. This plurality is both compatible with and implied by the Rawlsian approach. In the case of the conceptions of evil, too, some doctrines may become overtly dominating. In a free society, thoughtful people are likely to criticize the dominating views in various ways. However, Rawls expected that these people - such as you and me - will also return to certain fixed points and reasonable principles again and again.

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Notes

[i] John Rawls, *Political Liberalism: With a New Introduction and the "Reply to Habermas"* (New York: Columbia University Press, 1996), xvii-xxxii, 36-40, 173-176.

[ii] I call an approach Rawlsian if it relies on roughly the same fundamental assumptions as Rawls did, but also reaches somewhat beyond justice as fairness on the basis of further considerations.

[iii] Susan Neiman, "What's the Problem of Evil?" in *Rethinking Evil: Contemporary Perspectives*, ed. María Pía Lara (Berkeley: University of California Press, 2001), 29.

[iv] Neiman, 27-29. Susan Neiman, *Evil in Modern Thought: An Alternative History of Philosophy* (Princeton, New Jersey: Princeton University Press, 2002), 1-5.

[v] Charles T. Mathewes, *Evil and The Augustinian Tradition* (Cambridge, UK: Cambridge University Press, 2001), 3.

[vi] John Rawls, *A Theory of Justice* (Oxford, UK: Oxford University Press, 1973), 11-22. John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Cambridge University Press, 2001), 26-32.

[vii] Rawls, *Justice as Fairness*, 29.
[viii] John Rawls, "Reply to Alexander and Musgrave (1974)," in *John Rawls: Collected Papers*, ed. Samuel Freeman (Cambridge, MA: Harvard university Press, 1999), 235.
[ix] Rawls, lxii.
[x] Martha C. Nussbaum, "Rawls and Feminism," in *The Cambridge Companion to Rawls*, ed. Samuel Freeman (Cambridge, UK: Cambridge University Press, 2003), 491.
[xi] Rawls, lxi.
[xii] John Rawls, *The Law of Peoples: With "The Idea of Public Reason Revisited"* (Cambridge, MA: Harvard university Press), 19-22.
[xiii] Jefferson wrote about the slaves in 1814: "My opinion has ever been that, until more can be done for them, we should endeavor, with those whom fortune has thrown to our hands, to feed and to clothe them well, protect them from all ill usage, require such reasonable labor only as is performed voluntarily by freemen, & be led by no repugnancies to abdicate them, and our duties to them." Thomas Jefferson, "To Edward Coles," in *The Portable Jefferson*, ed. Merrill D. Peterson (New York: Penguin books, 1975), 546.
[xiv] John Rawls, "Fifty Years after Hiroshima (1995)," in *John Rawls: Collected Papers*, ed. Samuel Freeman (Cambridge, MA: Harvard university Press, 1999), 565.
[xv] Rawls, 565-570. Rawls, *The Law of Peoples*, 98-99.
[xvi] Jonathan Glover, *Humanity: A Moral History of the Twentieth Century* (New Haven: Yale University Press, 2001), 70-73, 79-88.
[xvii] Richard J. Bernstein, *Radical Evil: A Philosophical Interrogation* (Cambridge, UK: Polity Press, 2002).
[xviii] Charles Kimball. *When Religion Becomes Evil* (San Francisco: HarperCollins, 2003), vii.
[xix] Kimball, 44-45, 53-56, 62-63.
[xx] They include Asahara Soko (behind the nerve gas attack in Tokyo subways in 1995), Jim Jones (the organizer of the mass suicide of the Peoples Temple members in 1978), and Ayatollah Khomeini. Kimball, 71-72, 75-88.
[xxi] Kimball, 100-104, 111-121.
[xxii] Rawls, *Political Liberalism: With New Introduction and Reply to Habermas*, 374-378, 391-395.
[xxiii] John Rawls, "Constitutional Liberty and the Concept of Justice (1963)," in *John Rawls: Collected Papers*, ed. Samuel Freeman (Cambridge, MA: Harvard university Press, 1999), 86-88.

[xxiv] Think, for instance, of James Waller's approach. He has classified the factors in the process of becoming evil under the following headings: (1) "Our ancestral shadow," (2) "Identities of the perpetrators," (3) "A culture of cruelty," (4) "Social death of the victims." James Waller, *Becoming Evil: How Ordinary People Commit Genocide and Mass Killing* (New York: Oxford University Press, 2002), 133-135, 271-275.

[xxv] Peter Koslowski, "The Origin and Overcoming of Evil and Suffering in the World Religions: Introduction," in *The Origin and the Overcoming of Evil and Suffering in the World Religions*, ed. Peter Koslowski (Dordrecht, the Netherlands: Kluwer Academic Publishers, 1986), 4-6.

[xxvi] We may add, though, that Rawls would hardly have regarded this as *the most reasonable doctrine* because of the limitations to liberty that it implies.

[xxvii] For short, the principles are: The principle of extensive and equal basic liberties (1), the principle of fair equality of opportunities (2a), and the difference principle that maximizes the position of the least advantaged (2b). Rawls, *Justice as Fairness*, 42-43. Principles akin to these might well support the attempts to oppose the common evils, too.

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Security and the Use of State Violence: Justifications and Limits in the Treatment of Asylum Seekers

Claudia Tazreiter

Abstract

In this paper I explore cruelty and violence institutionalised and practiced by states on the bodies of vulnerable persons; in this case asylum seekers. In the area of immigration control, states are asserting their power over individuals who cross territorial borders with increased ferocity and often violently. Violent responses are particularly apparent in state responses to people who are smuggled or trafficked into a territory seeking protection under the 1951 Refugee Convention. It has been asserted that the harmonisation of strategies dealing with asylum containment are akin to the erection of an imaginary border around Western states. States have sought to increase measures of exclusion and deterrence of various groups of outsiders, including asylum seekers, through internal and external measures of control, coercion and violence. We know from political theory that the modern state has the monopoly of legitimate physical violence, exercised through means of the military, overt and covert forms of surveillance and the legal/political order. I ponder whether links can be drawn between heightened international security concerns over terrorism, and the retreat from human rights protection by Western states. Moreover, what consequences can be anticipated from the more generalised erosion of social trust where state violence is recognised as excessive?

1. Introduction

Throughout the member states of the European Union, as well as in Australia and the United States of America a number of measures have been introduced in the last decade aimed at averting refugee flows into these states. These measures include, turning people around at airports, or intercepting them en-route (interdiction); immigration detention; the denial or restriction of social and economic rights; new categories of visa even when an individual is found to be a genuine refugee (temporary

visas); and involuntary return and deportation, including *refoulement* (return to situations of danger and persecution).

I begin this paper with a brief overview of heightened immigration control by Western states in order to provide a context for the theoretical analysis in the second part of this paper which seeks to understand the rationale for state violence exerted on asylum seekers and the acceptance of such violence by the citizens of particular states.

Through the 1990s refugee flows have increased in most parts of the world due to internal conflicts, civil wars, ethnic cleansing and the persecution of minority groups. In response, Western states have reacted by moving to a 'closed border' model of the state. The trend has been toward policies and administrative techniques that privilege a communitarian rather than cosmopolitan ethic of obligation. That is, a circle of loyalty is drawn tighter around *nation*, rather than extending to universal ideas human rights, which transcend the borders or the national interest of any particular state.

In this trend toward tighter control of the entry of persons, the emphasis of Western states has been to curtail clandestine entry: that is, the entry of people without a visa or other travel documentation. While such control is a legitimate assertion of national sovereignty, it must also be acknowledged though that those entering in a clandestine fashion may have to enter in such a manner as they are subject to a security threat and are seeking the protection of a state other than their own.

2. The Australian Case

I shall turn to the case study of Australia to illustrate my argument of measures of deterrence which are often violent and incommensurable with the that asylum seekers pose. Though of course there are administrative and legal differences between Western states, nevertheless the general trend toward control, is similar, and certainly stimulated by a similar emphasis on the exclusion of asylum seekers and other 'unauthorised' persons.

As a country of immigration, Australia utilises a queue for those people who wish to migrate permanently. That is, as the state runs a non-discriminatory immigration policy, immigrants must wait until they reach the top of the entry queue as demand for immigration usually outstrips the number of places allocated in any give year. Since the early 1990s, Australia has also applied the principle of a queue to those people who arrive in Australia spontaneously and apply for asylum under the 1951 Refugee Convention through the implementation of mandatory and non-reviewable immigration detention. Australia is the only country which has practiced such an all-encompassing detention policy, without access to appeal or special consideration. Male and female asylum seekers are detained, as are children and babies. The length of detention is determined

by the length of the legal process, with the result that it is not unusual for asylum seekers to spend a period of several years in detention. It should also be borne in mind that the majority of Australia's seven detention facilities are located in remote, desert regions of Australia, far removed from non-government agencies and legal advocates. It should be noted that Australia has not had large numbers of spontaneous asylum seeker arrivals in the way that countries of the European Union such as Germany and Great Britain have had.

In 1999 Australia introduced a new class of visa – the Temporary Protection Visa which applies to those individual who have arrived in Australia spontaneously and subsequently been found to be a genuine refugee. Unlike other refugees who entered Australia on valid travel documents, these individuals may not remain in Australia after their temporary visa has expired; they may not bring family members into the country; and they have limited work, social and medical rights. This legislation has had the effect of creating a 'two-class' refugee system, merely by mode of entry. However, the most significant development in the management of asylum seekers in Australia came as a result of the so-called 'Tampa incident' of August 2001.

On 26 August, 2001, a small boat, carrying 433 asylum-seekers which had embarked from Indonesia, was in distress and appeared to be on the verge of sinking some 140 km north of Christmas Island, which is part of Australian territory. A Norwegian commercial container ship, the *MV Tampa*, rescued the asylum-seekers and, after initially seeking to return them to Indonesia, attempted to take them to Christmas Island. The captain of the *Tampa*, Arne Rinnan, was refused access to Australian waters and was threatened with fines and the impounding of his ship. As the *Tampa* made for Christmas Island, Australian Special Air Services (SAS) troops were ordered to board the ship and take over control. For my purposes, it is not so much this incident, but the consequences of it which are of interest. The *Tampa* asylum seekers were not allowed onto Australian territory. Moreover, since that period no boat person has been able to land on Australian territory for the purpose of claiming asylum. In the heat of the *Tampa* incident, multilateral negotiations, including the involvement of the UNHCR, culminated in the 'Pacific Solution'. Australia's Prime Minister, John Howard, insisted that the *Tampa* asylum-seekers would not be allowed to lodge protection applications in Australia. After hasty negotiations with neighbouring Pacific Island nations, the *Tampa* asylum-seekers, and all subsequent boat arrivals intercepted by the Australian Navy, have been sent on to processing centres in the neighbouring Pacific states of Naru and Manus Island[1] of Papua New Guinea. The *Tampa* incident is estimated to have cost the Australian government US$120 million.

A raft of legislative measures were passed before the federal election of 10 November, 2001, as a direct consequence of the *Tampa*

incident. The Migration Amendment Bill 2001, facilitates stricter border control and further restricts the rights of asylum-seekers. The effect of the bill was to excise from the Australian Migration Zone the Australian territories of Christmas Island, Ashmore Reef, Cartier Reef and Cocos Island. As part of this package of amendments, the Judicial Review Bill, which was first introduced to the Senate in December 1998 was passed. This mechanism restricts access to Federal and High Court judicial review of administrative decisions under the Migration Act 1958, such as the decisions of the Refugee Review Tribunal.

The Australian state has managed asylum-seekers through mechanisms of the long-term detention of those who arrived before *Tampa* and the warehousing of the *Tampa* asylum-seekers as part of the 'Pacific Solution', and the mandatory return of individuals who may well still have profound protection needs. Once asylum seekers are granted protection by the Australian government, they may only gain temporary protection, creating a 'two-class' refugee system within the Australian state. That is 'mode of entry' determines temporary or permanent protection of persons who qualify as 'genuine' refugees under the 1951 Refugee Convention.

Non-government advocates for asylum seekers have long been concerned about the involuntary (forced) return of asylum seekers from Australia. These returns often occur directly from detention centres either to a country of origin or a third country in cases where an individual cannot be returned to their own country. Recent research indicates that indeed Australia has *refouled*, individuals to whom it owed protection obligations. In one case a Kuwaiti man of the Bedoon minority was returned from Port Hedland detention centre to Damascus, where he lived underground in considerable fear for a period of some two years without proper documentation. He subsisted on funds sent by a family member from Canada. Recently the Canadian government granted him refugee status and he now resides in Canada. Evidence gathered by various researchers suggests this case does not seem to be an isolated one.[2]

3. State Power as Coercion

I now move to a normative consideration of state violence, pondering first under what circumstances the state acts in coercive and at times violent ways toward individuals. Second, I ponder how such action continues with legitimacy even where the individual, in this case an asylum seekers, poses no threat to the state or its members.

States do have the monopoly of legitimate use of coercive force: justifiable force to maintain the integrity of the nation, and assure the 'national interest' of members. Submission to a legitimate level of coercion is deemed necessary for the maintenance of order, security, and the conditions of a functioning society.

What I am pondering is where *legitimate* force crosses into cruelty to strangers and non-members (foreigners). Such cruelty might be exercised by the state in various forms, such as the administration and law imposed on asylum seekers and other 'unauthorised persons', I have outlined three areas where I contend such cruelty is visible; the practice of detention both within Australian territory and in the Pacific Solution warehousing; the TPV; and the mandatory (forced) return of asylum seekers who are still in need of protection.

The modern state is in significant ways a security state, guarding what is held as valuable by members. Even more basic to the state than mechanisms of security is the use of force and violence. Max Weber, in defining the activity of 'politics,' situates the modern state at the centre of sources of violence - indeed as having the *monopoly of legitimate physical violence*. The state has at its disposal the coercive means of the military, overt and covert forms of surveillance and not least an established politico/legal order with which to govern a given territory.

Despite the expansion of various globalising processes, the state and its representatives still maintain control over the dimensions of territory and membership. Indeed it is in this area where many states have chosen to exercise force in validating and displaying control. It is the 'security state' with which newcomers, and particularly those who enter a territory unlawfully, first make contact. Border patrols, police, army and navy, are the physical embodiments of the security state, enforcing the integrity of the nation. Security forces are only the most visible manifestations of violence a state will carry out towards a perceived threat. Modern legal systems of *positive law*, view violence as a product of history, judging all evolving law only in as much as it is critical of the means utilised.[3] We can further extrapolate that the modern state, having institutionalised in various ways positive law, utilises violence in the pursuit of 'just' ends. So long as it can legitimate the methods employed, the authority of the state is reinforced through the use of force. That is, violence can not be seen to be used for its own sake, but is valid so long as it is employed for specific purposes. In antithesis it follows that ' . . . law sees violence in the hands of individuals as a danger undermining the legal system'.[4] A legal institution exists through the residual understanding (consciousness) that violence is a latent presence of contractual arrangements in that the state will employ sanctions and even force to ensure that certain rules are adhered to.

4. 'Unrefusable Offers'

So how can we conceptualise this violence in terms of strangers? I argue that violence unnecessarily penetrates the lives of asylees, or 'unsituated persons' who are outside the protection of any state. I contend that the violence exerted on asylum seekers by Western states is contrary to the spirit of the 1951 Refugee Convention, which would require states

to act as if each asylum seeker deserved protection until it could be substantiated that it was not needed. This basic principle has been reversed in the practice of many Western states, including Australia. Such individuals are given 'unrefusable offers' in the form of law and administrative practices.[5] As non-members they do not have the formal or informal networks and resources to draw on which might make such offers refusable.

A state has the power to present an individual with 'unrefusable offers', where coercive acts by a state are impossible to avoid by an individual. Indeed where state violence becomes embedded in law, and administrative techniques, non-compliance or resistance becomes impossible.

State violence is practiced on the bodies of individuals. An important question that emerges when thinking about violence, both from the view of the agent who carries out the act, and the way in which the act comes to understood by the broader membership of a state, is the question of distance. We should ask ourselves does distance (social or physical) from an act of violence or coercion (the implementation of an unrefusable offer) ameliorate the suffering we recognise as happening to the other? Is pain mediated by physical distance such as when persons in detention are removed from our sight, or psycho-social distance such as 'unsituated persons' to whom obligations are thin?

Strategies of coercion are regularly marked by 'unrefusable offers'. In other words, coercive acts whether employing direct violence or not, communicate to the victim the compliance required and the impossibility of non-compliance. 'Unrefusable offers' work because they link choice of any but the compliant option to residual options which the particular agent cannot survive or sustain. The coercers' skill is to identify how to tailor 'offers' to the incapacities of particular victims, how to make non-compliant action not merely less preferred but unsustainable, so that their victims are driven to compliance. An unrefusable 'offer' is not, indeed, one where non-compliance is made logically or physically impossible for all victims; it is one that a particular victim cannot refuse without deep damage to sense of self or identity.[6]

Unrefusable offers in the form of detention, exclusion from entry to put an asylum claim, or limiting access to any subsistence while an application for protection is being processed, extends violence faced by asylum seekers. It can further be extrapolated that there might be a reasonable expectation that asylum seekers subject to 'unrefusable offer' will find it difficult to formulate a measured response. Most often asylum seekers resort to forms of self-harm in the face of unrefusable offers. Indeed, the most recent report of the Human Rights and Equal Opportunity Commission in Australia is a detailed study of the consequences of detaining child asylum seekers.[7] Self harm and long-term psychological problems are prominent consequences of detention.

Such acts subsequently broadcast by the media and retold by government officials reinforces the image of dangerous, unpredictable persons, who are best given more 'unresfusable offers' to keep them at bay. This situation in turn is reinforced by more subtle violence – *symbolic violence* – which has a hidden quality making it difficult to identify. Such violence may include cultural forms of exclusion where outsiders or strangers are cast as impure and thereby dangerous: a characterisation and simplification of social and political realities which resonates in a time of heightened security concerns.

5. Symbolic Violence

Bourdieu's theory of *symbolic power*, from which symbolic violence can be extrapolated, provides a useful series of instruments with which to gauge social and political processes. Such symbolic instruments are: *structuring structures,* as the instruments with which we know and construct the objective world (the *modus operandi*); *structured structures*, as the means of communication; and *instruments of domination*, as the forms of power exerted in the competition for production of what come to be seen as legitimate goods.[8] In this tripartite schema, 'symbolic violence' is a result of the sum total of the instruments utilised, representing a type of orthodoxy. Symbolic violence may be manifest in the codifications that communicate one set of values and dispositions as superior to others. Alternatives may not be totally excluded, yet orthodoxy causes a slippage in hierarchies to occur.

The reaction to unauthorised arrivals has regularly been accompanied by violent and fearful reactions within receiver societies. Violence has both tangible and symbolic forms, evident in the state response to asylum seekers: the use of water cannon and riot police in detention centres, the physical distance and harsh settings of immigration detention centres and most recently, the use of the military to push-off boat arrivals who have sought to invoke Australia's protection obligations. Less directly, fear and even hatred is often generated through the modes of communication which governments utilise in the practice and administration of policies on a day-to-day basis. Though symbolic forms of violence and coercion may be less visible than overt acts of violence, symbolic forms may ultimately prove to be more damaging in the ability to penetrate ideas and attitudes.

Let us not forget that coercive means and strategies take different forms, the less direct of which are often difficult to demarcate and to quantify. Benjamin already alerted us to the role of language as a sphere of activity which appears to be non-violent inasmuch as it is largely inaccessible to modes of violence. Yet language does have a role as an ostracising or stigmatising mechanism in contemporary societies. We may think of the political regulation of language or the psychological exercise

of violence, whereby images and words can be powerful means of rocking a sense of stability, certainty, or comfort. Here again we encounter the figure of the stranger and the role of cultural difference in everyday exchanges. The use of stereotypes in building enemy pictures is but one way in which language is employed in what could perhaps be termed 'soft' coercion. This form of coercion associated with less direct and opaque methods, can be likened to 'symbolic violence'.

Bourdieu's concept of symbolic power and as a corollary, violence, is a useful tool in understanding the legitimacy of state violence – even where it extends past what might be deemed 'reasonable'. Equally convincing and useful is the idea of 'cultural anaesthesia' in reaching some understanding of the ability of persons to inflict pain on others. This idea, following Adorno, posits that in late capitalist modernity, with a myriad of stimuli from within and outside nation-states, a generalized *objectification* increases the social capacity to inflict pain upon the 'other'.[9] Objectification operates when we can no longer identify with the 'other'. Persons outside our 'circle of loyalty' for instance are in a sense 'disappeared'. Cultural anesthesia can be said to operate in that even though our eyes may gaze on tortured bodies and events of violence, we are removed from an ethical relationship with the victim. We register their pain in a cognitive sense, yet are numb to it emotionally. The mass media's depiction and normalization of persons as objects of violence is one manifestation of this process. The second concept I have utilised, which goes some way to assisting in an explanation of the generalised acceptance of state violence and coercion exerted on 'unsituated persons', is the concept of symbolic violence.

In today's world of heightened concerns over security and the threat of terrorism, membership and belonging to a nation-state can be argued to be more important than ever. Exclusionary and tribal forms of membership, asserting the insider with reference to derogatory and harmful images of outsiders, are not only common, but increasing in number and scale. In this volatile international environment, the practices of state violence against vulnerable groups such as asylum seekers must be able to be rigorously defended as legitimate. If state violence against such vulnerable individuals is excessive, it not only harms the individuals targeted, but sends a strong signal to members of a state, to other states, and to other marginalised groups regarding the arbitrariness of violence. The accumulated incidence of such illegitimate and arbitrary violence by states can be expected to be destabilising for the international system of nation-states.

Notes

[1] In May, 2004, the last detainee on Manus island was released. He had spent the last 9 months in detention alone, as all the other detainees had been released. This last 9 months of detention cost $250,000.

[2] Leavey, C., Hetherton, M., Morris, A., and Glendenning, P. *No Liability – Tragic Results from Some Deportations*, (Sydney, Edmund Rice Centre, 2003).

[3] Walter Benjamin *Reflections. Essays, Aphorisms, Autobiographical Writings*, (New York: Schocken Books, 1978), 278.

[4] ibid

[5] Onara O'Neil *Bounds of Justice*, (Cambridge: Cambridge University Press, 2000).

[6] O'Neill, 91.

[7] Human Rights and Equal Opportunity Commission, *A Last Resort? National* Inquiry into Children in Immigration Detention, (Sydney: HREOC, 2004).

[8] Bourdieu Bourdieu, Pierre, *Language and Symbolic Power*, (Cambridge: Polity Press, 1991), 165.

[9] Feldman, Allen "On Cultural Anesthesia: From Desert Strom to Fodney King". In *Violence in War and Peace*, edited by Nancy Scheper-Hughes Philippe Bourgois, 207-216. (Oxford: Blackwell, 2004), 207.

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A Veiled Discourse of Democracy: A Deadly Consciousness of Obedience to Authority

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Abstract

The National rhetoric of American patriotism is founded in a hegemonic ideology that silences individuals educationally, legally, and socially by denying a counter-hegemonic dialogue in search of social justice. Existing educational systems, legal, and governmental agency practices perpetuate the hidden curriculum; and solidify dominant power structures in the enforcement of law and order. If human silencing is indeed an act of violence, then acts of violence are occurring with great frequency in the name of patriotism, nationalism and education while performing a socially constructed reality of democracy. Dialogic encounter engages the dialectic in questioning the revocation of issues of freedom regarding individual choice, action, and responsibility as well as academic freedom. Otherwise, what exists is a frightfully powerful counterfeit that poses as patriotism and national identity. I term this national affliction the *Veiled Discourse of Democracy*. This divisive rhetorical device functions to appear to be one of free expression. When in fact, the veil is lifted and more critically examined by progressive, transgressive, and liberatory minded educators and citizens, closer inspection reveals that the veil hides a deeper deadly consciousness, that of obedience to authority or risk punitive consequences involving corporeal, legal, and governmental action.

Key Words

Veiled rhetoric, patriotism, academic freedom, democracy, obedience, hegemony, justice.

Any situation in which some individuals prevent others from engaging in the process of inquiry is one of violence. Paulo Freire—Pedagogy of the Oppressed 2001

I. Introduction

This paper examines the linguistic and rhetorical devices framed through veiled discourse to present a false vision of open, democratic freedom of voice and action in education and society, when in reality freedom is conditional within a free State that legislates obedience to authority.

> The mission of the United States Department of Justice is, to enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide Federal Leadership in preventing and controlling crime to seek just punishment for those guilty of unlawful behaviour; to administer and enforce the Nation's immigration laws fairly and effectively; and to ensure fair and impartial administration of justice for all Americans (U. S. Department of Justice).

Such a vision of justice is contradicted by the 2003 removal of a female, Asian-American community college professor, within my own "backyard" for daring to express her concern and outrage with America's war efforts in Iraq. If human silencing is indeed an act of violence, then acts of violence are occurring with great frequency in the name of education, patriotism, and national security while performing a socially constructed reality of democracy. The focus of this paper expressly examines the exigent of hegemonic rhetoric of nationalism, legislative strategies, and social discursive devices that form and project the *Veiled Discourse of Democracy* found in society, the law, and academe. American democracy is presumably grounded in freedom of speech. Through voice we affirm our individual presence in the larger collective identity and demonstrate empowerment of a free people. Dialogic encounter engages the dialectic in questioning the revocation of freedom regarding individual choice, action, and responsibility as well as academic freedom. Democracy is nothing, if left simply to rhetorical devices.

What exists then is a frightfully powerful counterfeit that poses as freedom, but in actuality it is a national affliction I have termed the *Veiled Discourse of Democracy*. This divisive rhetorical device functions to appear to be one of solidarity and free expression, when in fact, it is not. Stated differently, Zakaria[i] claims that

> for people in the West, democracy is 'liberal democracy': a political system marked not only by free and fair elections but also by the rule of law, a separation of powers, and the protection of basic liberties of speech, assembly, religion, and property. But this bundle of freedoms—what be termed 'constitutional liberalism'—has nothing intrinsically to do with democracy and the two have not always gone together, even in the West. After all, Adolph Hitler became chancellor through free elections.

II. A Veiled Discourse of Democracy

The national rhetoric of American patriotism is founded in a hegemonic or dominant ideology that potentially silences individuals educationally, legally, and socially by denying a counter-hegemonic dialogue in search of social justice. Such concerns in quieting, if not silencing, citizen voices is on the increase since the events of *September 1, 2001***.** Further, the existing educational system perpetuates the hidden curriculum while legal, and governmental agencies solidify dominant power structures in the enforcement of law and order.

A *Veiled Discourse of Democracy* is becoming the normative rather than honest, open dialogue between government and the people. This divisive rhetorical device functions to appear to be one of free expression for all, when in fact, when the veil is lifted and more critically examined by progressive, transgressive, and liberatory minded educators and citizens, upon closer inspection, there is the recognition that the veil hides a deeper deadly consciousness—that of *obedience to authority* or risk punitive consequences involving corporeal, legal, and governmental action—all under the governmental auspices of protecting nationalism and patriotic sentiment.

I specifically draw upon the metaphor of veiling for such an image frequently offends Western world sensibilities. For the veiling of the female embodiment and aesthetic observed in many Middle Eastern Countries has come to be associated with all that is evil, suppressed, and lifeless. Particularly since *September 11*, for people of the West this image evokes notions of oppression, imprisonment of the human spirit, and the revocation of a living and present voice—violence and murder of the innocent. For this reason, I contend undeniably, our government, society, and particularly the existing educational systems, function through the mechanism of V*eiled Discourse in Democracy* that enforces obedience to authority failing to recognize U. S. ideological dogma.

Millgram's landmark study in the 1960s revealed that presumably good, ordinary citizens could become complicit agents in destructive and even life-taking deeds in an effort to obey perceived authority. To allow the act of freedom of speech is much different than *veiled discourse* or *shadowed rhetorical* strategies used to impersonate the ideology of democracy without allowing its efficacy. Missing is a grounded, purposeful process to allow freedom and democracy to become operationalized by the educator, student, or citizen—particularly during times of war when life-threatening questions require answers. Such a mantra of democracy, without individual action, profanes the sacredness of freedom. The aesthetic design of veiling dramatically conveys that there are points of transparency within the overall coverage or veil of an object, person, ideology, or in this case, language and rhetoric. In other words, hints or visions of freedom and democracy appear faintly visible behind

the veiled discourse allowing citizens to become socially unconscious to a deeper, darker consciousness at work. This metaphorical and visual image of suppression demonstrates how freedom can be cloaked in binary determinism that robs individuals of their human agency and self rule as a result of fear. It is often suggested, that Americans recourses imposed to protect the destruction of citizens and freedoms in America.

III. The Hidden Curriculum and National Hegemonic Discourse

The Progressive educator, John Dewey was committed to the belief that the basic freedom is that of freedom of the mind and intelligence, action and experience in society. By contrast, the hidden curriculum is implemented to maintain the dominant culture by suppressing the views of difference and dissent for it functions to support and codify norms, values, and beliefs that are broadcast to students. Awareness of its power and surreptitious tendencies help teachers and students to counter its hegemonic impact or the transmission of socially constructed notions and beliefs that shape our worldview. What makes hegemony, in the guise of the hidden curriculum, so potent is that over time its influence is perceived, as *natura*l and *normal*—worthy of our support Such a sanctioned vehicle can easily transmit beliefs concerning threats to democracy, anti-patriotism, and national security.

For Americans, the experiment of democracy is grounded in religious values and taught through the most powerful socializing agency in our country, education. That is why citizens must show vigilance in scrutinizing even the most benign public discourse that may render agendas that could threaten the quest for real democratic practice in education. Giroux alleges that national identity cannot be forged around the suppression of dissent. He has demonstrated great concern over the embracing of a mythic, ideological national identity that attempts to convey a harmonious, non-conflictive solidarity among American citizens. Without participatory voice, everyday citizens are denied involvement in the educational, social, political, and legal practices affecting their lives.

IV. The Law and Loss of Social and Academic Freedom

Systemic causes in the potential undermining of social and academic freedoms are consequences of fear, fear of the unknown enemy to democracy. As an educator, who teaches and prepares future educators, I am grieved to think that citizens and educators are increasingly censored and silenced from naming and questioning their world in light of recent world tensions regarding terrorism and war. Academic muting is a concern among many institutions of higher education. Increasing fear is being expressed that academic and intellectual freedoms are compromised under the patronage of combating divisive anti-American sentiment. Education is the venue and forum in which to question epistemologies and

the ontology of life and being. Some ask, what is being taught regarding fundamental information about representative government and the role individual citizens within the American democratic system? Such practices of inquiry and dissent are fast becoming interpreted as speaking against freedom and democracy. Too often, educators and students are falsely labelled as becoming complicit with terrorist extremism or dabbling in areas deemed anti-patriotic for engaging in free acts of speech, or engaging voices of descent and debate. It is my contention, that many educators are experiencing a decline in their ability and allowance to engage students in conversations of emancipatory personal narratives that question the world in which they must live and strive to make sense of. The current shift of heightened *fear* within American society connected with the USA Patriot Act, Homeland Security and loss of academic freedoms offer justification for my deep concern.

A. USA Patriot Act

Legislation titled the USA Patriot Act, also known as *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism* was swiftly put into affect by the existing administration after the tragedies of September 11, 2001. Considerable trepidation has accompanied the support of this Act due to limited public debate and deliberation prior to its enactment; and its broad ranging negative implications impacting civil liberties and freedom of academic intellectual expression. Serious concern has been given to the deficiency in checks and balances, as it were, to monitor the integrity and credible implementation of this Act. The grounding premise of this legislation allows state and national law enforcement government agencies considerable latitude in discerning who is acting or speaking in ways that are antithetical to American nationalism, security and particularly, with regard to the current war efforts in Iraq; as well as counter- terrorism.

The USA Patriot Act, in its most salient and basic framework seeks to protect American's from ubiquitous forms of potential terrorist threats. Unfortunately, there were unforeseen consequences that accompanied this Act that came in the form of: racism, unfair and socially unjust scrutinizing of dissenting voices and the inciting of political and human barriers and obstacles toward peaceful dialogue. According to a recent report published by the American Association of University Professors (AAUP) Special Committee, this Act significantly influences existing academic institutional sociopolitical climates involving foreign students, professors and visiting foreign scholars; as well as, dramatically infringes upon intellectual and academic freedom of expression within curriculum and pedagogic approaches.

B. Homeland Security

The credo governing the actions of the Office of Homeland Security is that America remains a nation at war. However, for many Americans, the war appears to be domestic rather than international. For, along with the USA Patriot Act is yet another government sanctioned act that further threatens to invade the privacy, freedoms and civil liberations of average American Citizens. An executive summary outlining the National Strategy for Homeland Security, prepared by the National Office of Homeland Security, conveys that the "National Strategy for Homeland Security is the beginning of what will be a long struggle to protect our Nation from terrorism." Three key strategies are outlined: prevention of terrorist attack on the US, reduction of vulnerability to terrorism, and minimizing damage while maximizing the country's ability to recover from attack.

Efforts to reorient various law enforcement agency strategies in the practice of counterterrorism innovations have been initiated to provide for greater coverage in identifying breeches in homeland security such as: information sharing at all federal and local government levels enabling further losses of freedom and privacy. The outgrowth of such legislative and legal instabilities, though intended to produce confidence and increase protective measures and safety, have functioned to instil even greater fear of the unknown. Under the direction of the government to "be alert," suspicions of neighbours, colleagues and other citizens have escalated distrust. Fear and resentment toward others deemed culturally and ethnically non-American have incited a suspicious citizenry, predatory police and governmental agency profiling those presumed to be in collusion with 'the enemy." These are acts of social violence in my view, reminding us that violence comes in many forms. Legal attempts to protect American citizens and freedoms have invaded the classroom.

C. American Association of University Professors

A *Special Committee on Academic Freedom and National Security in a Time of Crisis*, was formed and a report was released by the American Association of University Professors. The committee examined current practices involving the collision of academic and intellectual freedom with the newly sanctioned USA Patriot Act. There is real concern within the Academy[ii], of the danger of returning to a Cold War mentality; and unchecked zealotry in nationalism, along with the resurrection of the extremism experienced during the McCarthy craze or Red Scare that sought to publicly stigmatize those citizens as traitors to the nation who engaged in free acts of speech by voicing opposition to U. S. national policy that blindly obsessed over the fear of Communism annihilating democracy in America.

Upon historical reflection, there is clear evidence that due to some politically extreme partisan attempts to shield democracy from being tarnished—abuses resulted in the form of marking citizens as traitors or communists, ruining lives and livelihoods. Those labelled as citizens critical of domestic or international policy, such as presumed subversive professors, were imprisoned; and innumerable rush to judgments were made prior to fully examining any proffering of evidence to support accusations of "guilt." In such a climate, activist citizens risked serious reprisal, victimization, or severely punitive consequences.

In 1998, Giroux wrote of his concern that the United States was potentially returning to a dangerous "Red Scare" social-political posture similar to that of the 1902s. More recently, Hussung[iii] writes that "perhaps one of the most crucial lessons our country might realize in response to September 11 and the war with Iraq is the importance of exploring and understanding all sides of an argument."

It is my sense, that the current rush to judgment regarding academic freedom offers renewed evidence that this basic, yet powerful action, has gone overlooked and underused. Disturbing is the effort to mute academic expression in relation to society. Freedom, cannot be viewed as an endowment bequeathed to those holding the dominant power.

V. Counterhegemonic Practice

Through knowing and inquiry we live and practice an educational ideology whose earnest pursuit is one of humanity dignity. Education cannot continue as a mind-deadening mechanism disavowing critical inquiry and individual expression. For such methods produce mute, disempowered citizens fearful to test the bounds of democracy. In examining issues of educational policy, greater strides must be made to ensure that the voices of citizens are heard, when constructive change in governmental and educational policies are called into question for violation of freedoms. The creation and implementation of critically engaged citizens begins with an educational pedagogy and praxis whose foundation is dialogic encounter and dialectic engagement—freedom of inquiry.

A. Dialogic Encounter

Educators and students as well as the larger society have a powerful and dynamic opportunity to participate in what Martin Buber termed "moments of meeting" or rather dialogic encounter. It was his view that due to social and cultural differences along with unequal roles in society that individuals struggle to overcome alienation from one another. The seminal key to transforming the dominant power in education that

oppresses freedoms is co-action, collaboration, and equality thus promoting solidarity of social purpose and mission.

B. Dialectic Engagement and Freedom

Freire's theory of anti-oppressive pedagogy is grounded in dialogic encounter, conversation within the framework of dialectic practice or questioning. He fought against narrative forms of teaching or banking in a desperate effort to awaken students to questioning the world in which they lived. Vital questions must be interrogated through educational pedagogy and praxis such as what are the conditions of citizenship? What constitutes a citizen's rights and freedoms of expression and choice? What are the boundaries of free speech versus as anti-patriotism? Counterhegemonic practice begins with educating students to claim their right to disagree, debate, and resist the status quo. Maxine Greene emphasizes that freedom cannot exist when oppressions and exploitations are perceived as natural.

VI. Conclusion

This paper has drawn from multi-theoretical borders to gain a better understanding of how threads of freedom are so easily pulled from the cloak of society and education, leaving citizens and educators uncovered and unprotected from malevolent harm for endeavouring to engage the dialectic within education and lived praxis—to assess the bounds of freedom. I agree with Hannah Arendt that "polarized communication" makes enemies of people whose views are perceived as either singularly right or wrong, each holding onto their own view of "truth." This is the formula for fear, distrust, and war. In sum, nationalism, patriotism, democracy and education must encourage exploration and discovery of individual ontology and the right of choice and action. Human agency and power to act has to be reclaimed to counter, resist, and transform dominant ideologies and hidden curriculums in education, government, and society. Imposed security sanctions that constitute and legislate morality, human choice—are vested in rhetorical devices of nationalism and grounded in a *Veiled Discourse of Democracy*. The free act of speech cannot be silenced; and a nation claim itself to be free. "If I do not love the world—if I do not love life—if I do not love people—I cannot enter into dialogue."[iv]

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Notes

[i] Zakaria, F., The Future of Freedom. NY: W. W. Norton & Company, 2004. p. 17.
[ii] "Academic Freedom and National Security in a Time of Crisis," Academe, November-December ,2003, 34-59.
[iii] Hussung, A., *Academic Freedom Under Fire*. Organization of American Historians.
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[iv] Freire, P., *Pedagogy in Progress.* NY: The Seabury Press. 1978. Giroux, H., *Teachers as intellectuals*. Westport, CT: Begin & Garvey, 1988.
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