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# Offsetting the Harms of Extinction<sup>1</sup>

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## ABSTRACT

Many people assume that the extinction of humanity would be a bad thing. This article scrutinizes this apparent badness and demonstrates that on most plausible consequentialist frameworks, the extinction of humanity is not necessarily bad. The best accounts of the badness of the extinction of humanity focus on the loss of potential utility, but this loss can be offset if it is the result of sufficiently large gains by the present generation. Plausible means of calculating the goodness of outcomes accordingly suggest hastening extinction even in some circumstances where the alternative is a long period of human existence at a high level.

**Keywords** Ethics, consequentialism, existential risk, harms, extinction

## INTRODUCTION

Many fear the potential extinction of humanity due to the common intuition that extinction is bad and should be avoided.<sup>2</sup> Yet what it means for extinction to be ‘bad’ is not obvious. This article scrutinizes the apparent badness of extinction. The most plausible candidate explanations for the badness of extinction do not rely on extinction itself being bad but on extinction pairing with other negative effects or forestalling other potential goods. Not all extinction scenarios have these implications. Extinction is not an impersonal bad and need not be personally bad even if we grant potential persons some moral personhood. Extinction is thus not necessarily bad. Even imminent extinction may be preferable to the continued existence of humanity for

1 Thank you to Derek Parfit and Jeff McMahan for comments on the earliest version of this article, which was drafted for their graduate seminar at Rutgers University. Thank you also to the other students in that course for thoughtful conversations on many issues and to the anonymous reviewers for feedback on more recent drafts.

2 As Larry Temkin notes, “anything...anyone...writes on this topic should be taken with a large grain of salt” (2008: 193). It is hard to know what the futures below would look like. This may affect intuitions about some cases and the theories used to explain them. ‘Extinction’ here refers to the extinction of humanity. The argument has implications for other extinctions.



very long periods of time on plausible means of calculating the value of outcomes if the extinction is brought about under the right circumstances. Once one recognizes that the badness of extinction is reducible to this lost potential utility, confidence in the intuition that imminent extinction is a bad thing that is to be avoided and/or delayed can be challenged on most plausible forms of outcome analysis that take potential utility into account. The lost potential utility of even a large number of future generations living lives that are worth living could be less than the amount of utility accrued by the current generation.<sup>3</sup> Extinction scenarios thus do not give one reason to choose between competing theories of outcome valuation.

The argument for these claims consists of six substantive parts. The first section assesses competing theories of the good and demonstrates that the badness of extinction is reducible to the lost potential utility of future generations that could exist but for the extinction (and any negative effects on existing persons). The second section briefly canvasses the best means of calculating the value of potential utility and outcomes including potential utility. I argue that intuitions that extinction is a bad thing to be avoided and/or delayed are undermined regardless of which mainstream position one takes. On Total-, Average- or Perfection-based analyses, the badness of extinction can be outweighed if it takes place as a consequence of an act that creates sufficiently good benefits for existing persons. The third and fourth sections demonstrate that this is true in cases where there is a choice between extinction and humanity continuing to experience lives worth living for a short period and cases where the alternative to extinction is humanity continuing to exist with very good lives for very long periods. The fifth section examines the significance of potential future flourishing generations in the analyses of the badness of outcomes. The final substantive section further defends the approach to extinction above by highlighting how it explains a separate intuition that the death of the last person is not the worst death in the history of humanity.

## 1. APPROACHES TO VALUING EXTINCTION

The claim that extinction is bad could mean several things. This section presents several alternatives and demonstrates weaknesses with many of them by way of defending the relative plausibility of a particular view.

The most common view on the value of extinction is probably something like:

**a.** Extinction is intrinsically bad.

John Broome helpfully explains the structure of this view (but does not

<sup>3</sup> 'Utility' here refers to whatever is valuable in life. Those who are queasy about hedon-focused Utilitarianism can substitute their own units of measurement.

defend it) (2012: 180-181). Contrary to (a), however, there are cases where many would not want to avoid (even near-term) extinction. All-else-being-equal, it is implausible to deny that one should choose extinction now over a million years of people living lives not worth living. Moreover, this position seems confused on terminological grounds. Non-existence has no intrinsic features/properties.

If the badness of extinction is not intrinsic, it is likely tied to its effects on the amount of utility that is realized in the world. This raises issues in moral mathematics that can be fruitfully explored in extinction cases. One type of value assessment appeals to purely person-affecting principles in which the goodness and badness of outcomes is determined by their effects on persons. The most common response to extinction may be best explained by what Derek Parfit calls the Narrow Person-Affecting Principle, according to which one of two outcomes cannot be worse if it would be worse for no one (1984: 393-395). Common aversive responses to extinction likely stem from imagined links between suffering and extinction. In several plausible scenarios, painful deaths act as a prelude to full extinction. Common responses to such cases support:

- b.** Extinction is bad because the effects on (including harms to) existing persons are sufficiently great to render it bad.

If extinction were to take place as a result of a disaster that brought untold suffering with few benefits, (b) would be true. But determining whether extinction is necessarily (even comparatively) bad or necessarily includes bad-making features requires sifting out contingent facts. Extinction need not include such effects on existing persons. An impartial non-human observer interested in utility could lament the suffering in (b), but this would not entail lamenting the fact of extinction. If the early deaths are the price for a shorter period of an extreme well-being greater than the amount of well-being expected for any potential extra years of life, it is plausible that early death would not harm them. Imagine an extinction case where this is true for all existing persons such that no one currently alive is harmed by extinction. (b) is false in such circumstances and many others. Further, Strict Person-Affecting Views, which calibrate the goodness of outcomes using the effects on persons alone, tend to have unintuitive determinations about the supposed badness of extinction. On these views, extinction is bad iff the sum of utility of existing people lost by the act of extinction is larger than the sum of the utility gained. This does not always hold true. Therefore,

extinction is not always bad here.<sup>4</sup>

Issues with (b) lead theorists to seek other ways in which extinction is a bad thing. One attempt merely modifies the Person-Affecting Principle. This implausible approach can be dealt with briefly. The badness of extinction is often thought to go beyond its effect on the currently living. Some thus suggest that extinction is bad because of its effects on future persons. They explain the badness of extinction by extending the scope of the Person-Affecting Principle to include potential future persons who do not exist because humanity goes extinct prior to their birth. On such views, the badness of extinction can be calculated by some mixture of the effects on existent and potential persons, resulting in views like:

- c.** Extinction is bad because the effects on potential persons (which do not include direct harms) are sufficiently great to render it bad.
- and
- d.** Extinction is bad because the effects on existent and potential persons are sufficiently great to render it bad.

These views likely describe the common views of lay persons, but are mistaken. At the time of extinction, potential future persons do not exist and cannot be harmed in the person-affecting sense.<sup>5</sup> If potential persons cannot be harmed, future generations are not directly harmed by extinction either. It is not, then, enough to appeal to person-affecting principles about what might be in or against the interests of presently existing people and future people when analyzing outcomes if one wants to salvage the intuition that extinction is always bad. The modified Person-Affecting View nonetheless hints at an important point: there is reason to take future generations into account when making moral decisions today and the sense in which future persons are morally relevant explains why we should usually avoid/delay extinction.

It is more plausible that the badness of non-existence stems from the fact that the history of the world would be better if extinction came later or never came about. The badness of extinction is impersonal. Jeff McMahan

<sup>4</sup> Complex Person-Affecting calculi better demonstrate the potential badness of extinction. James Lenman (2002) suggests we care about future generations for selfish reasons (e.g., joy of knowing about future generations analogous to the joy of having children). This construction includes a personal bad, but hardly supports the idea of extinction as an impersonal bad whose badness extends beyond its effect on persons. Samuel Scheffler (2013) suggests that the badness of extinction partly stems from the way that it negates our ability to value and thus destroys utility in the present and future. These contingencies may be undermined in some cases below.

<sup>5</sup> They will not exist unless we act in certain ways. Slight policy changes produce different future persons. Recall Derek Parfit (1984: Chapter 16).

(2013) plausibly ties together this impersonal bad and the potential interests of future persons. He suggests that the non-existence of a potential person is an impersonal loss. One cannot care for these persons morally for their own sake. McMahan nonetheless holds that one has a reason to bring a better off person into existence rather than a worse off person, which he suggests implies a reason to bring the better off person into existence rather than no person at all. To bring a person into existence is to confer a “non[-] comparative” benefit on him/her (9). Extinction is potentially problematic because it forestalls the granting of many non-comparative benefits and thus produces a history with less utility than a history in which extinction either never takes place or comes much later and non-comparative benefits are bestowed on new persons. The most important implication of McMahan’s view for the extinction case is that there are impersonal reasons to bring people into existence due to the value they will add to the world. The perspective of the aforementioned impartial non-human observer interested in utility is the best point of view from which one can assess the potential badness of extinction. From this perspective, extinction is bad because it forestalls potential utility. Potential persons do not lose something by failing to come into existence. Instead, if causing people to exist would be good for them, their not coming into existence is bad despite not being bad for them.<sup>6</sup> If these people could have had lives worth living, their non-existence is an *impersonal* loss of value. The lack of benefits is a detriment in the history of the world. Comparisons of the utility of worlds with future generations and those without them help identify the bad of extinction: potential utility is not realized in the world where extinction is earlier.

One should, then, count the potential future utility of presently non-existent people when choosing between outcomes. This is not because of a duty to potential persons or because existence would be good for them. It is because it is comparatively better to have more utility in a given history than less utility. All-else-being-equal, it is better to bring about an outcome that realizes more of what is now merely potential utility than one that realizes less of it. If we count potential harms in our calculus of the badness of extinction, two plausible views arise. Given the contingency of an extinction scenario harming current individuals, one may adopt a view focused on impersonal loss alone:

- e. Extinction is *comparatively* bad if the loss of potential utility that would have accrued had the currently living people existed for a longer period of time and had other persons lived in the future is greater than 0.

<sup>6</sup> Our “moral reason to ensure the existence of future generations is at least in part a moral reason to provide, or not to prevent, the enormous benefits of life for the enormous number of people who might exist in the indefinite future” (McMahan 1986: 335).

Yet even the truth of (e) depends on how extinction arises. Those interested in utility more broadly should take account of the utility of existing persons as well. While the badness of extinction may be reducible to (e), full utility-based outcome analyses cannot ignore when an outcome includes the suffering of current existing persons; contingent suffering is relevant when present. The impartial non-human observer cannot ignore it. An alternative thus combines person-affecting and impersonal perspectives:

**f.** Extinction is comparatively bad if the sum of the suffering it imposes on living persons, the loss of potential utility that would have accrued had the currently living people existed for a longer period of time and had other persons lived in the future, or some combination of the two is greater than 0.

Richard Kraut, an opponent of absolute/intrinsic value, supports something like (f). For Kraut, the extinction of any species is bad iff the loss of the species is bad for the Earth's other creatures (2011: 169). The loss of beings that can and do experience and produce more good is worse than the loss of being who can and do experience and produce less good (185). Humans, including future humans, can experience and produce more good than any other species. Thus, the extinction of humanity would be the greatest of all catastrophes (164). Like McMahan, Kraut takes future generations into account when assessing outcomes. He thereby commits to a view whereby potential utility must be weighed in our moral calculations. Both the last generation of humanity and their possible beneficiaries in future generations would be negatively affected by an extinction scenario, reducing total utility in the world (164-165). Occasionally, Kraut makes it sound as if future generations could be harmed by extinction, but to the extent that he can be plausibly be read as endorsing (f), his view appears more plausible than alternatives.

Extinction scenarios, then, are most likely bad because of their negative impact on existing persons (to the extent that such effects are present) and because of the loss of the possible goodness of the people who might have existed and had good lives. The following explains how to compare the values of histories including the potential utility of future persons and how plausible calculations still lead to scenarios where extinction today is preferable than many years of continued human existence. It thereby explains why one should adopt a new approach to the badness of extinction, which is introduced in the next section.

## 2. CALCULATING THE BADNESS OF EXTINCTION

There is, then, a comparative harm in future people failing to come into existence if they would experience utility that would not otherwise be realized.

This harm is impersonal. If the badness of extinction is comparative and its value is exhausted by the loss of potential utility (and perhaps the disutility experienced by existing persons when the extinction scenario arises), this raises questions about how to calculate potential utility and the overall utility of an outcome.

The loss of potential utility stemming from an early extinction is a bad-making feature of an extinction scenario. Comments on *how bad* it would be are necessarily speculative,<sup>7</sup> but an impartial non-human observer would likely possess better measurement tools than I do. This piece thus assumes determinations on how much potential utility future persons would realize if brought into existence can be made, bracketing one source of uncertainty in population ethics, uncertainty about value, to assess the badness of extinction.

One cannot place potential utility valuation completely in a black box, but attempts to answer hard questions about such valuation raise several problems. Practical decisions rely on information available to modern humans, not impartial non-human observers. When comparing potential histories, we want to know if, for example, we should discount benefits to future persons or if potential utility is equivalent to actual utility (see e.g., Bostrom 2002: 15-16). Black boxing may thus be practically problematic. For present purposes, however, it suffices to note that the loss of potential utility is non-negligibly bad.<sup>8</sup> Regardless of how one values potential future

7 John Broome agrees that we must take potential persons into account (2012: 175). The absence of persons accounts for our intuitions about the badness of extinction, even if we do not think it can explain why we think extinction is any worse than any other massive drop in the potential population. Yet Broome is more skeptical than McMahan about the ultimate badness of large absences of persons:

Intuitively it seems most plausible that...[absences] are bad....But...we still have a lot of work to do before we can be sure that this is so....[E]ven if we can be sure a collapse of population would be bad, we have no idea how bad it would be. We have empirical work to do in predicting what would have been the well-being of the absent people, had they lived (183).

This provides reason to question (e), (f), and (g). Broome suggests we cannot be sure of our utility calculations and thus may not be able to do the moral mathematics necessary to support the views. If this is true, any comments on the value of potential utility, including comments on the value of outcomes that rely on potential utility calculi, are necessarily speculative.

8 I am tentatively wont to provide such a discount based solely on the uncertainty identified by Broome, but the claim that the badness of extinction can be outweighed by other relevant circumstances even when the alternative would be many years of continued human existence does not depend on such a discount. E.g., Parfit offers a Two Tier View, according to which we give greater weight to the badness of outcomes that would be worse for particular people, but give some weight to non-person-affecting good and bad outcomes (2011: 219-233). Questions concerning whether extinction is always bad and whether we should always attempt to delay it arise even on versions of the Two-Tier View that give significantly less weight to effects on future well-being that do not affect particular people.

utility, it should be included in assessments of the good of outcomes. The more pressing concern is how to calculate the overall utility of an outcome given fixed inputs of the utility of existing persons and potential utility of future persons.<sup>9</sup> Two popular candidate principles for such determinations are the Total Principle and the Average Principle. The former holds that “other things being equal, the best outcome is the one in which there would be the greatest quantity of whatever makes life worth living” (Parfit 1984: 387), but unfortunately entails the Repugnant Conclusion (388). The latter holds that the best scenario is one in which the average amount of utility experienced by each person is highest and may have similar implications in its widest form (399). It is also subject to further critiques, including the Levelling Down Objection (described in Temkin 2012: 75-76). There is thus reason to question the most intuitive Non-Person-Affecting Views. Nearby views suffer from similar defects<sup>10</sup> and extinction cases like the ones below raise similar problems.<sup>11</sup> All principles of valuation suffer from some defects and are thus not obvious candidates for use in the valuation of the badness of extinction.

The following possibility, which is agnostic about the competing principles, helps avoid these problems, but also supports the view that extinction is not necessarily bad:

**g.** Extinction is not comparatively bad if the sum of any negative disutility experienced in the process bringing about extinction and the impersonal negative effects of the potential utility of existent and future persons failing to be realized can be negated by earlier benefits conferred on existing persons.

The scenarios below suggest followers of Total-, Average- and Perfection-based outcome valuation principles should all prefer imminent extinction

9 For simplicity’s sake, calculations here ignore Different People Choices, wherein different persons will be born depending on which of two scenarios arise and we assess the relative value of their lives (Parfit 1984: 356). The choice is between only this generation existing and any future generation existing.

10 Given space limitations, other principles cannot be canvassed. Yet it should be reasonably clear that nearby view suffer from similar defects. E.g., those who understand the case demonstrating how the Average Principle may lead to Repugnant Conclusion should understand how these arguments also apply to the Average Utility Principle. Small differences in particular cases are dealt with briefly below. The key is that the treatment of (e)-(g) above remains true when reformulated to account for average utility.

11 The Impersonal Total and Average Principles also entail that, under certain circumstances, extinction is preferable to long periods of continued human success. Indeed, the cases below suggest that extinction may be preferable on any plausible valuations. Given the similar problems between these views and their nearby alternatives on the margins, it is likely that the total badness in (e) and (f) can be negated by earlier benefits conferred on existing persons regardless of whether the loss of utility is calculated in totals or as deviations from an average.

provided that the limit on the amount humans are able to flourish is sufficiently high. (g) is thus true regardless of whether one calculates the value of outcomes from a Total-, Average- or even Perfection-based perspective.<sup>12</sup> Given that the most plausible outcome valuation theories all rely on one of these principles, one should not choose a theory solely to account for one's pre-theoretical intuitions that extinction is bad and should be avoided or delayed to the greatest extent possible. Regardless of whether one assesses the comparative badness relative to the possible total sum of utility that would have been contained in the lives of people who would have otherwise existed, on their quality of life, or some combination of these, imminent extinction may be preferable to long continued periods of human existence even at a high level of well-being.

This does not entail that extinction is always the better outcome, but only that an early extinction may be a better outcome than a later one (from an outcome perspective) and a history with extinction in it may be preferable to one without it. This is an argument against those who consider extinction to be intrinsically bad and argue that it is always the worst, including those who say it would be intrinsically worse than humanity's continuing to exist for longer.<sup>13</sup> The main arguments for this claim are case-based and appear below. Following theories to their logical extremes to derive implausible results is common in ethics. I hope to show that any view on valuation may have the implausible result that extinction could be preferable to continued human instance. This is not meant to be an argument against consequentialism, but it should help demonstrate that one should not accept a particular form of consequentialism just to avoid the conclusion that extinction is preferable to alternatives.<sup>14</sup> For instance, McMahan uses the badness of extinction as a datum for why one should admit non-comparative benefits, the aforementioned benefits that "cannot be explained in counterfactual comparative terms" (2013: 9), into one's moral mathematics (26). For McMahan, extinction appears to be "the worst of those possible tragedies that have more than a negligible

12 Perfectionists believe ensuring people have a high quality of life is most important. Perfectionism too produces results where extinction is preferable to even long periods of continued human existence. E.g., the impartial perfectionist who is only concerned with the potential humanity being fully realized may prefer a world in which humanity flourishes to the greatest extent possible now even if the non-existence of many future generations who would otherwise exist is a necessary consequence.

13 I will not address an extreme view one could read into David Benatar (2006: 194):  
h. Earlier extinction is preferable to a later one because coming into existence is always harmful. We are obligated not to harm people and thereby obligated to hasten extinction by not procreating.

14 If (g) is true, those who believe that extinction is necessarily bad need to look outside utility-based analyses for justification. A rule-based approach to ethics may justify this belief. Adopting such an ethics may be the right application of the argument's conclusion. This piece merely seeks to identify implications of utility-based analysis.



probability of actually occurring”, not merely due to its effects on existing persons, but also due to the loss of potential future utility by potential future persons (26). Since potential future persons when choices concerning extinction are being made, there may be no relevant counterfactual in which they are comparatively benefitted or harmed. The purported losses of extinction thus appear non-comparative. Extinction produces impersonal losses. McMahan’s view’s ability to explain the general plausibility of (e) and (f), in which extinction will almost always be at least comparatively bad, counts in its favor. The loss of potential value in (e) and (f) are best understood as non-comparative or impersonal. One should not, however, assume that (e) and (f) are true. Indeed, even McMahan’s mathematics can be used to create a choice scenario where extinction is not the worst outcome. Plugging non-comparative harms into (e) and (f) can still result in ‘Extinction is bad’ reading false. The badness of extinction alone thus does not justify admitting non-comparative benefits and harms into our moral calculations. McMahan is aware of other problems with non-comparative benefits and harms, but these considerations suggest that the extinction case may not provide adequate reason to accept them in the first place. To the extent that one prefers one’s intuitions about the badness of extinction to one’s ability to make plausible moral calculations, this is a problem with utility-based theory. Others should be moved to reconsider their distaste for certain imminent extinction scenarios. The remainder of this piece will demonstrate that one should not admit the potential utility of future persons into one’s moral calculations merely to explain pre-theoretical intuitions about the badness of extinction. This is because the addition of these people into our moral calculus will not always allow us to maintain these intuitions. Providing future individuals with the means to realize their potential utility is good. Since this good is merely comparative, however, it is not morally necessary that one bring it about in all cases. Since it is impersonal, no one is harmed by failing to realize it. When the potential utility calculus is paired with the most plausible means for analyzing the overall goodness of outcomes, the loss of potential utility of a hastened extinction will not rule out choosing extinction over histories where human beings live longer in certain circumstances. Extinction today may be preferable to millions of years of continued human existence in some circumstances.

### 3. EASIER CASES

The extinction of humanity, then, is not intrinsically bad and any potential negative effects on existent and potential persons can in principle be negated by earlier benefits conferred on existing persons. The following cases, focused on the use of pills that are unavailable in the physical world but

common in philosophy, support the more fundamental first conjunct concerning the intrinsic value of extinction. One may prefer a history with an earlier extinction to a latter one and a history with extinction in it to an alternative without it. Moral mathematics does not always demand choosing an outcome that avoids extinction. Nick Bostrom notes that it is not “a *conceptual* truth that existential catastrophes are bad or that reducing existential risk is right” (2013: 24). If one is solely concerned with outcomes, it also may not be a substantive truth that extinction is necessarily bad. Harder cases below suggest early extinction may be preferable to circumstances in which humanity survives for a very long time. I first address less contentious cases where humanity will only continue to exist somewhat longer.

The supposed badness of extinction is often demonstrated with hypothetical scenarios, but such scenarios also undermine this supposed badness. Larry Temkin provides an example of a scenario in which mass sterility leads to extinction to suggest that an outcome where regular regeneration continues is better than one giving current people immortality; contra Jan Narveson,

if we developed a pill enabling each of us to live wonderful lives for 120 years, it would be terrible for us to take the pill if the cost of doing so were the extinction of humanity. This is so even *if* taking the pill were better for each individual who took it, and hence everyone whoever lived, collectively....[I]f the cost of immortality would be a world without infants and children, without regeneration and rejuvenation, it wouldn't be worth it....[T]his is so even *if* each immortal would be better off than each mortal (2008: 208)<sup>15</sup>.

Intuitions about similar cases are supposed to demonstrate the badness of extinction. Yet I suspect that our intuitions about the case will differ if it is altered such that existing persons are made sufficiently well off. Extinction may be the worst outcome of a given decision, but if we remove personal harms from the scenario, extinction can be personally good. In such circumstances, the impersonal loss is merely a function of the lost potential utility of future generations that would have otherwise existed. A sufficient level of personal good for existing persons could outweigh this loss.

From a pure outcome perspective, case-based reasoning suggests that a history including extinction may be preferable to an indefinitely long history without one.<sup>16</sup> Imagine a choice between:

<sup>15</sup> My thoughts on this topic were furthered by two Temkin-inspired cases in Nick Beckstead's doctoral dissertation (2013: 63). Gregory Kavka provides another famous pill case (1982: 98).

<sup>16</sup> These intuitions affirm Lenman's claim that “[f]rom an impersonal, timeless perspective it is hard to identify good reasons why it should matter that human extinction comes later rather than sooner” (2002: 253).

**The Highest High:** An intergalactic travelling salesman arrives on Earth. The salesman offers the Earth's inhabitants a pill that allows everyone currently alive to reach the highest level of flourishing possible. Infertility is a side effect. The salesman is only on Earth for a brief period of time and will not make the offer again, but will only provide it to the current generation on the condition that everyone agrees to take it. Everyone agrees to take the pill. Humanity goes extinct when the last currently alive person dies.<sup>17</sup>

**Rejecting the Offer 1:** The intergalactic travelling salesman makes his offer, but it is rejected. Humanity continues to develop, but extinction comes within a few hundred years due to natural circumstances.

**Rejecting the Offer 2:** The intergalactic travelling salesman makes his offer, but it is rejected. Humanity development plateaus due to unforeseen technological problems. Extinction comes within a few hundred years due to the natural circumstances from Rejecting the Offer 1.

**Return to the Repugnant Conclusion:** The intergalactic travelling salesman makes his offer, but it is rejected. Human development regresses. A large number of humans continue to exist for an indefinite period of time with lives barely worth living.

The pill's extraterrestrial origin removes contingencies in other pill cases.<sup>18</sup> Many of the worries surrounding extinction are also removed. Preferences can be satisfied. Voluntariness is not undermined. Even the violent ends of the last generation that add to the badness of extinction in similar scenarios are not present.<sup>19</sup> Most forms of uncertainty are removed from the comparative equation. The possible outcomes are stipulated to identify whether one with the extinction of humanity in it is necessarily

17 For simplicity's sake, assume that the last people die together, everyone enjoys full material comforts, and no family members see each other suffer. This avoids pains in Lenman (2002: 255).

18 In the absence of an 'all or nothing' decision on whether to take the pill, it is best to delay taking it until either scientists develop it without the sterility side effect or it is clear that the side effect could not be remedied. It remains important to determine whether extinction following flourishing is problematic rather than focusing on when one can know the following periods will not be better. If the side effect could not be remedied, the case would be akin to the extraterrestrial introduction in all relevant respects.

19 Lenman provides a famous example of such a scenario and poses two questions: Suppose it is written in The Book of Fate that one day we will be wiped out in a nasty catastrophe. Many millions of people will die in terrifying circumstances involving great pain and distress. The only thing the Book of Fate is silent about is when this is going to happen....The question is—Should we care? Does it matter how soon this happens? (2002: 255).

worse than the alternatives.<sup>20</sup> It is not obvious that The Highest High is the worst scenario. It is thus not obvious that extinction sooner rather than later is necessarily a bad outcome. Human beings' ability to flourish could be limited by their nature and psychology. If so, a relatively small number of future generations existing below the limit may produce a larger number of positive benefits than the pill. If, however, the level of flourishing is sufficiently high, then The Highest High creates more utility than Rejecting the Offer 1 and 2. It thus appears to be the preferable outcome.

The choice above may be a mere choice between existential risks,<sup>21</sup> but this does not undermine the broader implications of the example. When compared with Return to the Repugnant Conclusion, the mere presence of extinction in the Rejecting the Offer scenarios does not make the situation worse than an alternative without it in any substantial way.<sup>22</sup> Nick Beckstead (2013) is likely right that a given period with people in it is better than a period without sentient life, but the preceding choice scenario suggests that the disvalue of empty periods can be outweighed by sufficiently good periods when we look only at histories.

#### 4. HARDER CASES

One may charge that the important comparison involves not just a few more centuries, but a much longer survival of humanity. Parts of Parfit's *Reasons and Persons* (1984) and other influential works in population ethics assume that the human race could continue to exist for a long time.<sup>23</sup> They then question whether an earlier extinction would be preferable to such long histories. Even those who prefer the Highest High to Rejecting the Offers 1 and 2 would likely find it less obviously preferable to a future where human beings continue to live for longer periods.

20 Broome's uncertainty about value potentially remains. This lingering uncertainty about the extent to which things are good or bad is no worse than what we find in any other scenario. Even Broome notes that expected value theory will not help with this uncertainty (2012: 184).

21 E.g., Rejecting the Offer 2 includes a long period of stagnation (which is not Nick Bostrom's "permanent stagnation" (2013: 20) since extinction occurs).

22 One may argue that this would result in a decrease in morally relevant diversity, but a fully realized human contributes to diversity in the history, resulting in a tradeoff of the loss of diversity. There is reason to question the long-term relevance of this diversity criterion even in the absence of that tradeoff. As Lenman argues (2002: 255), it seems more important that humanity exist at some point in a history to contribute to diversity than for it to continue to exist indefinitely. Diversity could be a bad-making feature of extinction at any given time, but if we take a sufficiently impartial view and analyze outcomes of whole histories, it is no longer relevant. Diversity over a history may additionally benefit from humans failing to exist if some species can only exist where humans do not.

23 Bostrom suggests this is an issue with many existential risks (2013: 22).

It is important to examine these harder cases comparing early extinction to a history where humans continue to live for longer periods. Yet the only fundamental difference where one is using the most plausible outcomes valuations is that the amount of utility the current generation would need to experience to make imminent extinction preferable is much higher than it is in the easy cases. Even if we grant that the loss of potential persons could make a history worse, extinction is not worse than even alternatives where humans continue to live even very good lives for thousands or even millions of years if it came about as a consequence of existing people being guaranteed lives that were very much better.

Consider:

Rejecting the Offer 3: The scenario in Rejecting the Offer 1 takes place but thousands of years pass before the extinction of the human race due to natural circumstances.

Rejecting the Offer 4: The scenario in Rejecting the Offer 2 takes place but thousands of years pass before the extinction of the human race due to natural circumstances.

Given a sufficiently long period of time, one may plausibly believe that the gains in quantity of lives in these outcomes when compared with the Highest High would be outweighed by the lower quality of people's lives. Much longer time periods make hastened extinction less compelling.<sup>24</sup> If one accepts Beckstead's claim that "it is not absurd to consider the possibility that civilization continues for a billion years, until the Earth becomes uninhabitable" (43), Rejecting the Offer 3, in which humans continue to develop, or Rejecting the Offer 4, where human development plateaus, could be plausible constructions of these long histories.<sup>25</sup>

Variations on Rejecting the Offers 3 and 4 suggest that extinction should often be avoided, but, given certain assumptions, the Highest High may still be preferable. From an outcome-based perspective, extinction should be avoided where the positive benefits of an act that will result in or hasten extinction will not outweigh the loss of potential utility of future generations. For any given comparison with a potential future, one should focus on the potential utilities of future histories. To determine whether the Highest High is preferable to Rejecting the Offers 3 and 4, one must be able to calculate the total amount of utility in each. Whether the Highest High will outweigh

<sup>24</sup> One may worry that these additional numbers will eventually lead to Return to the Repugnant Conclusion. The structure of Rejecting the Offers 3 and 4 ensures a relatively high amount of well-being in both scenarios. I nonetheless discuss this concern below.

<sup>25</sup> Return to the Repugnant Conclusion is unlikely. Broome says "we cannot reduce the chance of extinction to zero" (2012: 179). Richard Kraut agrees (2011: 163). They are likely right.

Rejecting the Offers 3 and 4 depends in part on what ‘the highest level of flourishing possible’ in the Highest High means. It is easy to see how, all-else-being-equal, much longer periods of time will create much greater amount of utility over the history of humanity. Rejecting the Offers 3 and 4 thus include more utility than Rejecting the Offers 1 and 2 respectively. Whether they will include more utility than the Highest High is not obvious. It is natural to assume that we will eventually reach a point where the amount of time is sufficient long that even a much smaller amount will sum (or even average) to a higher amount than the pill in the Highest High could possibly reach. Return to the Repugnant Conclusion is supposed to make this clear. In cases where extinction will eventually take place, albeit millions of years later, the question of whether more people experiencing less good for longer periods of time includes more utility than everyone alive today experiencing the highest amount of utility possible depends on how much utility the present generation could enjoy. It is hard to imagine ‘indefinite utility’ that could offset any potential lesser good in the future. There likely is a limit to the amount of utility any person could experience, but (g) remains true where the alternative history extends for thousands or even millions of years iff the limit on the amount of utility currently existing persons could accrue is sufficiently high that they could accrue more utility than many future generations. If the limit is sufficiently high, it may be such that the good current persons get from taking the pill is greater than thousands, millions or even billions of years of existence in any of the four Rejecting the Offer scenarios.

If the gap between present utility levels and our maximal utility levels is sufficiently high and one is only interested in choosing between better outcomes, then, one may choose the Highest High over Rejecting the Offers 3 and 4. Given what we know about human physiology and psychology, the gap between humanity’s current utility level and the maximum amount we could enjoy is likely insufficiently large to offset millions of years at current or even lesser levels of utility. But imagine a pill that brings us beyond our current maximal capacity such that the highest level of utility is beyond current human limitations and results in each of us experiencing bliss much greater than the cumulative well-being of hundreds of persons at our current level living long lives. If this is the pill on offer in the Highest High, humanity would not err in collectively agreeing to take it on risk of sterility. Even if humanity would continue to develop such that future generations would flourish much more than we do today, experiencing goods far beyond our current capacities, a pill that could take existing persons beyond that level and provide the maximal amount of utility possible could produce more utility provided that the maximal amount of utility possible is sufficiently high.

One may suggest that beings who took that pill would no longer be recognizably human. The pill would then result in the immediate extinction of humanity by another name. Yet most theorists agree that any history of humanity that will continue for thousands, let alone millions, of years needs to appeal to human beings' descendants (e.g., Beckstead 2013: 43). The relevant comparison thus assumes we are dealing with beings that may not be recognizably human (but are closely related). While some will reject this assumption, it is sufficiently pervasive to support my demonstration that there is a way of understanding the Highest High that makes it preferable to Rejecting the Offers 3 and 4.<sup>26</sup>

If the limit of human flourishing is sufficiently low, the Highest High may not be preferable to different Rejecting the Offer scenarios. Eventually there will be a long enough period of time that will make rejecting the pill necessary given a sufficiently long period of time and some cap on the highest level of utility possible. A problem for this salvation of anti-extinction-based intuitions nonetheless threatens. Perhaps any time extension of this sort would create a gap between the level of well-being of pill takers and future generations such that the scenario would mirror Return to the Repugnant Conclusion in certain respects. The idea that a world with more persons who are less well-off could be better than a world that has a smaller but still considerably large number of persons (and, indeed, more than enough for society to function) who are much better off strikes many as implausible, but the source of the repugnance of the repugnant conclusion is hotly debated. The Repugnant Conclusion seems to demonstrate that, once a sufficient number of persons exist, the aim should not merely be to ensure more people exist, but also to ensure that each person experiences a certain level of well-being. Given that the persons in both worlds are living lives worth living, the problem cannot be that the level of well-being in either world is too low in an absolute sense. The repugnance of the Repugnant Conclusion only occurs in comparative analyses. One explanation for it is that the gap in well-being between persons in the first possible world and those in the other is too large to be justifiable. The gap in quality of life across worlds makes the creation of lives worth living seem repugnant even when the lives would otherwise be worth living. If Return to the Repugnant Conclusion is problematic not because of the much lower amount of well-being allotted

26 Depending on how one individuates species, it is possible that Beckstead's multiple phases of humanity/post-humanity will contribute to diversity more than the instant development of the pill in the Highest High. One may argue that this would be a further bad-making feature of extinction in this circumstance that is not adequately covered by utility calculations. Even if one grants that the manner of species individuation that would undermine my position is correct, it is possible that the number of species that could flourish in the absence of humanity would be greater than the number of post-human species. Such speculation should be examined elsewhere.

to each person in the world with more persons as such, but because it is much lower than what we take to be acceptable, perhaps a sufficiently high level of maximal utility could make existence even at the a very good level seem repugnant compared to the blissful level produced by taking the pill. Even the existence of many more persons for a long period of time at a current level of well-being may seem repugnant when one compares the quality of life at the blissful level with the quality of life at our current levels of well-being. Rejecting the Offer 4, where human development plateaus, seems particularly problematic here, though development at a slow enough pace in Rejecting the Offer 3 could also be worrisome. I suspect that the comparative explanation for the repugnance of the Repugnant Conclusion is the wrong tack, but the fact that the lives in Return to the Repugnant Conclusion are worth living makes the claim that they are absolutely, rather than relatively, bad implausible. Defenders of Rejecting the Offers 3 and/or 4 need to explain why we prefer the Highest High to Return to the Repugnant Conclusion without appealing to the large gap in the relative well-being of persons across the scenarios or risk a similar gap in the relative well-being of persons in the Highest High and Rejecting the Offers 3 and 4 undermining their position. The badness of extinction is still not as obvious as it seemed.

If we can limit the maximal amount of utility that could be brought about by the pill, lengthen the amount of time in the Rejecting the Offer scenarios to a sufficiently long period that the total utility in the scenario would be greater than that amount, and explain why Return to the Repugnant Conclusion is worse than the Highest High without appealing to a comparison that is mirrored by any Rejecting the Offer scenario and the Highest High, then it is easy to construct scenarios where even one who is only concerned with total utility in an outcome should refuse to take the pill. The number of conditions here would, however, likely surprise many. Laypersons likely believe their intuitions that hastening extinction is a bad thing will survive most scenarios. This jolt to intuitions strengthens the claim that the Highest High reveals a non-obvious truth about the badness of extinction on outcome-based analyses: it is comparative and can be offset.

## 5. POSSIBLE FUTURE GENERATIONS WHO WOULD GREATLY FLOURISH

If Beckstead's speculation about the future is correct, however, it is more likely that anyone who will approach the blissful level will do so through a gradual process of development (like in Rejecting the Offer 3). The intergalactic salesman is unlikely to arrive soon. Even if s/he could exist, it is likely that s/he will only visit in a far future in which we can communicate with extraterrestrials and interstellar commerce can be done efficiently. It is more likely that the highest level of flourishing will require continued technological



development.<sup>27</sup> It is, in other words, unlikely that we will flourish more than any potential future generation that could exist.

It is thus worth considering what we should believe about the possible existence of people whose lives would be vastly better than the lives of the most fortunate actual people, but a few comments will have to suffice here. If an impartial observer knew that the Highest High would take place 1,000,000 years from now, then, all-else-being-equal (e.g., assuming there are no periods where everyone has lives that are not worth living in the interim), s/he would have reason to prefer a history that lasted that long.

Consider:

**Weak Batch:** The pill from the Highest High is offered to humanity in a diluted form that will only bring the existent generation up to level of the best life anyone is currently living. The salesman says s/he could provide a better batch in the future that would bring a future generation up to the Highest High. Ingesting the weak batch now will produce infertility that would make such a trip useless. Humanity takes the weak batch.

The value calculations above suggest humanity should not take a pill that could raise all existing persons up to the level of the best currently existing persons with the same infertility side effect as the pill in the Highest High if it knows that a much higher level of flourishing could be experienced by a future generation. The future generation would not be harmed by not being able to take the pill, but the history of the world would be worse if they were given the opportunity. Even a massive boost in well-being for the current generation beyond what anyone experiences today cannot justify hastening extinction to an earlier date. A 'Stronger Batch' situation produces the same result. From an impartial perspective, the current generation has no special standing.

Yet more interesting questions arise when we contemplate future periods of great levels of flourishing below the maximal level in the Highest High. Consider:

**Good Times Ahead:** Development in Rejecting the Offer 3 creates a period of overwhelming positive utility in the future, much higher than

<sup>27</sup> Bostrom posits a Technological Completion Conjecture: "If scientific and technological development efforts do not effectively cease, then all important basic capabilities that could be obtained through some possible technology will be obtained" (2009: 190). One can imagine a version that brings humanity to its highest level of flourishing. Given certain technological developments, we may reach a point where humanity's highest ends can be realized even without the intervention of an intergalactic traveler. If reaching this point requires sterility and we know this side effect is unavoidable, the choice scenario is similar to that of the intergalactic traveler. This piece provides guidance on how to make that choice. See note 18.

the level any human experiences today.

The forgoing provides the tools necessary to decide whether one should prefer this to the Highest High. If its “overwhelming utility” is greater than one would get by taking the pill, Good Times Ahead is preferable to the Highest High. If the maximal level of utility in the Highest High is sufficiently high and the “overwhelming positive utility” in Good Times Ahead is less than the maximal level, it is possible that the gap is such that even the addition of other periods could not result in utility at the level of the Highest High. The Highest High would thus be preferable.

## 6. EXPLAINING ANOTHER INTUITION

Extinction, then, is not bad in certain circumstances on most plausible outcome-based analyses. This helps explain common intuitions about the relative badness of the deaths of the last person and others. Many do not think the death of the last person is worse than the death of others who preceded him/her. The fact that one death would bring about the extinction of humanity is not seen as conclusive proof that it is worse than others. The simplest explanation for this intuition that does not run afoul of other plausible ethical stances is that the outcome of this death, extinction, is not worse than the outcome of other deaths where other persons remain.

The intuition about the relative badness of deaths is most easily raised when comparing the death of the last human and the death of the human immediately preceding him/her. It is stronger where we imagine that the last humans know each other. Many people do not believe that the last human death would be worse than the penultimate human death. The penultimate death may even be worse since the last person will mourn the penultimate person's death in the circumstances, if s/he knew that person, and then live alone without interpersonal connections that provide most of life's meaning. S/he could be deeply affected by the death of the penultimate person even if s/he did not know the penultimate person, but only knew of his/her existence. Samuel Scheffler “would choose not to live on as the only human being on earth even if the alternative were not that human society would survive after my death but rather that everyone including me would die... [This preference most importantly] reflects the strongly social character of human valuing” (2013: 80). This claim is supposed to be evidence for the badness of extinction, but can support the claim that the death of the last human may not be the worst one. For Scheffler, knowledge of imminent extinction renders one's life plans meaningless and one's projects valueless. One's current values are likewise tied to the existence of other persons at the same time. We need other people to value our lives. If Scheffler is right, the death of the last person is less bad than the death of second last person.

Desires to ensure that one last person remains alive, even indefinitely, are thus curious.

The fact that the last and penultimate persons are among the last members of society obscures a larger truth: we often think that the fact that the last person alive is the last person alive does not make his death any worse than the death of many, and perhaps even any, other persons. The mere fact that s/he was the last person in existence does not make his/her life any more valuable than another. Barring circumstances in which the person's status as the last person was the result of virtues fully in his/her command, we often think that this status is arbitrary and could easily be otherwise. If this is the case, there is little reason to mourn his/her death any more than we would mourn the death of an equally valuable contributor to society today. The claim that the deaths are not worse than one another is slightly different from the claim that there is no reason to mourn one more than the other. The latter claim is trivially true if we consider mourning to be a strictly *post hoc* determination: there is by definition no one to mourn the last person on Earth after his/her death. We must instead examine the former question in an *ex ante* manner and compare which of two deaths we would prefer not to take place in certain circumstances. This determination is similar to one on which death is worse all-things-considered from the standpoint of the impartial observer judging outcomes. Many think neither death is worse than the other. Some believe that the death of the last person on Earth is better than the death of earlier persons in certain circumstances.

The easiest explanation for these intuitions, treating one death as worse than the other seems arbitrary, is not the best explanation. The relative badness of the deaths of two persons who are otherwise the same should not be determined by the order of their death. Reversing the order seems morally irrelevant. Intuitions about the relative badness of the deaths of the last and penultimate persons thus cannot be fully explained by the irrelevance of the moral order of actions. The order of actions affects their independent moral status elsewhere.<sup>28</sup> This could be true where the order otherwise seems to be an arbitrary distinguishing mark between two cases. The best explanation for intuitions supporting the view that the death of the last human on Earth is sometimes no worse than and even preferable to earlier human deaths is simply that sometimes the later death is preferable *despite bringing about the extinction of a species*. In other words, the best explanation is that the ultimate outcome of extinction is preferable to an alternative in which persons continue to live in limited circumstances. (g) helps explain intuitions about the relative badness of

28 McMahan plausibly argues that "the order does make a difference" in determining the permissibility of certain actions in the domain of abortion and prenatal injury (2006: 649).

deaths without appealing to questionable claims about the moral irrelevance of the order of actions. This provides further reason to accept it.

## CONCLUSION

The extinction of humanity, then, is not intrinsically bad and might be comparatively bad only by being an absence of what would have been good. This absence can be outweighed by current goods. Thus, the extinction of humanity is not always worse than alternative possible futures. Even the imminent extinction of humanity may be preferable to the continued existence of humanity for long periods of time at high levels of well-being on most plausible valuations of outcomes provided that extinction takes a certain form. Methodologically, then, one should not choose a means of valuing outcomes merely to avoid imminent extinction. Extinction may be preferable in certain circumstances regardless of what view one takes. The insights here, then, have methodological value. They should also help clarify *why* extinction should not be hastened now and when it may not be the worst outcome.

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# The Limits of Moral Argument: Reason and Conviction in Tadros' Philosophy of Punishment<sup>1</sup>

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## ABSTRACT

For generations, philosophers of punishment have sought to revise or combine established theories of punishment in a way that could reconcile the utilitarian aims of punishment with the demands of deontological justice. Victor Tadros' recent work addresses the same problem, but answers it with an entirely original theory of punishment based on the duties criminals acquire by committing their crimes. The unexpected appearance of a new rationale for punishment has already inspired a robust dialogue between Tadros and his critics on many of the individual claims that, linked together, comprise his argument. This critique focuses instead on Tadros' theory as a whole and the methodology he uses to support it. It proposes that Tadros' argumentative strategy can't justify his rationale by virtue of (1) the extent and complexity of the moral reasoning he invokes, (2) the counter-intuitive results his theory produces in an array of specific cases, and (3) the superiority of a negative-retributivist account in which moral reasoning and intuitive judgments, and the principles and applications that flow from each, are coherent and mutually supportive. Victor Tadros responds to these arguments in an essay following this critique.

**Keywords:** Moral philosophy, punishment, criminal law theory, moral reasoning, Tadros

The philosophy of punishment covers enormous ground, but if one problem endures at its core, it is the conflict between the utilitarian aims of punishment and the demands of deontological justice. They seem mutually

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exclusive in theory, and may often generate different sentences in practice. Finding a principled way to combine them has motivated generations of criminal law theorists. This challenge has served as a kind of conceptual Rosetta Stone that, if met, might clarify much of the field.

The philosopher Victor Tadros has applied his considerable skill to the problem and believes he has solved it. In his highly regarded 2011 book *The Ends of Harm* and in papers since refining some of his views,<sup>2</sup> Tadros offers a truly original justification for state punishment, and does so with impressive depth and clarity. The astonishing advent of a new moral account of punishment has already inspired three journals to publish symposia on its merits, and prompted punishment theorists to revisit widely varied areas of the field. Tadros and his critics have commenced a robust dialogue on many of the individual claims that, linked together, comprise his argument. I join that endeavor in Part 1(B), *infra*, enumerating what I see as weak or missing links in Tadros' argument.

Although I raise these substantive objections to particular claims, my principal interest is in the argument as a whole, and the methodology Tadros uses to construct it – subjects that are necessarily excluded from the piecemeal analyses that have occupied Tadros and his interlocutors to date. A central claim is that this methodology is out of balance: it places too much faith in conceptual argument and too little in intuitive moral judgment; its extreme reliance on distended chains of reasoning leaves no role for deeply held convictions about specific cases.<sup>3</sup> One can't reach an end-point of reflective equilibrium with such a methodology, and I believe this, more than any

2 Tadros has developed and in some respects revised his theory in response to critics (2012; 2013; 2015a) and in his Response to this critique (2015b).

3 Rawls distinguished three categories of normative beliefs that should play a role in the method of moral reasoning he called Wide Reflective Equilibrium: considered judgments about specific cases, moral principles and rules, and moral theories (Rawls 1971: 19-21, 48-51). The distinctions are orthogonal and overlapping, however, because we may also have considered judgments about moral principles and theories (Rawls 1999: 286, 289; also see Brun 2014). "Considered judgments" are akin but not identical to what others call "pre-theoretical convictions" or "moral intuitions." As an example, one might believe that slavery to be immoral (A) by virtue of an intuitive conviction that such is the case, or (B) by inference from other beliefs that yield that conclusion; judgment "A" would qualify as a considered judgment in Rawls' usage if it also satisfied certain epistemological safeguards – stability over time, relevant knowledge, impartiality, etc.. "Considered judgments about specific cases" thus supply two ingredients to moral inquiry, both integral to the method of reflective equilibrium: moral convictions regarding particular cases, which in their specificity can act as a check on more general principles and theories (and vice versa); and moral intuitions as provisionally credible sources of moral knowledge. Both dimensions of a moral belief are important to my critique. Regarding its degree of generality, section 3 argues that specific sentences the Duty View would generate are so unacceptable as to warrant rejecting the theory. Regarding its grounding, section 2 argues that intuitive moral judgments matter, and cast more doubt on Tadros' counter-intuitive conclusion than his distended chain of inferential reasoning can support.

particular weakness in Tadros' reasoning, accounts for the theory's failure to persuade the numerous commentators who have sought to pick his argument apart.

Methodological imbalance is not a problem for Tadros alone, but constitutes an occupational hazard for moral and legal philosophy generally, given that conceptual argument is at the heart of what philosophers and lawyers are trained to do. But Tadros' argument is an especially fruitful example with which to consider the use of reason, intuition and judgment in moral argumentation generally: it is precisely because Tadros' moral reasoning is so exhaustive, accomplished and transparent that its frailties and limits come into view.

This study proceeds as follows. Part 1 describes Tadros' justificatory theory of punishment, distilling his argument down to eleven sequential steps and identifying several weak or missing links among them. The balance of the article puts these piecemeal critiques aside and evaluates the methodology and strength of the argument as a whole. Part 2 argues that Tadros' argumentative strategy can't take him as far as he seeks to go, simply by virtue of the extent and complexity of the moral reasoning he invokes. Part 3 demonstrates the counter-intuitive results his theory would produce in an array of specific cases, and argues that results so at odds with strong and settled convictions count heavily against that theory. Finally, Part 4 demonstrates that an alternative – a form of negative retributivism -- remains more persuasive than Tadros' theory because it leaves us in a position of reflective equilibrium, in which moral reasoning and intuitive convictions, and the principles and applications that flow from each, are coherent and mutually supportive.

## 1. TADROS' THEORY OF PUNISHMENT

On one view, punishment is justified by the intrinsic goodness of a criminal's suffering in proportion to his desert. Tadros entirely rejects this idea; he believes that no one deserves to suffer and that suffering is never valuable in itself, whomever it afflicts. For Tadros, the only possible ground for punishing someone lies in its beneficial effects. His rationale for punishment is exclusively instrumental.

Tadros calls his philosophy of punishment "instrumentalist" rather than "consequentialist" because he wants to distinguish clearly between his justification of punishment and the comprehensive theory of morality known as consequentialism (2011: 25, 39-40). Were his theory consequentialist in the latter sense, he would face the familiar devastating objection: because



results are all that count, the theory could require imprisoning a mobster's innocent mother when there would be utility in doing so, and even her execution if it would deter more killings than the one it would inflict. This is unacceptable to Tadros, but so is the retributivist solution that grounds punishment in the offender's desert.

Tadros' third way is a hybrid position: an instrumentalist rationale for punishment situated within a non-consequentialist moral theory. He insists that the value of punishment lies in its deterrent impact, but also recognizes deontological side constraints on pursuing it – most importantly, the Means Principle prohibition on using a person merely as a means to another's benefit (13, 23). In Tadros' telling, this constraint places very stringent limits on government actions (so much so that only a libertarian state would seem to comply with it.<sup>4</sup>) We punish in order to reduce crime, but the Means Principle restricts its infliction to the guilty, Tadros claims, because only the guilty have a duty to submit to it. For that reason, Tadros calls his theory the "Duty View" of punishment.

Of course, everything depends on establishing that this duty exists, and that it derives from something other than desert. (Otherwise all Tadros has done is change words, substituting a "duty to suffer punishment" for "just deserts.") Tadros' starting point is the example of one person attacking another: uncontroversially, the assailant is morally liable to be harmed by defensive force. Tadros then argues that if the assailant completes the crime, his liability to suffer harm persists, extending to a series of residual and remedial duties that culminate in a duty to deter crime by submitting to punishment.

<sup>4</sup> Tadros argues that the state may not tax people to finance retributive punishments, both because (1) liberal neutrality would rule out compelling people to finance a controversial, non-neutral conception of the good, and in any case, (2) citizens are not bound to expend resources to pursue the good unless they have a duty to do so (2011: 79-83). He argues that measures protecting people from crimes are not subject to either objection, because citizens have rights to security that create co-relative duties to provide it (82-3). By contrast, he classifies retributive justice as an impersonal good and "it is much more difficult to justify forcing a person to make a contribution to the pursuit of goods that are not grounded in the rights of others," like the promotion of natural beauty, because each citizen is entitled not to pursue them (81).

Of course, this objection would eliminate large areas of government funding well beyond the promotion of natural beauty or the arts. Massive infrastructure projects like America's rural electrification project in the '30s or interstate highway system of the '50s are also not "grounded in the rights of others." Even funding such things as health care or occupational safety would seem to require a showing that people have rights to them and co-relative duties to provide them through the state. For that reason, the implications of Tadros' argument seem to approach the strict libertarianism Robert Nozick (1974) propounded, and bring to mind Nozick's famous claim that redistributive taxation is akin to forced labor. Compare Nozick 1974: 169 with Tadros 2011: 79, wherein Tadros argues that to "use resources that a person produces for the pursuit of [a] goal is perhaps not as coercive as forcing them to work for the sake of that goal, but the difference is not terribly significant."

That's a very long road to travel. How does Tadros get all the way from the permissibility of defensive force to the permissibility of state punishment? A highly distilled and simplified version of Tadros' argument as I understand it consists of the following multiple-step progression.

### *1.1 Tadros' Argument in Eleven Steps*

#### *Liability to be harmed by defensive force*

- I. All persons have a moral duty to refrain from wrongful aggression against others.
- II. If wrongful aggressor A commences an attack upon victim V, A has a residual duty to prevent its completion or harmful impact on V if possible. A's obligation includes incurring a proportionate degree of harm if necessary to thwart the crime.

Note: A's obligation to incur harm does not arise because he deserves it. It stems in part from a principle of distributive justice, the Choice Principle. On this principle, if someone must suffer, it is better that it be a person whose choice created the situation than someone merely trapped in it. (Whether it is "better" prudentially because we all have reason to value choice, or morally because it is fairer, neither view treats deserved suffering as good.) Here it was A's choice to attack V that made the threat of harm inevitable (2011: 56).<sup>5</sup>

- III. V (or a third person) may enforce A's duty to avert her threat by using defensive force against A that inflicts no more harm than A would have been liable to suffer in discharging her own duty to avert her threat.

#### *Residual duty to compensate victim by protecting against other crimes*

- IV. If A's attack succeeds and harms V, A has a residual duty to provide a remedy to the victim.
- V. The remedy A must provide V is protection from future crime, even at significant cost to herself, as long as that harm is (a) no more than A was liable to suffer from V defending himself at the time of the crime, and (b) proportional to the harm it would prevent.

<sup>5</sup> Tadros (2011: 56) says that while the opportunity to avoid being harmed will often coincide with culpability, it is the element of choice rather than desert that is basic.

The obligation to submit to defensive force appears over-determined in Tadros' theory. Whether the Choice Principle is necessary to his argument is left unclear given his sporadic reliance on the aggressor's breach of her duty of non-aggression to justify, by itself, the residual duty to suffer defensive force that follows. If it is the latter, there is a question whether forcing the aggressor to do what he had a duty to do can fulfill the duty, because it may completely bypass the aggressor's agency. (See Duff 2013: 116-117.)

Note: suppose  $A_1$  has just shot  $V$  when  $A_2$  arrives on the scene and independently attempts to shoot  $V$ .  $V$  may use  $A_1$  as a protective shield against  $A_2$ 's attack even though  $A_1$  was not responsible for it, based on  $A_1$ 's remedial protective duty. While this uses the aggressor as a means, it does not violate the Means Principle because she has a duty-based liability to suffer that harm.

Regarding the specification of protection as the remedy, Tadros argues that monetary compensation is ordinarily an inadequate remedy for a serious crime, and often unavailable in any event, so something more akin to specific performance is required of the aggressor: to protect the victim against a future crime of similar gravity (2011: 2, 277-78).

- VI. On efficiency grounds, criminal wrongdoers are obligated to pool their protective duties and take responsibility for protecting each other's victims (193-94, 280).

Note: consider two assailants, each responsible to protect her particular victim from a future crime. If each assailant is unable to protect the person she attacked, but is able to protect the other's victim, both have an enforceable duty to do so. In the previous example,  $A_1$  was liable to be used as a shield to protect  $V$  from  $A_2$ . As a result of this implied exchange,  $A_1$  may now be used as a shield to protect someone else.

*Duty to submit to punishment*

- VII. If punishing wrongful aggressors can deter crimes against the victims they are responsible to protect, they have a duty to submit to punishment, subject to the same limits as step #5 (279-80, 291).

*State's exclusive right and responsibility to punish*

- VIII. The state may enforce a wrongful aggressor's duty to submit to punishment by punishing her (395).
- IX. Because all citizens have a modest duty of mutual protection, all victims are obligated to use their right to protection-through-punishment to protect others as well as themselves (298).
- X. For reasons of prudence, effectiveness and fairness, the state is best able to fulfill the victim's duty to punish. Therefore, all victims have an obligation to transfer their rights to punitive compensation to the state (297-99, 304-05).
- XI. As the exclusive instrument of enforcement of both citizens' and aggressors' protective duties, the state is obligated to punish wrongful aggressors (293, 299-305).

Hence the core principle of the Duty View: The state has the exclusive right and responsibility to punish a wrongful aggressor for the purpose of general deterrence, provided that (a) the harm the punishment inflicts is proportional to its beneficial consequences, and (b) does not exceed that which the aggressor was liable to suffer in order to avert his crime.

### *1.2 Some Weak Links in the Argument*

Critics who quarrel with a particular step in an argumentative chain often assume that the argument is only “as strong as its weakest link.” In fact, as the next section argues, an inductive chain of reasoning is not as strong as any of its individual links, however weak or strong, and this problem may prove fatal to an argument as distended as Tadros’. But first, with Tadros’ individual claims now in mind, it is worth noting some particularly weak or missing links in that argumentative chain.

*Step 5* - The prior step has established that if a wrongdoer does not thwart the crime he started, he must do the next best thing: he must provide a remedy to the victim. Step 5 specifies that “[t]he appropriate way to remedy that wrong is by providing protection to victims and other citizens against future harm.” (2011: 2). But that claim dismisses alternative types of rectification – monetary payment in a theft case, for example, or surgery and long term care in a maiming case. This move has spurred a fair amount of argument between Tadros and his critics which I need not repeat here, other than to note that nothing in Tadros’ further arguments obviates the two problems noted in the margin.<sup>6</sup>

*Step 6* - This step seeks to establish the aggressor’s obligations to people he has never threatened: he has a qualified duty to exchange responsibilities with other wrongdoers, so that each victim will be protected by somebody. The duty to pool responsibilities is contingent on the greater effectiveness

6 First, mandating a protective duty rather than permitting monetary or other compensation deprives the victim of any choice in assessing how she might best overcome the damages she suffered. In a theory largely concerned with assuring respect for the moral status of autonomous persons, why should the state arrogate this choice to itself? (See Tanguay-Renaud 2013: 154; Ferzan 2013: 193-94). Responding to this criticism, Tadros has argued that leaving this choice with the victim “may lead her to violate the duty of protection that she owes to others.” (2013: 307). As I argue later in this section, it is more likely that the state will violate its duty to protect the victim’s compensatory right by aggregating it with all others and trading off among them on utilitarian grounds.

Second, the residual duty is supposed to be the next-best thing to fulfillment of the original duty, and it is far from clear that the victim would be better off with protection from a possible future crime than with a remedy aimed at mitigating or compensating for damages the victim has already suffered (Tanguay-Renaud 2013; Ferzan 2013). Tadros assumes monetary compensation is inadequate, but a remedy that is contingent on the possibility of future victimization may be more so.

of doing so. Suppose A assaulted V, and now wants to fulfill her protective obligation by purchasing a guard house on V's street and spending hours a day there insuring V's safety. Assuming A's work is sufficiently onerous so that it not only provides the protection but also exacts the degree of harm A could be required to bear, is A then exempt from the exchange, and thereby lacking the special duties to protect other victims that would ground A's liability to punishment? If so, punishment will be imposed unequally, based on arbitrary factors like the wrongdoer's wealth or the victim's age.

*Step 7* - Step 7 specifies that the wrongdoer's protective duty is to submit to punishment. Having already established the wrongdoer's duty to avert someone else's threat – serving as a shield, for example - Tadros says, "If punishing each wrongdoer can protect other victims of crime from future offending, each wrongdoer ought to accept that he must be punished. (Tadros 2011: 280) Assume punishment *can* protect victims from future crime via deterrence; note that Step 7 still doesn't establish that wrongdoers are restricted to fulfilling their protective duty by that means when there are other effective methods available. Punishment is only one of many methods of deterrence, and deterrence is only one of many methods of protecting people from crime. We may achieve deterrence without punishment by increasing the neighborhood police presence, and we may reduce crime without deterrence through social work, job training, or other programs that ameliorate criminogenic conditions like poverty; so obligating offenders to undergo or help finance such programs might also fulfill their protective obligations. Given the suffering that punishment inflicts and Tadros condemns, he needs a persuasive argument to bypass such non-incarcerative alternatives.

As this step makes clear, Tadros' justification for punishment is entirely contingent on the effectiveness of deterrent punishments, a relationship that is notoriously contested and hard to determine; and if the required deterrent value is present, contingent as well on what other consequences might accrue, as Tadros recognizes (2011: 40; also see Ch. 15, sec. V discussing what consequences may properly count in determining proportionality; and 30, 338, 348, 352-53).<sup>7</sup>

*Steps 9 and 10* - Here Tadros seeks to transform the victim's individual right to protection-through-punishment into a collective right exercised exclusively by the state. In step 9, he establishes that victims have a duty to use their right to punish so as to protect others as well as themselves, based on the modest duty all citizens have to provide mutual assistance to each

<sup>7</sup> America's mass incarceration policy arguably resulted from an unduly narrow focus on crime control, to the exclusion of the social damage that would result from the removal of vast numbers of men from their communities, the diversion of resources away from policies that might ameliorate criminogenic conditions, etc..

other (“easy rescue”). Step 10 then argues that the victim’s duty to punish includes the obligation to authorize others to punish if they will do so more effectively and fairly, and that because the state is such an agent, the victim must transfer her individual compensatory right to protection-through-punishment to the state to enforce (301; also see 297-99, 302-07).

One difficulty with this two-step argument is that it depends on a duty of mutual assistance that can’t support it. At the least, the duty of mutual assistance morally (though not legally) requires a passerby to undertake relatively costless rescues, like calling 911 or throwing a lifejacket to a flailing swimmer. Does it also require that a victim’s compensatory rights be transferred to the state and transformed into a system of deterrent punishment benefitting victims and non-victims alike, as Tadros argues? That strikes me as a bridge too far.

Even if the duty of mutual assistance could justify some loss in benefits, it cannot justify the loss of the victim’s right to the remainder. Although Step 10 is framed as a matter of more effective enforcement of the rights and duties of each victim, the state can only enforce them in the aggregate. My right to compensation for theft, and your right to compensation for torture, and all other victims’ compensatory rights, become subject to trade offs based on factors such as which punishments of which kinds of crimes will have the “biggest bang for the buck.” Rights may be defeasible, but they cannot not be subject to such maximizing cost-benefit calculations and remain rights.

*Indeterminacy and Arbitrariness* A more general substantive problem with the Duty View is the degree of indeterminacy and arbitrariness that comes with the proliferation of a large number of duties and rights, each with uncertain borders and relations to the others. Among those that play a role in Tadros’ argument are a wrongdoer’s duties to thwart her crime, to provide a remedy, to pool her protective duties with those of other wrongdoers, and to submit to deterrent punishment; a victim’s duties to punish wrongdoers and transfer his right to punish to the state; and the state’s duties to protect citizens from crime and from unjust punishment. According to Tadros, some of these duties may fade over time as the duty-holder becomes less psychologically connected to the person he was when he committed the crime.

Needless to say, with duties as inherently broad, vague, and temporally unstable as many of these are, problems of interpretation and application are daunting. For example, when is the remedial duty satisfied and the debt paid? How should we measure the state’s duty to punish in proportion to the good that would accrue -- case-by-case, or systemically with all

punishments treated collectively? If the former, how would we isolate the effect of the individual's punishment? As duties and rights proliferate, and as more than one applies (or is available to be applied) to a particular circumstance, attempts to define, apply and balance them will generate a large margin of error that, with successive iterations, threatens to take over the page. As I shall now argue, we get closer to justice with a discourse that is tied more directly to our moral intuitions and capable of finer distinctions than the abstract discourse of rights and duties that constitutes the Duty View.

## 2. A METHODOLOGY OF DIMINISHING RETURNS

Let us now put aside these substantive critiques, assume that all of Tadros' subsidiary claims are individually plausible, and consider how they operate collectively in an argumentative chain. I want to examine two inherent limits on the persuasiveness of highly distended moral reasoning of this type. The first problem is that, as a general rule, the more complex and lengthy the argumentative chain, the less confidence we should have in its conclusion. A chain of inductive reasoning is weaker than the sum of its parts. The second problem is comparative. When such an extended chain of reasoning is necessary to establish a position as revisionist as the Duty View, we may think that it isn't enough to justify rejecting much more deep-seated and immediate intuitive beliefs. However strong the argument, it will lack plausibility if it is incompatible with fundamental moral convictions that are too compelling to doubt. (I leave aside a third methodological critique that has been persuasively demonstrated elsewhere: Tadros' reliance on highly idiosyncratic hypotheticals to elicit far broader principles than they can support. See Husak 2012: 19)

Consider first Tadros' argument on its own terms. Its initial steps invoke certain intuitively plausible principles, such as a moral duty of non-aggression; succeeding steps are mainly established inductively by taking a preceding step's principle and eliciting responses to hypotheticals testing its extension. This multiple-step moral argument is essential because the ultimate principle it seeks to establish -- that state punishment is permitted only insofar as it may fulfill the wrongdoer's protective duty -- is not at all intuitive by itself.

This kind of moral reasoning suggests the construction of a building, starting with the foundation and progressing upward as each successive floor is built. It appears to make progress by addition. But addition is a misleading metaphor for viewing this kind of argument. Each successive step should reduce our confidence in the conclusion,<sup>8</sup> for three reasons:

8 Unless, of course, it adds to the plausibility of a prior one.

(i) The longer the chain, the greater the chance for a substantive error to infect it. Each additional step brings with it an additional risk of failure.

(ii) The second reason applies even if every step is highly likely to be correct. It reflects the mathematical truth that a chain of inductive reasoning is not “as strong as its weakest link” but weaker. The “weakest link” adage *does* apply to deductive reasoning, where the truth of the logically-entailed conclusion rests entirely on the truth of its premise. But Tadros’ argumentative steps are based on inductive inference, analogy, and intuition, none of which can supply the 100% confidence that logical entailment does. In this case, each step can only be judged more or less plausible, and each step makes the chain weaker by compounding the possibility of error, however minimal. A Bayesian calculation would treat each step as probabilistic to the degree of its plausibility, and the likelihood of the concluding proposition as a product of the multiplication of fractions, just as the chances of tossing two tails in a row are  $\frac{1}{2} \times \frac{1}{2} = \frac{1}{4}$ .

We can illustrate how severely Tadros’ methodology undermines his thesis by assuming that each individual step in Tadros’ argument is amply persuasive, with all intuitive and inferential claims highly plausible. If we represent this arithmetically by assuming a 90% level of confidence in each of the eleven steps, the likelihood of the conclusion being correct is just 31%. We may well have more confidence in the brute conviction that only desert can justify and calibrate punishment.

Now this 31% figure is illustrative and subject to reasonable disagreement. One might deem some step unnecessary, or deductive, or so self-evident as to be incontrovertible, for example. But at least five of the eleven steps would have to be entirely discounted on such grounds to render Tadros’ conclusion even slightly more likely than not.

(iii) Some may question whether this mathematical likelihood of error is sufficient to discredit a moral argument in the absence of specific counterarguments, or whether mathematical probabilities can be attached to moral judgments at all. But a third reason to doubt Tadros’ distended argument needs no mathematical proof to warrant acceptance: *Occam’s Razor*, the principle that the simpler explanation for a proposition is more likely to be true than a complex one, all else equal. Given its fruitfulness in directing scientific investigation over centuries, we need not be able to



explain *why* this principle is true to be justified in presuming it is.<sup>9</sup> By this standard, Tadros' 11-step argument should be rejected as unnecessarily complicated, if only because the same principle Tadros uses to justify the victim's right to self-defense – the Choice Principle – would justify state punishment directly if punishment deters crime. If imposing the death penalty on convicted killer A will deter the unprovoked murder of B, the Choice Principle provides a reason to execute A because, as one of the two will die, it is fairer that it be the one who had the opportunity to avoid the risk.

In his response to my “diminishing returns” argument, Tadros does not contest the math, or the inverse relation between the number of steps he uses and the likelihood his conclusion is correct. He argues instead that all moral claims rely on the truth of many subsidiary claims, so all moral claims are vulnerable on this analysis, including the ones I propound elsewhere in this essay. My “diminishing returns” argument would lead to a general moral skepticism, he claims. (2015b: 58)

But that's the wrong lesson. My argument is not an invitation to moral skepticism, nor a claim that intuitions are infallible, but an appeal to consider the relative persuasiveness of different legitimate modes of moral discernment on the question at hand. As moral argument becomes increasingly abstract and distended, the intuitive plausibility of its conclusion increases in importance. This creates a burden that highly revisionist moral arguments may not be able to meet. The problem with Tadros' multi-step argument is that it culminates in a rationale that opposes the fundamental intuitive convictions most people have about the morality of punishment, and this forces us to decide which ground of belief is more trustworthy on the issue. This is one answer to Tadros' claim that my arguments are as vulnerable as his own because they also involve multiple steps. The conclusions to those arguments - that it is unjust to inflict punishment in the absence of desert, and that it is unjust to the victim for the state to ignore his victimization – do not require us to choose between an extended chain of reasoning and our considered moral convictions.

The bottom line is that Tadros' methodology places his conclusion in a less plausible initial position before any question is raised about the soundness of individual links in the chain. This doesn't obviate exploring the merits of those links, see Sec. 1(B) above, but it does provide a substantial, independent ground for skepticism.

9 Richard Swinburne (1997) claims that “it is an ultimate a priori epistemic principle that simplicity is evidence for truth.” Some argue that this principle is self-evident, constitutive of rationality, or another kind of foundational truth that cannot be further justified. Others, however, accept Occam's Razor is an appropriate methodological maxim but not by itself indicative of truth.

### 3. COUNTER-INTUITIVE SENTENCES

The last section examined the intricate structure of Tadros' reasoning and whether it can support the principles he derives from it. If we examine how these principles would apply to specific cases, the difficulty multiplies. They produce results so counter-intuitive that something has to give. Apparently recognizing this, Tadros modifies the Duty View to make it cohere with moral common sense, but to such an extent that it largely disappears; as I shall argue, with Tadros' many work-arounds in place, what remains is something very much resembling negative retributivism. This is not surprising, as so many obvious sentencing factors are easily understood in terms of retributive desert but invisible to the Duty View in its unvarnished form.

#### *3.1 Losing Proportionality in Punishment*

Consider the case of Dzhokhar Tsarnaev, recently convicted for his part in the 2013 Boston Marathon bombings that killed three people and injured hundreds of others. The Duty View would prohibit punishing Tsarnaev if he were innocent, but is it capable of generating a *proportional* sentence to Tsarnaev given his conviction? I doubt it, unless we so revise our moral convictions as to make irrelevant numerous factors that Anglo-American jurisprudence has consistently viewed as important considerations in sentencing.

For example, in planting the bombs Tsarnaev acted with extreme premeditation. Others may kill on impulse, or after being provoked, or by negligence, or by accident. Retributivism can explain the enormously different sentences imposed in killings perpetrated with these different levels of culpability: a premeditated killing displays a degree of blameworthiness that doesn't exist in a negligent one, for example, and therefore deserves far harsher punishment. On the other hand, Tsarnaev was a teenager, and we are likely to think he therefore deserves a different, lesser sentence than a forty year old career criminal who committed the same crime. These factors have been important to sentencing judges because of their obvious relation to desert. Retributive sentences are straightforward in that way; most retributivists believe that a punishment should reflect the gravity of the crime and the blameworthiness of the perpetrator in committing it. If premeditation, youth, and prior convictions are relevant sentencing considerations under the Duty View at all, there is nothing straightforward about why this is so.

On the Duty View, we impose sentences based on many factors, but most centrally on the factors that governed the wrongdoer's liability to be harmed defensively at the time of his crime. The two primary sentencing limitations are that the harm it inflicts on the wrongdoer not exceed that

which (A) he would have been liable to suffer from the victim defending himself (2011: 347), *and* (B) is warranted for the sake of the net benefit it will produce (333-34). That sets the baseline for the wrongdoer's liability to suffer harm in punishment, which is then adjusted by many factors, including *inter alia* reductions based on repentance (347-48), the passage of time since the crime (347-48), the difference between "eliminative" self-defense and "manipulative" punishment for deterrence (319-320), and the offender's absence of responsibility for the threats his punishment will deter (348).

As to "A", note that this proportionality requirement has little to do with the rectificatory basis that Tadros invokes as the primary ground for liability. The sentence is limited not by what would be required to make the victim whole, nor by what would now be required to avert a new but similar crime against him, but by how much harm the victim was permitted to inflict defensively at the time of the crime. This seems to make the aggressor's liability to punishment dependent on the factors that govern the permissibility of self-defense. Key among them are necessity and proportionality: the defender may use only the amount of defensive force that is necessary to repel the crime and proportional to the gravity of the threat it is defending against. There are other factors that may limit defensive force, but none of them are sensitive to the age, record, or culpability of the aggressor because those factors do not change the moral preference afforded the victim given that one of the two must suffer harm. Nor do age, record and culpability have much bearing on compensation to someone victimized by a crime; whether the aggressor's threat is a product of negligence, recklessness, or design is not at issue, only the degree of harm that must be rectified.

On the other hand, some factors that *are* relevant to self-defense have little obvious bearing on punishment. Most inapt is the self-defense element of necessity. A victim defending himself may use only the amount of force necessary to repel the aggressor, which means that differences in the circumstances – such as the type of weapon the aggressor is using -- will change the amount of defensive force permitted. If one's liability to punishment depends on one's liability to suffer defensive force, punishment may vary greatly among wrongdoers who are identical in every respect except the morally arbitrary circumstances in which they acted. The result will be sentences that, intuitively, seem much too low or much too harsh. Consider as examples:

- A, a bank teller, embezzles V's account. B, a purse snatcher, grabs V's purse. Should A and B's liability to punishment vary according to the fact that V is entitled to use defensive force against B but not A?

- A shoots V and misses, leaving V unaware of his narrow escape. V has no need to defend himself and no right to compensation. Does this have any bearing on whether A should be liable to punishment for attempted murder?

- A threatens V with a knife. V is able to retreat safely and therefore defensive force is unnecessary; but V fails to retreat, parries A's thrust unsuccessfully, and dies. Does the fact that A was not liable to be harmed in self-defense have any bearing on what his liability to punishment should be? In his response to this last hypothetical, Tadros seems to argue that the permissibility of defensive harm does *not* have bearing in that case, but that seems impossible to reconcile with his fundamental argument against desert.<sup>10</sup>

### 3.2 Tadros' Work-arounds

This mismatch between permissible self-defense and proportional punishment should not be surprising. Even if we assume the purpose of both is to prevent crime, the factors relevant to averting a wrongdoer's imminent threat are not the same as those relevant to using a wrongdoer as a means of preventing crimes by other people against other victims at some time in the future. Tadros allows that the "transition from self-defence to punishment may not be entirely smooth," (2011: 348) and develops a number of arguments for departing from the self-defense template he had adopted. The challenge he faces is to change the scope of punishment liability -- expunging the irrelevant factors and incorporating the relevant ones -- while somehow maintaining the self-defense rationale for liability. In my judgment it is a challenge that defeats him: the independent proportionality rationales he marshals become so ad hoc, and so divorced from the self-defense and compensatory grounds that preceded them, that we may wonder what the self-defense template for punishment has accomplished. Some illustrations:

*Punishing environmental crimes* - Most criminal codes include environmental crimes that cause harm without harming any particular person – for example, the intentional killing of the last member of a marine species. Duties of victim compensation can't apply to such a case, so one can't justify punishment

<sup>10</sup> Tadros says that V wrongs A because his defensive force was unnecessary, but that "given his wrongful act he is permitted to defend himself. It follows that there is no asymmetry between liability in self-defence and liability in punishment of the kind that Blumenson's argument relies on." (2015b: 71). This seems to contradict the central argument Tadros used to show that liability to defensive force is justified by the Choice Principle, not by the aggressor's desert. That principle of distributive justice holds that if harm is inevitable, it is better that it befall someone who was responsible for creating the situation than one who is not. In this case, harm is not inevitable given the victim's opportunity to retreat; and when he fails to do so, he is the person responsible for making harm to one of the two inevitable.

by extending the compensatory duty. But Tadros doesn't interpret that fact to bar punishment of such crimes. Rather, he develops some much more direct grounds for punishing them.

On Tadros' alternative rationale, the wrongdoer had a duty to respect the natural environment, and his violation of that duty may give rise to "a duty to protect that aspect of the natural environment from further damage. If the first duty is not owed to anyone, neither is the second.... Hence, it may be permissible to punish [him] to deter others from causing further damage to the natural environment." But the duty not to commit a criminal act applies to *all* crimes, raising the question of why these grounds don't obviate his more complex (and therefore, *ceteris paribus*, less persuasive) primary argument. Why isn't that duty sufficient to ground a protective duty to prevent further such crimes, without relying on a particularized duty to victims at all? Richard Burgh (1997: 316) has made an argument along these lines, characterizing a crime as a social harm that requires the offender to compensate society through punishment.

*Punishing attempts* - Similarly, an attempted crime does not harm a particular victim who has no knowledge of it. If the perpetrator of such an attempt is to be punished, it can't be because of any liability to submit to defensive force or provide compensation to the victim. However, Tadros thinks these crimes *can* be punished because attempted crimes divert police resources and make *everyone* less safe, thereby establishing the attempter's duty to compensate everyone (2011: 326-27). Alexander (2013) has criticized the factual premise of this claim,<sup>11</sup> and Ferzan (2013: 185-86) has criticized its rationale, both because it offers no way to determine what degree of harm a wrongdoer's diversionary act has caused, and because it holds her strictly liable for it. But even if Tadros could answer these critiques, his rationale would still dictate an entirely implausible proportionality calculus. For example, it suggests that attempted drug smuggling should be punished more harshly than attempted murder, given the greater police resources devoted to preventing smuggling.

Since publication, Tadros has turned to a different argument to justify punishing attempted crimes. He argues that it is implausible that "attempting to harm others makes no difference to a person's liability to be harmed as a means...I do not see what argument could be provided for it. Even if we think that causing a threat is very important to ground a person's liability to avert the threat, why should we conclude that attempting to cause harm

11 Alexander (2013: 172) argues that because many failed attempts would go unnoticed but for their criminality, it is "ludicrous to assert that were they not criminalized, they would be causing us to devote security resources away from averting harmful acts."

is insufficient on its own to *make any difference at all* to a person's liability to be harmed?" (2013: 320). Tadros' intuition is clearly explainable on grounds of desert, but given his rejection of that ground, and the inapplicability of Tadros' compensatory theory, I would argue this gets the burden of persuasion backwards, that the argument missing is his own.

*Punishment beyond compensation* - Attempted crimes present one of several difficulties that confront Tadros' effort to justify punishment on the basis of the offender's residual compensatory obligations. As commentators have noted, this basis also produces the unacceptable corollary that wealthy offenders may be able to buy their way out of punishment (Ferzan 2013: 189-91; Walen 2012). Most people would find this unacceptable on grounds of inequality, but because their measure of inequality is comparative desert, that can't be Tadros' worry. His worry is that an offender who does not bear any significant cost in protecting the victim "cannot claim to have fulfilled his rectificatory duty...[f]or he would only have done what he would have had a duty to do independently of his wrongdoing" – the duty to rescue each other from harm if it can be done at little cost (2011: 286). So Tadros annexes an independent basis of punishment liability to the Duty View. He claims that:

our compensatory duties are fulfilled when we have done what is required to rectify the harm that we have caused. The duties that underpin punishment, in contrast, are not...Because I could have been harmed as a means to avert a threat that I posed as a result of my wrongdoing, I may now be harmed as a means to an equivalent degree to avert other threats, even threats of a greater magnitude than the harm that I caused (288, 291; also see 283-91 discussing punishment beyond rectification).

The question is, *Why?* Tadros offers two rather vague answers. The first is the analogical argument that because a guarantee of compensation does not obviate the prohibition on tortious conduct in advance, *ex post* compensation does not fulfill the offender's duties either (2015a: 82-83). But this analogy works only if the reason compensation is insufficient *ex ante* also applies *ex post*,

and it doesn't. That reason depends on the act not having occurred: at that point, compensation is second best to preventing the tort to begin with. *Ex post* no such preference exists. In fact, there can't be a preference as to type of remedy, because both the compensatory and further duties are paid in the same currency - protection from future crime.

The best we get is the discussion of a hypothetical -- *Three Threats*, described below<sup>12</sup> - that suggests that committing a crime subjects the wrongdoer to conscription as a utilitarian means for crime control. Tadros' grounds are that (1) the victim is in serious danger, (2) the offender is harmed to no greater degree than he is liable to be harmed to avert the threat he imposed, and (3) he could have avoided that liability simply by refraining from his wrongful act (2013: 303, enunciating these reasons for the Three Threats conclusion; 2011: 291). But these grounds prove too much twice over. The first difficulty is that these grounds cannot distinguish between using wrongdoers to prevent crime and using them to supply organs or fulfill other important social needs. In order to avoid making the offender fair game generally, Tadros offers some exceptions to the above rationale; whether these exceptions are persuasive I leave to the reader to consider.<sup>13</sup>

12 In *Three Threats*, Tadros imagines that Bob has propelled a boulder that will injure Jane. On the Duty View, Jane would have been permitted to harm Bob to Y degree in order to stop the boulder, but the boulder is unstoppable. She can, however, use Bob to divert either Boulder 2 or Boulder 3, each of which have been pushed towards her by others. If she uses Bob to avert Boulder 2, she will avert the same degree of harm that Bob's boulder will cause, at minimal injury to Bob. If she uses him to avert Boulder 3, she will avert twice the degree of injury that Bob's boulder will cause, but Bob will be much more badly injured, though in an amount less than Y (2011: 289). Tadros argues that it is strongly intuitive that Jane may use Bob to avert Boulder 3, even though using him to avert Boulder 2 would fully satisfy Bob's compensatory obligation with less injury to him (291).

13 Tadros says that certain kinds of punishment will always exceed the offender's liability. On his account, even if an offender was subject to lethal defensive force at the time of the crime, capital punishment is impermissible given the passage of time and the difference between eliminative and manipulative harm (2013: 308). What about the non-lethal harm of organ removal for transplantation? Tadros rules this out as well on the following grounds: (1) "It is wrong to harm a person to tackle a problem that is utterly different from criminal offending." (2011: 354). Whether a particular punishment is excluded thus depends on what kind of differences matter and why, but we get no more than the conclusory term "different." Without a definition, the criterion cuts both ways: others would find the difference between (a) harming a wrongdoer to defend against his aggression and (b) harming him to deter the aggression of others sometime in the future sufficient to make the latter impermissible. (See Quinn (1985). (2) "It may be that there is something special about organ distribution.... Perhaps using a person's organs is a particularly pernicious way of using a person..." (2013: 309). But again, without specifics we are hard-pressed to explain why incarcerating a person regardless of his desert is not similarly pernicious. (3) Institutional reasons to constrain punishments: for example, the likelihood that the institutions administering transplant punishments will act unfairly, the availability of less draconian but equally effective alternatives, and the expansive tendencies of criminal justice systems (2013: 308-09). Notably, however, all three grounds may easily apply to exclude prison sentences as well.

The other way that Tadros' reasoning proves too much is that it seems to leave the duty of compensation superfluous. Its justification reaches all the punishments that were previously grounded in the compensatory duty. The latter now seems beside the point - as arguably it should be, given that a victim may be fully compensated through the civil system.

Let us consider a different explanation for the intuition that wrongdoers have an extra-compensatory duty to deter crime by their own punishment. Daniel Farrell (2015) has argued that this putative requirement must be a duty of retributive justice; Tadros disputes this on the ground that "retributivist views of punishment are not grounded in duties of offenders, or the relevant duties have nothing to do with protection." (2015a: 81)

I believe Tadros is right to deny that this additional duty constitutes the pure form of retributivism that requires the infliction of suffering on offenders, because his theory prohibits doing so solely for that purpose. But I find it difficult to view his claim as plausible except as an implicit if diluted version of the negative retributivist theory I argue for in the following section – the view that desert is a necessary but not sufficient condition for punishment. On the Duty View, the offender has a duty to exceed compensation to the full extent of his liability to be harmed, but this duty should only be enforced if some utilitarian benefit will accrue. And on what basis does that duty exist? Not on the basis of either utility or compensation, because the duty exists apart from both. In the absence of some other specification by the author, it seems that the duty persists beyond full compensation because the offender deserves to suffer the additional burden. That seems to be the best explanation for Tadros' statement that assailant Jake still owes something after he has fully compensated his victim Sally: "If Jake manages to benefit Sally at little cost to himself, we will have a sense that he has 'got away' with his crime." (2011: 289).

#### 4. THE INEXORABLE SIGNIFICANCE OF DESERT

I have just argued that the Duty View generates highly counter-intuitive instructions to a sentencing authority unless modified beyond recognition, and that retributivism offers a better account of the factors that must inform the proportionality calculation. This should count heavily against the theory *unless* its retributivist rival is itself lacking in some greater way. So we must assess the comparative strength of the retributivist alternative and Tadros' arguments against it.

Tadros argues that retributivism is not an option because it is both false and incoherent, and what intuitions seem to support it can be better explained



in other ways. His central objection, and the one I shall explore here, is that retributivism rests on a false premise – the premise that a wrongdoer’s suffering is intrinsically valuable to the degree it is deserved (2011: 26, 45).<sup>14</sup> But there are many retributivisms, and only some of them depend on that premise.<sup>15</sup> Therefore Tadros’ critique cannot establish the Duty View’s comparative advantage over retributivism *tout court*.

More specifically, Tadros’ definition does not encompass retributivists who believe that punishing criminals is at least sometimes a duty of justice, a claim I shall argue in part 4(B). Nor can it apply to the prominent version known as negative retributivism. Negative retributivists do not believe that the state *should* punish a criminal to the extent she deserves. Rather, they believe that the state *must not* punish the innocent, nor punish the guilty beyond what they deserve. For them, desert is a necessary but not sufficient condition for punishment; therefore punishment is justified only if there is also an additional, non-retributive basis.

Negative retributivists quite clearly do not believe that the “goodness” of deserved suffering requires the punishment of a criminal, and there is no reason to think they believe such suffering is good at all. *But desert is still the central element in their theory*: its absence bars punishment, and its presence places an upper limit on the permissible sentence. Negative retributivism illustrates the error in Tadros’ argument: one can’t eliminate the importance of desert to sentencing by showing that deserved suffering is, like all suffering, bad. We can believe this but also believe that the infliction of suffering in proportion to desert is sometimes justified as a necessary evil.

There is a reason Tadros dismisses negative retributivism, but not, I think, a good one: he believes there can be no such thing. He claims that by its terms, retributivism provides a putative reason to punish the guilty but no reason at all against punishing the innocent, or against punishing the guilty beyond what they deserve. He further argues that if it did protect the innocent, the idea would be incoherent. The next section challenges these two claims. Following that, section 4(B) shows how a broader non-consequentialist theory of punishment might justify both a limit on punishment (through negative retributivism) and an affirmative duty to punish (grounded on other considerations of justice), as one example of a theory incorporating desert that is not subject to Tadros’ critiques. I suggest that this theory is more compelling than the Duty View, given its superior ability to account for our considered sentencing judgments and its greater

<sup>14</sup> More precisely, Tadros believes that only a retributivism built on that premise would be weighty enough to justify an incarcerative system of punishment.

<sup>15</sup> Those that do include the theories argued in Moore (1997) and Kirshnar (2000).

coherence as a theory.

#### *4.1 Desert as Prerequisite: Is Negative Retributivism Possible?*

Retributivists disagree about whether their theory commands punishment of the guilty or only permits it, but it seems *all* retributivists believe that their theory bars punishment of the innocent, and consider this a unique and powerful point in their favor. Remarkably, this is precisely the opposite of Tadros' novel rendition of retributivism, which to him constitutes only a sword, not a shield. This follows, he says from "the very simple truth that the existence of a reason to do something does nothing to exclude the possibility that the thing (and more) could not adequately be justified on other grounds." (2011: 36; also see 35-7, 312-13). He claims that only the Duty View protects the innocent from punishment.

The oddity is that the basis for Tadros' claim that the Duty View bars punishment of the innocent is identical to the reason retributivism purports to do so. That reason is the Means Principle. The claim in both cases is that only the guilty may be punished consistent with the Means Principle - either because only they deserve it (according to retributivists) or because only they have a protective obligation the state may enforce (according to Tadros). Given the parallel structure, there are no good grounds to claim, as Tadros does, that the Duty View bars punishment of the innocent but retributivism does not.

Perhaps Tadros believes that the Duty View includes the Means Principle, while the retributive view does not. But why should he think that? The retributivist tradition since Kant has most centrally embodied respect for the right of autonomous individuals to choose their ends for themselves, a constraint that restricts punishment to those who will it on themselves by their own blameworthy acts.

Tadros (2015b: 59) also argues that if negative retributivism did protect the innocent it would be incoherent because desert necessarily cuts both ways:

I think that 'X deserves O' implies that there is good reason for X to get O irrespective of any further good that will be secured if X gets O. If so, there is no such thing as negative desert in Blumenson's sense.

A negative retributivist may believe it bad (or unjust) for someone to get what he doesn't deserve without being logically committed to the view that it is necessarily good (or just) for him to get what he does deserve (Wasserstrom 1978: 309-10). But let us assume that Tadros' first proposition is correct. His second sentence would not follow from it if any one of the following is true:

- I. A reason may be overridden. An offender may deserve punishment, and this may entail that punishing him is good in one way, but

the net costs of punishment may be so great as to foreclose it. Here's an analogy: equality is intrinsically good in one way; if achieving it would require redistribution that left everyone almost as impoverished as the worst off were, doing so may be bad in a greater way; therefore, whether states should aim for equality in any particular case is contingent on the costs and benefits it would produce.

- II. A moral side-constraint might bar the state from aiming to cause offender suffering even when deserved. That constraint would not rule out state punishment for other reasons.
- III. Even if "X deserves O" entails that X should receive O, desert will not require punishment if "O" signifies "forfeiture of a liberty right" rather than "punishment." The question here is whether one can deserve to lose a right by his blameworthy actions, and surely it is at least coherent to think one can. Some of one's rights may be contingent on respecting the rights of others. Alternatively, blameworthiness may be the fairest criterion for the distribution of individual punishments when a punishment regime will produce enough benefit to be justifiable. There is nothing unintelligible or inconsistent in recognizing both a moral prohibition on punishing the blameless and a humane directive to impose punishment on the guilty only when something would be accomplished by doing so.

Rights-forfeiture theories differ over what rights a criminal forfeits by her conduct. Depending on the theory, she might retain rights against punishments that serve no utilitarian benefit, or inflict pain, or are imposed by vigilantes, for example (see Wellman 2012). There are many versions, but to qualify as a form of negative retributivism, the forfeited right against punishment must be limited to punishments proportional to the offender's desert.

#### *4.2 Beyond Desert: Why Punish?*

The second and third interpretations conceive negative retributivism as a matter of principle – one that limits who may be punished and by how much – but by itself provides no reason to punish anyone. If there is to be any punishment at all, negative retributivists must look to some other theory that provides an affirmative reason to impose punishment on an offender. Many negative retributivists find that reason in the utility of punishment as a crime-preventive deterrent. That hybrid view parallels Tadros', except that the permissibility of punishment is grounded in desert rather than a forward-looking remedial duty.

But there is powerful intuitive support for another reason to punish as well: as Tadros notes, most people believe that “something is amiss when a serious wrongdoer is not punished,” even in the absence of deterrent value (2011: 276). In this final inquiry, I add this conviction to the mix and ask whether it weighs for or against either theory.

If we credit this intuitive conviction as roughly reflecting some moral truth, we must ask what exactly *is* amiss. Tadros thinks it is the fact that “offenders who are not punished have a duty that is unfulfilled.” (276). The retributivists he targets believe it is the failure to inflict suffering on wrongdoers who deserve it. One might argue that a negative retributivist who rejects both views, as I have, can’t explain this intuition and that this should count heavily against his theory. There are two rejoinders. First, even if true, that criticism would not count against the theory in a pair-wise comparison with the Duty View, which itself leaves a wrongdoer unpunished when deterrent value is lacking. Second and more importantly, a negative retributivist *can* answer that challenge because, unlike Tadros’ theory, nothing prevents him from combining a desert-based limit on punishment with a non-utilitarian rationale for imposing it.

Here is a rudimentary sketch of one possibility: a hybrid theory that asserts as state deontological obligations (1) a prohibition on inflicting undeserved punishment, and (2) a responsibility within that limit to impose punishment when required as a matter of justice to the victim. (Whether utilitarian benefit is also a reason to impose a permissible punishment is a separate question.) The intuitive appeal of the second element is currently illustrated by the demands for “justice for Michael Brown” by residents of Ferguson, Missouri, following a grand jury’s failure to indict the police officer who killed him, and by the startling number of similar cases since. What is “amiss” in such cases, and in a state’s refusal to sanction any grave crime, is the injustice that inflicts upon the victim: the devaluation for a second time of someone who has already been treated by the perpetrator as no more than an instrument to his ends. For George Fletcher, this constitutes state complicity in the crime that leaves “the victim’s blood...on our hands.” (Fletcher 1995: 6, 205; also see Hampton 1992: 1684, 1692; Burgh 1987). Complicity may be too strong, but at the least, such state inaction betrays the protective role that largely underwrites its own legitimacy, and treats the victim as an outcast.

On this account, the state’s obligation to punish crime derives from the injustice it does to victims when nothing is done. But to be clear, this rationale for punishment is a qualified one: punishment is not the obligation, only a means of fulfilling it, and whether other means may also do so is necessarily

dependent, at least in part, on the social meanings that prevail in a culture.<sup>16</sup> In ours, many people believe that a long term of imprisonment is the only way of taking victimization seriously. Yet it is possible to imagine a cultural shift towards less draconian methods, such as fines, community service, house arrest now enforceable through the use of GPS ankle bracelets -- and even non-criminal restorative justice resolutions, in which case this justification for punishment would dissolve.

To be sure, the Duty View is also concerned with justice to the victim -- unlike the prevailing punishment theories, which neglect the victim as an independent subject of justice<sup>17</sup> -- but its conception of justice is quite different, and is contingent on its crime-prevention utility. Tadros believes that the state's obligation to repudiate crime and vindicate its victims can't justify punishment, (2011: 87-8, 91-2, 107, 109; 2013: 255) and argues that because a victim's moral status "is incapable of being eroded through wrongful action....it is difficult to see why the obligation to protect people against lack of respect is very significant in itself" (2011: 108).<sup>18</sup> But this misses the real stakes involved in a state's response to victimization, and leads Tadros to severely underestimate its importance. What is involved is not merely the wrongdoer's violation of a victim's inalienable moral status, but the very *existence* of the victim's civil status as a member of the political community. In the United States, it is unconstitutionally cruel and unusual punishment to strip a person of "his individual status in organized society".<sup>19</sup> A state that ignores crimes against its citizens withdraws that status.

There are other hybrid theories, of course. H. L. A. Hart's distinction between the utilitarian "general justifying aim" of punishment and a desert-based distributional constraint is perhaps the most influential among many (Hart, 1968: 8, 10). The only point here is to demonstrate the inexorable significance of desert in punishment as a restriction on its permissibility, and its compatibility with a range of affirmative rationales

16 A further, necessary question, of course, is whether any particular cultural take on the requirements of justice may be morally unacceptable. Where permissible cultural diversity ends and moral imperatives begin is a vexing problem, and one that increasingly confronts institutions of global justice. For the International Criminal Court, that issue takes legal form as the question whether non-criminal, transitional justice alternatives are sufficient to bar ICC prosecution under its complementarity principle. Rome Statute of the ICC, Art. 17, UN Doc. A/CONF. 183/9 (July 17, 1998). Over time, ICC decisions on the issue will define minimum requirements for criminal justice systems throughout the world.

17 Consequentialism is concerned with the collective benefit, presumptively leaving the victim with no greater significance than any other individual; retributivism classically treats justice to the victim as if it were a mere by-product of, or necessary identical to, the punishment that is required to treat the offender as she deserves.

18 See also 2013: 277-79, in which Tadros rejects Adil Ahmad Haque's claim that punishment can be justified because we owe it to the victims; see Haque 2013.

19 *Trop v. Dulles*, 356 US 86, 101-102 (1958).

for punishment. What's fatally counter-intuitive in the Duty View is its exclusion of any direct role for desert as a prerequisite to the permissibility of punishment.

## CONCLUSION

I have argued that the Duty View is unpersuasive as a theory of punishment, and that an alternative theory – one that recognizes both a defendant's right against undeserved punishment and a victim's right to vindication – comes closer to a point of reflective equilibrium in which principles, theories, and intuitive judgments cohere and support each other rather than forcing us to choose among them. Yet what a fruitful thing it is for the philosophy of punishment that Tadros has made his case for the Duty View! There are not many works within the field that cover so much criminal law ground with such originality, and even fewer with the potential to stimulate a new wave of thought on numerous issues in the field.

And, it is to be hoped, not just in the realm of philosophy. One of the gifts of a theory of punishment as imaginative and revisionist as the Duty View is that it allows us to view our correctional policies through a new lens, rethink old choices, and discover alternative routes to security that don't always go through a prison gate. *That* route, which the United States has traveled for the last half century, has left us with over 2.2 million prisoners and the distinction among nations of imprisoning the largest percentage of its population, five times the world's average (Bureau of Justice Statistics 2012: 3). Tadros asks us why, and what we have to show for it. His approach presses us to take the suffering of inmates seriously as a central moral element in punishment, and in so doing, to consider alternatives. For consequentialists, retributivists, policy-makers, judges and others who long for a morally defensible criminal justice system, that is the best place to start.

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# Response to Blumenson

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## Abstract

This paper defends some of the central claims in *The Ends of Harm: The Moral Foundations of Criminal Law* against challenges by Eric Blumenson.

**Key Words:** Punishment, duties, retributivism, desert, proportionality

## INTRODUCTION

I am very grateful to Eric Blumenson for his thoughtful, insightful and wide-ranging essay engaging with my book *The Ends of Harm: The Moral Foundations of Criminal Law* (hereafter, *Ends*). Blumenson makes many points which he thinks count against the Duty View of punishment (DV) that I defend in *Ends* which need careful thought. I won't attempt to address all of his concerns. I will focus on those objections which I think he finds more telling, and where I have said less to defend the view outlined in *Ends*.<sup>1</sup>

Before continuing, let me clarify one feature of the general moral and political view outlined in *Ends* that Blumenson briefly engages with. Blumenson suggests that the account of *the means principle* in ends is so strict and wide ranging that it implies a form of libertarianism akin to that defended by Robert Nozick in *Anarchy, State, and Utopia* (Nozick 1974). I would like to clarify the similarities and differences between my approach and Nozick's.

I have some sympathy with Nozick's general methodological approach to political theory. Like Nozick, I think that the duties and constraints on state action are to be defended in the light of a more basic set of moral principles that govern individual interactions with each other. The state, and the principles that govern it are not, I think, *sui generis*. Nozick's account is more directly reliant on a set of rights than that defended in *Ends*. Nevertheless, otherwise there is a broad similarity between us with respect to methodology.

<sup>1</sup> I have responded to some points that are similar to those advanced by Blumenson in Tadros 2012, 2013 and 2015.



Furthermore, like Nozick, I think that there is a constraint on compelling some people to provide for others – the constraint on using some as a means to the good of others. Where Nozick and I differ, though, is in our understanding of the content of these rights and duties. Nozick was much more skeptical than I am about enforceable positive duties, and this feature of his moral theory is central to his defence of libertarianism.<sup>2</sup> In contrast, I believe that there are enforceable positive duties. The scope and stringency of these duties may depend on a number of factors, including the extent to which people are mutually engaged in cooperative beneficial activities. I do not provide a full account of the scope and source of positive duties in *Ends* – I leave that as an open question, even though it has implications for criminal justice. Nevertheless, my account of *the means principle* emphasizes the limits of that principle in a way that Nozick’s account does not.

This provides the possibility of broad ranging social provision and development aid, depending on the scope of domestic and international moral obligations. My own view is that positive enforceable duties are quite extensive, and hence I believe that we have powerful obligations of these kinds that can be enforced by the state.<sup>3</sup> This also helps to address one of Blumenson’s concerns – he thinks that relying on the ‘duty of easy rescue’ to secure the permission of the state to punish offenders is inadequate because individuals do not have a very powerful duty to transfer their compensatory rights to the state to ensure that other people are protected from offending. I doubt that this is right. This is so in part because victims of crime are provided with substantial benefits from a system of punishment. Requiring them to allow the state to have control over their punitive rights is not typically onerous (on the contrary) and any cost that they bear as a result is more than compensated for by the benefits they are provided with.

Blumenson also complains that funding health care and occupational safety would, on this view, depend on the existence of duties to provide these things through the state. But it is highly plausible that the provision of these things does depend on such duties – when we fail to provide adequate health care or occupational safety, or for that matter adequate security from crime, we fail to do what justice requires, and hence we fail to satisfy our duties to others. When we provide health care beyond these limits, the appropriate complaint does seem to be that citizens do not owe this level of health care to each other. If the state fails to demonstrate that we owe some level of health care to each other, it has failed to justify that level of health care.

2 Nozick 1974, especially 30-3.

3 See, also, Tadros 2011b.

I think, therefore, that the provision of social justice depends on citizens underlying duties to each other. This is not a libertarian view, at least if libertarians are committed (as Nozick was) to the non-existence of general enforceable positive duties.

## 1. METHODOLOGY

Blumenson thinks that the fact that there are many duties, with uncertain scope, involved in DV provides some reason to reject that view. This is not a reason to reject DV. If these duties exist, we ought to try to fulfill them. It may be that we are likely to fulfill them only approximately, but that fact does not free us from these duties. In any individual life, many of us are confronted with a wide range of duties, some of which are in conflict with others. We have many complex duties as parents, children, professionals, friends, and simply as human beings, and it is often difficult to know whether we have fulfilled these duties. We are likely to do so only approximately at best. This fact hardly frees us of these duties, or makes them irrelevant to the way we live our lives.

Blumenson also thinks that the fact that DV has many steps should incline us against it. The success of the argument for each step, he suggests, is necessary for the success of DV. Even if we have a great deal of confidence in each step in the argument, our confidence in the conclusion should be limited if there are many steps in the argument.

Unfortunately, Blumenson's argument would rule out being persuaded by any philosophical argument that relies on many steps, even where we have very powerful reasons to endorse every step in the argument. It is difficult to accept this conclusion. Furthermore, *any* particular moral claim relies on the truth of many other controversial claims – for example claims about moral claims. Blumenson's argument would thus lead to more general skepticism about all particular moral claims.

Finally, Blumenson's argument makes philosophical argumentation too easy. Consider the truth or falsity of act utilitarianism. Act utilitarianism is false if any non-act-utilitarian claim is true. There are many non-act-utilitarian claims. Even if we have very low levels of confidence in any particular claim, Blumenson's view implies that we ought not to endorse act utilitarianism in virtue of the fact that there is some relatively high probability that one of these claims is true. I take it that this argument against act utilitarianism is not valid – to show that we ought not to accept act utilitarianism, we ought to demonstrate that we have confidence in some particular claim that is in conflict with act utilitarianism.

It is also worth noting that some of the steps in the argument provided in *Ends* are not necessary to justify punishment generally – they justify punishment of particular people for particular purposes. For example, I defend the view that it is sometimes permissible to harm a person as a means to avert threats to people other than their immediate victims, even when they are not responsible for posing these threats. If the argument for this claim fails, punishment may still be justified in many cases. It will be justified in cases where offenders, through their offending, create threats to others. This will sometimes be so, because by offending they may undermine the effectiveness of the criminal law. It will also be justified in cases where punishing the offender helps to protect the victim from future offending. I don't find these limits on punishment plausible, and I argued for a more expansive view. But the question under consideration is not about whether we should accept DV, but rather about what version of DV we should accept.

## 2. BLUMENSON'S ALTERNATIVE

As punishment is difficult to justify, we should not be surprised that an argument for punishment has many steps to it. Take Blumenson's justification of punishment. One idea amongst many controversial ideas that Blumenson relies on, in defending his negative retributivism, is that punishment of the innocent is ruled out by something like the following principle:

*Negative Desert*: It is permissible to use D as a means to the good iff D deserves to be used, and in virtue of this fact.

*Negative Desert* is not a very clear principle. We need to know what desert means, and there are many possibilities. We also need to know what it means to deserve something 'negatively'. I have some doubts that we can make good sense of negative desert in this sense. Like many friends of desert, I think that 'X deserves O' implies that there is good reason for X to get O irrespective of any further good that will be secured if X gets O. If so, there is no such thing as negative desert in Blumenson's sense.

*Negative Desert* is not a coherent view, I claim, because it is a fact about desert, as I understand it, that if D deserves O, the value of giving O to D does not depend on any further value that giving O to D will secure instrumentally. *Negative Desert* is in conflict with this claim about desert. It makes the reason to give D O depend on something external to D getting O – that O is a means to some further good. Hence, it is not a view about desert, as I understand it. Perhaps Blumenson has a different conception of desert in mind in *Negative Desert*. Without an account of that conception, I continue to find *Negative Desert* confused.

My suspicion that Blumenson's view is confused was strengthened by his response to the incoherence objection. There Blumenson swithers between two different views. On the one hand, he seems to accept that desert implies that there is a positive reason to give D O, but a reason that can be outweighed. This view accepts that it is intrinsically valuable to give D what he deserves, but that this value can be outweighed. But this view is in conflict with Blumenson's denial that retributivists are committed to the view that it is intrinsically valuable that offenders suffer the burdens of punishment. All sensible retributivists claim that the good of offenders getting what they deserve can be outweighed. So this view is just accepts positive desert, with all of its difficulties.

Another view is the 'rights forfeiture' view. D, this view claims, loses his right against being punished in virtue of having acted wrongly. This view is not best seen as a form of retributivism at all. One reason is that rights forfeiture does not depend on desert.<sup>4</sup> A second reason is that it is not clear how desert adds anything to a rights-forfeiture view. Rights-forfeiture views of punishment claim that punishment may permissibly be inflicted to serve certain ends on condition that a person has forfeited her right against such treatment. They then argue that a person forfeits her right against such treatment by acting wrongly. It would add nothing to such theories also to claim that wrongdoers *deserve* to lose these rights. The language of desert adds nothing substantial to rights-forfeiture theory – it is not even clear what it means to deserve to lose a right.

DV is a version of a forfeiture view. So if, by negative desert, Blumenson simply means 'rights forfeiture', we are roughly in the same camp. But traditional rights-forfeiture views of punishment are superficial – the idea that wrongdoers lose rights is, of course, true on any justification of punishment. What needs explaining is why offenders lose their rights against being harmed as a means to the ends of punishment. Claiming that they have lost their rights to be used in this way is a conclusion that needs defending.

The duty view offers a defence of this claim: it suggests that wrongdoers lose their rights against being used for the ends of punishment because they incur duties to serve these ends. I also claim that nothing, or almost nothing, else is sufficient – a person loses her right not to be used to serve an end, I claim, only if she has a duty to serve that end, or would have such a duty were she able to pursue it. Blumenson does not show that this view is false. If Blumenson wishes to defend a rights forfeiture view of punishment, he ought not to refer to desert. The idea that D has forfeited her right against being treated in a certain way does not depend on desert. If he rejects the

4 See, for example, McMahan 2009: 8-9.

kind of rights forfeiture view defended in *Ends*, he should supply an alternative explanation how wrongdoers lose their rights against being punished.

Furthermore, any convincing and complete account of rights-forfeiture will be controversial. A rights-forfeiture theorist needs both to provide an account of why people lose rights, and an account of the extent to which they lose rights. One reason why the argument in *Ends* is complex is that it attempts to make substantial progress with both questions. Simple rights-forfeiture views seem comparatively simple, but that is only because they avoid making progress with the difficult questions about why people lose rights, and the extent of the rights they lose.

Let's suppose that there is such a thing as negative desert. Let's suppose that there is such a thing as negative desert. Like DV Negative Desert relies on very controversial premises if it is to play the role in the justification of punishment that Blumenson wants it to play. Defending some particular account of desert against others will be controversial. This is obviously so as there are many different claims that friends of desert make about the nature of desert.<sup>5</sup> Furthermore, any interpretation of *Negative Desert* is extremely controversial. Even if there is such a thing as negative desert, it is not uncontroversial that we can deserve to be used. It is not uncontroversial that anything like criminal wrongdoing is the desert basis for being used. And it is not uncontroversial – in fact it is clearly false – that it is only permissible to use a person as a means to the good only in virtue of the fact that the person deserves to be used. That this is clearly false is demonstrated by the fact that we can mount relatively uncontroversial arguments for the permissible using of others without relying on desert.

*Negative Desert* is by no means the most controversial element of Blumenson's view, though. It relies on another claim: that the state has an obligation to punish wrongdoers even when this will produce no net social benefit 'when this is obligatory in order to fulfill the state's social contract obligations to the victim because no less draconian route is sufficient to do so'.

This element of Blumenson's view also relies on many controversial claims, and so is vulnerable to Blumenson's own argument. It relies on the success of following argument:

The state has social contract obligations to victims.

These social contract obligation that the state owes to the victim require the state not to ignore wrongdoing.

<sup>5</sup> Even within the camp of the intrinsic goodness desert view, there is an enormous range of possibilities, many of which have gone unnoticed. For an exhausting, but perhaps not exhaustive, exploration of many of them, see Kagan 2012.

If serious wrongdoing is not punished, the state ignores wrongdoing.

Therefore the state must punish serious wrongdoing.

This argument is even more controversial than *Negative Desert*. First, the social contract tradition is extremely controversial. I doubt that state obligations are grounded in social contract obligations. More importantly, it is not clear why the state, in failing to punish, necessarily ignores wrongdoing. There are many different non-punitive responses that the state might make to wrongdoing that would demonstrate that the state takes wrongdoing seriously.

Given that punishing offenders is necessarily burdensome to the offender, but not necessarily burdensome to the state, it is also not clear why punishing offenders is sufficient to demonstrate that the state takes wrongdoing seriously. If I want to show that I take something seriously, it is I that should demonstrate a willingness to bear burdens for the sake of that thing. In punishing offenders, the state only demonstrates that it is willing to burden someone else – the offender. This may simply show that the state does not care much about the offender, not that it takes the wrongdoing seriously.

Furthermore, it is not clear that by refraining from punishing a person who has committed a serious wrong against the victim the state withdraws the status of citizens as valued members of the political community, as Blumenson claims. To demonstrate its commitment to the victim, the sensible thing to do is to help the victim. Punishing the offender may be one way to help the victim. The argument in *Ends* is intended to demonstrate that. But it is not the only way. The victim could be helped by being provided with extra protection by the state, or by being compensated in other ways. And the state could publicly express the importance of the victim, and educate its citizens about how terrible it was that the victim suffered in the way that she did. None of this requires punishing the offender. If the state does these things, is it really true that the state devalues the victim or denies his civic personhood?

So spelling out and defending *Negative Retributivism* requires an argument with many steps in it. As we have reason to doubt each of these steps (in my view, decisive reasons to reject some steps), Blumenson's 'diminishing returns' argument, if successful, defeats his own view as well as mine.

Blumenson responds that an argument with multiple steps is more credible if its conclusion is independently intuitively attractive. He thinks that negative retributivism is intuitively more attractive than the duty view. I don't find retributivism intuitively attractive. Blumenson's version seems unclear. Negative retributivists can simply assert that those who we

intuitively think ought to be punished lack a right against being punished. But then the theory does little more than reporting our considered convictions about punishment rather than explaining them.

More standard retributivist views are also unclear, and seem barbaric. Few claims need more careful defence than the claim that it is impersonally valuable that wrongdoers suffer. Though some people believe this claim, it is not by itself intuitive – it rests on the idea that suffering and harm are sometimes to be sought for their inherent properties, and many recoil at this thought.

Furthermore, I don't think that the explanation that DV gives for the permissibility of punishment is intuitively unattractive. First, the vast majority of people, when asked why we punish offenders, cite prevention as the aim. DV offers an argument why it is permissible, subject to certain constraints, to harm offenders to secure this aim. But the aim that DV advocates is familiar and attractive. Secondly, the idea that offenders may permissibly be used to secure this aim in virtue of their wrongdoing is attractive. DV then gives an answer to the familiar objection that offenders may not be used merely as a means to secure this aim – that offenders can be expected to serve the end of protection in virtue of having acted wrongly. This is the most original part of DV, but I don't think that the response to the objection is itself unintuitive.

### 3. OTHER WAYS OF FULFILLING THE DUTY

DV relies on the idea that the permissibility of punishing offenders is grounded in the (primarily protective) duties that offenders incur as a result of their wrongdoing. Blumenson, in challenging *Step 6* of his summary, argues that it is a weakness of DV that this would allow uneven punishment of offenders in cases where offenders have discharged the protective duties that they owe to their victims in other ways. I think that this implication of DV is one of its strengths.

#### 3.1. *Who Gets to Decide*

One question that Blumenson raises, that has also been raised by Kim Ferzan, is why the state should be in a position to decide how the duty that the offender owes to the victim is satisfied.

Ferzan raised the following objection to DV. She argued that if the offender owes a duty to the victim, it is for the victim to determine what the offender does for her. If she wants protection, she can secure protection from him. If she wants her car washed, she can secure that end (Ferzan 2013). In response, I

argued that it would be wrong for the victim to impose any significant harm on the offender for the sake of her car. The offender can be harmed for the victim's sake only if any harm imposed on him is proportionate to the end sought (Tadros 2013).

Blumenson does not think that this obviates the problem that Ferzan raises. I do not see why. The first thing to note is that offenders obviously do owe very stringent duties to the victims of their wrongdoing. Blumenson's challenge of explaining how these duties can best be fulfilled is thus quite general. If punishment does not vitiate these duties, offenders retain them. If Blumenson thinks that offenders retain these duties, how does he think they ought to be fulfilled? Does he think, for example, that after the offender is punished, the offender may nevertheless be seriously harmed again for the sake of the victim?

Nevertheless, we should meet the challenge posed by Blumenson. Why does Blumenson doubt that DV can meet it? It is not completely clear, but perhaps Blumenson believes something like this: if D owes a duty to act for the sake of V at some cost  $n$ , V may impose  $n$  on D for any end whatsoever. This view, though, is not credible. It is not generally true of duties. For example, the fact that I have promised to deliver a television to your house implies that I must bear the cost of driving to your house. That, though, does not imply that you may impose on me the cost of driving to your house for some other end.

The most important restriction on the duty imposed on offenders is that any cost that the offender is compelled to bear must be proportionate to the end sought. For example, if D kills one of V's children, it is plausible that V can kill D as a means to protect another of V's children if that is the only way to protect the second child. This is so in virtue of the stringent protective duty that D incurs to V, and to V's child. This does not imply that it would be permissible for V to kill D for fun, or to use D's skin to make a handbag, for the harm imposed on D would be disproportionate to the good of having fun or getting a handbag. Hence, if the victim has a right to decide how the duty that the offender owes to her is satisfied, she has a right to decide only within a certain range of goods that are sufficiently important to justify the harm imposed on the offender.

Now, there might be some circumstances in which the victim does have a right to decide, and the state would act wrongly in making the decision for her. For example, suppose that both V and X, who is V's husband, are now threatened with death. D can be used as a means to protect either V or X but not both. It is plausible that V is permitted to determine whether to use D to protect V or to protect X. It follows that it would be wrong for the state to use D to protect V if V would prefer that X be protected. Needless to say,



though, the fact that it would be wrong, in these circumstances, for the state to decide for the victim does not militate powerfully against DV, for these circumstances very rarely arise.

It is also worth noting that the state does sometimes give the victim control over how the offender's duties are satisfied. For example, it is common in restorative justice programs to provide the victim with an opportunity to decide what the offender should do in response to having offended. Within some limited range of options, this will sometimes be appropriate.

In determining whether the state or the victim ought to decide how D's duty is satisfied, we must also bear in mind a number of other factors that count against victims making decisions. First, if victims are entitled to make decisions about how the offender's duty is satisfied, they will be at risk of coercion from offenders.<sup>6</sup> Secondly, victims, who will often feel resentment towards offenders, may be inclined to seek retribution by imposing heavier costs on offenders than necessary. Thirdly, the victim owes duties to other citizens, including protective duties, and she may be required to select a particular way of satisfying the duty that the offender owes to her because this will best satisfy these protective duties.<sup>7</sup> Fourthly, if the state punishes the offender, certain other values, such as communicative values, can be advanced, and this provides some reason for the state uniformly to determine how the offender is punished. If the victim does not have a strong reason to prefer that the duty that is owed to her is satisfied in one way rather than another, it is permissible to ensure that the duty owed to her is satisfied in a particular way to advance other values.

Overall, the idea that the victim should have complete choice over how the offender's duty is morally abhorrent, unrealistic and impractical. Hence, the fact that victims typically have a right to determine how the duties owed to them are satisfied is not a significant challenge to DV.

### *3.2 Duties and the Wealthy*

The second part of Blumenson's challenge concerns wealthy offenders. There are three features of this challenge that should be separated. One question is whether it is plausible that wrongdoers who have taken on burdens for the sake of their victims ought nevertheless to be punished. DV implies that if these burdens are sufficiently large they ought not to be. A second question concerns the relationship between punishment and compensation.

<sup>6</sup> See, also, the discussion concerning giving the victim control over prosecution decisions in Tadros 2011a: 296.

<sup>7</sup> See Tadros 2011a: 297-9.

Does DV deny the victim the right to seek monetary compensation from her offender? A third question is whether DV has plausible implications for the punishment of the wealthy, who may have the means to provide a great deal of protection to others at little cost to themselves.

To assess the first question, suppose that V is attacked by a gang, including D, X, Y and Z. D assaults V. Let us suppose that it would have been permissible to harm D as a means to avert this threat, harming him to degree  $x$ . If the harm that D does to V is large,  $x$  will be even larger. This is for the reason that it is generally permissible to harm a person to avert a threat that they culpably pose, even if the harm that is necessary to avert the threat is greater than the harm that the person would do if the threat they pose were realized. D then realizes that what he did was wrong. V still faces a threat from X, Y and Z. D, recognizing the duty that he owes to V, now protects V against X, Y and Z. He is harmed to degree  $x$  in the process.

Blumenson implies that the state nevertheless ought to punish D. This seems wrong. D has borne a great cost in order to protect V against X, Y and Z. It is wrong to harm D even more for punitive reasons. The idea that we should punish people who have already voluntarily borne great costs for the sake of their victims fails adequately to acknowledge the idea that people can redeem themselves for their wrongdoing through their voluntary actions.

In response to Blumenson's second challenge, there is nothing in DV that rules out the provision of monetary compensation to victims where monetary compensation is available, and can help to ameliorate the victim's loss. In evaluating the comparative merits of a compensation scheme against a punitive scheme, we ought not simply to consider what would be beneficial to individual victims where most offenders are punished. We ought to consider the circumstances of victims where no one is punished. In a system where compensation was the only available remedy for theft, for example, people would be very insecure in their property. In those circumstances, a compensatory scheme would be wholly inadequate to secure property rights. Hence, there would be powerful reasons to criminalize theft. Nevertheless, even if theft is criminalized, victims may seek monetary compensation from offenders.

To explain why this is so, notice the following feature of DV. Obligations to compensate others are subject to two constraints – a constraint on the maximum amount of harm that can be imposed on the wrongdoer (what I have called the *maximum harm threshold*) and a constraint on the maximum amount of benefit that can be secured from the wrongdoer (*the maximum benefit threshold*). DV accepts that there is a *maximum harm threshold* beyond which the offender may not be harmed, though not a *maximum benefit threshold*. Below the former threshold, we must consider how the offender

is to be harmed, and for whose benefit. Harm may be imposed on the offender to provide monetary compensation to the victim, to deter, or a combination of the two. This has the attraction that it limits the overall harm that an offender suffers as a result of his wrongdoing. If the offender provides compensation to the victim, and this is very burdensome to him, the amount that he may be punished is reduced.

Blumenson's claim that, according to DV, offenders who are punished owe no compensation to their victim is thus false. That depends on how much the offender is punished. It is true that if an offender is punished up to the *maximum harm threshold*, he may not be harmed further to compensate the victim. But this is an attractive implication of DV. If, though, the offender is punished to some degree less than the *maximum harm threshold*, compensation may be extracted from him for the victim's sake. Given that the victim will typically have been rendered much worse off than she would have been by the offenders action, there is good reason to ensure that we should aim to improve the victim's circumstances. The question is how best to do this.

The third feature of Blumenson's challenge concerns the way in which we should respond to the greater protective resources available to the wealthy. As I have said a great deal about this elsewhere, I will make my comments brief.

In compensatory justice, the *maximum benefit threshold* is normally set at the level of full compensation. It is contested how full compensation should be understood,<sup>8</sup> but in standard cases, if the wrongdoer has rendered the victim as well off as she would have been had the wrongdoer not wrongfully harmed her, he has fully compensated her.

The *maximum harm threshold* implies that there is a limit to how much the wrongdoer may be harmed in order to provide the victim with full compensation. If full compensation to the victim would require us to harm the wrongdoer a great deal, it is impermissible to extract full compensation from the wrongdoer.

With respect to serious wrongdoing, whilst there is a *maximum harm threshold*, there is no *maximum benefit threshold*. Wrongdoers cannot satisfy the duties incurred through wrongdoing simply by providing full compensation to victims. If the provision of full compensation is not onerous, they can be expected to do more to protect the victim, and perhaps to protect others. Given this, the fact that the wealthy can provide a great deal of protection to victims at little cost does not imply that they may not be punished to produce further protection if they provide this level of protection.<sup>9</sup>

8 I discuss this further in Tadros 2014a.

9 For further defence of this view, demonstrating how it comes apart from retributivism, see, Tadros 2011a: 286-91; 2012: 99-102; 2013: 300-9.

Blumenson, I think, agrees with this verdict, but thinks that this is tantamount to a form of negative retributivism. This is false. First, the scope and stringency of the duties that we owe in virtue of wrongdoing are not, in general, best explained by desert. When we act wrongly, we incur duties. We do not incur them because we deserve to incur them. Of course, we should explain why we have these duties – for example, because we can redeem ourselves by responding appropriately to our wrongdoing, or because we could have avoided having them, or some other explanation. It is difficult to see how desert claims figure in an explanation of the duties that we incur.

Of course, we could *define* retributivism in a way that corresponds to the duties that we incur through wrongdoing. We could simply claim that when a person incurs a stringent duty in virtue of having wrongdoing, that *just is* her getting what she deserves. But if the retributivist claims this, she just accepts DV, but mangles the terminology.

Now, Blumenson looks for an explanation why serious wrongdoers cannot satisfy their duties simply by providing full compensation to their victims. He complains that my defence of this is vague. I agree that there is more to say about this issue than I said in *Ends*. There I noted the fact that it is implausible that the duties of serious wrongdoers are satisfied when full compensation is provided, and gave an explanation for this by considering complaints that wrongdoers and victims could make to the scope of these duties. I also showed that the view that I endorse is intuitive in protection cases such as *Three Threats*. I have since done more to explain this idea, and I will say no more about it here.

But whatever the merits of my explanation, Blumenson's reference to desert does nothing to help. It is simply a bad redescription of the idea that wrongdoers incur stringent duties that are not satisfied by providing victims with full compensation. It does nothing at all to explain the source of these duties. The explanation that I provided in *Ends* may have been vague and incomplete. Blumenson offers no explanation at all.

#### 4. EMPIRICAL SUPPORT

DV justifies punishment only if punishment is effective in deterring crime. I am poorly placed to do the empirical work to that is necessary to determine whether it is effective, and in which circumstances. This is partly due to my lack of empirical skills. It is also due to the fact that the empirical work could not realistically be done. What would be required would be a study that compares reasonably just large-scale liberal societies with and without

systems of punishment. But there is no reasonably just large-scale liberal society without a system of punishment. The question is whether dismantling a system of punishment and replacing it with some intrinsically better alternative would be detrimental to the crime rate. If it would not be detrimental to the crime rate, our system of punishment is unjustified.<sup>10</sup>

The fact that DV justifies punishment only contingently on it being effective in deterring crime and on it not having disproportionate bad side effects is no objection to it. *Any* sensible theory of punishment is contingent in this way. Any system of state punishment is enormously costly. It will harm not only offenders, but innocent people as well. These costs need to be justified. The idea that they can be justified by anything other than crime reduction is implausible. Even if it is true, as retributivists claim, that punishment is impersonally valuable, it is very difficult to believe that any impersonal value that it has is sufficiently great fully to justify the costs of any realistic criminal justice system. If state punishment is ineffective in reducing the crime rate, state punishment ought to be abandoned.<sup>11</sup>

## 5. PROPORTIONALITY

Blumenson thinks that DV cannot explain why some factors that intuitively ought to affect the sentence that we ought to impose on an offender are relevant to punishment. I am not sure why he thinks this. Though it is true that I ought to have said more about this issue in *Ends*, it is highly plausible that both a person's duties to avert the threats that he poses and the strength of the duties he incurs through his wrongdoing depend on the kinds of factors that Blumenson outlines as relevant to punishment.

Furthermore, retributivism seems to me less well placed to explain these factors. Blumenson rightly claim that retributivists typically think that punishment should reflect the gravity of the crime and the offender's blameworthiness for it. What they lack is an explanation why this is so. There is little reason to think that, on the best view of desert, what we deserve is determined by the properties of our actions. It is more plausible to think that what we deserve depends on our virtues and vices.<sup>12</sup> But this more plausible view of desert has troubling implications for a theory of punishment.

Retributivists typically tailor their theory of desert to provide plausible

10 For further discussion, see Tadros 2012: 91-3.

11 For a compelling argument for this view, see Husak 2010.

12 See, further, Tadros 2011a, ch.4.II. It is not uncommon for friends of desert in moral philosophy to think that virtue and vice over a whole life is the proper desert basis. See, for example, Kagan 2012: 6-12.

implications for punishment. But if so, their justification of punishment is unsatisfactory. It is no good to begin from a conventional view about what punishment ought to be imposed for which crimes under which circumstances and justify this conventional view simply on the basis that doing what we do is impersonally valuable. What is needed is an independent argument that shows that desert explains why punishment should fit the gravity of crimes and blameworthiness for them. Such arguments are hard to find, and Blumenson offers none.

Blumenson is also wrong to think that the necessity constraint on self-defence creates problems for the relationship between self-defence and punishment outlined in *Ends*. I will restrict myself to an evaluation of Blumenson's first case, as I think this the most interesting:

*Unnecessary Defence.* A threatens V with a knife. V is able to retreat safely and therefore defensive force is unnecessary; but V fails to retreat, parries A's thrust unsuccessfully, and dies.

As harming A was not necessary to avert the threat he poses, it might be argued that A is not liable to defensive harm. Blumenson then concludes that DV implies that he is also not liable to be punished. This argument is much too quick.

First, it is not clear that A is not liable to defensive harm. It is a matter of dispute whether harming A wrongs him where harming him is unnecessary.<sup>13</sup> I am inclined to the view that V wrongs A if V unnecessarily harms A. But this does not imply that A incurs no duties as a result of wrongfully killing V. The fact that V wrongly chose to attempt to harm A rather than retreating does not vitiate the duties that A incurs for wrongfully harming V.

It is also false that A is not liable to defensive harm to avert the threat that he later poses in *Unnecessary Defence*.<sup>14</sup> To see this, consider a variation on *Unnecessary Defence* where X, a third party, could intervene after V attempts to parry A's thrust to avert the threat that A poses to V. If X harms A to avert the threat that he poses, X does not wrong A. Although V acts wrongly in attempting unnecessarily to harm A, this does not vitiate A's liability for threat that he later poses.<sup>15</sup>

Furthermore, whilst it is true that, if V successfully harms A in *Unnecessary Defence*, V wrongs A, it is false that it is wrong for V to harm A *given that V*

13 For some discussion, see, for example, McMahan 2009; Firth and Quong 2012; Frowe 2014.

14 Blumenson also considers the problem of criminal attempts and the significance of intentions to punishment. I say more about these issues in Tadros 2013: 313-22, so I leave them aside here.

15 For related discussion, see further Tadros 2014b.

*has decided to stand his ground rather than to retreat.* Suppose that V stands his ground. Suppose, also, that by standing his ground he gives up the opportunity that he had to retreat. He must now decide whether to harm A, parrying the blow that A aims at him, or to allow himself to be harmed by A. He may recognize that he was wrong to stand his ground, but this does not vitiate his permission to harm A. He wrongs A in virtue of the fact that he had another option which rendered his defensive force unnecessary. But despite the fact that the existence of this option renders his defensive harm wrongful, given his wrongful act he is permitted to defend himself. It follows that there is no asymmetry between liability in self-defense and liability in punishment of the kind that Blumenson's argument relies on.

## CONCLUSION

Obviously, there is a great deal more that would need to be done fully to meet Blumenson's interesting and important objections to the arguments in *Ends* than I have done here. I hope, at least, to have shown that some of Blumenson's objections can either be met by clarifying DV, or by showing that the seemingly counterintuitive implications of DV are more attractive than he thinks. DV is a new theory of punishment. I do not claim to have worked out all of the details of the theory in *Ends*. I continue to think that it has a great deal of promise, despite the powerful objections that have been mounted against it.

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Symposium

Philippe van Parijs'  
Four Puzzles on Gender Equality

# Unjust Gender Inequalities<sup>1</sup>

**PAULA CASAL**

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Many papers on gender inequality focus on one or more respects in which women, as a group, fare worse than men, with some also noting respects in which gender discrimination and oppression is bad not only for women and children but also, as John Stuart Mill recognized, for society as a whole (1869: eg. 471-5, 558, 564). All this is, of course, consistent with men being harmed by patriarchal institutions or worse off than women in some respects either because of those institutions or for independent reasons.

In his controversial paper “Four Puzzles on Gender Inequality,” based on a provocative talk presented at a feminist forum, Philippe Van Parijs lists some peculiar gender inequalities. Such inequalities are puzzling not because they indicate dimensions in which women fare better than men but because they show a lack of shared and clear criteria to determine when inequality involves injustice, which is not due to predictable differences between Left and Right. Whether some inequalities require some sort of compensation or institutional reform is unclear even within a single position in distributive justice, including positions as elaborated as that of John Rawls.

As readers will notice, the paper is different from the standard scholarly pieces that appear in academic journals like LEAP. However, it still serves a valuable philosophical function because the puzzles it describes raise important questions regarding which statistical differences between two social groups identify an injustice and which merely contain information that is either irrelevant or that bears a more indirect relation to social justice. The value of discussing these questions, stressed by Van Parijs’ response “Real Freedom for All Women (and Men),” thus extends well beyond feminism. In addition, each instance of gender inequality Van Parijs describes is also intriguing in its own right, and not only as an illustration of the general problem just described. So, the discussion published here aims to contribute to an exchange that is informative and engaging not only for those interested in gender but also for those working on distributive justice more generally.

1. I thank Philippe Van Parijs and all participants for their cooperation and contributions and Serena Olsaretti for useful comments on this introduction. For help with the entire exchange, I thank Andrew Williams for excellent philosophical advice, and Laura Sánchez de la Sierra and Hannah Weber for their conscientious editorial assistance.

The first potential injustice Van Parijs' paper discusses concerns the fact that women live longer than men. This issue, previously discussed not only by conservatives like John Kekes (1997: 100ff) and men's rights advocates like David Benatar (2012: 57ff), but also by luck egalitarians like Shlomi Segall (2010: 105ff), brings out the controversy over whether there are normative differences between natural and social inequalities. The authors who successively agreed to contribute a piece on this puzzle turned out to be unable to deliver it. And so, despite the fact that LEAP Editors do not normally contribute to any exchanges, I ended up writing a (doubly blind refereed) reply to this first puzzle not to delay publication further. The response, "Distributive Justice and Longevity," claims that on plausible liberal egalitarian views men's lack of female longevity is not an injustice.

The second potential injustice concerns women's greater educational achievements. This new trend is worth attending to *inter alia* because women's lower educational achievements used to be deemed an important cause of gender inequality (e.g. Okin 1989: Ch. 7, esp. 142-7). In "Women's Greater Educational Efforts as a Consequence of Inequality," Jesús Mora denies there is any injustice here because society does not offer men any less educational opportunities. Instead, men reject or squander their equal or greater educational opportunities because society already offers them such good opportunities that they do not need qualifications as desperately as women, who, by contrast, in view of their greater likelihood of suffering domestic and workplace exploitation, take up the opportunities they have more conscientiously.

A third puzzle highlighted by Van Parijs concerns the fact that most voters are women, both because women live longer and because educated individuals tend to vote more. In "Do Women Enjoy a Political Advantage?" Pierre-Étienne Vandamme denies this inequality is an injustice or even an advantage because mere membership in a majority group cannot plausibly be judged so. Moreover, if women are not voting self-servingly, it is inappropriate to respond to their discharging their duty to vote and protect public goods or vulnerable groups, like children or animals, by depriving them of resources we otherwise deem theirs.

A fourth and final puzzle arises from three distinct inequalities, which may or may not represent injustices: inequalities in the possession of certain hormones, in incarceration rates, and in sexual desire. In fact, the final puzzle actually contains three distinct puzzles, which is why there are three responses to it. "Hormonal inequality" is the claim that men are handicapped by possessing more hormones linked to undesirable behaviors such as those involving imprudence or aggression. In "A Blatant Case of Over-Accommodation," Valeria Ottonelli grants that the set of propensities Van Parijs describes as

linked to male hormones could, in some sense, be understood as disabilities. But she argues that the over-accommodation of the unfortunate traits has effectively turned them into advantages. One cannot thus claim hormonal inequality is an injustice that needs to be rectified or that diminishes the inequality between men and women.

Inequalities in incarceration rates are a very different matter. First, incarceration is something only a minority of men experience, rather than part of men's normal constitution, like male hormones. Second, incarceration is not something that happens "naturally" but is instead a social method to prevent a murderer or rapist from committing further crimes and to deter other individuals from acting likewise. Third, unlike hormones, incarceration rates bring back the debate between natural and social inequalities and causation. Van Parijs compares the higher incarceration rates suffered by men with those suffered by the victims of social injustice, poverty and racial discrimination, despite the fact that it is women that are more often the victims of social injustice, poverty, and discrimination. However, in "Are Unequal Incarceration Rates Unjust to Men?" Gina Schouten answers affirmatively, even if men are the beneficiaries of injustice and guilty of the crimes for which they have been imprisoned.

A final issue involves the fact that men tend to be more interested in sex than women, and hire prostitutes or act foolishly, harming themselves and others in the pursuit of sexual gratification. In "The Rich Also Cry," Ana de Miguel not only addresses the issue of prostitution and male desire. In addition, she also tries, to some extent like Vandamme, to explain why Van Parijs' original audience reacted with hostility to his talk.

One reason for the adverse reaction seems to be the way Van Parijs' comments on prostitution sit outside decades of feminist work on the fact that almost all clients of prostitutes— including child prostitutes – are male, and how the sex industry and much of society caters to male desires for sex and domination that men do not regret.<sup>2</sup> Van Parijs, of course, does not claim that since men have certain desires women should give in to men's demands. However, at least part of the hostile reaction appears to have been caused by his unawareness of the way, vividly illustrated by de Miguel, in which portraying male sexual "greediness" as a burden *men* bear can be used, and has been used, for oppressive purposes.

2. For example, since men want novelty and ethnic variety, pimps regularly relocate prostitutes, preventing them from forming attachments that can undermine the pimp's control (de Miguel 2015:165). In the wider society, too, sexual access to women is maximized by keeping them poor, voiceless, isolated, homebound, or foot-bound, in harems or brothels, and by inventing religions like that of *trokosi*, *deukis*, and *devadasi* that sanctify sexual slavery, or by brainwashing girls into "wifely duties" and obedience because "men can't help it."

Van Parijs was moved by the desire to understand distributive justice better and was not thinking about possible misuses of his questions nor about the existence of a men's right movement, with which he has no connection. However, as women's position slowly improves in developed societies, and men's rights groups grow and become more vocal academically, legally, and politically, these sorts of misencounters and heated reactions are only likely to multiply and escalate. It is, therefore, preferable to examine calmly and separately each claim about a potential injustice to men. Some disputes may be solved by mere exposure to the relevant empirical research and by clarifying misunderstandings or faulty patterns of reasoning, whilst others may involve reasonable disagreements, or refer to an important unfairness to men that needs to be institutionally addressed. In all cases, however, it seems preferable to discuss such matters amicably when one has well-disposed interlocutors eager to do so, than to ignore potentially reasonable considerations. Failing to discuss such concerns is likely to fuel the growing resentment that is already brewing in the men's rights movement.

Some general recommendations one can extract from the exchange between Van Parijs and the other six political philosophers who respond to him are also likely to prevent other inequalities from being misconstrued as injustices. The first is that we should not *zoom in* and focus on an isolated inequality, for example, on education or longevity, without also *zooming out* to take a wider picture that may change the significance of the observed inequalities. The second is that we should not assume all statistical regularities indicate the existence of constraints reducing individuals' options, responsibility, or liabilities. For example, the fact that there is a strong statistical correlation between excessive power and corruption does not mean that power reduces people's options and should be seen as an attenuating circumstance making the powerful less liable to punishment for corruption. Finally, we cannot assume inequalities are reduced whenever the better-off engage in unadvisable behavior. For example, we may have reasons not to count the badness of being corrupt as something that diminishes the inequality between the very powerful and the powerless.<sup>3</sup>

3. One example can illustrate all three points. It was statistically very normal for slave-owners to pick a slave and force her to satisfy whatever sexual whim they had. The way the slave's family looked at the slave-owner doing so or perhaps the expression of the slave-owners' wife or daughter if they saw him may have caused him a temporary discomfort. However, it would seem odd to focus on that discomfort as an inequality justice requires amending, once we *zoom out* and take into account the circumstances that surround the discomfort and explain it. Second, the fact that it was common for slave-owners to exploit slaves sexually does not automatically mean slave-owners were constrained or lacked sufficient opportunity to act differently. Finally, it would be strange to deem the slave-driver's greater tendency towards additional wrong doing as something that reduced the inequality between masters and slaves.

The following exchange discusses several inequalities seen both from a narrower and a wider focus by Van Parijs and his commentators, reflecting on relevant factors that surround each of them. After all, it is by placing all the pieces together rather than by staring at each one in isolation that puzzles are usually solved.

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# Four Puzzles on Gender Equality

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## **Abstract**

There are dimensions along which men seem to be disadvantaged, on average, relative to women. For example, they can expect to live less years; in a growing number of countries they are, on average, less educated than women; they form an electoral minority; and their greater propensity to misbehave means that the overwhelming majority of the prison population is drawn from their ranks. These disadvantages, if they are real, all derive from an unchosen feature shared by one category of human beings: being a male. Does it follow that these advantages are unjust?

**Keywords:** gender equality, social justice, political power, criminality, philosophy

## PREAMBLE

Part of my job consists in giving talks. Many of them leave hardly any trace in my memory, but some of them I shall remember forever. One of these is the short speech I agreed to give in Brussels on the 25<sup>th</sup> of April, 2013 at the 2013 JUMP forum, a big annual event “for advancing women in the workplace.” What happened?

Over a year prior to the event, I had been asked by JUMP’s wonderfully dynamic director, my ex-student Isabella Lenarduzzi, whether I would agree to take part in a *débat des philosophes* on gender equality before an audience of hundreds of bright and active women. Despite my lacking any specific expertise on the subject, I accepted her kind invitation to open that debate, on the assumption that it would provide an opportunity for a common reflection on real and difficult issues, rather than for a rambling rehearsal of well-meaning platitudes. Given the time limit (ten minutes for the initial input), I asked whether I could be gently provocative. “Excellent,” Isabella said.

Because of unexpected technical difficulties, the debate had to take place without simultaneous translation, and hence in English rather than

in Dutch and French, as initially announced. For this reason, I probably skipped some qualifications. I did warn my audience that some of what I was going to say would be said ‘tongue-in-cheek’ but did not realize that this opaque metaphor meant nothing to many of them. Yet, as at least part of the audience laughed when I expected them to laugh, I felt confident that I was being understood.

I started realizing that something had gone wrong when booing joined the clapping after I finished. This was soon confirmed by the first commentator: my speech, the man said, had been an insult to both women and philosophy. After several other reactions in a milder tone but a similar vein, I was given a couple of interrupted minutes to start clarifying what badly needed clarifying – obviously not enough to convince the lady in charge of the conclusion that, behind the appearance of some of the worst bullshit she had ever heard, something was hiding that even she might have found palatable.

The result, I confess, was some predictable frustration. Facing a disapproving, even indignant, audience is part of the price we have to accept paying occasionally for playing our role as academics – i.e., people whose fate is not dependent on their popularity and who therefore have the freedom and responsibility to say what they believe is right even if their audience does not like to hear it. But the source of my frustration, in this case, was different. The part of the audience I had unintentionally upset, I felt, was not indignant because of what I said and thought, but because of what they had some reason to believe I said and thought, though never said or thought. And the fault, I realized, was mine.

What follows is a written version of what I did say on that occasion, without any significant alteration in substance or form. However, after the introduction and each of the four puzzles I presented, I have added (in italics) a slightly longer comment. These comments are meant to spell out more clearly what my ten-minute speech tried to say. I conclude with a brief epilogue on the connection between the philosophical questions I wanted to raise and the struggle for greater gender justice.

## 1. BACKGROUND: MULTI-DIMENSIONAL INJUSTICE TOWARDS WOMEN

I was invited to introduce a philosophical debate on equality between men and women. I want to do so in a way that befits a philosopher, that is, by questioning assumptions that are too easily taken for granted, by asking questions that may sound incongruous or that one would prefer not to ask



oneself. In particular, as I am addressing an audience with an overwhelming majority of women, I want to draw attention to four dimensions along which gender inequality does exist, but in women's favor. I am not claiming that they are all of the same importance, nor that they can, without qualification, be regarded as dimensions of gender injustice. I am claiming even less that the disadvantages incurred by men along these four dimensions currently offset the disadvantages incurred by women along many others.

*[These other dimensions do not only include those most commonly mentioned, such as the income gap on both an annual and hourly basis, the extent to which women and men occupy positions of political or economic power, or the extent to which men and women perpetrate violence on members of the other gender. They also include, for example, the fact that, on average, women (have to) spend more time and money on their external appearance, wear more uncomfortable shoes, cover or uncover parts of their body, or are de facto denied access to public spaces or means of public transport at certain times.]*

*This last aspect is of particular and growing importance, as highlighted, for example, by the conjunction of the motivation behind last year's "Picnic the Streets" action on Brussels' central lanes and of Sofie Peeters' superb documentary "Femme de la rue."<sup>1</sup> Sustainability will require us to live more and more packed together in cities, with urban housing becoming ever more expensive and hence private space ever smaller. This makes the quality and safety of public spaces ever more important for the well-being of all, and freedom from threats and harassment in those places increasingly crucial for a fair distribution of access to such well-being between women and men.]*

Nothing in what I am going to say amounts to belittling the importance of these various dimensions or to denying that the disadvantages incurred by women along these dimensions far exceed the advantages I am about to sketch. But I do want to question the view that the latter is true as a matter of necessity or that it will be true forever.

## 2. LIFE EXPECTANCY

Life expectancy at birth is currently 82.5 years for European women and 76 for European men. One might be tempted to regard this as a minor advantage: an additional six years of life would be of greater value if they could be squeezed in at age 30 or 40 rather than added at age 80. But this is a

<sup>1</sup> "Picnic the Streets" is a movement that started with a massive unauthorized sit-in triggered by the opinion piece I published under that title in the Belgian press in May 2012 and that led to the city's decision to pedestrianize Brussels' central lanes. "Femme de la rue" is a short film first broadcast in July 2012 that documented how women were being harassed in some streets of central Brussels.

confusion. What hides behind the gap between the average lengths of women's and men's lives is a greater probability for a woman to reach and enjoy her forties, her fifties, her sixties, and so on, not only her nineties. One necessary consequence is that the gap between men's and women's incomes is smaller on a lifelong basis than on an annual basis: on average, men get a significantly higher income than women in every year they live, but they live less years. My point, however, is more fundamental. As regards inequalities in life, there is something that is presumably even more valuable than income: life itself.

*[Perhaps a better way of conveying my point is as follows. Imagine a society in which one gender dies on average at age 50, the other at age 55, but the former has an average annual income 10% higher than the latter (with everyone guaranteed a decent minimum income). If this is all you know, which gender would you prefer to belong to? My guess is that many of us would go for the longer life. If instead, you would prefer to belong to the gender with the higher annual income, reiterate the thought experiment with a 5%, a 1% or even a 0.1% income gap, while leaving the respective life expectancies unchanged. I doubt that anyone would need to go to such a low income differential before indicating a preference for the gender with a longer life expectancy. As long as most people would be willing to give up some income in order to live longer, women's higher life expectancy reduces the inequality between men and women.*

*This claim is not self-evident, as shown by two interesting objections. Firstly, whereas the socially produced income inequality between the two genders is an injustice, should we not say that the inequality in life expectancies is not, because it derives either from a biological difference or a difference in lifestyles (or a combination of both)? In the former case, it is a natural fact, not a social injustice. In the latter case, it is a matter of choice for which people need to be held responsible, not of social circumstances which social justice requires us, as far as possible, to neutralize. But are just institutions not also required to reduce natural inequalities, say, between the more talented and the less talented, between the able-bodied and the handicapped? And are gender-specific lifestyles not a matter of social norms at least as much as of individual choice?*

*Secondly, doesn't the alleged advantage of women in terms of life expectancy overlook the inequality in the distribution of care work generated by this very advantage? Women do not only live five or six years longer than men, they are also on average two or three years younger than their male partner. This means that far more women than men are likely to still be around when their ageing partner is becoming frail and dependent. As long as much of the elderly care required in these circumstances is performed within the household, the necessary consequence is a very significant inequality in the amount of*

*domestic elderly care work performed by the two genders, which — as lives get longer and children fewer — may approximate or even exceed the size of the inequality in the respective amounts of domestic child care. Note that this holds even under the unrealistic assumption that both the will and capacity to care for their partner are the same for men and women. In this light, men's lower life expectancy might be interpreted as a trick to extract more care work out of women. Its impact could only be neutralized if elderly care work were 100% outsourced — which hardly seems desirable, even if it were affordable — or if women had male partners on average 5 or 6 years younger than them — which, for whatever reason, does not seem on the horizon.]*

### 3. EDUCATIONAL ACHIEVEMENT

Ever since the invention of school, men have long enjoyed a huge educational advantage over women. In most, if not all, developed countries, this has ceased to be the case for some years. In the European Union, for example, the percentage of women with a higher education degree is 25%, compared to 22% for men. And in Sweden, often regarded as the forerunner in matters of gender equality, the corresponding figures are 35% for women and 25% for men. Isn't the concern to reduce this inequality overshooting?

*[One may reply that some overshooting would do no harm. After centuries of massive inequality favoring men, a few decennia of some inequality favoring women would be welcome. However, even if today's men were the descendants of yesterday's men only and today's women of yesterday's women only, thereby forming two separate lineages, this sort of intergenerational revenge would have a hard time passing as justice between members of the current generation. If only because today's men are just as much as today's women the descendants of the female victims of yesterday's injustice, I doubt anyone will, on reflection, take this objection seriously.]*

*Far more serious is the objection that even though women are, on average, more highly educated than men, they still earn lower incomes. This would seem to make the injustice even worse: not only do women get paid less than men, but they do so despite studying harder. No doubt this paradoxical situation is due in part to the time it takes for differences in educational accomplishment to be reflected in differences in professional success, but also and probably to a larger extent to the fact that women choose studies that lead to less lucrative careers. If this is the main factor, can the paradox still be viewed as amplifying the injustice?*

*Whatever the verdict on the previous two issues, there is a third consideration worth pondering. Irrespective of its specific content, the level of education*

*matters for reasons irreducible to earning power: it has a significant impact on health, for example, or on empowerment as citizens and household members. This is arguably why it features as an important separate variable in indexes of a country's human development proposed as alternatives to GDP per capita. If we accept this proposition, we seem led again to the same sort of trade-off as in the case of life expectancy: women's emerging educational advantage should then be regarded as offsetting (albeit in small part) men's economic advantage. Or can this only be said if the educational advantage is due to a difference in innate ability rather than to a difference in effort?]*

#### 4. POLITICAL POWER

If you combine the first two inequalities, you are in a position to predict the growth of a third one. From women's longer life expectancy, it necessarily follows, with universal suffrage, that they form a majority in the electorate. Moreover, in countries in which voting is not compulsory, there tends to be a significant statistical correlation between level of education and actually using the right to vote. Even in Belgium, where the vote is supposed to be obligatory, the less educated, I gather, are over represented in the growing percentage of non-voters. Consequently, the growing educational gap between women and men can be expected to express itself in a continuous strengthening of women's electoral majority.<sup>2</sup> If as a result of these trends women regularly cast over 60% of the votes, can it not be said that there is a political inequality in their favor, no doubt less outrageous as regards both size and source than the one that long prevailed in our so-called democratic past, but nonetheless real? Moreover, this inequality would hold even if the people elected into power by this predominantly female electorate kept being mostly men. On the assumption that the electorate is not stupid or blind, these people, whether women or men, will only be elected and re-elected if the policies they propose or adopt match the preferences of the female majority.

[Again, a simple thought experiment may make the point more vividly. Suppose you can choose between two electoral systems: one in which only women can vote and only men can be elected, and one in which only men can vote and only women can be elected. Which would you prefer? Isn't it obvious that those concerned with the fate of all women, rather than the career prospects of a few, should prefer the former to the latter? If this is the case, shouldn't the fact that women form a growing proportion of the voters (if it is a fact) count as a significant political inequality in their favor?

<sup>2</sup> This must be asserted with some caution, as one would need to verify that, for any given level of education, men do not vote more than women and that the overall positive correlation between education and voting holds for both genders taken separately.

Moreover, this inequality in electoral power is one which, if they so wished (and contrary to the institutional assumption in the thought experiment of the previous paragraph), women could convert into an even greater inequality in their favor among those who hold political responsibilities. This would be the case, for example, if our electoral system were organized so as to aggregate the votes of women and men in a way essentially analogous to the way in which Belgium's electoral system aggregates the votes of Flemings and Walloons in Belgium's federal elections or the votes of (supposedly) French and Dutch speakers in Brussels's regional elections: women would be required to vote for women only and men for men only.<sup>3</sup> The seats in Parliament would then be automatically distributed in proportion to the number of men and women in the electorate. If all the government needed were support of a majority in the Parliament (without a further institutional constraint analogous to the parity rules in the Belgian and Brussels governments), an all-female government supported by the female majority could rule the country in impeccably "democratic" fashion.

There are of course good reasons to avoid extending to the gender divide the electoral pathology of Belgium's language community divide. It is important that those who want to govern a country should be electorally accountable to its whole population. But even with a strict analogue of Belgium's current electoral system, and hence in the absence of a guaranteed proportional representation of men and women in the elected assemblies, it is within the power of the electoral (and even greater voting) majority of women to vote into office a corresponding majority of women. Indeed, under the French or British system of single-member constituencies, and on the reasonable assumption that women form the majority of the voting public in every one of them, women have the power to make sure that only women get into the parliamentary assembly. However, the point to which I want to draw attention holds irrespective of whether women use their power in this way. It holds even if they elected into office only male candidates, those ambitious enough to fancy exercising the increasingly unattractive job of politician, but driven by their very ambition to advocate and implement policies favored by the female majority.]

3 For its federal elections, Belgium has a list-proportional system with provincial constituencies. In Flemish provinces, there are only Flemish candidates. And in Walloon provinces, there are only Walloon candidates. For the regional elections in the officially bilingual Region of Brussels Capital, there are two electoral colleges, with only Dutch-speaking parties standing in one, and only French-speaking parties in the other. Brussels voters can choose in which of these two colleges they wish to vote and are assumed to do so according to their own native language — an increasingly problematic assumption in a region with hundreds of distinct native languages.

## 5. HORMONAL INEQUALITY

The fourth inequality to which I want to draw attention is more delicate. Although part of what I am going to say will be said, as I hope you will notice, tongue-in-cheek, it is meant to draw attention to another important and difficult issue relating to the connection between gender injustice and gender inequality.

As a point of departure, take the rather unsurprising fact I recently heard that over 95% of the consumers of prostitution services are men. Why is this? This might have something to do with the fact that men's annual incomes exceed women's by a significant amount and that men therefore have more pocket money to spend on this expensive form of leisure. Though pretty ignorant on these matters, I suspect that the cause is more basic and has something to do with the difference between male and female libido, their respective hormonal endowments, or some other physiological difference. No doubt this difference can be said to generate some of the most despicable cases of domination of women by men (whether clients or pimps). But does it not also reflect a gender-based inequality of needs, i.e., a form of handicap? Men's greedier libido turns them into handicapped individuals, sometimes even super-handicapped *à la* Dominique Strauss-Kahn. Whether the price to be paid for this handicap takes the form of expenditure on sexual services or of a fall into a reputational precipice, isn't there here something to pity as well as to be indignant about?

*[Attributing the frequency of some form of misdemeanor to the fact that the perpetrators are men rather than women does not disculpate them: an explanation is not an excuse, let alone a justification. Most men, after all, are not prostitution clients, and however plausible the claim that the strong statistical correlation with maleness reflects a genuine causal link, the role played by free will in the causal process is by no means irrelevant. This is arguably one key reason why we believe that prostitution services should not be subsidized in the way we believe psychiatric services and other forms of medical care should be. All of this hardly needs saying, I thought, but some of the reactions to the rather abrupt punch line of my speech suggest that stating the (fairly) obvious is not always a waste of time.*

*There is, however, a deeper challenge here. Consider the fact that young men are massively over represented among perpetrators of violent crimes (partly against women, but to a large extent against other men), and hence (luckily)*

*also among prison inmates. Here again, the hormonal story is not implausible.<sup>4</sup> But the argument need not be fundamentally different if men and women had equally aggressive dispositions but men gave way to them more often simply because their genetic endowment makes them physically stronger. Under modern conditions, it is fortunately less easy to get away with violence than in the era of Genghis Khan. Has an advantage not thereby be turned into a disadvantage? Can it not be said that men are handicapped relative to women because of their greater propensity to end up in jail as a result of acts they would not have committed had they been women? Here again, it may be prudent to add that this is no excuse, nor justification, for their behavior. After all, there are men who have not spent one minute in prison any more than one cent on prostitution.*

*However, think about the way we react to similar figures displaying strong correlations between social background and smoking, or between social background and criminality. People who grew up in poor families tend to smoke far more than people from rich families (which makes the tobacco tax one of the most regressive taxes ever implemented), and they are disproportionately in prison (in part, no doubt, but not only, because they tend to be sentenced more severely for the same crimes). Is it not plausible to regard this as an aspect of the injustice they suffer? They did not choose to be poor, and had they been rich rather than poor they would not (probabilistically speaking) be wasting their money on cigarettes or their time behind prison bars. This should not prevent us from taxing the smokers or punishing the offenders, but should it not temper our indignation – especially if we happen to enjoy a more privileged background? Indeed, should we not view such facts as one of the expressions of the injustice inflicted on the poor?*

*In this light, let us return to those men who waste their money on prostitutes or misbehave in a way that gets them into trouble (whether incarceration or reputational precipice). They did not choose to be men any more than those born poor chose to be born poor, and had they been women rather than men, they would not (probabilistically speaking) have to bear these burdens. Is the analogy between the two cases not so strong that it would be inconsistent to regard the inequalities mentioned as an aspect of an injustice suffered by the poor, but not as an injustice suffered by men? (Note that the analogy holds irrespective of the validity of the hormonal diagnosis. If the difference between the behavior patterns of men and women has nothing to do with testosterone or any other physiological difference, but rather with the way in which boys*

4 See Paula Casal's striking piece, which helped inspire the formulation of this fourth puzzle: "Love not war. On the chemistry of good and evil," in *Arguing about Justice*, Louvain-la-Neuve: Presses universitaires de Louvain, 2011, 145-156. Freely downloadable at [www.academia.edu/2396206/Arguing\\_about\\_Justice\\_Essays\\_for\\_Philippe\\_Van\\_Parijs\\_PUL\\_2011\\_free\\_PDF](http://www.academia.edu/2396206/Arguing_about_Justice_Essays_for_Philippe_Van_Parijs_PUL_2011_free_PDF)

*are socialized – say, being encouraged to play with guns rather than dolls –, the analogy would arguably be even closer).*

*This brings us to my philosophical question. Why is it that my intuition – and presumably yours – is different in the two cases? Is it simply because of the contingent fact that these handicaps suffered by men can hardly be said to offset the many unjust inequalities that favor them, whereas in the case of the poor they are added to a whole series of other clearly unjust inequalities in the same direction? Or is there a deeper, less contingent difference between the two cases? Is the key difference, for example, that it is hardly controversial that a world without poverty would be a better world, whereas some doubt (perhaps wrongly) that a mankind without males would be a better mankind? If this is not the key difference, what is?]*

## EPILOGUE: A PHILOSOPHER'S JOB

*As mentioned at the start, part of the job of a philosopher is to question assumptions, and one effective way of doing so is by formulating puzzles by asking, for example,*

*(1) If society gives group B more money per unit of time while nature gives group A more units of time, can it always be said that there is an unjust inequality at the expense of group A?*

*(2) If society gives group B more money and group A better education, can it always be said that there is an unjust inequality at the expense of group A?*

*(3) If group B enjoys a majority among power holders and group A a majority among those who choose the power holders, can it always be said that there is an unjust inequality at the expense of group A?*

*(4) If group B's genetic endowment makes its members more likely to end up in prison, can this ever be counted as an injustice suffered by its members, none of whom chose not to be born a member of the less incarceration-prone group A?*

*Are these questions outlandish, far-fetched, deprived of any relevance to the most pressing issues and most urgent struggles for the sake of greater justice between men and women? At first sight, several of them certainly are. Yet they are worth asking. For each of them is meant to invite further thinking on the ideal of equality of opportunity that underlies much of the struggle for greater gender justice. The equalization of opportunities requires that one should neutralize the impact on our life prospects of circumstances beyond our control – including our being born women or men –, while making us bear the consequences of the choices we make – including those made by virtue of preferences that may happen to differ markedly between women and men.*



*Taking seriously the questions raised above and addressing the difficulties they reveal is essential to clarify, refine, and sharpen this ideal, and thereby to strengthen the struggles they inspire. Dismissing them, by contrast, deprives us of an opportunity to give a sounder basis to the struggle for greater justice along the gender dimension, as along any other. In particular, articulating the ideal in response to puzzling challenges is essential to put any particular struggle in a broader context: the concern for opportunities, the real freedom of those with least real freedom, irrespective of their gender, but among whom women are massively overrepresented.*

# Distributive Justice and Female Longevity<sup>1</sup>

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## Abstract

This paper discusses Philippe Van Parijs' claim that men's lack of female longevity constitutes an injustice, whether this is caused by asocial factors or by gendered lifestyles. This response argues that, like others, such as John Kekes and Shlomi Segall, Van Parijs underestimates the resources of egalitarian liberalism to avoid this implication. One explanation treats individuals as liable for gendered life-shortening behavior, for example, when they value either life-shortening lifestyles or the choice between lifestyles, and one cannot say society has not "done enough" for them. A second explanation claims a trait is not a relative advantage when it is systematically part of a package of traits that do not constitute a relative advantage. A third explanation claims a trait is not an advantage when its value to the trait bearer is conditional, and the relevant conditions are unlikely to be fulfilled.

**Keywords:** R. M. Dworkin, hypothetical insurance, John Kekes, gender, natural and social inequality, T. M. Scanlon, Shlomi Segall

## INTRODUCTION

In "Four Puzzles on Gender inequality" (2015), Philippe Van Parijs presents his first puzzle thus: "*As long as most people would be willing to give up some income in order to live longer, women's higher life expectancy reduces the inequality between men and women*" (2015: 82). This first puzzle is probably the most familiar of the four Van Parijs addresses. For example, when John Kekes (1997) sets out to discredit egalitarian liberalism, he uses the idea of women having to compensate men for lacking female longevity as a *reductio*

1 I thank Aurora Pujol, José Luis Martí, and particularly Andrew Williams for helpful comments on an earlier draft. I also thank two very thorough anonymous referees. I also thank Jesús Mora, Laura Sánchez de la Sierra, and Hannah Weber for their excellent editorial assistance.

of the targeted view.<sup>2</sup> Rather than finding it absurd to treat women as relatively advantaged by their greater longevity, Van Parijs cannot think of a way to avoid the conclusion. He envisions only two ways to challenge it. One is to claim that greater female longevity is either (i) due to men's lifestyle and, therefore, something men are liable for, or (ii) biologically-based and, thus, something justice does not require society to amend. He states that (i) is not available to those who hold that social norms shape gender-specific lifestyles, and (ii) is not an option for those who believe just institutions should also reduce inequalities derived from natural talents or disabilities (82). A final option he considers involves denying female longevity is a significant benefit, given the way those final years are spent. I shall follow this useful map to describe in more detail the territory it charts, and draw some routes he does not consider. Like Van Parijs, I shall not establish the facts, but focus on the normative implications of different factual assumptions.

Kekes finds the idea of compensating men for their lower longevity particularly ridiculous because he regards the variation as a product of biology rather than of unjust social practices (1997: 104). However, I agree with Van Parijs that it is not plausible to regard greater female longevity as an entirely asocial phenomenon and then argue that only inequalities that are socially generated can be unjust (Nagel 1997; Daniels 2007; Pogge 1989: secs. 15-16, 1995 and 2000). Along with Kekes, and others such as Shlomi Segall (2010: 105-10), Van Parijs gives the impression that liberal egalitarianism lacks the resources to deny plausibly that it is unjust that men lack female longevity. In contrast, I shall argue that there are plausible liberal egalitarian views that hold individuals liable for the harmful consequences of their gendered lifestyles, and that deny that individuals lacking a certain trait are owed compensation when they identify with their trait-destroying lifestyles or when they value having the *choice* between different lifestyles. Furthermore, even if we assume the variation in longevity between men and women depends entirely on asocial factors, plausible liberal egalitarian responses are still available. One such response claims a trait is not a relative advantage when it is systematically part of a package of traits that do not constitute a relative advantage. A final option, which Van Parijs also considers, is to deny a trait has value to the trait bearer if its value is conditional, and the relevant conditions are unlikely to be fulfilled.

I shall proceed to examine the options just noted, referring both to mainstream normative theories and to scientific explanations. My main hope

<sup>2</sup> For convenience, like Van Parijs, I shall compare men and women; and like Kekes, I shall refer to "compensations." The relevant measure, however, is not how far individuals or groups are from one another but how far they are from what they would have in a just society.

is to show the complexity of Van Parijs' first puzzle. Some deem compensating men for their lesser longevity obviously absurd whilst others find it just as obvious that liberal equality rightly mandates such compensations. In contrast, I think that both reactions are mistaken, and that the puzzle is not only very difficult but also an interesting litmus test to sort important variants of plausible forms of egalitarian liberalism. I am also sure that if a random mutation resulted in women starting to die far ahead of men many of those who currently find Van Parijs' suggestion absurd would start listing lesser longevity as one of the disadvantages women suffer. But I shall leave the defense of his position to Van Parijs, and focus on some plausible responses liberal egalitarians could give, and which he has so far neglected.

## 2. THE SOCIAL HYPOTHESIS: LIFE-SHORTENING GENDERED BEHAVIOUR

Although women live longer *on average* than men, there are remarkable differences in the variation among different societies. This suggests that social factors play some important role in explaining gender-based variations in longevity. For example, in 2013 women outlived men by twelve years in Belarus, but only by one year in San Marino, and men outlived women by four years in Tonga (WHO 2015). In Europe, women outlive men by eleven years in Lithuania, while in more gender egalitarian societies like Sweden, Netherlands, and the United Kingdom, the gender gap is just around three years (Eurostat 2015). Further evidence of the importance of social factors refers to changes in the gender gap within one society across time. For example, as gender equality increases in Europe, the longevity gap is shrinking (Eurostat 2015). In China, the projection of current trends shows that as more people survive their 80th birthday, women become more prevalent in the last age group (Fig. 1).

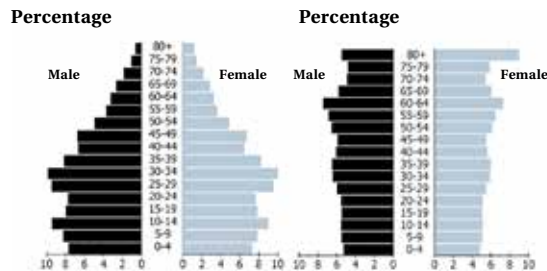


Fig 1. Chinese life expectancy pyramids in 2000 and 2050.  
Source: World Population Prospects, 2004 revision (2005)<sup>3</sup>.

3 <http://www.prb.org/Publications/Articles/2006/ChinasConcernOverPopulationAgingandHealth.aspx>

Now, longevity may depend on social factors without also depending on gender-specific lifestyles. For social factors could include, for example, a reform in the publicly-funded health service or the adoption of a certain tradition or sport with an unexpected differential impact on male and female life expectancy. Improved hygiene and obstetric care, for example, reduced women's death in childbirth, creating a longevity gap which was not so noticeable before. Longevity varies from one society or one period to another for social, but not always gendered, reasons.

Let us assume, however, as Van Parijs does, that if the causes are social, they involve gender-based variations in lifestyle (see also Segall 2010: 108). The causes generally listed involve different factors. Some are unhealthy habits such as some pleasurable forms of consumption like drinking alcohol, smoking, taking drugs, or eating without measure whatever one fancies. Others involve risky activities such as speeding, drunk driving, dangerous sports, and the sort of behavior displayed in internet videos with labels such as "extreme idiots."<sup>4</sup> A third factor involves occupational hazards, and a fourth, violence or a greater tendency to commit suicide or homicide, or to be killed or injured in fights (see fig. 2).

	White, Non-Hispanic		Black, Non-Hispanic		Hispanic	
	Men	Women	Men	Women	Men	Women
Injuries	70.8	22.3	49.0	14.8	55.7	13.0
Homicide	6.4	2.6	102.2	11.3	28.0	4.0
Suicide*	24.6	5.0	14.5	2.4	12.8	2.9
Cancer	6.0	4.5	6.7	6.3	5.7	5.4
Heart Disease	5.0	3.0	13.8	7.4	4.6	2.0
HIV**	—	—	—	5.7	—	—

Fig. 2: Leading causes of death for men and women aged 20-29 in the US in 2007, deaths per 100,000 (PRB 2010).

Most feminists, and perhaps most liberal egalitarians, tend to hold social rather than biological explanations of gendered behavior, and so they may find the lifestyle explanation of longevity plausible. This, however, does not commit them to the view that if a man's behavior is gendered, he is not liable to bear the burdens arising from it.

There are different explanations of why inferring a lack of liability is a *non sequitur*. I cannot review them all but several are not hard to guess. First, denying liability for the bad consequences of gendered behavior would

4 See, for example, <https://www.youtube.com/watch?v=PxAxbZeGtUA>

have undesirable consequences as it would leave us without important incentives to avoid behavior that is both undesirable and gendered. Leaving consequences aside, one may argue that it is not fair that, while men can indulge in drinking and eating without gaining weight or being so strongly penalized by society, women must exercise self-restraint and then compensate men for not having exercised it. This is unfair because if A already had all the fun of a *carpe diem* lifestyle, B should be allowed to keep the benefits of the self-restraint exercised. Otherwise it would be like making women who diet pay for the slimming treatment of those who overeat. Second, since male violence and risk-taking are already among the main causes of death for young women, one could argue that women have already paid with a significant reduction in their own longevity and shared in the costs of male behavior. Regarding occupational hazards, some would argue that if both A and B want jobs, and jobs that involve (on-balance advantageous) combinations of benefits and drawbacks, it will be unfair to give A the job, and make B compensate A for the job's drawbacks (including possible longevity losses).

Assuming it is not the dead but living people to whom compensation is or is not owed raises further problems. It would not make sense to compensate men who avoid all life-shortening behavior and are thus likely to live long. For then there will be nothing they have to be compensated for, and they will be unfairly enjoying both the extra years and the compensation for lacking them. But it would make even less sense to compensate individuals who, despite engaging in all the life-shortening gendered behavior, still escape the fate for which they are supposed to be compensated. We would be giving extra resources to people who remain alive despite their eating without self-restraint or their indulging in other imprudent activities. This seems just as implausible, if not more. It may seem more plausible if, instead of granting monetary compensations to the men who stay alive, we invested more on men's health and spent less on pregnancy or cervical cancer, as Shlomi Segall at one point suggests to illustrate the case (2010: 108). But if pecuniary compensations are not justified, neither are these in-kind compensations. If there is nothing to compensate men for, they will be enjoying both the extra years and the compensation, and this would be unfair. (Both pregnancy and cervical cancer, moreover, come about because of sperm, which arguably makes it even more unfair).

Another possibility would be to force men to adopt female lifestyles. But men may resist this option. This could be because they prefer life-shortening lifestyles or because they value having the *choice*, the mere opportunity of engaging in activities with some risk of self-harm.

Adapting an example proposed by Scanlon to explain the value of choice, let us imagine that there is an area with extremely nasty nettles in bloom

that cause a terrible rash (Scanlon 1998: 256).<sup>5</sup> The authorities mark the area and warn people about the consequences of wandering through the flowering nettles. Scanlon argues that even if it is difficult to see any value in getting a nasty rash, there is generic value in being able to choose rather than be forced to do the right thing all the time. Thus, having fenced off the area and issued all the warnings, we could say that society had done enough to protect individuals from the danger (see Scanlon 1998: 249-294; Voorhoeve 2008; Williams 2006).

Scanlon then asks us to imagine there is a curious woman who really wants to see what is happening in the fenced area, and so decides to go in to check it out (Scanlon 1998: 257). He denies she will then have a claim on society for help or compensation, since she had an adequate opportunity to avoid the harm. There could be exceptions to this conclusion that Scanlon would accept. For example, if we can stop her rash by showering her with the public park's watering hose, it would be such an easy rescue that she could have a complaint if she were not showered. In other cases, perhaps during a drought, she could not make such demands. Another plausible exception would be that of individuals or groups who are already victims of injustice or live below a minimum threshold and take some risks to escape their dire condition.

Since such exceptions do not apply to the case of men indulging in unhealthy habits, let us add to the picture some gender stereotypes and claim that the woman was a victim of female curiosity or love for flowers, and so was engaging in self-harming *gendered* behavior. Or suppose a man wants to enter the fenced area to show off how tough he is or because of a gendered sensation-seeking desire, or a gendered authority-defying attitude. Would this change anything? It is implausible to assume that the mere fact that such behavior can be associated with gender stereotypes makes a difference. It would make a difference if the signs were unclear or if the individuals were children. But adults who chose to ignore the clear signs do not have a legitimate complaint if they come out with a rash, regardless of whether theirs was a case of typically male, female, sport-fan, or ideological foolishness.

In the case of life-shortening gendered behavior, the case against compensation is even stronger than in the example of the nettles because incursion into the fenced area is a one-off event rather than recurrent behavior, like eating and drinking excessively, driving recklessly, picking fights, and general carelessness. If the behavior that causes a man to have

<sup>5</sup> I have modified Scanlon's original example because it involved hazardous waste, which may suggest corporate responsibility for extremely nasty and premature deaths in deprived areas.

a shorter life span is traceable to choices that men pursue repeatedly, and even identify with, the case for compensation is even less plausible. Given that we cannot plausibly claim society has not done enough for men, or compare the case to that of an easy rescue, liberal egalitarians who believe in accommodating the value of choice would not compensate men for undesirable, gendered behavior. Needless to say, for desert theorists, making the prudent, non-violent, law-abiding poor reward the imprudent, violent, careless rich is exactly the opposite of justice (see, for example, Arneson 2007). But let us now examine what follows if sex variations in longevity do not depend on behavior but respond to some other explanations scientists have proposed, and which I sum up below.

### 3. THE ASOCIAL HYPOTHESIS: THE EVOLUTIONARY EXPLANATIONS

On average, women live longer than men. It would be puzzling for scientists if they did not, as this is normal for females in other species. A traditional explanation in the case of humans is that estrogen protects women from cardiovascular disease. Another explanation is that having only one copy of the X chromosome makes males more vulnerable to harmful recessive mutations (Pan 2012).<sup>6</sup> The latter explanation could also account for the alleged female tendency to form a tighter cluster near the mean while more males are outliers, occupying more extreme (desirable and undesirable) positions (Cronin 2008).

Sexual differences in longevity, however, are greater in species with a history of polygyny (i.e., of males mating with several females) and tend to be greater the larger the size of the harems. Thus, in very polygynous mammals, like elephant seals, males are almost twice as large as females and females almost twice as long-lived as males.<sup>7</sup> In contrast, in less polygynous species, sex differences in either size or longevity may be much smaller. The massive bowhead whales can survive two centuries, while small insects may survive only two weeks because, *across* species, a large size correlates with longevity. By contrast, between the sexes of the *same* species, the reverse obtains: if the females of a species are much smaller than the males of the same species, they tend to live much longer.

<sup>6</sup> A recently proposed explanation is that the quality-screening process of our mitochondrial genes only happens through females, and so mitochondrial mutations may be weeded out when they are harmful to females but not when they are harmful to males (Camus 2012).

<sup>7</sup> Male southern elephant seals weigh 11,000 pounds and live around 15 years, whilst female southern elephant seals weigh 2,000 pounds and live around 24 years. See, for example, <http://www.marinebio.net/marinescience/05nektion/esbody.htm>.



In species with a polygynous history, when compared to females, males are: (i) larger and better armed or ornamented; (ii) more aggressive; (iii) more drawn to competitive interaction and aggressive play; (iv) more likely to engage in escalating violence, leading to injury or death; (v) more eager to mate; (vi) less discriminating about mates; (vii) more prone to high-risk behavior, particularly when pursuing females (Darwin 1872; Thornhill and Palmer 2000: 37); (viii) more likely to die prematurely in accidents, combat, or from disease (Daly and Wilson 1983); (ix) less long-lived through physiological malfunction (Hamilton 1966); and (x) conceived and born in larger numbers, roughly balancing their dying prematurely in larger numbers from violence, disease, malfunction, or imprudence (Alexander *et al.* 1979). These characteristics could cause men to lack some of the self-repair mechanisms that women have because there would not be much point in nature investing in self-repair systems for those likely to die of other causes anyway (Diamond 1993: 110).

Other explanations refer to the social usefulness of females for youngsters of either sex. In polygynous species, males are more expendable than females not only because fewer males are needed for reproduction, but because offspring benefit more from females. One example is the *grandmother effect*, observable in matriarchal societies like those of orcas, where older females guide and protect the young, surviving menopause and outliving males by several decades (Brault and Caswell 1993). Think too about how male lions wait for the females to bring home the bacon, and having killed all the cubs they did not sire, leave only scraps for their own offspring to eat. Youngsters sometimes do so much better without their large, sexually aggressive male parent around that the best such males can do for their offspring is what some actually do: go away and die to avoid competing with their own kin.

Longevity is known to correlate not only with size in the two ways explained above but also with cultural transmission. Elephants, great apes, and other highly intelligent, self-aware, cultural creatures, like orcas, lactate for many years. They do so not because they need the milk, but because they need to intersperse the pregnancies to allow mothers enough time to provide their offspring with an education. Lactation, however, is also connected to the high incidence of polygyny in mammals, since such devoted mothers are very easy to exploit: they will not abandon the offspring in which they have invested so greatly, even if they are abandoned or exploited themselves. The large investment per infant typical of these species is adaptive because its members are long-lived, so education and cultural transmission tends to pay off. In the case of humans, the large human brain required for extensive learning involves large additional costs for child-bearing women, and this

may have also resulted in their greater longevity: a very large brain for babies, combined with a pelvis not initially designed for bipedal walking, makes human births exceptionally dangerous even for young and healthy mothers. Given these facts, if women died younger and were fertile until they were about to die, both mothers and their infants would die in even larger numbers. Female longevity might then be a consequence of how much more costly it is to have offspring for female humans compared to other female primates (Diamond 1993: 117). And since mothers pass their genes to their sons, men could have then benefited from an increase in their longevity (relative to that of all other apes) without having to pay the costs.

Appealing to these considerations, some may respond to Van Parijs in at least four ways. First, one may respond by arguing that the main beneficiaries of female longevity are actually men. Female longevity is not a trait that is explained by its benefits for females but by its benefits to offspring of both sexes. Moreover, possessing this trait comes at a high price for women since it is connected to the extraordinary danger and difficulty involved in giving birth, as well as to smaller size in females, and inequality and reproductive exploitation. Without paying these costs, men also benefit from female longevity since they benefit when they are young males, they benefit from their own offspring being safe, and it is likely that they have also benefited with increases in their own longevity. On this view, then, one could argue that is not males, but rather females that ought to be compensated for the costs of securing collective longevity.

A second reply would involve arguing that the inequality in longevity is not unjust because its removal would make humans worse off. If so, Rawlsians, for example, would deny such beneficial inequalities are unjust. If these explanations are correct, Van Parijs' assumption that, if longevity has a biological explanation, then men's lack of female longevity is unjust, would be a *non sequitur*.

A third answer to Van Parijs would be to argue that if males die younger because of their propensity to attack others in order to monopolize more females, while females live longer because of their useful caring services, in a way we are back to the explanation of longevity in terms of "gendered" lifestyles discussed earlier. Van Parijs, however, may argue that evidence of gendered lifestyles having evolutionary roots only reduces men's liability. But this is too rushed. First, everything has evolutionary roots, and we do not generally deny all liability. Second, for some theories of liability, the fact that humans have an evolutionary past is taken for granted and makes no difference at all. Third, we are sufficiently monogamous and sufficiently unlike seals, orcas, and lions that although some may be tempted to behave like such animals, we are not hardwired to do so, and most of us do not.

A fourth and final answer to Van Parijs is to deny compensation on the ground that a trait cannot be considered an advantage when it is inextricably linked to other traits that cannot, on the whole, be considered an advantage, which is precisely what scientists are telling us with these explanations.

Ronald Dworkin and other advocates of *equality of resources* (Dworkin 2000), for example, would deny that individuals have any claim simultaneously to enjoy the advantages of a condition and the advantages of lacking the condition. Take a case (suggested to me by Andrew Williams) involving a basketball player whose exceptional success depends on unusual height that is also correlated with premature death and terrible backaches. Dworkin would deny another shorter player is relatively disadvantaged in a compensation-supporting sense when he prefers only the taller player's success, and does not regret lacking the package of traits on which it depends. On this view, men have no legitimate complaint regarding female longevity because, as the biological explanations suggest, giving birth and living a few more years are tightly linked and part of the same package, like the height and the backache, the suffering and the medals. And people are not entitled to have their cake and eat it too, enjoy an able body and yet insist in competing in the Paralympics, or be compensated for not being able to do so.

There are, moreover, further arguments against compensating men inspired by Dworkin's work on equality. As many readers probably know, for Dworkin a fair distribution of external resources is one which could have emerged from a hypothetical auction where individuals enjoy equal bidding power (2002: 67). When the process is complete nobody envies the bundle of resources others have ended up with, since they could have also bid for those resources themselves. Against this background of equality of resources, equally situated individuals then purchase insurance against what they *by their own lights* consider a relative misfortune (Clayton 2000; Williams 2002, 2004).

Now, since men do not normally regard being male as such a misfortune, they are not entitled to compensation for lacking female longevity, or female hormones, or female breasts. By contrast, some transgender persons who very much want to have female bodies, and even give birth and breastfeed, with or without the extra longevity, but have a male anatomy, should be compensated. Dworkin's view supports assisting these individuals with their sex-reassignment needs through a publicly-funded health service because people would have insured against being born with a body which does not match their self-identified sex when others possess such a body.

Some may worry that this Dworkinian criterion for justifying or denying compensations depending on whether individuals identify with their condition may not always favor feminist demands. In response to this worry, one may

argue that the Dworkinian criterion cannot be used against feminist demands because what women want (equal pay, respect, political representation, and so on) has nothing to do with being male or female. Few expressions in the history of thought are as unfortunate as the Freudian and Lacanian “penis envy,” when what women want and demand does not depend on maleness or anatomy. Thus, if men do not suffer from the reverse condition (say “womb envy”) but are perfectly happy to be men, and identify with being men and do not consider being male a misfortune, they have no claim to compensation because in their own opinion they are not the victims of bad luck. They would have insured against illness or disability but not against being male.

The same will apply to a religious believer who ends up not only with a lower life expectancy but lower welfare throughout his life because of the constant fasting that his religion demands. If this person identifies with his faith and does not regard it as a craving or disability, he does not have a complaint. He cannot both pity the atheist’s lack of faith and think of his own faith as a blessing whilst still plausibly claim to suffer from relatively bad luck. Similarly, there is no injustice if this believer dies younger purely as a result of a faith he welcomes and the corresponding religious activity he willingly pursues (Dworkin 2002: 119, 138; Williams 2002: 378).

Dworkin’s account, thus, is an example of a view that does not claim that justice concerns exclusively that which has a social origin, and still denies that men’s lack of female longevity constitutes an injustice.

Van Parijs may want to reject Dworkin’s account and all forms of egalitarian liberalism that conclude men’s lack of female longevity is not unjust, and he may be able to offer good reasons for doing so. My main point, however, is that his road map is not exhaustive: there are more exit routes on offer than he allows. In fact, Van Parijs even omits to mention his own proposal regarding how to evaluate variations in internal assets, namely *undominated diversity*, according to which targeted transfers and other measures must make sure that no person’s lifetime internal endowments are regarded by all as inferior to that of someone else (Van Parijs 1997, ch. 3). On this view, men are owed no compensation because there is no agreement on their endowment being inferior – there may even be a consensus on the denial of this claim. So it seems that not only Scanlonians and Dworkinians but even Van Parijsians may deny it is unjust that men lack female longevity.

Regarding Rawls, his theory of justice has been widely interpreted as denying that it is unjust that men lack female longevity (Barclay 1999; Segall 2010, 99ff and Clayton 2001). The first statement of his view was understood as claiming that justice requires equalizing individuals’ natural primary

goods when a deficit in those goods resulted in an unequal access to social primary goods, namely income, wealth, the basic liberties, and the social bases of self-respect. Since men are not disadvantaged in their access to social primary goods, however, there is no injustice that needs to be corrected. Rawls' later *Justice as Fairness. A Restatement* (2001), however, contains a section on Sen's capability approach (Rawls 2001: 168-176), which suggests that the widely held interpretation may not be the only position a Rawlsian may take in this debate. Instead, some Rawlsians may argue that longevity is a capability and that enjoying greater capabilities matters even if it does not alter an individual's access to primary goods. So Rawlsians may accept that differences in longevity can have independent relevance for justice. Since most people disregard this aspect of Rawls' restatement of his theory, we can safely conclude that most liberal egalitarians deny that men's lack of female longevity is unjust.

Let us now turn to the final question Van Parijs raises which concerns the value rather than origins of greater female longevity.

#### 4. IS FEMALE LONGEVITY A SIGNIFICANT BENEFIT?

Van Parijs begins by granting that having some extra years may not be significantly valuable, and that concession seem plausible. Women's extra years may come when they are too old, weak, disabled, or dependent to achieve anything very valuable with the extra time. They may spend most of the time asleep, ill, in and out of hospital, and with their mind and energy focused on coping with the problems of female old-age: frequent falls and fractures, arthritis, incontinence, deafness (cutting people off socially, which affects women more), stress, insomnia, depression, and dementia, which claim more female than male victims.

Longevity, then, is only *conditionally* valuable, and the last few years of one's life are the ones more likely to detract from the total value of one's overall existence. As Van Parijs notes, it would be great to have some extra years if they could be "squeezed in at age 30 or 40" (2015: 82) rather than prolonging the worst bit of one's life. I agree again. Van Parijs, however, goes on to add: "But this is a confusion. What hides behind the gap between the average lengths of women's and men's lives is a greater probability for a woman to reach and enjoy her forties, her fifties, her sixties, etc., not only her nineties" (82). Van Parijs does not indicate the extent to which men's prospects of reaching middle age are smaller than women's, and if that gap is not itself significant, he has not made any progress in showing that women enjoy a significant benefit here. Moreover, Van Parijs does not cite any data supporting his claim, and population pyramids like those indicated earlier (Fig. 1) suggest that the number of males and females at ages 30 and 40 remain largely the

same until we reach the very last, and least desirable, stage of life. Thus, even if his qualification is relevant, the differences in probabilities may not be sufficiently large as to constitute a significant advantage.

There are also likely to be regional variations, and so depending on your birthplace you may be a victim of female infanticide or die in childhood from “the pattern of neglect” (the systematic dismissal of a daughter’s nutritional or medical needs), you may be killed by your rapist, stoned by religious fanatics, burned for witchcraft, killed for dowry, or die in childbirth or from domestic violence. As different factors combine, over a hundred million women are missing (Sen 1990). Of course, things are different in developed societies. But there, if you are prudent and look after yourself, the chances of dying young are so small for both women and men that some small difference in what is already a remote chance may not be very significant.

In addition, as Van Parijs notes, women are not only poorer but also need to stretch their scarcer resources over more years, which makes them in one respect poorer still. Having said this, however, he adds that there is an income difference (and he mentions income differences of 5%, 1% and 0.01%) that individuals would accept in exchange for increased longevity. Three observations are needed here. First, women do not only have to stretch the fewer resources they have over a few more (equally costly) years. In fact, it is in those final years that the costs of surviving often skyrocket. Second, women are not only poorer but *much* poorer than men and *much* worse paid. And so that the reader is not left with the wrong impression, it is worth noting that income differences are much larger than those Van Parijs suggests in his thought experiment. In Spain, for instance, the gender income difference is 33.7% (Eurostat 2015b), so that if a man makes 1,000€ a month, the woman would only make 666€, receiving just 2€ for every 3€ a man secures. Third, just as we cannot imagine that the extra years are additional years in our 30’s or 40’s, we cannot imagine these are additional years of a typical *male* life, with all the drinking or speeding included. For the alleged advantage consists mainly in the final years of a *female* life, with its poverty, illness, stress, and subordination to men.

It is unlikely, then, that men would prefer these female ‘advantages’, and if they are tempted to do so they should consider Van Parijs’ final, and most original, observation regarding longevity. He notes that besides living longer, women

*are also on average two or three years younger than their male partner. This means that far more women than men are likely to still be around when their ageing partner is becoming frail and dependent. As long as much of the elderly care required in these circumstances is performed*

*within the household, the necessary consequence is a very significant inequality in the amount of domestic elderly care work performed by the two genders, which — as lives get longer and children fewer — may approximate or even exceed the size of the inequality in the respective amounts of domestic child care. Note that this holds even under the unrealistic assumption that both the will and capacity to care for their partner are the same for men and women. In this light, men's lower life expectancy might be interpreted as a trick to extract more care work out of women (2015: 82).*

What this means is that women's somewhat longer lives are not really theirs: whatever their vocation, they are effectively conscripted as nurses, cooks, and cleaners. Not long after they finish cleaning and feeding their children, they may end up stuck with the far less pleasant chore of cleaning and feeding old men, often first their own father and then their elderly spouse. Having looked after their partner day and night, they then see them die, and go on to age and die alone themselves. Van Parijs sees no way out of this. Since deterring men from marrying younger women seems difficult, if not impossible, and getting them to outsource their elderly care seems to him not only costly but undesirable, he thinks we face here a blind alley. If we accept this pessimistic conclusion, it becomes easier to deny men are missing out on any significant benefit. But perhaps we should explore ways to change women's situation in those final years.

Let us consider the age gap first. The age between spouses correlates with higher divorce rates (Francis-Tan and Mialon 2015), and so we may have additional reasons to nudge people into reconsidering divorcing to marry somebody much younger. Van Parijs himself once proposed a tax on the age difference between partners to reduce the chances of the wife leaving a less senior job than her husband's in order to care for their children (Van Parijs 2001). Such a tax could serve other functions too, and it could even be progressive: the rate could be adjusted so an elderly millionaire starting his fourth marriage to a barely adult beauty queen would pay a higher tax than a less wealthy man whose marriage involves a smaller age gap. And since the gap correlates with income inequality and other aspects of the social structure (Casterline 1986), it may also spontaneously shrink as society becomes more just.

Regarding elderly care, I favor more outsourcing. Some countries outsource care by combining the elderly individual's savings with state aid, for example, by advancing funds that the state can then recover once the deceased's home is sold. Most developed countries outsource childcare despite the fact that it is important for the development of the child (but often not for the elderly) to be cared for by a specific person, and despite

the fact that it is far more delightful for a person to wash and feed her own child than an old man. One may prefer to see and talk to one's spouse or female relative rather than a paid carer, but then one can always invite them to visit rather than force them to be there performing all sorts of tasks, such as treating bedsores, that not everybody is cut out for. Caring for an elderly person often requires the ability not to feel faint or nauseous when confronted with certain sights and smells, the ability not to take criticisms personally, and the strength not to drop a man's body when moving it. If a young male professional is much better than an aging wife at all of this, it is not desirable to rely on her performing such tasks.

Moreover, it is unfair that after a lifetime of being paid so much more, men could go on to expect women to care for them *gratis*. Instead, everybody should feel under a duty to save to avoid becoming, in effect, slave-drivers in their old age. I certainly do not see how one could have a right to turn a rare and modest advantage for women into yet more unpaid and unchosen female labor. As Dworkin would say, we may disagree about to what extent we should compensate people for a certain disability, but we should agree that a just society will not turn individuals' natural advantages into a liability by engaging in some sort of slavery for either the talented or the long-lived.

## CONCLUSION

Van Parijs claims that lacking female longevity is an injustice against men, if it is caused by a gendered lifestyle. I have argued that on some plausible views, such as Thomas Scanlon's, at least under some circumstances in which society can be said to have "done enough" for some individuals, they can be expected to bear the consequences of their life-shortening behavior, whether or not it is influenced by gender stereotypes. Van Parijs also argues that if men's lack of female longevity is due to asocial factors, then it is an injustice against men. I have argued that on some plausible views, such as Ronald Dworkin's, it is not an injustice if, as scientists suggest, having female longevity is inextricably linked to being female, and men identify with their condition and do not consider it bad brute luck. Finally, Van Parijs notes various reasons to deny female longevity is a significant benefit. One of them concerns the informal conscription of unpaid female labor for elderly care. I have argued such conscription should end. Until it does, however, I agree with Van Parijs that it greatly diminishes the value of what was already at most a very modest benefit.



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# Women's Greater Educational Efforts as a Consequence of Inequality<sup>1</sup>

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## Abstract

Contrary to Philippe Van Parijs' assumptions, women's greater educational achievements do not indicate that gender inequalities are smaller than assumed or that the efforts to achieve gender equality are overshooting. Being more qualified may be women's best hope to escape poverty, unemployment, or single-parenting, as well as domestic and workplace exploitation. They are thus symptoms of gender inequality, not signs of its disappearance. In addition, they do not translate into greater access to income and wealth, positions of power and authority, social standing, or the chance to have several children, in the same way as they do in the case of men. Having to work so much harder to be rewarded so much less is, as Van Parijs at one point suspects, one of the forms of compound injustice that women face.

**Keywords:** gender inequality, education, poverty, traditional gender roles, leadership positions

## INTRODUCTION

In his second puzzle on gender equality, Philippe Van Parijs draws attention to the fact that, in some places, women are now more successful than men in securing degrees in higher education. This is not true everywhere, but I shall not dispute the trend in some countries and instead note that this already happened in the United States in the mid-1980s (Schwartz and Han 2014: 605). This paper disputes some of the lessons Van Parijs draws from these events.

Van Parijs points out that higher education “has a significant impact (...) on empowerment as citizens and household members” (2015: 84), and so wonders whether “women's emerging educational advantage should then

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be regarded as offsetting (albeit in small part) men's economic advantage" (84). My view is that it is true that education *could* potentially, in some possible world, offset men's economic advantage. In ours, however, it does not. Income and employment gender differentials persist, as Van Parijs admits (84). And, in fact, such inequalities compel women much more than men to achieve higher education. Women's income and employment are much more dependent than men's on qualifications and so, rather than indicating the end of inequality, women's greater educational efforts appear to be just one of the many *consequences* of the pervasive inequality favoring men. Women's greater dependence on extra educational effort is one of the many disadvantages women suffer. It is well known that women, whether they are secretaries or MPs, also have to make a greater effort than men to look good and dress well to avoid mockery. The fact that they try so much harder and sometimes succeed and do look better than men is not a sign of the end of injustice, but just one of the respects in which, as it is often said, women have to "try twice as hard, to be granted half as much." And this makes men like myself wonder why they do persist in trying rather than give up in the face of such obstacles.

## 1. PROTECTION FROM POVERTY, SINGLE PARENTING AND DOMESTIC EXPLOITATION

One of the most relevant disparities between men and women is what we may call "the poverty risk," which refers to the chances of ending up living in poverty. While in the past there were a variety of reasons why somebody could end up living in poverty and the ranks of the poor were made up to a greater extent of people from a variety of groups, poverty statistics and projections clearly show single (especially, never-married) mothers and their children as making up a large and growing<sup>2</sup> percentage of people living below the poverty line in developed societies (see Bianchi 1999: 313; Targosz *et al.* 2003: 716). Women's poverty risk is higher than men's. In addition, *poverty* (income inequality) involves additional harms for women because of how deeply and irreversibly it can affect their children and because it correlates with increased risks of violence, harassment, and rape (Whaley 2001: 550), as well as depression and other types of mental disorder (Targosz 2003: 721). In the United States, the poverty risk increased for women relative to

2 In the words of Bianchi, "since the mid-1980s, the percentage of mother-child families in poverty has fluctuated, and the ratio of their poverty rate to that of married-couple families has been higher than in 1984." She also notes that the relative poverty ratio between mother-child families and two-parent families, fluctuated between the 1970s and the 1980s. Nevertheless, in 1984 mother-child families' poverty ratio was still five times that of two parent-families.

men in the period from 1950 to 1980 (Bianchi 1999: 310), precisely the period in which women applied themselves enough to catch up with men educationally. Despite such a great educational effort, however, women's poverty rates still remained higher than men's during the 1990s (Bianchi 1999). Recent data shows that the efforts of European women have also failed to liberate them from a higher poverty risk (see Van Lancker *et al.* 2015: 45-54). Given this explanation of women's educational efforts, the prediction can only be that the trend will remain while sexism remains.

A fundamental factor in explaining women's greater poverty risk is single-parenting, which is strongly connected to their education. Since the chances of finding a co-parent increase for women as they obtain diplomas and degrees, women with higher education reduce their poverty risk, for even if their educational efforts do not secure them permanent employment, they reduce their risk of single-parenting in poverty (Diprete and Buchmann 2006: 4). This offers an excellent deterrence against dropping out of school. Since men do not face the same risk, they do not have the same deterrent.

Education diminishes women's chances of being abandoned while pregnant and giving birth alone, and when the relationship continues, education remains one of the few protections (and perhaps the only protection) women can secure against the man then insisting that since he earns more, she should stay home, cooking and raising the children. This is a risky option for women, as with every pregnancy and every year into the marriage, women become less desirable both in the love and the labor markets, becoming less employable and attractive, not only because of the physical deterioration usually caused by motherhood, but because when children come with the package, women become less attractive both to other men and employers. Meanwhile, the man is promoted, takes senior positions and his stocks in both markets go up. With very poor exit options, the woman then tends to lose her voice and have to accept any deal she is dealt (Okin 1989: 137-8), including affairs or sexual activities she does not want, while living with the fear of being abandoned for another woman, or seeing this happening and becoming poor.

Even renouncing motherhood and staying in paid employment is no guarantee against being expected to do most of the household chores after work (Hochschild 1989: 4). Men need not fear such exploitation, and do not need a degree to gain protection against such fate.

## 2. PROTECTION FROM UNEMPLOYMENT AND EXPLOITATIVE WAGES

Outside the home, women are also at greater risk of unemployment, underemployment, and unfairly low wages and so need to have more qualifications for these purposes than men. In addition, in the 1980s and 1990s, the value of higher education has been growing faster for women than for men, not only regarding family returns but also the labor market (Diprete and Buchmann 2006). The gap in income between college and high-school educated women increased enormously after the 1980s and remained always larger than that of men (13 and 20). This shows that women's income is more dependent on higher education than men's, for whom high school is often enough to provide adequate earnings. Similar trends appear in relation with access to employment. In the European Union, men's rates of employment are superior to women's in all levels, with the exception of tertiary education (Eurostat 2014). Only at that level are female rates able to achieve men's possibilities to find a job. This provides an additional good reason for women to accomplish higher education: it constitutes an irreplaceable tool for them to achieve levels of employability similar to men's. Becoming well qualified may also be the only way in which women can reduce (rather than eliminate) the rate of patronizing comments, demeaning and intimidating attitudes, and bullying. It seems, then, that educated women are penalized for being women less than less educated women are by all those who select them as either employees or as co-parents or partners. If so, even if female higher educational efforts do not make women wealthier, they are worth pursuing, for it is their protection, and perhaps the only one, against being short-changed at work and at home. Thus, female educational efforts, far from signaling the arrival of equality, are the knotted rope women use to escape the flames of discrimination, domestic and workplace exploitation, and poverty.

Van Parijs doubts there is any inequality "if society gives group B more money and group A better education" (2015: 88). This is misleading because societies do not reserve school places for women or otherwise offer women something it denies to men. To understand something complex we may need to take its simpler constitutive pieces apart and place them together again. But we may mislead rather than contribute to a better understanding if we greatly simplify something and just leave it at that.

### 3. WOMEN'S LOWLY OCCUPATIONS

Van Parijs admits that “not only do women get paid less than men, but they do so despite studying harder” (2015: 83). He then suggests, however, that this may be because “women choose studies that lead to less lucrative careers” (83). If that is the case, he doubts whether their studying more and earning less could “still be viewed as amplifying the injustice” (83). This speculative monistic explanation, again, stops the inquiry short. We need to ask why women pursue badly paid careers. There are several widely discussed explanations of this phenomenon in the literature. One well-known explanation refers to social conditioning, stereotypes, and the systematic undermining, from a young age, of women's confidence in their being able to perform well in certain occupations. Another theory is that some occupations have low status and are badly paid because so many women work in them. We know, for example, that when women started to occupy the respectable positions of “clerk” and “administrator,” though the tasks remained the same, the position was demoted to that of “secretary” and the salary lowered (see Reskin and Hartmann 1986: 31). A third, extensively documented explanation of why women take such occupations is that other occupations are less compatible with women having to do most of the housework and childcare.

It seems that the three best known accounts do not imply that there is no injustice to worry about, but on the contrary direct us to the existence of other injustices explaining women's actual occupations. Van Parijs would have to show that none of these explanations or any other alternatives referring to some background of unfairness is even partially correct. He would then have to provide a more convincing account which does not ultimately refer to unfair phenomena. It is unlikely, however, that a complete description would not involve elements from all three explanations.

A starting point to analyze the traditional attribution of certain professional pathways to each of the sexes can be the common association between women and childrearing. Regardless of whether women decide or not to have children, most gender differences in employment and economic opportunities are parasitic on the sexual division of labor (Nagel 1997: 318). The assumption of the interconnection between womanhood and childrearing has had the widespread effect of denying women the ability to specialize. The interruption that the need to care for children necessarily generates makes women engage in a whole set of different tasks that involve lower cognitive, emotional, and aesthetic demands, without fully concentrating on any of them (Wilson 2004: 261, 272). Women's work should not be too absorbing or dangerous, as it must always allow them to maintain their socially assumed maternity function (261, 272). Statistical evidence shows that the presence of women in full

time work decreases enormously after the birth of the first child (Paull 2008: F18) and small children at home increase the likelihood that a woman is employed part time (Rosenfeld 1996: 209). The different expectations generally attributed to men's and women's work make it necessary for the latter to choose careers that allow little specialization and great ability to combine childrearing with work outside the household. As a consequence of the assumption that it is them who will have to take care of children, women accommodate their fertility to their labor force participation and vice versa (Brewster and Rindfuss 2000: 289-290).

Consequently, women tend to be overrepresented in fields characterized by their functional or symbolic proximity to the traditional female domestic role, which cover health related careers (nursing), education, and humanities (Charles and Bradley 2002: 581, 590). These occupations provide more poorly paid jobs than those that require specialization, like Math, Science, and Engineering (MSE), which are characterized by the abundance of men (580). The traditional absence of women from MSE domains has also had effects on men's and women's self-perception of their skills. As a result of common stereotypes, women with equal scores in Math tests to men tend to rate their own mathematic skills much lower (Fine 2010: 48). Differences in rating of one's own skills derive also in a different disposition to choose one or another professional path (48), so that, even though women are not necessarily less competent than men for MSE, they will be more reluctant to lead their careers in this direction.

These stereotypes, though, do not only work against women's fitting in particular domains, they also affect their position within different occupations. Both in traditionally male and female spaces, the disproportionate upholding of leadership spots by men hinders women's upwards career mobility (Maume 1999: 1436, 1452). Managers often associate positions of power with the exercise of abilities like aggressiveness and ambition (1436, 1452), which are more commonly coupled with men. There are, however, other abilities, like social and psychological skills or ability to negotiate, which can be more useful in some managerial positions. In contrast, managers' preconceptions about women tend to describe them as 'gentle' or lacking ambition, which creates problems for those who try to climb up the leadership ladder (Fine 2010: 52). The exercise of leadership is simply not seen as feminine, and when women manage to achieve positions of power they are commonly regarded as 'competent but cold' (52). Therefore, the situation of women in access to leadership is hindered by the interplay of first, the assumption of their lack of competence to exercise power and, second, the negative perception of those women who attempt to put leadership-associated abilities into practice.



The traditional exclusion of women both from MSE domains and leadership positions makes it harder for them to fit into those spaces still nowadays. As Radcliffe-Richards (1980: 113) points out, if a group is kept out of a particular area long enough, it is overwhelmingly likely that activities will develop in a way unsuited to the excluded group. MSE careers and the achievement of leadership (both in traditional male and female domains) are currently linked to capacities which are uncommonly associated with women. Men's socially-designed biographies define workplace expectations and successful career patterns (MacKinnon 1987: 36). These long-lasting stereotypes are hard to break for women who, as we have seen, are at the same time regarded as incompetent for leadership and valued negatively when they try to exercise power in 'masculine' ways.

Even if women were truly less attracted than men by MSE careers, that interest is clearly not impervious to outside influence (Fine 2010: 50), so that social stereotypes condition enormously women's predisposition to enter such domains. In addition, the assumption of their lack of competence for leadership blocks women's career mobility both in traditional male and female domains, in which men are commonly 'kicked upstairs' on the belief that they are *too* competent for low-rank posts (50) or that leading is a special talent men have.

Randall Filer offered an alternative explanation of women's lower income. He argued that women are badly paid because they care more about the non-pecuniary aspects of a job and so systematically pick badly paid but otherwise attractive positions (see Filer 1985: 426-37). This did not sound *prima facie* implausible and points to a potential, exonerating explanation which probably helped those who already wanted to do nothing about existing inequalities. However, as J. S. Mill had already argued against Adam Smith, and as contemporary social scientists confirm, the worst paid jobs have a systematic tendency to be the worst jobs in all the non-pecuniary dimensions of job desirability as well. Moreover, women's jobs in particular are worse than men's in twelve of the fourteen non-monetary measures used by Christopher Jencks and his co-authors (Jencks *et al.* 1988: 1352). Thus, "if it is true that women value non-monetary factors more than men, what this shows is that women fair worse than men even in what matters to women most" (Casal 2016: sec. V.b).

Therefore, the fact that women are badly paid, far from being explicable by some exonerating factor, constitutes a clear case of compound injustice. So, the answer to Van Parijs' question regarding whether the fact that women today are both more qualified and worse paid should be seen as "amplifying injustice" (2015: 83) is "yes," because women are worse paid within the same occupation, and the most likely explanations of their being in certain occupations refers to further injustice.

It is also important to note that having an education which those in the opposite sex lack has very different consequences for men and women, regarding non-pecuniary or promotional aspects of their lives. Men with very successful careers in the hard sciences often have several children, while successful female scientists often have no families at all, as they have to compete with men who have housewives that do everything for them whilst lacking one of their own. So a group of well qualified women are childless or even entirely alone. For another group, their qualifications have just brought them additional sadness and frustration in realizing that the price of having children was having to leave their PhD on the shelf and put on their cleaning gloves, while their less qualified husbands pursue their careers. A third group of women lives with extraordinarily high levels of stress as breadwinners who still make sure their children keep medical and social appointments, do their homework, have all they need for school, and either do all the housework or have to chase the man so that things get done to what they consider an acceptable level. For, while getting married does not affect male careers negatively – rather the opposite – (see Wolfinger *et al.* 2008: 394), the weight of housework forces women either to delay their decision to form a family or to forsake it if they want to succeed in the professional world (390-1, 398-402). Having an education, thus, does not bring women the benefits it brings men.

## CONCLUSION

Women's educational achievements do not show that the efforts to achieve gender equality are overshooting. Being more qualified may be women's best (or sometimes only) hope to escape poverty, unemployment, or single-parenting, as well as domestic and workplace exploitation. It is thus a symptom of gender inequality, not a sign of its disappearance. In addition, it does not translate, in the same way as it does with men, into greater access to income and wealth, positions of power and authority, social standing, or the chance to have several children. Having to work so much harder to be rewarded so much less is, as Van Parijs at one point suspects, one of the forms of compound injustice that women face.

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# Do Women Enjoy a Political Advantage? Majority Position and Democratic Justice<sup>1</sup>

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## ABSTRACT

Philippe Van Parijs suggests that there might be a political inequality in favor of women, taken as a group, stemming both from their life expectancy and their supposed higher participation in elections due to their higher level of education. He also wonders about the status of this inequality. Is it advantageous? Is it unjust? Does it partially counterbalance other disadvantages or injustices? This paper starts by assessing and qualifying the alleged inequality from an empirical perspective. It then considers Van Parijs' normative questions and argues that we should not consider the inequality as an advantage, nor an injustice, because mere membership in a majority group cannot plausibly be judged so. Where women have strong common interests, they have no power; where they have electoral power, they have no overarching common interests.

**Keywords:** Political equality, gender equality, life expectancy, education, democratic justice

## INTRODUCTION

In his provocative and stimulating paper on gender inequalities, Philippe Van Parijs discusses four puzzles. I focus on the third, which concerns an alleged political inequality in favor of women, taken as a group, stemming both from their life expectancy and their supposed higher participation in elections due to their higher level of education. Van Parijs recognizes that, all things considered, women suffer many more disadvantages than men, but wonders about the status of this inequality: is it advantageous? Is it

<sup>1</sup> I am very grateful to Paula Casal for her numerous useful comments on earlier drafts of this paper and linguistic advice. I also thank Siba Harb and LEAP's anonymous reviewers for various excellent suggestions.

unjust? Does it partially counterbalance other disadvantages or injustices? I argue that we should not consider this inequality as an advantage, nor an injustice, because mere membership in a majority group cannot plausibly be judged so.

## 1. A GENERAL PUZZLE ABOUT THESE PUZZLES

Before considering Van Parijs' puzzle, I feel I should say a more general word about the questioned appropriateness of his paper, if only because it has engendered offended reactions. I have found around me that most men considered the puzzles amusing and stimulating, whereas most women found them inappropriate, if not stupid. It is certainly easier to discourse with lightness over the possible advantages of being a woman when you do not experience everyday domination nor bear the symbolic weight of an enduring oppression. Therefore, even though I agree with Van Parijs that the questions he raises are "worth asking" (Van Parijs 2015: 88) and take this puzzle as an invitation to reflect upon the interesting issue of democratic justice, I also agree with several of his critics that the puzzles are of little practical relevance and therefore somewhat odd in the writings of such a *philosophe engagé*.

## 2. THE EXTENT OF GENDER POLITICAL INEQUALITY

Van Parijs makes two empirical hypotheses. First, that women form a *potential* majority in all constituencies with universal suffrage where they enjoy longer life expectancy. Although men are more numerous at birth almost everywhere in the world, it is true that women outnumber them in the population of most advanced democracies, such as Western Europe and North America. By contrast, the sex ratio tends to be reversed in Africa and Asia.<sup>2</sup> Second, he suggests that this unequal balance of electoral power might be increased by a larger participation of women in elections, thanks to their higher level of education in several countries. This is more controversial.

It has generally proven true in the history of democracy that the level of education increases electoral turnout (Norris 2004: 175). The correlation between education and women's turnout is expressed by the fact that in developed countries, where they are likely to have a more equal access to education, the gender gap has disappeared: women participate in elections

<sup>2</sup> See the CIA's "World Factbook" <https://www.cia.gov/library/publications/the-world-factbook/fields/2018.html>

at least as much as men (Norris 2002).<sup>3</sup> In contrast, in newer democracies, where unexamined religious norms and/or sexist social norms reducing women's educational opportunities tend to be more pervasive, women's turnout to elections is lower. In recent history, though, there seems to be a clear secular trend, expressed in the generational variations in women's turnout (Norris 2002) and political orientation (Stevens 2007: 52-58).

Is it then the case that, in contexts where women are on average more highly educated, the inequality in electoral turnout is reinforced? Not really. In advanced democracies, with the exceptions of the United States and Switzerland – which sometimes alter the general picture–, education seems to have almost no effect anymore on turnout (Przeworski 2010: 94).

The impact of education on electoral participation is generally higher in less affluent countries, which usually show less gender equality and less female participation in elections.<sup>4</sup> Therefore, where the impact of education on turnout is high, women might not otherwise enjoy high turnout or a higher level of education. What is more, even where higher education does increase turnout, a reversed tendency might counterbalance it, as a low education profile seems to affect women's (lower) turnout much more than men's (Norris 2002).

In sum, the accumulation of the two advantages envisioned by Van Parijs – participation and education – is plausible in the U.S., and possibly Switzerland, yet much less elsewhere. This does not affect his hypothesis that longer life expectancy might constitute a political advantage, but it restricts the extent of the supposed inequality of political power.

Now, what could somewhat increase the plausibility of Van Parijs' claim is the amusing fact that “surveys find more people saying that they have voted than the actual polling figures confirm” (Stevens 2007: 49) and “men are slightly more likely than women to misrepresent having gone to the polls” (Verba *et al.* 1997: 1054). This, however, is unlikely to increase significantly women's actual electoral power.

A more promising path for Van Parijs could be to consider the effects of age on turnout, which used to worry him (Van Parijs 2011). As he knows, older people tend to vote more than younger people (Norris 2004: 125; Van Parijs 2011: 35). And contrary to what he seems to assume (Van Parijs 2015), the ratio of elderly women to elderly men is higher than the ratio of women to men at younger ages (CIA 2014; Casal 2015). In light of developed democracy's

<sup>3</sup> They often have more or less equal rates of turnout, and as they often outnumber men in those societies, they often (yet not always) outnumber them in elections.

<sup>4</sup> This with reservations, as little information is available about turnout rates broken down by sex. See Norris 2002.

tendency to face an ageing population, one might thus think that the imbalance of electoral power is increasing in the West. However, the sex differential in life expectancy is now narrowing with the years in developed countries after having peaked between 1970 and 1980 (Glei and Horiuchi 2007). So, while differences in turnout according to age may slightly increase the imbalance of electoral power, ageing will probably not.

Political action, however, is not reducible to participation in elections.<sup>5</sup> This brings in another reason for tempering Van Parijs' hypothesis that women could enjoy some political advantage. It seems that "[w]ith respect to most forms of political activity other than voting, women are slightly less active than men" (Verba *et al.* 1997: 1053).<sup>6</sup> This comes from the fact that they generally have less resources to spend on political activity than men, but also that they have on average less interest in – and knowledge about – politics. This difference, it appears, "persist[s] at each educational level" (1060), and can be explained both by their perception of politics as a man's game – their interest and knowledge increase in constituencies with female (potential) representatives – and a gender differentiated political education. In addition to this, their lower participation in the workforce also negatively affects women's engagement with politics in the broader sense (*et al.* 2001: 198-218).

Finally, the potential electoral advantage cannot be taken in isolation from the rest of the process characterized by a marked underrepresentation of women in parliaments, local government, media, or lobbying. Elections constitute only a part of politics and turnout does not amount to political engagement. Rather than a political inequality in favor of women, it would thus be more appropriate to talk about a potential electoral inequality in their favor or, more precisely, a potential inequality in active suffrage, dwarfed by an unfavorable inequality along most other dimensions of influential political action.

5 This is not denied by Van Parijs, but somewhat obscured by his tendency to use a Schumpeterian model of democracy. See Van Parijs 2011.

6 Marien *et al.* (2010) recently arrived to the opposite conclusion, using a broader data set than Burns, Schlozman and Verba, who mainly focused on the US. More cross-country investigation would be necessary. Yet what seems to account for the difference is mainly a different understanding of political participation. Marien, Hooghe and Quintelier conclude that women are more active in non-electoral politics because they consider charity donations and products boycotting – both performed more often by women than men – as important "participation acts." Yet it seems to be in activities producing influence on institutionalized politics (party membership, party meetings, direct contacts with politicians) that women are generally less active than men – except for signing petitions (Marien *et al.* 2010). Furthermore, if you consider the money invested in political action beside the time dedicated to it, the imbalance of influence in favor of men becomes more apparent (Burns *et al.* 2001: 68).

### 3. IS THIS INEQUALITY UNJUST? IS IT EVEN AN ADVANTAGE?

Having a qualified picture of the extent of the (potential) inequality in active suffrage in favor of women, we can consider its normative implications.

If the inequality in active suffrage is only caused by an unequal use of an equal opportunity to vote, one might argue that there is no injustice. For there being *procedural* injustice, one needs to trace back the unequal turnout to unequal opportunities. When men's turnout is lower than women's, it might be because they are on average younger and less educated. Life expectancy does not affect men's opportunities to vote, since at each age, all other things being equal, they have equal opportunities to do so. What about their lower educational achievements? They cannot plausibly stem from unequal educational opportunities, but they might result from unequal educational abilities. If this were the case, one may argue that this involves some procedural injustice in countries where education has an impact on turnout. This small disadvantage, however, would be cancelled by all the other advantages politically enjoyed by men, which provide them many more opportunities of political influence than women. Moreover, if women's higher educational achievements are due to unequal opportunities in the job market (Mora 2015), men suffer neither unequal educational opportunities nor unequal voting opportunities, and there is no procedural injustice.

Van Parijs seems nevertheless more concerned with people's use of their votes than with procedural justice. What he invites us to consider are the implications of being in a majority or minority position in a constituency. Here the problem is not procedural. That women have more power because they are more numerous is procedurally irreproachable: it is the very implication of the basic principle of political equality – one person, one vote. The worry is that they could turn this numerical advantage into a *substantial* injustice. Van Parijs' approach is radically consequentialist, as illustrated by his past discussion of the disenfranchisement of the elderly (Van Parijs 2011: 31-66).

To be member of a minority group cannot by itself be considered as an injustice, but a minority position makes groups more vulnerable to injustices. As people differ along many lines in characteristics, we are all potentially members of a minority group. What can be considered as democratically unjust – or can lead to substantive injustices – is to have political institutions



arranged in such a way that majority groups are allowed to exert domination over minorities.<sup>7</sup> But domination should not be understood here as Philip Pettit (2012) does. According to him, it is sufficient for there being domination that one agent has the possibility or power to arbitrarily interfere with the choices and actions of another. Yet such understanding of domination is of little use for exploring democratic justice in group relationships because virtually all potential majorities dominate potential minorities. Ian Shapiro, for example, defends a conception of domination that is more useful for our purpose. He suggests that having the capacity to interfere with people's basic interests "does not itself constitute domination; rather it creates the potential for domination" (Shapiro 2012: 324).<sup>8</sup>

What matters for democratic justice is therefore to assess the plausibility of the threat that one group will take advantage of a favorable balance of power to actually dominate another by systematically favoring its own interests at the expense of the other's. It is the case, for example, when an ethnic group outnumbers another one towards which it is hostile, or because the employed largely outnumber the unemployed. There you find ground for justifying constitutionally protected rights for minorities, in order to avoid this specific kind of domination. To the contrary, we do not consider people with blue eyes as disadvantaged because in a minority, as it is unlikely that they are going to suffer a political disadvantage because of this imbalance of power. They can take part in multiple more plausible majority coalitions, as does the minority sometimes formed by men. I mean by this that it will prove easy for men, as for the blue-eyed, to build a coalition of interests or convictions cross-cutting sexes and eye color.

Now, it seems quite implausible to consider the fact that women generally outnumber men as an advantage, because where they could take advantage of their number, they lack the interest in doing so. The only common interest of women which could bring them together despite the diversity of their socio-economic interests and their diverging values is the avoidance of male domination. This explains general progresses towards more gender equality since the advent of universal suffrage. Yet, in the countries where they are the most oppressed – say, Saudi Arabia –, women are not allowed to vote. In oppressive democracies, where they are entitled to vote but lack education

7 I say "democratically unjust" because social injustices are not reducible to domination. Nevertheless, contrary to a just society, a just democracy cannot eliminate all kinds of unfair advantages. Politically relevant majorities will always enjoy an advantage – stemming from the inescapable use of majority rule –, which it should be the aim to minimize, at least in such a way as to reduce political domination.

8 As Shapiro suggests, Pettit's understanding of domination "partly accounts for [his] schizoid attitude toward the state" (Shapiro 2012: 321), as it pushes him to defend multiple veto players that can lead to a political stand still.

and freedom of conscience, they can vote but either do it less than men – see India –, or do it against their common interest – be it under the pressure of their male relatives or because they have internalized some oppressive ideology. Only in countries where they have equal access to education and are freed from ideological domination could they use their number as an advantage and “convert [it] into an even greater inequality in their favor” (Van Parijs 2015: 85). But in those contexts, their common interest – reducing male domination – does not seem strong enough to offset their divergent interests and values.<sup>9</sup>

Take the U.S. as an example. Since the 80s, contrary to their previous tendency, women have tended to support Democrats more than men at every election (Stevens 2007: 55-56). Moreover, since 1964, women systematically outnumber men in presidential elections, with a difference reaching 7.2 million votes in 1996 (Norris 2002).<sup>10</sup> One could then wonder why Republicans do not adapt their programs – on reproductive issues for example – to catch more female votes. Such an intuition seems to be endorsed by Van Parijs when he says that “on the assumption that the electorate is not stupid or blind, [the representatives], whether women or men, will only be elected and re-elected if the policies they propose or adopt match the preferences of the female majority” (Van Parijs 2015: 84). Yet the latter preferences vary along many dimensions and are not sufficiently tied together to make women’s votes an attractive specific target for Republicans. Conflicts of economic interests and (religious) values largely dominate the competition for votes. Targeting one gender group at the expense of consistency regarding those more sensible issues is risky for both parties. Women, as everyone, assign priorities to some political goals over others, and seldom are their special interests – those they share only with women – on top of the list. This probably explains why historical attempts to create women’s parties “have generally proved short-lived” (Stevens 2007: 100).

For all these reasons, it seems implausible to characterize the larger number of women among voters as an actual advantage, and even more as an injustice. It could be advantageous for them in a hypothetical world with full consciousness of their common interests and no division along other lines. Then, only, would we have to take it seriously and possibly design institutions in such a way as to reduce their possibilities of turning this

9 What is more, these countries have generally adopted strong anti-discrimination laws which undermine the possibility of a domination of men by women. These laws do not make male domination disappear, as it is rooted in pervasive social norms, but they would most probably impede new forms of domination. Political power is not unchecked.

10 This could be due both to demography and education, as the latter does have an effect on turnout in the US.

advantage into an injustice.<sup>11</sup> In the meantime, men can sleep soundly.

## CONCLUSION

I have argued that the electoral power imbalance between men and women is a fact in advanced democracies, yet not very significant – contrary to Van Parijs’ hypothesis –, and to be considered alongside a reversed power imbalance along other dimensions of political action neglected by his argument. Then I have claimed that for a majority to exert political domination, and thus turn a numerical advantage into an unjust democratic advantage, it needs power and overarching common interests. Where women have strong common interests, they have no power; where they have electoral power, they no longer have overarching common interests. The fact that they constitute a potential electoral majority is thus unlikely to constitute an injustice someday nor to counterbalance (even modestly) other political disadvantages – such as the fact that women are underrepresented, less politically stimulated, and have fewer resources for political engagement.

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<sup>11</sup> Note that this hypothetical power imbalance might bring, overall, more justice, as it seems that most crimes and injustices are committed by men (Casal 2011; Pinker 2011), and Van Parijs argued elsewhere (Van Parijs 2011) that we should opt for the democratic arrangement most favorable to justice, even at the cost of political equality.

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# A Blatant Case of Over-Accommodation<sup>1</sup>

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## Abstract

Van Parijs asks whether the fact that men engage in regrettable behavior at much higher rates than women could be seen as a “handicap” due to their hormonal set-up, and therefore as a dimension of gender inequality to men’s disadvantage. I argue that this suggestion rests on unwarranted assumptions about the meaning of gender equality and the causes of men’s behavior. Moreover, even if for the argument’s sake we grant these unwarranted assumptions, it is easy to show that no unfairness is suffered by men because of their (supposedly) unbalanced hormonal constitution. Indeed, if any injustice is done by our current social arrangements, it is injustice to those who suffer from the over-accommodation of this highly dangerous and destructive trait of men’s character.

**Keywords:** gender equality, hormones, disabilities, violence

## INTRODUCTION

It is a known fact that men get themselves into trouble much more often than women do. They commit 95% of murders worldwide (UNODC 2013), over 95% of recorded rapes in Europe (HEUNI 2014), and everywhere have a greater tendency to engage in inappropriate or wrongful sexual behavior. The vast majority of serial killers, prostitute killers, serial rapists, and sociopaths in general are also male. As a result, men are more likely than women to spend long terms in jail and suffer from social disgrace.

In his piece on gender equality, Van Parijs suggests that this phenomenon can be traced to hormonal causes. He does not produce any account of how this may be so, but refers to an intriguing article by Paula Casal (2011) in which scientific evidence on the correlation between high testosterone levels, typical of males, and aggressive, unempathetic, careless, and anti-social

1 For helpful suggestions, I thank Paula Casal and three anonymous referees.

behavior is discussed. Van Parijs asks whether the fact that men engage in regrettable behavior at much higher rates than women could be seen as a “handicap” and therefore as a dimension of gender inequality to men’s disadvantage.

Van Parijs’ puzzle about hormonal inequality relies on a biased and incomplete description of the facts at hand. Once the facts are reassessed and more accurately described, it becomes clear that no unfairness is suffered by men because of their (supposedly) testosterone-driven behavior. Indeed, if any injustice is done by our current social arrangement, it is injustice to those who suffer from the over-accommodation of this highly dangerous and destructive trait of men’s character.

Moreover, Van Parijs’ argument not only assumes a description of our social world that is deeply misleading and inaccurate, but also rests on factual and normative assumptions that are highly controversial. I intend to accept such assumptions for the sake of my argument. However, it will be worth making them explicit and show how disputable and unwarranted they are. This is where my discussion will start.

## 1. TWO UNWARRANTED ASSUMPTIONS BEHIND THE FOURTH PUZZLE

Van Parijs’ arguments rest on two main premises. The first concerns the meaning of gender inequality; the second concerns the hormonal bases of men’s behavior.

Let’s start with his notion of gender inequality. From the way in which Van Parijs frames the puzzle on hormonal inequality and the other puzzles he considers, it looks as if what he has in mind by gender inequality are differences in opportunities for welfare or resources between men and women. This is not an obvious presupposition. In the rich and highly sophisticated literature on gender inequality (for some useful surveys, see Squires 2000, ch. 4; Walby 2004; Verloo and Lombardo 2007), indeed, such a metric of equality is far from central. Even when comparisons between levels of achievement in terms of resources or welfare are made (see for example Young 2001; Phillips 2003), in most cases they are not taken as relevant *per se*, but as indicators of other dimensions of injustice and gender inequality. For example, women’s higher unemployment rates, lower income, and greater hardship resulting from divorce are taken as signs of the domination, oppression, and exploitation that women suffer in our society. Considering the intricate and fascinating philosophical questions that are involved in these debates, it is puzzling that Van Parijs

assumes as unproblematic that the relevant notion of equality at stake must be some version of equality of opportunity for welfare or resources. What is even more disconcerting is that this unwarranted assumption evidently leads Van Parijs to believe that the only alternative to posing the unorthodox questions he asks is to restate mere “well-meaning platitudes” (Van Parijs 2015: 79).

Once we assume a different notion of gender equality than the one chosen by Van Parijs, such as equality as non-domination or democratic equality as the equal access to full citizenship, it becomes evident that his remarks are in need of much further analysis. Merely pointing at a highly circumscribed welfare loss or an unsatisfied preference will not do.

The second highly controversial assumption that Van Parijs makes is that men’s criminal and sexually inappropriate behavior is explained by hormones. This cannot be the full story. If violent behavior were simply driven by male hormones, we would not be able to explain why, for example, in 2012 in South Africa there were 31 homicides per 100,000 people (and 64.5 in 1995), 39.3 in Jamaica, 90.4 in Honduras, 7 in Moldova, 7 in West Bank and Gaza, and just 1 in the Netherlands, Italy and Spain (UNODC 2013). Of course, in all these countries most killers are men, but such huge variations in homicide rates suggest that the reason cannot be an evenly spread feature like testosterone. The same should be noted about sexual behavior. Rape, sexual harassment, or paid sex cannot be interpreted as the mere satisfaction of an impellent physiological urge (Pateman 1988: 198). In truth, at a point in his discussion, Van Parijs considers the possibility that the bases of men’s behavior are not hormonal, but rather social and environmental. He suggests, however, that his analysis of the disadvantage suffered by men “holds irrespective of the validity of the hormonal diagnosis” (Van Parijs 2015: 87). In the following discussion, I will treat Van Parijs’ puzzle in its straightforward, unqualified version based on the hypothesis that men suffer from a “handicap” caused by their hormonal constitution. In fact, as I will note at the end, Van Parijs is right that the conclusions we may reach on this puzzle can easily be extended to the case in which men’s behavior is determined by environmental factors rather than hormones.

## 2. WHY IS MEN’S “HANDICAP” NOT TREATED?

I interpret the hormonal puzzle as a matter of justice. I do so not only because this is how Van Parijs formulates it when summing up the four puzzles at the end of his discussion (2015: 88), but also because the debate about gender equality he contributes to is in fact a debate about justice. Discussing gender inequality is not making humorous lists of relative pros and cons of being

a woman or a man, or asking ourselves which gender we should “pity” the most. We ask about inequalities between men and women because we worry that they are a matter of social injustice.

I therefore assume that Van Parijs points to hormonal inequality because he thinks that there is something wrong with the fact that, in our society, a biological feature leading to dysfunctional behavior, which therefore can be described as an unchosen “handicap,” determines the fate and opportunity for welfare and resources of those affected.

In order to assess whether men’s levels of testosterone can be treated as a handicap that raises issues of justice, we may compare it to standard cases of disabilities, for example someone who has lost her capacity to walk. Given the conception of equality that we are assuming here, she suffers injustice to the extent that her unchosen handicap affects her prospects of success in terms of welfare or resources. In order to redress that injustice, if her disability is due to a reversible medical condition, she should have access to adequate healthcare. When this is not possible, society should accommodate her needs and abilities, by removing all the architectural barriers, social rules and practices that cause her physical constitution to be a disadvantage. To the extent that this is unfeasible, she must be compensated.

Now, consider Van Parijs’ worry about men’s hormonal constitution. What is the nature of this alleged genetic handicap? Van Parijs admits that high levels of testosterone do not imply that men can never manage to repress their instincts in order to avoid their worst expressions, but believes that high levels of testosterone induce a tendency to lose control and engage in various forms of anti-social behavior (Yildirim and Derksen 2011). In fact, murders and rapes are only the most dramatic expressions of such a biological disposition. In the literature Van Parijs indirectly refers to, high levels of testosterone are associated with aggressive (Montoya et al. 2012), uncaring, unempathetic (Zilioli et al. 2014), and risk-taking (Stanton *et al.* 2011) behavior; this not only makes men prone to violent crimes, but affects all their interactions with other people and their everyday activities (Legato 2006). If we assume that it is something built into men’s constitution, then this actually looks like a very unfortunate condition, which should be recognized as a handicap. If we are worried about injustice, then we should ask whether our society is doing enough to treat, accommodate, or compensate men for such an impairing disability. If not, men could legitimately complain about our current social arrangement.

As a matter of fact, in our societies we witness no attempt to treat male’s hormonal handicap. However, once we start inquiring about this lack of treatment, we realize that the analogy with other central cases of disability breaks down. The reason why men are not treated, in fact, is not because



males are carelessly left to themselves with their impairing handicap, as is the case with other conditions that could be treated but are not. Rather, the reason why men are not treated is that male aggressive, unempathetic, careless, and risky behavior is taken, and has been taken for centuries, as the norm rather than a handicap. Our whole social world has been organized around the notion that male behavior, as sociopathic as it may look to an enlightened mind, is just normal – if not the model to emulate. Of course, the norm is not described as being aggressive, unempathetic, and prone to risk-taking; the use of these disapproving descriptions is ruled out exactly because male behavioral predispositions have always been and still are very much taken as the golden standard. Rather, those attitudes, typically feminine, that depart from the male constitution taken as the norm are described as feeble, overly risk-averse, and women are taken to be exceedingly prone to swooning, fainting, and crying. In this respect, like in others, women are conceived as men “minus certain attributes whose paradigm is morphological” (Irigaray 1985: 27); women’s feeble character is traced to their ill-developed biological constitution.

In fact, the proposal that men’s disposition to violent and aggressive behavior could be treated as a handicap and changed through a direct intervention on their hormonal constitution would be perceived as horrifying. Although the alteration of female hormonal constitution is often readily accepted, be that for birth control or achievements in competitive sports, any curtailment of male hormonal constitution tends to be perceived as an unbearable form of violence. This is exactly because those hormonal traits that make males so unfit for healthy social interactions are, in fact, cherished by our culture.

### 3. HOW MEN’S HANDICAP IS OVER-ACCOMMODATED

With other disabilities, it is often the case that when they fail to be recognized as unchosen handicaps, they fail to be accommodated by social institutions as well. This is the case, for example, with many conditions that received scientific and social recognition only recently, such as fibromyalgia, seasonal affective disorder, or genetic proneness to obesity.

Here is another point at which the parallel between men’s handicapping hormonal constitution and other central cases of disability breaks down. In fact, the failure to recognize men’s “handicap” as such does not result in a lack of accommodation by social institutions, since it is, indeed, seen as perfectly normal and even valuable. As a consequence, the tastes, values, and needs of men, and especially of the most aggressive among them, have shaped our entire social and political system, reaching an almost perfect level of accommodation.

Van Parijs seems to suggest that this was true once, in the remote times of Genghis Khan, but it is no longer the case in our highly civilized society in which physical violence no longer provides a social advantage. However, the genetic trait we are considering here is not violent behavior *per se*, but the high levels of testosterone that make males aggressive, competitive, careless, and prone to risk. Those traits, in fact, still constitute a very valuable factor of social advancement and prestige, and are still associated with higher probabilities to occupy top-rank positions in economic organizations and political institutions. The capacity for “leadership” continues to be celebrated in our society and its major economic and social domains; empirical studies show that such capacity is consistently associated with aggressive, competitive, and careless behavior (Alimo-Metcalfe 2010). Not surprisingly, a strong association has been found between possessing high testosterone levels and being rewarded as a “leader” in firms and social hierarchies in general (Sherman et al. 2015). Lack of “risk-aversion” and “competitive aggressiveness” are considered constitutive of good entrepreneurship (Rauch et al. 2009), and this is seen as giving men a comparative advantage (Sapienza et al. 2006; Lim and Envick 2013). Even in the apparently peaceful, enlightened, and highly civilized academic world, being competitive, aggressive, and not “too nice” is rewarded in terms of career and prestige (Van den Brink and Benschop 2012: 515-16; Bell and King 2010).

There’s more. In fact, if we look at how our major institutions and social practices are built and work, we realize that our treatment of males’ unfortunate hormonal constitution represents indeed a rare case of over-accommodation of an impairing disability. To see how this may be so, consider that wherever a public policy for the accommodation of people with disabilities exists, an important condition is included, which we might call a “safety proviso”<sup>2</sup>: the accommodation and inclusion in social, political, and economic institutions of people with disabilities should not cause grave risks to the safety and health of third parties. For example, in many Western countries, as people get older they have to pass physical examinations at increasingly shorter intervals in order to renew their driver’s license. Someone who suffers from narcolepsy cannot be hired as an air-traffic controller or as a school bus driver. Of course, this does not mean that their disabilities should not be addressed or that the cost of carrying them should fall only on those affected. People who cannot drive should have access to cheap and easily available public transportation; those who, for medical reasons, cannot be hired in certain jobs must have an adequate choice of alternative careers. However, no wrong is done to them if they are

2 A much discussed example is Section 504 of the *Americans with Disabilities Act* of 1990

prevented from engaging in those activities which would result in very high risks for other people. Indeed, the safety proviso is simply a requirement of justice; it rightly protects the welfare and opportunities of those who might be affected by risky or dangerous activities.

If we take seriously the idea that due to their high testosterone levels men tend to engage in aggressive, risky, careless, or even sociopathic behavior, then we immediately see that not only the hormonal disability that affects men is largely accommodated in our society, but, in fact, it is unduly over-accommodated, since in their case the safety proviso is massively violated. Unlike poor-sighted people wanting to fly planes, men are not prevented from engaging in activities and taking up roles that are likely to put other people at risk if carried out by someone with such an unbalanced constitution. In fact, men represent the vast majority in those jobs in which testosterone-driven aggressive, risky, and careless behavior is most likely to cause serious damages. In Western countries, 75% to 90% of those who work in law enforcement are men; women are only 10% of the police workforce in Portugal,<sup>3</sup> 13% in Spain,<sup>4</sup> 13% in Italy and the U.S.,<sup>5</sup> 15% in France, 22% in the Netherlands and 28.2% in the U.K.<sup>6</sup> Men still occupy the vast majority of public offices and are still dominating politics, especially in those executive roles that require making life-and-death decisions on the fate of millions of people. Men represent 93% of political leaders (heads of state or heads of government) in the world;<sup>7</sup> 88% of U.S. State Governors are men; 88% of mayors of U.S. major cities are male;<sup>8</sup> in Europe, 66% of members of National Supreme Courts are men;<sup>9</sup> they make up 82% of those sitting in decision-making bodies of Central Banks;<sup>10</sup> they are 73% of senior ministers in national cabinets; and 89% of leaders of major political parties

3 <http://www.theportugalnews.com/news/only-one-in-10-psp-officers-is-a-woman/6061> [last accessed 12 February 2016].

4 <http://www.elnortedecastilla.es/salamanca/201510/17/mujeres-ganan-poder-representan-20151017123638.html> [last accessed 12 February 2016].

5 <http://www.criminaljusticeschoolinfo.com/women-law-enforcement.html> [last accessed 12 February 2016].

6 <http://sputniknews.com/europe/20151202/1031099667/uk-women-police.html> [last accessed 12 February 2016].

7 <http://www.unwomen.org/en/what-we-do/leadership-and-political-participation/facts-and-figures> [last accessed 12 February 2016].

8 <http://www.fairvote.org/election-of-women-in-our-100-largest-cities-disadvantaged-by-districts> [last accessed 12 February 2016].

9 [http://ec.europa.eu/justice/gender-equality/gender-decision-making/database/judiciary/supreme-courts/index\\_en.htm](http://ec.europa.eu/justice/gender-equality/gender-decision-making/database/judiciary/supreme-courts/index_en.htm) [last accessed 12 February 2016].

10 [http://ec.europa.eu/justice/gender-equality/gender-decision-making/database/business-finance/central-banks/index\\_en.htm](http://ec.europa.eu/justice/gender-equality/gender-decision-making/database/business-finance/central-banks/index_en.htm) [last accessed 12 February 2016].

are men.<sup>11</sup> Although in Europe women are the majority of physicians under 35, men still dominate the higher ranks of the medical profession<sup>12</sup> (they occupy 86% of top positions in Italy;<sup>13</sup> 89% of leadership positions in Germany;<sup>14</sup> and they represent 72% of consultants in the U.K.)<sup>15</sup>. 83,7% of the U.S. active army,<sup>16</sup> almost 90% of the U.K. army,<sup>17</sup> 85% of the French army,<sup>18</sup> and 93% of the Italian army<sup>19</sup> are still composed by men. Such an overwhelming presence of men in dangerous, difficult, and hazardous jobs presumably causes countless episodes of killings, torture, physical aggression, humiliation, maltreatment, medical malpractice,<sup>20</sup> physical injuries, and deaths by negligence each year.<sup>21</sup>

Moreover, we should also be aware that the breach of the safety proviso in the case of men would produce even more victims if the non-hormonally-handicapped half of humanity, i.e. women, did not put in practice a whole array of everyday techniques in order to avoid or untrigger men's violence and aggression. These span from coping strategies in abusive relationships (Waldrop and Resick 2004), to self-imposed curfews at night (Bondi and Metha 1999), to the simple act of switching to the opposite sidewalk when a group of men approaches. The non-hormonally-handicapped half of humanity constantly works at reducing the toll that the over-accommodation of men's disability would otherwise exact. But this of course has enormous social costs in terms of opportunities for resources or welfare, which disproportionately affect women.

11 <http://www.unwomen.org/en/what-we-do/leadership-and-political-participation/facts-and-figures> [last accessed 12 February 2016].

12 <http://www.healthcare-in-europe.com/en/article/11487-male-female-doktors.html> [last accessed 12 February 2016].

13 [http://www.quotidianosanita.it/lavoro-e-professioni/articolo.php?articolo\\_id=12545](http://www.quotidianosanita.it/lavoro-e-professioni/articolo.php?articolo_id=12545) [last accessed 12 February 2016].

14 <http://www.healthcare-in-europe.com/en/article/11487-male-female-doktors.html> [last accessed 12 February 2016].

15 <http://www.theguardian.com/society/2010/aug/22/women-doctors-top-nhs-jobs> [last accessed 12 February 2016].

16 <http://www.army.mil/women/today.html> [last accessed 12 February 2016].

17 [http://www.huffingtonpost.co.uk/2015/03/27/women-british-armed-forces-sexism\\_n\\_6940538.html](http://www.huffingtonpost.co.uk/2015/03/27/women-british-armed-forces-sexism_n_6940538.html) [last accessed 12 February 2016].

18 [http://www.lemonde.fr/societe/article/2014/04/15/l-armee-sous-pression-pour-conforter-la-place-des-femmes\\_4401356\\_3224.html](http://www.lemonde.fr/societe/article/2014/04/15/l-armee-sous-pression-pour-conforter-la-place-des-femmes_4401356_3224.html) [last accessed 12 February 2016].

19 <http://www.esercitoitalianoblog.it/donne-nellesercito-italiano-nemici-dentro-e-fuori/> [last accessed 12 February 2016].

20 Throughout the world men in the medical profession are consistently much more likely than women to be sued for malpractice and this can be traced to differences in their personality traits (Firth-Cozens 2008).

21 Compare for example the striking data on deadly road accidents caused by men's reckless behaviour (Al-Balbissi 2003).

In our society, the only measure that is taken to prevent the disastrous effects of men's high testosterone levels are criminal laws against violent offences. These are a very poor way to address the risks posed by men's handicap. They only offer an *ex post* response when the damage has already been done, are highly ineffective even as a deterrent to prevent future damages, and disproportionately affect people from poor social backgrounds or members of stigmatized ethnic groups. The real target of these measures is not men's pervasive and highly damaging aggressive, careless, and risk-taking behavior, but the kind of violent personal aggressions that are likely to occur and be persecuted in deprived social contexts.

These considerations should also help us see why – as Van Parijs remarks (2015: 87) – we pity members of racial minorities and other disadvantaged groups for the high rates of incarceration they suffer, while we do not tend to do the same with men. A short answer is that it is mainly male members of those disadvantaged groups, rather than men in general, who are incarcerated and therefore should complain about the unfairness of our social arrangements.<sup>22</sup> This is a case of intersectionality in which race and class play a fundamental role. Moreover, if we try to disentangle the various determinants of high incarceration rates, we see that race and class on one hand, and gender on the other, play a completely different role. To the extent that incarceration can be traced to poverty, racism, lack of education, a dysfunctional family environment, or inadequate legal defense, it strikes us as an odious side effect of more fundamental forms of disadvantage created by our social institutions. To the extent that incarceration can be traced to men's proneness to aggressive, careless, and risky behavior, it strikes us as a poor and ineffective attempt to mitigate the most atrocious effects of the over-accommodation of such a dysfunctional behavioral trait.

## CONCLUSION

I have mainly focused here on the over-accommodation of men's proneness to risky, aggressive, and careless behavior. However, it should be clear that parallel considerations could easily be extended to men's exasperated libido. Our society provides for all sorts of accommodations and over-accommodations of men's sexual appetites, and prostitution is just one of the most evident expressions of such a bias towards men's constitution and the fundamental friendliness to men's sexuality that is a constant of most human societies.

22 Western and Pettit (2010), for example, report that 68% of African American men born after 1970 who have dropped out of high school have prison records, vs. only 1.2% of white males with college education.

It should also be clear that our response to Van Parijs' puzzle on hormonal inequality would be the same even if we assumed that men's behavior has social, rather than hormonal causes. Stressing the importance of socialization in the formation of men's character would only make the central point of our response more evident: men's aggressive, risk-taking, and careless behavior, far from being a disadvantage, is indeed cherished and accommodated in our society, and those traits of character are actively encouraged and rewarded since early infancy.

What would be different, if we dismiss the hypothesis that men's behavior is determined by hormones, is our picture of what it would take for our society to achieve justice, by redressing and preventing all the wrongs, dangers, and harms coming from the over-accommodation of men's behavior. If we took the hormonal hypothesis seriously, then ideally, a just society would consider the dismal (and very costly) prospect of massively medicating males or excluding them from those jobs and roles in which their high testosterone levels create unbearable risks for other people. If we instead see men's dysfunctional behavior as mainly determined by environmental causes, justice will be achieved through a different and much more appealing path: by pursuing more enlightened methods of male socialization, and a collective re-evaluation of which character traits should count as good and valuable among human beings.

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# Are Unequal Incarceration Rates Unjust to Men?<sup>1</sup>

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## Abstract

The genetic endowment of males makes them likelier than females to be perpetrators of violent crime and thus to end up in prison. Philippe Van Parijs notes this and raises a startling question: Is it not an injustice to males that their unchosen genetic endowment renders them likelier to suffer the harms of incarceration? In this brief response, I canvass some tempting avenues by which we might think we can dispel the puzzle, and argue that each is unsuccessful. This will disappoint those hoping for a refutation of the claim lurking behind Van Parijs' question: that even as their criminal behavior is so profoundly harmful to so many innocent victims, male violent offenders are *themselves* somehow victims of injustice. I hope to show that this indignation-provoking claim is far more difficult to refute than we would have hoped, but also to suggest that it is far less threatening—and less bizarre—than we might have feared.

**Keywords:** crime, gender, incarceration, justice, sex, testosterone

## INTRODUCTION

In his fourth puzzle on gender equality, Philippe Van Parijs notes that the genetic endowment of males makes them likelier than females to be perpetrators of violent crime and thus to end up in prison.<sup>2</sup> He raises a startling question: If the unchosen genetic endowment of males renders them likelier than females to suffer the harms of incarceration, could this be an injustice (Van Parijs 2015: 88) Plausibly, it adds to the injustice of poverty that those who grow up in poor families are likelier to be incarcerated

1 I am grateful to Paula Casal, Jeff Behrends, Harry Brighouse, and three anonymous reviewers at *Law, Ethics, and Philosophy* for asking challenging questions and making valuable suggestions on previous drafts of this response.

2 For more on biological contributions to male crime, see Thornhill and Palmer 2000, Casal 2011, and Rainer 2013. For data on men's greater criminality, see Greenfeld and Snell 2000.



than their more privileged counterparts.<sup>3</sup> Why, asks Van Parijs, do we have the intuition that the elevated risk to those born with these disadvantages is different than the elevated risk to those born with male genetic endowments?

Those who are concerned about ongoing injustices against women are likely, at first, to find these puzzles irritating. We might lament the opportunity costs of theorizing alleged injustices against men when women continue to be victimized by pervasive structural injustices, and worry that such theorizing will slow progress toward women's equality. I share these worries. Still, hormonal inequalities *may* generate injustices against men even if this fact is troubling for those concerned to strengthen coalitions for social reform on behalf of women.

Of course, it is right that men be overrepresented among the prison population given that they commit more violent offenses. We must protect victims and potential victims, and incarceration presently offers the best means of doing so. But is the higher likelihood of incarceration among males unjust? The harms of incarceration can be severe. They include foregone opportunities for flourishing, alienation from spouses and children, enhanced risk of being oneself a victim of violence, and difficulty finding and keeping employment subsequent to release.<sup>4</sup> If men are, through no fault of their own, likelier to suffer these harms, then we must at least entertain Van Parijs' question—a puzzling question to be sure, since the putative injustice to men would result, most proximally, from their doing violence to their victims: often, women.

In this brief response, I canvass some tempting avenues by which we might think we can dispel the puzzle, and argue that each is unsuccessful. No doubt other avenues for response exist, but I consider what I take to be the most plausible. Having explored these possible responses and found them unsatisfying, I tentatively conclude that men's higher likelihood of

3 No doubt rates of incarceration would be higher in these communities even if crime rates were not, but I assume that part of this correlation is due to elevated crime rates. As Van Parijs says, elevated crime rates among the poor are "in part no doubt but not only because they tend to be sentenced more severely for the same crimes" (87).

4 See NAACP Criminal Justice Fact Sheet. Some of these harms are intrinsic to incarceration, but some are contingent—incarceration need not be as harmful as we make it. I suspect that an elevated likelihood of criminal behavior is bad for offenders even if they are never caught: Whether or not they feel remorse for their crime, violent offenders are likely to experience greater difficulty maintaining or developing intimate relationships. Even those with a propensity to violence who never offend are likely to struggle to achieve and maintain the kinds of interpersonal relationships that, for so many, are crucial contributors to wellbeing, and they may be worse off for this whether or not they themselves judge it to be a loss. But nothing I say in the rest of this paper relies on the mere propensity to violence being harmful. All I will assume is that, on average, incarceration itself is harmful; I take it that any plausible metric of justice will have the resources to register it as such.

incarceration is a distinct injustice to men. This tentative conclusion is highly counterintuitive, but I suspect that a great deal of our resistance to it owes to worries about the strategies we might pursue to remedy the injustice. So I conclude by briefly sketching what seem to me some promising social policies to address inequalities in incarceration prospects—including unequal prospects based on sex, if it turns out that such inequalities are unjust to men.

How might we try to dispel the puzzle concerning men's incarceration? I first consider some reasons for thinking there is no injustice at all. I then consider a response that grants that there is *some* injustice but maintains that it is overridden by the many injustices of which men are beneficiaries; this response acknowledges that there is an injustice to men, but maintains that it is of no practical consequence, for men are owed no recompense.

## 1. NATURAL OR SOCIAL?

We might start by questioning Van Parijs' causal claims. Are the differences between men and women that lead to men's higher rates of violent crime *really* genetic, as he suggests? Isn't it plausible that some of these behavioral differences are due in part to social or environmental influences? Plausibly, even if genetic differences are present, certain socialization practices exacerbate their effects: If young boys are encouraged or indulged more when they display aggression, or if they are indulged more in losses of temper because gender norms make us more tolerant of male anger than female anger, these trends might help explain men's greater criminality. Even if they do, this does not dispel Van Parijs' puzzle. If Rawls was right that social and natural contingencies are "equally arbitrary" from a moral point of view (1971/1999, p. 64), then social contingencies justify inequalities no more than natural contingencies. If we have reason of justice to mitigate unearned disadvantage, those reasons apply no less to the disadvantage that results from socialization than the disadvantage due to genes.

Even if social and natural contingencies are equally morally arbitrary in the sense that the person whom they disadvantage is equally non-responsible for them, however, social contingencies at least seem to be within society's control. Because society appears responsible for creating it, socially-caused disadvantage might be thought more urgently to call for remediation. I find this implausible. Suppose there really is a fact of the matter about the extent to which the causes of any particular disadvantage are social or natural. Still, socially-caused disadvantage need not, in principle, be more amenable to change by collective action, either by mitigating the disadvantage or by mitigating the social differences that

cause it. Neither genes nor their justice-relevant effects are immutable. In a paper on educational justice, Christopher Jencks asks us to consider two deaf children: One child's deafness is due to an environmentally-caused early childhood disease; the other child's deafness is due to a genetic defect. According to Jencks, "the fact that one child's deafness was a product of heredity while the other child's deafness was environmental in origin tells us nothing about the physical character of the problem or the likelihood that it has a medical remedy" (1988: 523). This point about immutability increasingly applies to the *source* of disadvantage as well, as social sources of disadvantage become increasingly complex and gene therapy becomes increasingly sophisticated. Whatever the source of men's greater aggression, it *could* be addressed through collective social action—either by efforts to change socialization patterns, by existing gene selection and therapy, or by developing new technologies for genetic modification (Casal 2013, 2015, 2016; Rainier 2013).

But this is all largely beside the point. If men's greater likelihood of criminality is due to *social* influences contrary to what Van Parijs claims, and if social inequalities *do* more urgently call for remediation contrary to what I have claimed, then we have only strengthened the grounds for thinking there is injustice here. But if Van Parijs is right to regard the difference as genetic, then we're back to the puzzle we began with: Is it not unjust that genetic make-up renders men likelier than women to engage in violent behavior, thereby rendering them more susceptible to the harms of incarceration? Whatever configuration of social and natural causes are at work, they presumably make males likelier to be incarcerated because they make it more difficult for males than for females to avoid the kinds of behaviors that lead to incarceration. If so, then the influence of unchosen genetic or social endowment on males' prospects for incarceration seems to be the sort of starting gate disadvantage that justice condemns.

## 2. HARM TO OTHERS?

Violent crime is deeply harmful. It harms victims, and its harms extend beyond its immediate victims; for example, it inflicts opportunity costs in the form of public resources spent on prosecution and incarceration rather than other socially valuable projects. Can we dispel the puzzle Van Parijs' question raises by arguing that the serious and pervasive harms that crime inflicts tell against men's greater likelihood of incarceration being an injustice to them? Is it a plausible condition for an *ex ante* inequality in life prospects to constitute an injustice that those on the losing end not harm others in accruing the deficit they were *ex ante* likelier to accrue? No. Just

as men are disproportionately likely to be incarcerated relative to women, the least advantaged are disproportionately likely to be incarcerated relative to the more advantaged. This elevated likelihood of incarceration is plausibly one dimension of the injustice suffered by those who grow up poor through no fault of their own, and this would be true even if the effects of poverty on incarceration were mediated entirely by actual criminality—that is, even if poverty did not elevate one’s likelihood of incarceration beyond the extent to which it elevates one’s likelihood of committing a crime. Similarly, the effects of hormones on men’s high likelihood of incarceration are mediated by their criminality—by their harming others. But to be consistent, we must regard their unequal propensity to criminality as no less unjust on that count. This is true even if, plausibly, men’s criminality and the criminality of those born into disadvantaged circumstances disproportionately victimize those who are already unjustly badly off themselves.

### 3. FREE CHOICE?

Genetic and hormonal differences may render men *likelier* than women to engage in certain behaviors, but whether or not any of us *in fact* engages in those behaviors is, at the end of the day, up to us. Van Parijs readily acknowledges that “the role played by free will in the causal process is by no means irrelevant” (86), and clarifies that his drawing attention to the role of genetics is meant in no way to exonerate men for their violent crimes. How, then, is men’s greater propensity to violence an injustice, if we acknowledge that choice plays a role in determining whether any particular man acts on this propensity? If we are right to hold individuals accountable for the choices they make, even when factors beyond their control affect their likelihood of making those choices, why should we think that men suffer injustice due to the genetic endowments that make them, on average, *likelier* to be violent?

Consider the income inequality between women and men. Some of the inequality is due to outright sexism, and some to implicit biases or statistical discrimination that render women less likely to be hired and promoted whether or not they are or will become caregiving specialists, simply because they are statistically *more likely to be* caregiving specialists. Another cause of income inequality is unequal uptake of unpaid caregiving labor between men and women. Women take more time off for caregiving and more frequently work part-time so that they can perform caregiving. Full time working women have more caregiving constraints on their availability for overtime work or travel and are *likelier* to be on call for caregiving emergencies. They are also *likelier* to develop career aspirations in light of anticipating

that they will be the caregiving specialist within their families; they are thus likelier to choose the relatively flexible (and less socially valued) careers that will enable them to prioritize caregiving.

Some might think that if men's higher incomes are due to sexist bosses, that's unjust; but if the inequality is due to women's occupational or work-life balance *choices*, it is *not* unjust. This is a mistake. Women do indeed *choose* how to divide their time and energy, but they do not choose against a background of equality. Due to genes or socialization or both, women are likelier than men to subordinate the demands of paid labor to the demands of caregiving. Relative to men, women's options about how to allocate time and energy come with different constraints and payoffs. To make the counter-gender-typical choice of prioritizing paid labor, the average woman will have to overcome either ingrained social norms or a natural predisposition to prioritize others' needs for care, or both; and she will have to pay the costs of violating social norms that cast women as "cold" or "hard" for prioritizing paid labor and as "bitchy" or "domineering" for success in paid labor, which success itself will have to be won in a competition the terms of which largely favor men. So while women do indeed *choose* which careers to pursue and how to prioritize those careers against other life projects, we nonetheless rightly object to the *terms* of that choice: Women who choose less esteemed and less well-remunerated positions face higher costs than men for choosing more esteemed and better remunerated alternatives. Women who choose to shoulder more than their share of the caregiving load do so against a context that makes it costlier for them than for their male partners to resist doing so.<sup>5,6</sup>

Clearly, there are important differences between women's choices to prioritize the needs of dependents over paid labor and men's engagement in violent crime. My point is not to claim that they are analogous, but to make one very specific comparison: Both involve *choice*. Considerations of justice must be responsibility-sensitive, and so the role of choice is not

5 One might think that diagnosing this social context of choice as unjust requires a welfarist metric of justice. I deny this, and in fact think it would be a mistake to invoke such a metric. I offer an account of the injustice of the gendered division of labor—an account that does not rely on a welfarist metric—in Schouten (forthcoming). Nor does the case for regarding the gendered division of labor as unjust rely on assuming that men and women have different preferences; rather, the arrangement of institutions that makes transgressing gender norms so costly is unjust.

6 One might point out that the unfair terms of choice are due to men's intransigence. I do not think this is relevant for the point I am making here, which is about whether the consequences of choice can be unjust to the chooser if the terms of the choice are unfair through no fault of the chooser. I do not think that others' culpability bears on that question, though it is certainly relevant to others. Moreover, I do not think that the unfairness of terms is due primarily to men's intransigence, as will become clear below.

insignificant. But in both cases, the inequalities in the background against which the relevant choice is made are *not* chosen; and in both cases, the relevant choice is *harmful* to the chooser. Women are worse off in many domains by virtue of making gender-norm-compliant labor allocation choices (as well as by the norms themselves, whether or not the women comply with them), and these harms have long been a concern of theorists of justice. Men are made worse off by virtue of committing violent crimes that result in their disproportionate incarceration. Through no fault of their own, women are *ex ante* likelier to be worse off in virtue of their greater likelihood to prioritize the needs of dependents over their careers. Through no fault of their own, men are *ex ante* likelier to be worse off in virtue of their greater likelihood to engage in violent behavior. Perhaps the unequal propensities in the two cases are due to different configurations of social and natural causes. But if we are committed to neutralizing the influence on our life prospects of circumstances beyond our control, then this difference is irrelevant to our deeming it unjust that unchosen contingencies impact on life prospects in these ways.

Men should not be exculpated merely on the basis of their *ex ante* elevated likelihood of criminality any more than women's gender-compliant choices should be disparaged as not genuine choices. For the purpose of theorizing justice, we want to be able to hold agents responsible for the choices they make even when alternative courses are very costly; thus, we must attribute to individuals the capacity to make costly choices. This capacity is the basis on which we hold perpetrators responsible for their crimes and respect women's gender-compliant choices. But in neither case does the role of choice exempt the backdrop against which choices are made from criticism on the grounds of justice. Just as the norms and institutions that make gender egalitarianism so costly may be unjust, so too it might be unjust that social structures permit men's unchosen genetic endowment so heavily to impact their likelihood of incarceration. We have seen that the effects of natural contingencies are not categorically immutable. If the incarceration effects of male hormones are not immutable—and I shall tentatively suggest in concluding that they are not—then the element of choice in criminal behavior does not exempt society from an obligation to intervene to lessen the likelihood of the harm: in the case of incarceration, by expending social resources to make violent crime less common.<sup>7</sup>

7 I have not argued positively that society does have such an obligation; rather, I have argued more modestly that the role of choice would not lessen or undermine it if we did. Moreover, social resources are scarce, and the question of how to prioritize remediation of the various injustices we confront is complicated. Even if we do have the obligation I consider here, it may be that in our non-ideal circumstances other obligations of justice must take priority.

#### 4. AN INJUSTICE OVERRIDDEN?

Suppose there *is* some injustice in men's higher likelihood of incarceration. Still, we might think that, given the very many ways in which women are disadvantaged relative to men, that injustice is simply overridden by the many gendered harms to women of which men are beneficiaries. Indeed, some of the very features that plausibly help explain men's greater likelihood of incarceration also have disadvantageous consequences for women: Men are, on average, physically larger and stronger than women and so likelier to be successful when they undertake to commit a violent crime; this physical strength and stature might be a disservice to the men who are incarcerated for the crimes they successfully carry out, but those traits are much more pervasively a threat to women.

Of course, even if men are all-things-considered advantaged such that they are owed no recompense in virtue of their higher likelihood of incarceration, that disadvantage might still matter. If the various constituents of good lives are commensurable such that gains in one domain can make up for losses in others, any justice-relevant disadvantage men suffer might simply diminish the compensation owed to women on account of gender injustice favoring men.

But it is not obvious that the putative disadvantage to men would be relevant *merely* for lessening the compensation owed to women. Many candidate goods of justice—work, income, and leisure—appear to be commensurable in this way. But it is not always true that being advantaged in one way can compensate for being disadvantaged in another—that if the quantities and severities match up correctly, there is no injustice all things considered. Some goods are not commensurable. Certain health deficits that involve chronic pain plausibly cannot be outweighed by surpluses of other goods like income and wealth, or even by surpluses of goods that we regard, like health, as *intrinsic* constituents of wellbeing—intellectual stimulation, for example. Similarly, it may be that men's greater likelihood of committing violent crime is a disadvantage that cannot be compensated for by other goods, even goods in such important domains as those in which men appear to be favored, including social status and occupied positions of political power. None of this is meant to deny that the goods of which men enjoy unfairly large shares are very good goods; nor is it to deny that their large shares constitute an injustice. It is simply to point out that the impact on one's life of certain kinds of *bad*s cannot fully be remediated by a larger share of goods. Presumably, the harm of suffering physical assault is such a bad. We may regard the harms of incarceration as similarly un-compensable without thereby committing to men's susceptibility

to suffering them being a disadvantage comparable in severity to women's vulnerability to assault.

Here we might be tempted to think that the badness of men's greater incarceration is not best characterized as *unjust*. Maybe the world is somehow *worse* in virtue of this inequality, but *justice* is about the distribution of commensurables. If men's higher likelihood of criminality cannot be outweighed by the very many advantages they have in virtue of being men, then it is not *unjust*.

Justice cannot plausibly be restricted in this way, because such a restriction would also exclude paradigmatic cases of gender injustice. Consider the incommensurable harms of the gendered division of labor which account—at least in part—for our regarding *it* as unjust. Imagine, counterfactually, that traditionally male and traditionally female work were esteemed and remunerated at comparable levels. Still, the persistence of social norms and institutions arranged in compliance with those norms could make gender-counter-typical choices very costly for both men and women. The costs of transgressing gender norms within institutions that affirm those norms can constitute justice-relevant harms, even if gender-norm-compliant alternatives resulted in equal distributions of commensurables between women and men. On this basis, I argue elsewhere that the gendered division of labor could remain unjust even if caregiving work were compensated and its status elevated such that esteem and remuneration accrued equally to traditionally male and traditionally female work (2016). But at the very least, it is *coherent* to claim that the gendered division of labor could be unjust despite all commensurable goods being fairly distributed. If so, then the concept of justice must extend beyond commensurables.

The injustice of the gendered division of labor also shows that a justice-relevant, incommensurable disadvantage can *remain* justice-relevant when the disadvantaged group enjoys a surplus of different incommensurable goods. If we are to take seriously the insight that we presently fail to value caregiving in proportion to its true worth—both in terms of the public good that caregivers generate and in terms of the personal value of intimacy that caregiving enables—then we must accept that women are not the only parties harmed by the gendered division of labor. Just as many women would have been better off with more opportunities for stimulation and esteem in the world of paid work, many men would have been better off with more opportunities for the intimacy and fulfillment that caregiving



enables.<sup>8</sup> Women are harmed by their sub-optimal share of paid work, and men are harmed by a sub-optimal share of caregiving work. Of course, these harms are not of equal magnitude for women and men. But suppose, again, that traditionally female work were remunerated and esteemed equally with traditionally male work. Under these circumstances, the harms of a gendered division of labor could be equal in their extent and severity. Still, it would remain unjust that men and women are so thoroughly socialized in ways that make it very costly for them to attain what for so many of them is an important good, where the basis of this socialization is nothing more than (faulty) (institutionalized) assumptions about who is best suited to or equipped for different kinds of work. For those who would find fulfillment through non-caregiving work, a deficit in that domain cannot fully be compensated by larger allocations of commensurable goods or even by larger allocations of other non-commensurable goods. For those who would find fulfillment through caregiving, a deficit in that domain is similarly incommensurable. Still, none of this makes it incoherent to think of the gendered division of labor as a problem of justice. The gendered division of labor could remain unjust even if (counterfactually) it imposed only incommensurable harms, and even if (counterfactually) the harms accrued in equal magnitudes to men and women. Similarly, men's greater likelihood of incarceration could be unjust despite the harms it inflicts being incommensurable, and it could remain unjust even though women suffer incommensurable harms of even greater magnitude.

Because these (putative) injustices cannot fully be compensated by surpluses of other goods, to fully restore justice we must remove the *ex ante* inequality—by changing the gendered socialization patterns and institutional arrangements that sustain the gendered division of labor on the one hand; by removing or overcoming men's genetic or social propensity for violence on the other. In other words, fully remediating these injustices requires reform of social institutions rather than straightforward redistribution of goods. In one sense, this is nothing new. Even straightforward income and wealth inequalities might be best addressed *not* by giving more to those whose share is unfairly small, but rather by making careful and empirically-informed

8 It is tempting to think that if a dearth of caregiving really made men worse off, they would simply do more of it. But, first, even if their small share of caregiving work is simply due to their own intransigence, they might nonetheless be better off doing more. Just as women's socialization (or genetic endowment) affects their preferences and the choices they make, so too might men's. Second, there is evidence that men increasingly do prefer gender egalitarian partnerships and a larger share of caregiving work, but worry that "mounting job demands and a lack of caretaking supports" make egalitarianism not a viable option (Gerson 2010: 11). In other words, many of the same factors that make egalitarianism so costly for women—not intransigent partners but intransigent workplaces, for example—also make it costly for men.

institutional changes to schools, zoning policies, or campaign finance regimes.<sup>9</sup> The difference is that, when we are dealing with commensurables, redistributing goods can still, in principle, fully restore justice, albeit perhaps less efficiently. When the injustice involves incommensurables, redistributing goods is not only less efficient; it falls short of fully restoring justice. If incarceration inflicts incommensurable harms, then men's greater likelihood of incarceration might call for redress despite the very many inequalities from which they benefit.

## 5. UNJUST BUT NOT URGENT?

Men's many advantages do not render hormonal inequality irrelevant from the perspective of justice, but perhaps their advantages render it a *less urgent* injustice. Plausibly, hormonal differences that disadvantage men *are* less urgent than many of the inequalities that disadvantage women. Still, I question how far this can take us in resolving the cognitive dissonance Van Parijs' puzzle generates. The fact that men enjoy so many advantages in virtue of their gender may well depress the urgency of remedying the disadvantageous consequences of hormonal inequalities, but other considerations should figure into our calculations of urgency as well: How severe is the harm? How pervasive? How difficult is it to avoid? Are the *advantages* which its victims enjoy *commensurable* advantages? Judging from these questions, we can see that many injustices against women are exceedingly urgent problems of justice. We routinely fail to make women safe in public spaces from threat of violence and assault. The resulting harms are severe, pervasive, and exceedingly difficult for women to avoid. We should try to ease these harms, but their seeming incommensurability would make them impossible fully to remediate, which makes it urgent indeed to do what we can to avoid them in the first place.

Where do the harms of men's greater likelihood of incarceration fall along these metrics of urgency? They are presumably less urgent than the harm women disproportionately suffer in virtue of living under threat of violence, but neither can the influence of unchosen genetic endowment on men's likelihood of imprisonment be dismissed as unimportant. I do not know how difficult it is for those with the genetic endowment in question to avoid criminality. But surely the harms of incarceration are severe and pervasive: The Bureau of Justice reports that, as of the year 2000, male violent offenders made up "about one violent offender for every nine males age ten or older" (Greenfeld and Snell 2000). If the harms of incarceration

9 This is not a claim that these issues no longer fall within the purview of distributive justice. The injustices might be distributive even if the ideal remedies are not redistribution.

are incommensurable, that would heighten the urgency of finding ways to avoid them.

Even if I am wrong about this assessment of urgency, moreover, relative non-urgency does not exempt us from responsibility to theorize and address injustices. The harms of the present day gendered division of labor are, on any plausible measurement, less urgent than the harms of institutionalized practices of female genital mutilation. But concern over the persistence of the latter has not prevented a great deal of attention to the former, and this is as it should be, assuming we can maintain perspective and allocate scarce resources and attention appropriately. On reflection, the unjust consequences of hormonal inequality seem relatively urgent; but even less urgent injustices merit attention.

## 6. WHAT TO DO?

Men's genetic or socialized propensity to aggression is a circumstance beyond their control. We should be committed, as a matter of justice, to minimizing the effects of such circumstances on life prospects. This comes to us as puzzling, because we are accustomed to thinking of *women* as being victims of gender injustice. No doubt readers will have other ideas for how to dispel the puzzle, or ideas for how more effectively to execute the resolutions I have considered. I welcome such ideas. Diagnosing sex-based unequal prospects for incarceration as unjust is counterintuitive, and I am open to the possibility that creative maneuvers to avoid this diagnosis can be made to work. But it seems to me that we must also reflect on the status of the intuition being contradicted. At one extreme, we might treat it as a desideratum of a theory of justice that it not diagnose the unequal likelihood of incarceration between the sexes as unjust, or that it not do so when males comprise the disadvantaged group. This would too strongly privilege the intuition that men are not victims of injustice in Van Parijs' puzzle. A weaker way to privilege the intuition would be to treat it as a sufficiently reliable piece of data to justify creative refinement of our theories of justice to accommodate it. At some point, though, the creativity of our maneuvers will come at the cost of the plausibility of the theories. If the intuition is so reliable, that cost might be worth bearing. But at some point, ingenious maneuvers become at best ad hoc and at worst implausible on their own terms. There are certainly options I have not considered, and some of them may impose no plausibility cost to the best theory of justice. But suppose not. What amount of "plausibility points" should we be willing to sacrifice in our theories of justice to preserve the intuition that unequal likelihood of incarceration is not unjust to men? I don't know. But for two reasons, I think that it would

not be the disaster we might at first have thought it to be if we had to admit that our intuition in this case is misguided.

First, we have long known that certain gender inequalities harm men as well as women. Men have historically been discouraged from developing the kind of intimacy with their children that makes parenting so rewarding for some. They have been encouraged to regard paid employment as fundamentally important to their self-worth and role in society. There is no denying that men have been mal-formed under patriarchy in ways that constitute real harms *to them*, and acknowledging these harms as dimensions of gender injustice takes nothing away from the urgency of addressing harms suffered by women, who remain the prime victims of gender injustice. Nor should acknowledging an injustice in incarceration prospects detract from our commitment to the diverse array of feminist goals that we've long recognized as morally urgent.

Second, if our intuition that there is no injustice here turns out to be misguided, the practical upshots are not the unpalatable measures we may have feared but rather social policy measures that we already have independent reason to undertake. Certainly we should work to ameliorate the harms of incarceration by making prisons safer, but this does not mean that we should decriminalize violence, exonerate its perpetrators, or lessen any of our efforts to better protect victims of violence. From the fact that a man's propensity to violence is beyond his control, it does not follow that he should be exonerated for acting on that propensity. If they can be shown to be safe and effective, we might incorporate technological solutions to lower recidivism, for example offering male offenders drug or gene therapies to lessen aggressiveness.<sup>10</sup> And while it is a far less exotic proposal, I think we have reasons to be optimistic that education reform could lower men's likelihood of incarceration.<sup>11</sup> High quality early childhood education might better enable boys to manage and process anger. Arts and enrichment programming throughout primary and secondary school might help them find healthy outlets for it. Lengthening school days and school years could diminish students' availability for gang activity, drug use, and other behaviors that raise the likelihood of subsequent criminality. This strategy could be especially effective among students, like boys from

<sup>10</sup> For more on these possibilities, see Persson and Savulescu 2012, Casal 2011, 2013, and 2015.

<sup>11</sup> There are good reasons to worry about educational programs aimed at changing people's propensities to engage in certain behaviors. Indeed, many such efforts can be ineffective and even oppressive (Casal 2016). But evidence suggests that non-oppressive education initiatives can be effective in reducing criminality. For example, studies of early childhood educational interventions, like Perry pre-school and the Abecedarian Project, show that test scores improved in the short term, but faded out quickly, while other benefits associated with the interventions (including lack of involvement in the criminal justice system) persisted. See, e.g., Heckman et al. (2010). See also Machin et al. 2010 and Deming 2011.

poor communities with high levels of unemployment, whose intersectional group membership further elevates their risk. Perhaps most importantly, education reform could mitigate the severe deprivation and hopelessness that often lead to criminality. Well-educated students have more options for meaningful life pursuits, more developed capital to make those pursuits successful, and higher opportunity costs to criminality. For these reasons and others, we should work to diminish the extreme inequality in our society through education reform and other forms of social support. It might seem as though education reform could only make a difference if the problem had its root in social causes, but this impression is mistaken. Just as corrective lenses can improve poor vision whether it has environmental or natural causes, education could offset whatever environmental influences raise men's likelihood of incarceration *and* lessen the likelihood that they will act on—or raise the likelihood that they will resist acting on—any natural predisposition toward criminality they happen to have. In short: Whether men's greater propensity to violent crime is due to genes or socialization or both, social solutions like education reform could help reduce their likelihood of acting on that propensity.

Perhaps, if all this fails, we will have to accept that the problem, at present, cannot be ameliorated, or that it cannot be ameliorated without making the world more unjust overall than it is if we tolerate this disadvantage to men. If so, some might think that the disadvantage is therefore not unjust. I doubt that injustice is limited in this way, if only because restricting the concept based on what we are presently able to redress risks removing reasons to develop new mechanisms for redress. But even if the concept is rightly limited in that way, we should not accept the conclusion suggested without having made a good faith effort to deploy the kinds of social solutions conjectured here. I have suggested that they hold promise for reducing the influence of hormones on men's criminality, and there is little reason to doubt that, if they can be made to do so, they could do so without imposing decisive costs to other pursuits of justice.

It is indeed counterintuitive to think that men are victims of injustice because their genetic or social endowment makes them likelier to end up in prison. It might nonetheless be true. If so, then many of the social policies that could mitigate the injustice are policies about which we should have little reservation. Indeed, many of them are long overdue.

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# The Rich also Cry<sup>1</sup>

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## Abstract

Philippe Van Parijs (2015) reports a hostile reaction to some remarks he made suggesting that men's stronger sexual drive disadvantages them compared to women, in part because it causes them to visit brothels, thereby incurring financial and reputational losses. This paper describes how satisfying sexual desire can be very cheap, or even free, and explains why the way a man's reputation is affected by a greedier libido is not always significant or negative. More importantly, the paper tries to explain why Van Parijs' remarks were received with so much disapproval by feminists.

**Keywords:** sexual exploitation, prostitution, human trafficking, harassment, feminism

## INTRODUCTION

I have been asked to comment on a text by a philosopher I have never met called Philippe Van Parijs. He tries to describe some possible advantages women have compared to men and comes up with these: women outlive the men they look after; women earn less *but* study more; women have less political representation *but* vote more; women are the victims of crime rather than the perpetrators; and women tend to be those whose body is sold, rather than the client or pimp (Van Parijs 2015). Wow, men must be really envious! He warns that he is speaking "tongue-in-cheek." You don't say! It would be really worrying if this was seriously all one could come up with.

I hope he can appreciate other people's sense of humor, for I work on prostitution and the alleged handicap I have been asked to discuss is men's

1 I thank Paula Casal for her help with the translation, the structure, and countless examples (thirst, seafood, subordination fantasies, Coetzee, sunscreen...). In fact, her contribution was so great, that I thought we should both sign the paper, but she declined. I am also grateful to Jesús Mora for his references and revisions, and to Antonio García Valdecasas for the title and other suggestions. Finally, I am very grateful to three anonymous referees for their criticisms and encouragement and to Laura Sánchez de la Sierra and Hannah Weber for their thorough proofreading.

greedier libido. Van Parijs explains it thus: “Men’s greedier libido turns them into handicapped individuals, sometimes even super-handicapped *à la* Dominique Strauss-Kahn.” It causes them financial losses because they find themselves paying for prostitutes and, if caught, can also cause them reputational damage (86). I was myself really puzzled when I read, and then had to re-read, that he is now telling the world that this is what he actually *prepared* for a feminist, predominantly female audience at a major gender equality event (!).

Predictably, the talk did not go down well. And he could have left it there. Philippa would have gone home wanting the earth to swallow her and quietly researched into where she went so horribly wrong until she understood. But not Philippe. Two and a half years later he remains convinced that the problem lay with the female audience. They misunderstood him. All of them. They must have. There can be no other explanation. So, he is repeating it all again, trying to reach an even larger audience, without changing even a comma. He seems to believe that the problem lay with these women’s poor mastery of English, the insufficient time they gave him, and their unfamiliarity with a philosopher’s job (79-80), for it could not have been what he said. Absolutely not.

Having carefully read his piece, I think I know what happened. He was speaking to well-educated women, united to promote equality in the workplace, concerned with depressing gender facts, and they were outraged by their guest’s speech. They were outraged because they understood him and – what’s more unusual – they dared to say so.

I will try to spell out why, despite the additional complication posed by Van Parijs’ ambivalence about whether the behaviors he describes as hormonal inequality are actually about socialization (16). If I understood correctly – in spite of my being a woman and a feminist with imperfect English – the problem he was drawing attention to is this: men’s libido has the unfortunate effect of causing them to go whoring, which is bad because of the expense and potential damage to their reputation. Women are more fortunate in this respect, as they do not need to visit brothels, and therefore do not waste money or risk reputational losses. He calls the whoring propensity “a handicap,” perhaps offending the disabled and women at once. His paradigmatic super-handicapped male is Strauss-Kahn, a thrice-married millionaire who, swept away by the force of his libido, damaged his public reputation with various affairs – well past the age of sixty, I would add.



## 1. THE ALLEGED HANDICAP

Let us assume that, because of their hormones, men wake up with a burning desire that prevents them from functioning in life. Let us also grant that such sensation really is like being very thirsty, starving, or extremely cold, so that they truly cannot focus on other matters until they are relieved. 'It must be a handicap!' says Philippe the Philosopher. And he quickly closes his computer satisfied to have found yet another disadvantage he bets feminists have never before considered. However, let us suppose men have a plentiful and permanent supply of water, but love being thirsty. They like it so much that the moment their thirst subsides, they try to increase it with pills, pictures, videos, toys, or whatever works best for each of them. They do this in order to enjoy the thirst, and then the drink which they can always find – even if they could not, the pleasure derived from simple thirst would have made it worthwhile. After all, the market is full of stuff to increase this thirst and delay its satisfaction. It seems to me, then, that if men themselves are delighted with this 'thirst-thing' they possess and can easily relieve, there is no justification for telling women that they are not as far from equality as they would have thought otherwise. And the desire for sex is like this 'thirst-thing' for most men. They love having it, and so long as they are not handicapped in other ways, and so still have hands, relief is simple, instant, and gratis. This is the Cartesian "clear and distinct" idea Carol Pateman explains in *The Sexual Contract* (1988), a widely cited book Van Parijs' audience may well have read and discussed. Men prefer, of course, women pouring the drinks for them, but none dies for having to help himself (and nowadays we know it does not cause blindness either).

You can, by contrast, die working as a prostitute. Even if nobody attacks you, it is a largely nocturnal life of risks, drinking, drugs, driving, disease, and weirdos. This is my field of research: a heart-breaking world of rows of naked or half-naked women freezing in parks at night, or roasting in plastic chairs on the side of busy roads, with just a bottle of water to wash themselves between clients. It is a sinister world of women in glass windows in red light districts and industrial parks: "24 hours, all services," "Asian, very young, submissive," "sluts, totally shaved, do what you want with us." What was Philippe the Philosopher thinking, when he persuaded himself that conjuring these images in the minds of the concerned feminists was going to make them appreciate the disadvantages suffered by...*men*, and in particular one man, Strauss-Kahn? What were the chances of that audience ever thinking of this horrendous, ever-growing meat market as a massive charity operation to assist the poor men with their handicap?

It is strange to describe as a handicap a disposition that is catered to and celebrated both by those who possess it and their broader culture. Consider, for instance, the protagonist of Coetzee's *Disgrace* (2000) or Freud's discussion of the greater male libido as a sign of male superiority and the primary cause of greater creativity and inventiveness in men (1923). It is also very strange to say that somebody is to some degree disabled in an injustice-involving sense merely because they have, or are more likely to have, a preference. The same is true if the preference is a passion, for instance, for the sea or the snow, that might kill you in some circumstances. The word 'handicap' suggests something stronger than the frustration of a mere preference, the existence of an unmet need. But what kind of need, preference, or handicap are we really talking about? Does it involve the need for quick relief that can easily be obtained manually? No, it cannot be so simple or the whole sex industry would be redundant. Is it a desire to see a woman down there, on her knees, naked and obeying? Or the wish to humiliate her, to call her a 'slut', and to make her say that she wants you, when you know it is not true? Is it a desire to see women as nymphomaniac school girls, raunchy nurses, or interviewees who would otherwise not get the jobs (three of men's classic favorites)? Or is it the need to show who is boss and prove that 'women are whores' who will do anything you say for money?

Research shows that most men know that many of the girls they use are not self-employed but parts of networks of exploitation and trafficking (Raymond 2003). Many of them, we hear in the news, have been sold by their families, while others are captured by experts in supply and demand and in identifying girls from broken homes, prone to substance abuse or low self-esteem, who are more easily captured.<sup>2</sup> In any case, the majority of them come from the most sexist and unstructured countries, from poor and dysfunctional backgrounds, and cultures where a girl is worth nothing. We all know about this. But when entering a brothel and seeing the "Asian, very young" or "sexy Caribbean, barely 18," do 'the handicapped' step back in shock? Do they make any inquiries? *"Hey, I am handicapped, I hope you are not handicapped too and can help me. Are you here of your own free will? Could you leave anytime? Are you really this desperate for money? Are you really 18? Where is your family?"*

The handicap must be an extreme form of selfishness and indifference, for the handicapped customer asks nothing. In fact, he wants not to know: he is interested only in his handicap and in whether you have the body to relieve it. And so, an audience of women already concerned by the suffering

<sup>2</sup> The Daily Mail, 2014. <http://www.dailymail.co.uk/news/article-3300016/Human-traffickers-preying-refugees-Europe-forcing-slave-labour-child-prostitution-warn-Europol.html>

caused by men's selfish focus on their itch had to listen to the Philosopher blanketing out all else, claiming ignorance and telling them to focus on this matter of such great importance. As if they themselves had not had many occasions to hear men going on about it, demanding pity and relief. Feminists know full well how manipulative, rhetorical, and persistent men can be about the importance of relieving their itch. "Oh, I suffer so much! If you love me, you will make me happy (without thinking about pregnancy or venereal disease)." Even if they had not read it in feminist texts, they would have heard the male 'pity me' countless times directed at them. One wonders if the Philosopher knew this when he told the women they were to pity men.

## 2. THE ALLEGED COSTLINESS

The Philosopher observes that the man must pay (Van Parijs 2015: 16), as an added disadvantage, just in case this escapes us or seems unimportant in view of men's higher average income. It is true, you are supposed to pay. In Madrid or Barcelona you can pay 5€ for a blowjob performed by black girls with really good prices, plus those very special mouths, so perfect for the task.<sup>3</sup> For 10€ more, you can then penetrate one of those skinny Asians in the park, a car, or some back street. For 30€ you can have a half an hour with a breast-enhanced Latina in a room in central Gran Vía. And now there are also 'low-cost' brothels, brothels with "refund if unsatisfied" policies, and even brothels with loyalty cards where you can "enjoy and forget," as they say in the ads.<sup>4</sup> Driving along the Spanish east coast, you can find anything at really good prices: alleged sado-masochists, exotic girls with unusual bending or swallowing abilities, group acts, the lot. I am just reading the current menu to Van Parijs, since he seems unaware of the fact that whoring is rather inexpensive. It is cheaper than seafood, for example, or watching the local fallas, and presumably the Philosopher does not count seafood or firework lovers as handicapped too.

But perhaps he has in mind the exclusive services that arrange for you to have sex with top models, news readers, and top university students struggling with their fees,<sup>5</sup> assuring the 'handicapped' that there is no woman they cannot buy. After all, the paradigmatic super-handicapped is the Economics professor, minister, and IMF Managing Director, Strauss-Kahn, and these high-fliers sometimes spend exorbitant sums on their handicap (or get

3 QUE, 2013: <http://www.que.es/ultimas-noticias/sociedad/201310250800-prostitucion-nigerianas-recien-llegadas-cinco-cont.html>

4 See APRAMP: <http://apramp.org>

5 The Guardian, 2015: <http://www.theguardian.com/education/2015/mar/27/university-students-sex-work-living-costs-tuition-fee-debts>

funding from tax payers). But how could the Philosopher pick this man as the paradigmatic victim of any specific form of injustice? Strauss-Kahn did not lose his reputation in a brothel or a party with prostitutes. He made it to the front pages as somebody accustomed to “getting away with murder” who decided to grab his chambermaid and try to rape her.<sup>6</sup> At the time, he was with his third beautiful wife, heir of a millionaire, but hey, the male itch is so important, how could a maid refuse to cooperate in its relief? He was later accused of further rapes and involvement with a pimp network.<sup>7</sup>

The super-handicapped and self-proclaimed libertine – super-handicapped and proud<sup>8</sup> – soon acquired a new girlfriend, and his business continued to boom until his customers accused him of fraud in October 2015.<sup>9</sup> And yet, as I write, Strauss-Kahn is not in jail, or alone, or abandoned. Surely, while having a girlfriend, he finds time to frolic with the “very young Asian,” “submissive black beauty,” “operated Brazilian,” and “all-waxed Russian” that are routinely trapped in prostitution rings organized to relieve the all-important itch at all prices for men of all classes.

### 3. THE ALLEGED REPUTATIONAL LOSS

The Philosopher, I am reliably informed, is a nice guy who honestly just wants to understand things, and so might reply: “I didn’t realize buying the services of prostitutes is so cheap, and perhaps I was mistaken about Strauss-Kahn too. But what about the others?” Perhaps there are some men who buy sex only from self-employed, mature prostitutes, and take the trouble to ensure they are not prostitutes in part because they have been abused, are mentally ill, addicted, or need to support a sick child. But who are these people who unfairly suffer a reputational loss in such circumstances?

The greater understanding for the specifically male handicap that the Philosopher tries to promote gives the Berlusconi of this world a great sense of impunity. Their endearing “weakness for the girls” is said to make them “more human” (Walston 2010). They know they will not lose their reputation for doing what they want. It is after all a “handicap,” and a sort of need-based claim.

Bill Clinton did not think that being the most powerful man on earth as President of the United States came with the responsibility to behave himself

6 *The Guardian*, 2012: <http://www.theguardian.com/world/2012/dec/10/dominique-strauss-kahn-case-settled>

7 Sott, 2015: <https://www.sott.net/article/292198-Dominique-Strauss-Kahns-pimping-trial-starts>

8 France 24, 2015: <http://www.france24.com/en/20150210-libertine-strauss-kahn-admits-orgies-denies-prostitutes>

9 BBC, 2015: <http://www.bbc.com/news/world-europe-34549950>

at least until the end of his term in office. No, with so many centuries of the ideological compassion for the male weakness, he felt untouchable or at least less liable to indignation and sanction. Maybe he even felt entitled, and claimed that sex with the young intern was “consensual.” I am just a teacher, and a woman, but would not think that sex in my office with one of my students could count as consensual. Monica Lewinski’s reputation (and much of her life) was ruined, of course.<sup>10</sup> But what happened to Bill? He remained married and President, and the world remembers him as one of the best contemporary Presidents, and a rather nice guy.

#### 4. THE ALLEGED LACK OF UNDERSTANDING

Perhaps the Philosopher would judge Franco’s Spain superior to Zapatero’s in one respect. There was such understanding for the male handicap that it was normal for the *Señor* of the house to have access to the maid’s young body with neither the maid, nor the wife, having any say about it. “Men have to throw a grey hair in the wind” was the catch phrase (meaning: “copulate with somebody besides the wife”). Until 1963, a womanizing man could even kill his wife for adultery and be acquitted. Why? Because men have a weakness women lack.<sup>11</sup>

Given the Philosopher’s insistence on the need to abstract from all else, he may also want to focus on the unique way in which society accommodates for the male itch at war: at home, the soldiers’ prerogative is to leave a trail of pregnant girls behind, and while away, occupying armies are more readily permitted to ‘whore around’ than to read in the local library. Occupying armies are so understanding of the male need that soldiers can rape with impunity just about anyone.<sup>12</sup> The poor soldier forced into so much discipline has to let off steam somehow, right? Van Parijs condemns such actions, of course, but he seems to believe he is the first one to suggest the men are to be pitied for their weakness when in fact there is no novelty in this: this is the rancid ideology that has been oppressing humanity for centuries. He may say he does not mean his words to excuse such behaviors, but the fact is that his message has been used in this way for far too long. He cannot reasonably be surprised that feminists did not appreciate that his contribution to their empowering meeting was a disempowering message: “the handicap we ought to pity” is just too similar to the discourse fed to us ad nauseam which has done so much damage and we have to fight.

10 TED, 2015: [http://www.ted.com/talks/monica\\_lewinsky\\_the\\_price\\_of\\_shame](http://www.ted.com/talks/monica_lewinsky_the_price_of_shame)

11 ABC, 2010: <http://www.abc.es/20100915/internacional/adulteras-espana-201009151646.html>

12 Independent, 2014: <http://www.independent.co.uk/news/world/middle-east/no-justice-in-sight-for-iraqi-victims-of-alleged-murder-rape-and-torture-9849305.html>

For what made Strauss-Kahn assault the maid is not a handicap or a need, but a product of overindulgence in the male itch. The ideology of calling it “a handicap” misdirects attention and empathy away from the maid, and towards Strauss-Kahn’s desires. By reproducing it, the Philosopher is maintaining a discourse according to which, although men are already richer and more powerful, women must have some understanding and pity for the distinctively male “weakness.” Although they would have applauded loudly, Strauss-Kahn, Berlusconi, and Franco do not need this message, so Van Parijs instead delivers it to a feminist audience. But these are people devoted to ending precisely that ideology, people who encourage poor women to stand firm and tell their husbands to stop talking about *his* needs when they cannot even feed their existing children. Feminists tell women to stand up and show no mercy in denouncing men who rape or harass them.<sup>13</sup> Feminists tell women not to listen to his veiled threats of leaving her for somebody more accommodating to his whims. Feminists tell women not to risk HIV because a man tells them that he suffers. Feminists are people like Pateman, who tell women not to be afraid to say “why do I have to use my mouth when you have two able hands” (Pateman 1988: 172)?

Feminists, then, are not people reluctant to voice, or hear, challenging views. But they are people who would not have invited a speaker, philosopher or not, to repeat an old myth that women have worked long and hard to combat.

## 5. THE ALLEGED CLASS AND GENDER SIMILARITY

Philippa would have thought that having accepted such an invitation, she ought to engage in some research. But not Philippe. With the confidence society imbues so many men, Philippe thought he could quickly improvise something, thinking of four possible advantages for women and perhaps some comparisons between class and gender should suffice. And off he goes. And like so many men before him, but perhaps never to such a large audience of gender-aware listeners, repeatedly displays the androcentric understanding of class that feminists have so often criticized. For he writes, “people who grew up in poor families (...) are disproportionately in prison (Van Parijs 2015: 87).” No, Philippe, it is “prisons and brothels,” for not everybody responds to poverty in the same way. Depending on sex, race, and age, people face different risks: for some the risk is gang warfare or crime, for others it is, or also includes, teenage pregnancy, single motherhood, the sex industry, STIs, and encounters with Strauss-Kahn. The main cause of death for women aged 18 to 40 is gender violence (UN Women 2015). And

<sup>13</sup> Even Barak Obama had to speak against the view of rape as an inevitable part of life on US campuses (White House, 2014).

even if a poor, black man's chance of imprisonment was higher, anybody prefers a higher chance of committing a crime and a lower chance of being the victim, because the victim does not have a choice. Only for the rapist, not for the raped, is it enough to say "no."

The Philosopher then makes us search into our conscience with the phrase: "especially if we happen to enjoy a more privileged background" (Van Parijs 2015: 87), assuming, once again, before so many gender-conscious women an androcentric view. Perhaps his female listeners were middle-class, but that would not have saved them from a violent or oversexed father, an important portion would have been raped,<sup>14</sup> and tending to be pioneers in the workplace, most would have been harassed or threatened at some point (Fine 2010: 87). Knowing this, is it appropriate for a man to go to this female-empowerment meeting to attempt a sympathetic look at the men who can pick a poor, naked, maybe terrified girl, and use her for their pleasure? And why stop there and not include testosterone-filled tyrants, sadistic torturers, hangmen, and Nazi officials, who were all also overwhelmingly male?

## LOS RICOS TAMBIÉN LLORAN

Nobody, and certainly not Philippa, would go to a meeting in a South-African shantytown and attempt to move people with stories about privileged white lives, perhaps expressing frustration about servants' unreliability and showing how the rich can also cry. One could imagine the reaction on hearing about the puzzle arising from their need for more expensive sunscreen to avoid skin cancer. And why not go to a disability conference to talk about the four downsides of being able-bodied? Maybe Van Parijs would think that doing so is fine, because philosophers are licensed to focus on whatever they find interesting, blanketing out all else. But such things do not normally happen. It is usually women that have to put up with good philosophers coming to talk to them about gender and telling them the first thing that comes to mind. Philippa would have not dared to do such a thing. But Philippe may tell himself that the cold reception for his speech was not due to its being inappropriate or ill-researched, but due to some uncomfortable truth he alone unearthed. It is more likely, however, that there was little in it the feminists did not already know, and much the speaker should have known.

At the meeting, the women were concerned with discrimination, exploitation, and power and sex abuse in the workplace. In this context, Van Parijs' idea of comparing the scores of men and women must have

<sup>14</sup> In the UK, for instance, one in five women report having been victims of sexual offences since the age of sixteen (Ministry of Justice 2013: 6).

seemed rather juvenile to them. They were there to incite men to help create a cooperative and female-friendly work environment. In such a context, creating some petty competition (Men: 4, Women: 0) is unlikely to be of any help. Simone de Beauvoir (1966: 28) lamented the way men attempted to turn the female struggle for justice into a trivial diatribe, and perhaps this is just how these feminists felt.

And, no, men do not have to be eliminated, but the world would be a better place without patriarchal men.

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# Real Freedom for all Women (and Men): A Reply

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## Abstract

The disadvantages men suffer relative to women in certain dimensions are not always as significant as they seem. And even when they are real, they are not necessarily unjust. This reply to a set of six reactions to “Four Puzzles on Gender Inequality” offers a critical discussion of these claims. Above all, it questions the very idea of discussing issues of gender and justice in terms of “gender justice,” i.e., of justice between two categories of human beings.

**Keywords:** gender equality, longevity, education, political representation, social justice

## INTRODUCTION

Yes, my short speech on gender inequalities is what I think most of my commentators understood it to be: a modest invitation to help us better understand the demands of so-called gender justice and of justice more generally, by reflecting on some puzzles, none of them new but some of them sticky.<sup>1</sup> Ana de Miguel’s superbly formulated and entertaining commentary was most useful in helping me see better why my initial speech could be misunderstood, even with the explanatory notes I subsequently added.<sup>2</sup> I never read any masculinist pamphlet and do not intend to do so. But I can now imagine that some of what I said could have been reminiscent of some of what can be found in such writings and thereby suggest that I may be supporting their cause. Ana de Miguel can rest reassured. I do not believe,

1 In addition to the authors of the six comments included in this volume, I am most grateful to Sophie Heine, Meira Levinson, Anja Topolski, and the participants in the Lovanium Seminar in Ethics and Public Policy (Leuven, 21 November 2014) and the Nuffield Political Philosophy seminar (Oxford, 1 June 2015) for the sort of comments I was hoping to trigger – and be enlightened by.

2 Perhaps contrary to her expectation, I particularly enjoyed de Miguel’s contribution. I hope she enjoyed writing it at least as much as I enjoyed reading it – and more than I did trying to reply to it.

and never claimed, that it is high time we should start pitying the male gender, let alone that justice demands that it should be compensated for its many “weaknesses.” As a male member of a well-off segment of a wealthy society, I am only too aware of the privileges I enjoy, not only nor mainly by virtue of being a man, but definitely partly by virtue of being a man.<sup>3</sup>

Thus, the aim was not pro-male advocacy but philosophical clarification, and the point of departure, as so often for us philosophers, was a set of genuine puzzles, the nature of which is well captured by Paula Casal (2015: 90-106) in the case of longevity. She is sure, she writes, “that if a random mutation resulted in women starting to die far ahead of men many of those who currently find Van Parijs’s suggestion [that men’s shorter life expectancy may be unjust] absurd would start listing lesser longevity as one of the disadvantages women suffer” (90-106). If this is the case, and holds more generally for at least some of the other inequalities I listed, does it not follow that they should count, albeit *prima facie* and *pro tanto*, as injustices against men? This is, at any rate, the upshot of Gina Schouten’s careful discussion of differential incarceration: “I tentatively conclude that men’s higher likelihood of incarceration *is* a distinct injustice to men” (3).

Schouten usefully distinguishes two ways of accommodating this acknowledgment. If one is willing to adopt a general metric of justice, gender inequalities in favor of women would reduce the overall level of injustice they suffer: good news for overall gender justice. If instead no inequality in life expectancy, homicide, or incarceration can do anything to offset inequalities in, say, labor income, social status, or sexual violence, all these inequalities simply constitute incommensurable forms of injustice, and if an unjust inequality develops in favor of women, this would not reduce but further worsen gender injustice. But we are not there yet, and may never get there: most of my commentators deny that the inequalities I listed are injustices against men.

In this response, I shall discuss several of their insightful, sometimes ingenious arguments. But I shall not bore the reader with a point by point response, in particular with a defensive inventory of the many cases in which I feel that a (genuinely or falsely naïve) question I was asking was misunderstood as a suggestion, or even as an assertion. The literary genre

3 In particular, had I been a woman, it is most unlikely that I could have enjoyed as much as I did the immense privilege of combining a large family and a demanding job (see the section “Femmes Francqui” in my “Allocution à l’occasion de la remise du Prix Francqui 2001,” [www.uclouvain.be/8611](http://www.uclouvain.be/8611)). Possibly in a slightly weakened form, Jesús Mora’s apt remark can most probably be generalized: “Men with very successful careers in the hard sciences often have several children, successful female scientists often have no families at all, as they have to compete with men who have housewives that do everything for them whilst lacking one. So a group of well qualified women are childless or even entirely alone” (Mora 2015:).

of my initial piece is certainly largely to blame for such over-interpretations. Precisely because it (uncharacteristically) abstained from making specific proposals, it did not need firm assertions by way of premises.<sup>4</sup> It stopped at listing and motivating some questions. Asking a question leaves open the possibility of an answer my critics would find objectionable but does not amount to proposing it.

## 1. NO DISADVANTAGE

The general format of the question I asked was: are the apparent disadvantages of men that I listed unjust and, if not, why not? A first type of response to this sort of question consists in arguing that, once looked at closely, the appearance of advantage vanishes, or at least much of it does. This is the case for life expectancy. Paula Casal (90) usefully invites us to have a look at the age pyramid. If it turns out that there is little difference between the two sides except at the very top, it reinforces the idea that the advantage, if any, cannot be that great. At the limit, women simply “enjoy” some extra miserable years in their nineties which they may prefer not to have to endure (and would not if euthanasia and assisted suicide were legally and socially easier). Unequal numbers of years in good health would arguably be a better indicator of a genuine inequality of advantage, despite the unavoidable arbitrariness of the cut-off point between good and bad health. But this would still not do.

As briefly pointed out in my piece and insightfully developed in Casal’s, this would overlook the asymmetric care-giving to the ageing partner. Even if preaching and material incentives (favorably discussed by Casal) could drive down the average age gap between partners to zero, even if the disposition (and competence) for caring for one’s ageing partner had been equalized across genders, even if as much as possible was outsourced (as also recommended by Casal), there would remain, on average, a greater burden for the female members of heterosexual couples, simply owing to their longer life expectancy. This greater burden further reduces the associated advantage. In order to assess what advantage is left (if any), this suggests designing a notion of QALY (quality-adjusted life years) that does not only take health into account, but also such burdens. Inequality, using this amended metric, might still be in favor of women, but it will definitely be far smaller than when measured by the raw gap in life expectancy.

<sup>4</sup> When in other contexts I asked such incongruous questions as whether surfers should be fed (Van Parijs 1991), or the elderly disfranchised (Van Parijs 1998) – which some hard workers and some pensioners might have found offensive – I did not leave the questions open but argued for an answer (yes to food for surfers, no to taking away the old folk’s vote!).

A second interesting example of an advantage that arguably melts once scrutinized is provided by Jesús Mora in his stimulating discussion of education. While claiming that education should be regarded as a dimension of advantage not entirely reducible to the earning power it generates, I had also stressed the relevance of a paradox: “Having to work so much harder to be rewarded so much less is, as Van Parijs at one point suspects, one of the forms of compound injustice that women face” (Mora 2015: 114). Mora does not challenge the independent importance of education: “it is true that education *could* potentially, in some possible world, offset men’s economic advantage” (108). But his explanation for the paradox I stress makes the educational advantage enjoyed by women a necessary by-product of the inequality they suffer in other respects. Here is the core of the argument.

Females invest more than males in their own education because they anticipate that they will need it more than men for their own material security: “with every pregnancy and every year into the marriage, women become less desirable both in the love and the labor markets” (109). This is reflected, he conjectures, in a material return to education that is systematically higher for women than for men. Women’s greater educational achievements “are thus symptoms of gender inequality, not signs of its disappearance” (114). To the extent that the higher average level of education is inextricably linked to disadvantages in other dimensions and hence, by hypothesis, would disappear in its absence, it is therefore no longer clear that it could be considered a separate, possibly compensating, dimension of advantage, or at least it is less clear than I had made it sound. This is an interesting conjecture, and certainly part of the story.<sup>5</sup> Even if it is not the full story, it can legitimately be used to argue that the alleged advantage is less than it seems.

## 2. DISADVANTAGE JUSTIFIED

Let us now accept, as several of my commentators do, that along some dimensions women enjoy some advantage, though possibly smaller than what it looks at first sight.<sup>6</sup> A second response then consists in arguing that there is nothing unjust about it. A first version of it is the “Rawlsian”

5 Can the comparatively high rates of absenteeism, unruliness, and dropping out among male teenagers and their long-term consequences on the education gap be entirely accommodated by this conjecture? I doubt it.

6 One candidate I did not mention is strikingly documented by Casal (2015: 93): the probability of being killed is 2.5 times less if you are a white woman than if you are a white man, 9 times less if you are a black woman than if you are a black man. Does the fact that the overwhelming majority of the perpetrators are men prevent us from regarding men’s much larger probability of being murdered as a genuine and potentially unjust disadvantage?

argument developed by Casal (2015:98) against the background of fascinating evolutionary conjectures: “the inequality in longevity is not unjust because its removal would make humans worse off.” In the human and some other species, the females having longer lives than males is apparently beneficial to the care, survival, and education of all their offspring, male and female. This arguably turns women’s greater longevity into an adaptive feature, which natural selection has preserved throughout the millennia and is still with us. Let us suppose that this explanation is correct. By no means does it follow that the inequality it explains is thereby justified. For the surplus of strength or resilience that enabled more mothers to steer their offspring into adulthood, despite the hazards of delivery and other perils, is now what accounts for a life expectancy of 85 rather than 80 or so. We are therefore talking here about one of those features which, however crucial they might have been in a more or less remote past, have lost their function in a deeply altered environment. Similarly, male aggressiveness must have been a handsome asset, in both individual and group selection, throughout the millennia in which some of our ancestors lived in rival tribes of hunters, but this is no justification for it in our societies.

The other challenges to the injustice of a recognized disadvantage suffered by men rely on the assumption that this disadvantage—in terms of longevity, incarceration, education, etc.—is mediated by a lifestyle or behavior pattern that is male-specific or at least displayed by men more often than by women. The phrasing of my puzzles occasionally suggested that it was essential to them that this propensity to behave in a certain way should be linked to man’s hormonal constitution. But I fully agree with convergent remarks by Casal (2015: 91, 98), Ottonelli (2015: 134), and Schouten (2015: 139) to the effect that, however big a difference this may make as regards possible remedies, there is no crucial difference as regards justice or responsibility between causal accounts in terms of genetic equipment, early socialization, or socially sanctioned expectations about what it is to behave as a “real woman” or as a “real man.” Early socialization and social sanctions are no more chosen by the individual men and women shaped by them than is their genetic equipment.

This being clarified, let us consider the suggestion that women’s greater longevity is (*prima facie* and *pro tanto*) unjust, against the background of the factual assumption that men are predisposed, either by their genetic equipment or by their social environment, to a behavior pattern that will inflict on them a genuine disadvantage relative to women, by costing them on average several years of valuable life. Casal formulates two “liberal-egalitarian” challenges to this disadvantage constituting an injustice, one inspired by Tim Scanlon, the other by Ronald Dworkin.

According to the “Scanlonian” challenge, once society has done enough, i.e., once men, under appropriate circumstances, have been sufficiently warned that some behavior pattern can have detrimental consequences for them, there is no injustice involved if they persist in behaving in a damaging way. One serious problem with this challenge is that making people aware of the consequences of their choices does not get rid of the underlying unchosen disadvantage, as well characterized by Schouten in the case of incarceration: “Whatever configuration of social and natural causes are at work, they presumably make males likelier to be incarcerated because they make it more difficult for males than for females to avoid the kinds of behaviors that lead to incarceration” (Schouten 2015: 139). Much of the material injustice suffered by women is of fundamentally the same nature: “to make the counter-gender-typical choice of prioritizing paid labor, the average woman will have to overcome either ingrained social norms or a natural predisposition to prioritize others’ needs for care, or both; and she will have to pay the costs of violating social norms.” (141) Whether or not men or women are being properly warned about the consequences of following their natural or social inclinations, “in both cases, the inequalities in the background against which the relevant choice is made are *not* chosen; and in both cases, the relevant choice is *harmful* to the chooser” (142). If appropriate warnings are deemed sufficient to nullify the alleged injustice suffered by men as a result of their choices, the door is wide open for this sort of excessively easy justification of inequalities suffered by women.

The “Dworkinian” challenge presented by Casal deactivates the imputation of injustice by focusing on what the alleged victims of injustice identify with, rather than the warning given to them. There is no injustice involved (let alone compensation due), so the challenge goes, if men identify with the behavioral pattern that triggers the disadvantage. To the extent that they identify with it, such a behavioral pattern is not a handicap, like an addiction, which they would prefer to be without. It is part of their identity, like a religion which they may never have chosen – if they grew up within it – but which they embrace. The test proposed by Dworkin in order to determine what counts as an injustice calling for redress or compensation consists in a counterfactual insurance device, where people are supposed to know their ambitions but not their endowments. When performing this exercise, men “would have insured against illness or disability but not against being male” (Casal 2015: 100).

The trouble with this challenge is that nothing prevents, in Dworkin’s device, taking male, or female, or atheist, or Muslim, as part of what one identifies with, and hence of one’s ambitions (like wanting to be a pianist or a gardener), while insuring against how costly it will prove to be. This

presupposes that one can dissociate being male from the cost it involves (here in years of life), and there is no reason why such dissociation should be ruled out, unless the cost is what one identifies with (as some may do with fasting). If one did rule it out, as implied by Casal's Dworkinian argument, it is true that one could no longer make sense of the injustice of a number of disadvantages suffered by men, but equally of many putatively unjust disadvantages suffered by women.

"Some may worry," Casal (100) notes, "that this Dworkinian use of self-identification as a criterion for justifying compensations may not always favor feminist demands." Indeed they should worry. Spending plenty of time with their children is part of an identity some women embrace, and if the implied cost in foregone (current and future) income could not be dissociated from what they identify with, they would have no "Dworkinian" complaint of justice against the income inequality stemming from this source, just as men, for analogous reasons, would not have a "Dworkinian" claim of justice against inequality in life expectancy stemming from a lifestyle with which they identify. If we are not to miss a big part of the injustice inflicted to women, it would therefore seem wise to allow a dissociation between gender-specific behavioral patterns and their cost, at the price of acknowledging the failure of the "Dworkinian" challenge.

Are we then forced to admit that any disadvantage – whether higher chance of being killed or more expensive consumption – stemming from men's specific lifestyle or pattern of behavior is, albeit *prima facie* and *pro tanto*, unjust, given that it is causally linked to the unchosen fact that they are men? We are not. Clearly, any plausible conception of justice must manage to make a distinction between a handicap that justifies redress or compensation and preferences the cost of which need to be borne by those who have them. This point is forcefully made by de Miguel (2015: 154) in the case of prostitution: "It is also very strange to say that somebody is to some degree disabled in an injustice-involving sense merely because they have, or are more likely to have, a preference. The same is true if the preference is a passion, for instance for the sea or the snow, that might kill you in some circumstances. The word 'handicap' suggests something stronger than the frustration of a mere preference, the existence of an unmet need." Thirst, she argues, can qualify as a need, but not the preference for having it satisfied in a fancy way. "And the desire for sex is like this 'thirst-thing' for most men. They love having it, and so long as they are not handicapped in other ways, and so still have hands, relief is simple, instant, and gratis" (de Miguel 2015: 153). Any sensible conception of justice must make room for a distinction of this sort. In the following section, I shall drop the *ad hominem* (or *ad feminam*) posture I have adopted so far (as well as in

my initial piece) and sketch how the conception of justice to which I subscribe myself tries to accommodate this important distinction and to address other key issues raised in the comments.

### 3. SOCIAL JUSTICE AS REAL FREEDOM FOR ALL

Ottonelli (2015: 126) finds it puzzling that I assumed as unproblematic “some version of equality of opportunity for welfare or resources,” which fails to capture key aspects of the injustice suffered by women: “for example, women’s higher unemployment rates, lower income, and greater hardship resulting from divorce,” which should be “taken as signs of the domination, oppression, and exploitation that women suffer in our society.” She is right to complain. These aspects need to be taken on board, and the conception of justice I subscribe to can accommodate them, I believe, far better than the vague notion of equality of advantage which I have been relying on so far for the sake of the argument(s).

This conception can be captured in the slogan “Real freedom for all.” It essentially requires empowering as much as is sustainable those with least power to shape their lives. And it is leading me to advocate, along with Carole Pateman, for example, repeatedly cited by de Miguel (2015: 153, 158), and along with many others, an unconditional basic income.<sup>7</sup> For the sake of justice as real freedom for all, this unconditional income should be pitched at the highest sustainable level, part of it being given in the form of quality education, health care, and a sane environment, in addition to an unflinching protection of physical integrity. However they are funded, the introduction of an unconditional basic income and the rise of its relative level are bound to involve a net redistribution from men to women and, more importantly, a greater expansion of life options for women than for men.

It should not take too much effort to imagine, in particular, what difference the highest sustainable unconditional basic income would make to the prostitutes described by de Miguel (153-6). Its prospective effect is not mainly to increase their purchasing power. It is above all to increase their bargaining power on all fronts by multiplying exit options. Nor should it take much effort to show that such a conception of justice is more than compatible with Ottonelli’s (130) view that “our treatment of male’s unfortunate hormonal constitution represents indeed a rare case of over-accommodation of an impairing disability” or with de Miguel’s (158) call for putting an end to “overindulgence in the male itch.” Moreover, if it is

<sup>7</sup> See Pateman (2006), Murray & Pateman eds. (2012), and, for recent discussion of the connection between gender inequalities and basic income, McLean (2015) and Elgarte (in progress).



the case that “an overwhelming presence of men in dangerous, difficult, and hazardous jobs [...] causes countless episodes of killings, torture, physical aggression, humiliation, maltreatment, medical malpractice, physical injuries, and deaths by negligence” (Ottonelli 132), then there is no doubt that justice as real freedom for all would command that an end should immediately be put to this overwhelming presence of men. There may well exist sound evolutionary explanations for male-specific dispositions that generate despicable behavior, but this can never amount to justifying giving the latter free rein.

This being said, it is of course intrinsic to a conception of justice that adopts freedom as its *distribuendum* that it should not erect into an ideal the achievement of equal average scores – or of an equal grand total score – by all categories of human beings for variables expected to be affected by the latter’s free choices. The monitoring of gender gaps, in particular, can play a useful role in locating forms of discrimination or intimidation that hinder the pursuit of justice as real freedom for all. But the existence of significant gender gaps in terms of expected lifetime earnings or quality-adjusted life years, for example, is not, as such, decisive evidence that injustice is being perpetrated. The choices made by men and women that lead to such gender gaps are not made in an angelic vacuum. They are made by people enabled and inclined by their genes to do, on average, different things or do them differently, depending on whether they are men or women. These human beings also grew up and currently live in immediate surroundings and wider societies that tend to expect different things from them depending on their gender. Men and women may or may not identify with these expectations. A just society is not one in which all gender-specific capabilities and expectations have been eradicated. It is one whose institutions allocate resources in such a way that those women and men with least real freedom are made as really free as possible to live as they might wish to live, including of course by refusing to fulfill the existing gender-specific social expectations.

So far (perhaps) so good. But how can such a conception of justice make room for a distinction between, on the one hand, handicaps for which it is fair that one should be compensated and, on the other hand, preferences the consequences of which one should bear? Quite simple – in principle. As mentioned above, part of the highest sustainable unconditional basic income is to be given in kind, in particular, in the form of a health care package. How big this component should be, and what it should cover and how, is to be determined, in Dworkinian fashion, through a thought experiment that requires us to hide behind a veil of ignorance those of our features – including our gender – that affect the probability of our suffering disabilities

and other health impairments in a very broad sense.<sup>8</sup> The resulting just health care system can safely be expected to cover, for example, pregnancy, abortion, contraception, perhaps female and male infertility. It may well accommodate a dependency insurance that reduces the chance of elderly people needing to rely heavily on their close relatives. But I would not count on its including prostitution vouchers.

#### 4. AGAINST CATEGORICAL JUSTICE

This is not the place to further spell out the content and implications of social justice as real freedom for all, except to further clarify, using illustrations provided in the comments, in what sense it is incompatible with the very idea of gender justice (and, more generally, of category-based justice), and why this matters.

To illustrate the incompatibility, let us first return to longevity. In her insightful discussion, Casal (2015: 94) notes: “It would not make sense to compensate men who avoid all life-shortening behavior and are thus likely to live long. For then there will be nothing they have to be compensated for[...]. But it would make even less sense to compensate individuals who, despite engaging in all the life-shortening gendered behavior, still escape the fate for which they are supposed to be compensated.” Quite right. Let us radicalize the example by considering two fictitious situations. In situation A, all females die at 85 and all males at 80. In situation B, everyone dies at 85 except for one baby boy out of seventeen, who dies shortly after birth, thereby giving males a life expectancy at birth of 80. Surely, it would be absurd to count this lower life expectancy at birth as a disadvantage for the surviving males. If anything, it should count as an advantage, since the form taken by this shorter life expectancy has made them scarcer relative to females in the mating segment of their lives. But this is not only about just-born babies. Suppose that the whole of the gender gap in life expectancy was the result of a higher probability of males dying before forty. There would be no longevity disadvantage in being a male over forty. This should suffice to convey the intuition of why the very idea of talking about justice between statistical categories, gender or otherwise, is problematic. Within the framework of justice as real freedom for all, in particular, categorical justice makes no sense.

<sup>8</sup> As explained in Van Parijs (2009: section 4), I now believe that this is a better way of accommodating what is usually captured by the preference/needs distinction than the criterion of “undominated diversity” proposed for this purpose in Van Parijs (1995: chapter 3) and mentioned by Casal (2015: 9).

To illustrate the real-life relevance of this rejection of categorical justice, let us return to Mora's stimulating discussion of women's educational advantage. I liked the compact summary of his analysis: "female educational efforts, far from signaling the arrival of equality, are the knotted rope women use to escape the flames of discrimination, domestic and workplace exploitation, and poverty" (Mora 2015: 110). In the same vein, Mora points out that female higher educational efforts are worth pursuing because it is women's "protection, and perhaps the only one, against being short-changed at work and at home," and that higher education is the "irreplaceable tool for them to achieve levels of employability similar to men's" (110). One conclusion one may be tempted to draw from this is that promoting the education of women, and in particular their access to higher education, is the only serious hope for addressing the injustice suffered by women. But I am sure that Mora will want to resist this conclusion. For what about the countless women who, even in the best circumstances, will never go into higher education? Surely, the injustice they suffer is in no way diminished as a result of other women escaping the flames of discrimination and exploitation.

Justice as real freedom for all does not care about justice between genders, or any other categories, taken globally. It demands that prior attention be given to the real freedom, to the bargaining power of the worse-off, most likely women and men who never attended and will never attend higher education. Therefore, the privileges, big and small, enjoyed by those who do get access to higher levels of education can be justified only by the extent to which they contribute to the real freedom of those who do not. The pursuit of social justice as real freedom for all may require policy tools that are categorical, in particular gender-specific. But social justice and injustice themselves must be understood as obtaining or failing to obtain between individuals. One of the great contributions of feminism to the thinking about justice is to have made it more individualistic by blowing up the black box of the household and exposing intra-household injustice. Thinking about justice as applying between categories is no better than thinking about justice as applying between households.

## 5. POLITICAL INEQUALITY

I have said nothing so far about one inequality I mentioned as a potential injustice suffered by men, the fact that they systematically form a political minority. As well explained by Pierre-Étienne Vandamme (2015), this case is quite different from the other ones. The inequality, here, is not as such an advantage, but only a potential source of advantages. And it is, moreover, a source that is most unlikely to ever be activated.

Vandamme does not question the existence of a solid majority of female voters in mature democracies. He even mentions the stunning figure of seven million more women than men voting at recent US presidential elections. However, he does challenge the expectation that this gap will widen as a consequence of the widening gap between the educational level of women and men. Apparently, with some exceptions such as the US and Switzerland, the positive correlation between education level and turnout is vanishing in mature democracies. By contrast, the positive correlation between age and turnout remains firm, even though one cannot expect the ageing of the population to deepen the gap in life expectancy, nor therefore the male-female imbalance in either the electorate or the turnout.

The key issue, however, is whether belonging to a numerical majority – whether racial, religious, linguistic, professional, whatever – is a feature that matters as regards justice. Clearly, no procedural injustice is involved: one person, one potential vote. Hence, Vandamme (2015: 120) rightly argues that injustice can only arise from a numerical imbalance if the more numerous group uses its electoral power to “turn this numerical advantage into a *substantial* injustice.” One can imagine two situations in which this is unlikely to happen. One is a perfect deliberative democracy, in which all voters are guided by an impartial conception of justice or of the common good, not by their personal interests. The other situation is that of a democracy that is less than perfect in this sense, but in which the interests of majority and minority are so closely intertwined that the majority could not pursue its own interests without also pursuing those of the minority. If we diverge significantly from either of these situations, a serious risk of injustice arises, unless special constitutional or customary constraints are introduced in order to protect the minority, such as veto powers, guaranteed representation, quotas, and parity rules in executives and in legislative assemblies.

Why do such protections seem to make obvious sense in the case of Flemings versus Walloons, Shiites versus Sunnites, etc. and not in the case of women versus men? The reason is not that the categories of women and men are each very heterogeneous. So are the other majority/minority pairs. The difference, I submit, lies elsewhere. If every Fleming needed a Walloon, or each Shiite a Sunnite, in order to procreate, if each of them was born from a mixed couple and if most of them cohabited in mixed households and ended up with offspring from either group, their interests on most issues would converge sufficiently for the risk of a tyranny of the majority to be very limited, far more limited at any rate than if none of this were the case. But this is exactly the situation that obtains between men and women. There is a (quasi) unavoidable territorial and personal closeness between genders that makes for a far more systematic convergence of interests

than in the case of ethnic categories. Not a total convergence, needless to say, but one sufficient for no protective veto power to make sense, however large the gap between female and male voting power ever becomes, especially if, next to the convergence of interest, public deliberation plays some of its civilizing, justice-seeking role.

For the time being, anyway, the danger of misuse of political power is rather coming from the other side. Vandamme rightly stresses that political power does not reduce to electoral power. Whether because of the misplaced celebration of “leadership” qualities denounced by Ottonelli (2015: 130) or because of the unequal distribution of relevant resources, more men than women tend to be involved in forms of political participation more demanding and more consequential than casting a vote at distant intervals. Hence, if political power is being misused in those areas in which the interests of men and women systematically diverge, it is more likely to be at the expense of women rather than in their favor, for example, because platforms and policies are surreptitiously concocted and packaged in gender-biased fashion. This is why the presence of women at all levels of public (and private) power is so important. Not for the sake of equalizing the chance of access to top positions for the select few, but in order to prevent the specific interests of women of all social classes being systematically under appreciated or completely overlooked. This is about political power, though not the power to impose one’s will through majoritarian voting, rather the power to make problems visible and intelligible in time, and to create the conditions for the adoption and implementation of solutions that can be regarded as fair by all women no less than by all men.

## EPILOGUE

“Why not go to a disability conference to talk about the four downsides of being able-bodied?” de Miguel (2015: 159) asks. Good question. No, I would not do it. Why then did I agree to do something analogous on gender inequality? No doubt because I believe that there are some crucial differences between the case of gender and that of disability. And also because in this case I was specifically asked to raise some philosophical questions on gender by someone I like and whose action I wanted to support. Given the short time at my disposal, my first puzzles were the way I thought I could satisfy the request most effectively. This turned out to be a mistake in the short run, but perhaps not in the longer run, judging by the discussion in this volume, very instructive and clarifying certainly for me and probably for others too.

Nevertheless, as Schouten (2016: 137) puts it, “we might lament the opportunity costs of theorizing alleged injustices against men when women continue to be victimized by pervasive structural injustices, and worry that such theorizing will slow progress toward women’s equality.” I entirely share the underlying conviction that concern with real-life injustices should be at the core of much of our work as political philosophers. It has certainly been at the core of mine. Asking, as I did, some seemingly incongruous questions was certainly not intended to “slow progress toward women’s equality” (137). As should be clear by now, it was meant to invite more careful thinking about the relation between gender and justice in a way that should have some relevance to the public debate on these issues, and hence also to real-life gender-related public policy.

In particular, I wanted to highlight the possibility that gender justice, understood as justice between two categories, may be the wrong way to think about justice and gender – a point that, in different ways, both Casal (2015: 91) and de Miguel (2015: 159-60), also touch upon. To illustrate the relevance of this challenge to real life, consider the *Gender Equality Index* developed by the Vilnius-based European Institute for Gender Equality.<sup>9</sup> Such a composite index aggregates a number of variables each of which reflects some aspect of gender inequality, for example, the male-female gaps in earnings, in rates of participation in the labor market, in proportions of tertiary education graduates, in life expectancy or in parliamentary representation. When collected in a reliable and comparable way, the data sets used as inputs are extremely useful for the sake of assessing a country’s performance and guiding its policies. But the categorical-justice approach such a composite index encourages and the arbitrary weights on which it relies are, in my view, obstacles rather than tools in the effort to guide and design public policies in the service of social justice.

In order to engage with real issues, we philosophers often have to venture outside our tiny field of professional expertise. No problem as such: this is both our right and our duty. But it inevitably involves taking the risk of saying or suggesting things that turn out to be wrong, and hence of being corrected by colleagues who know more about the subject or have thought more about it. This is part of the never-ending attempt to give a coherent picture of what we can and must be heading for, to address the objections this picture may give rise to, and to correct it whenever needed. I am most grateful to my commentators and especially to Paula Casal, who master-minded this symposium, for having helped me along on this – sometimes bumpy – road.

9 *Gender Equality Index* 2012, European Institute for Gender Equality, <https://www.eige.europa.eu/gender-statistics/genderequality-index>, consulted March 2016.

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## Symposium

### *Family Justice: The Ethics of Parent-Child Relationships*

# *Family Values: An Introduction*

**ANDREW WILLIAMS**

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The social, legal, and political institutions that constitute the family play a profound and unavoidable role in shaping individuals' lives and distributing opportunities amongst them. They strongly influence our psychological development, including the acquisition of a sense of justice, as well as various cognitive skills, and our prospects of success in the competition for positions conferring authority and influence in the economy and the state. Those institutions also have non-instrumental importance insofar as we have weighty reasons to care about our capacity to enjoy love and intimacy both as adults and children, and the degree to which we are protected from various objectionable forms of control by other agents. Since the design of the family is malleable any reasonably complete political philosophy needs to reflect on these and related issues. Fortunately, contemporary Anglo-American political theorists have attempted to respond to this challenge. In recent years, some of the most notable contributions to the emerging debate have arisen via joint work by Harry Brighouse and Adam Swift, leading eventually to the publication of their book, *Family Values: The Ethics of Parent-Child Relationships* (Brighouse and Swift, 2014).

Brighouse and Swift provide a sophisticated liberal egalitarian account of the essential role of the family in a just society. The account is distinctive in part because of the role it affords to the interests of parents in enjoying valuable relationships with their offspring as well as the interests of children and adults in being raised in families. At the same time as showing how their favored dual interest case for the family justifies parental partiality, the authors are keen to establish their account offers no support for the types of substantial inequality in opportunity characteristic of most societies.

These claims and others made by Brighouse and Swift raise a host of questions within ethics and political philosophy, several of which are pursued by the authors of the following three thought-provoking papers. Sarah Stroud calls into question some of the egalitarian assumption about inheritance that animate many recent discussions of justice and the family. Anca Gheaus focusses on the extent to an adult's interest in parental authority over a child can plausibly ground its possession. Luara Ferracioli asks whether Brighouse and Swift are over-reliant on an ideal of personal autonomy, and extends our attention to the interests of offspring in family membership over the course of their lives and not merely during childhood.

The discussion concludes with a substantial response by Brighthouse and Swift that elaborates their position, and defends it where necessary.

The Editors hope the four papers advance debate on issues of pressing personal as well as public concern. They are grateful to all the participants for their commitment to the Symposium, and to Marcos Picchio for his invaluable administrative and philosophical assistance with the project.

# Egalitarian Family Values?

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## Abstract

*Family Values* seeks to offer a compelling defence of the family in the face of concerns that the institution of the family disrupts fair equality of opportunity. Brighouse and Swift endorse the concern but think that the great value of family relationship goods is nonetheless sufficient to vindicate the existence of the family. This response applauds Brighouse and Swift's insistence on the interests of parents in raising children and on the loving and intimate character of the parent-child relationship. However, it suggests that Brighouse and Swift's egalitarian framework prevents them from taking the full measure of the above salutary commitments.

**Keywords:** family, parent-child relationship, love, egalitarianism, relationship goods, parents' interests, equality of opportunity, intrinsic goods, positional goods

Harry Brighouse and Adam Swift are our leading theorists of the family.<sup>1</sup> Their previous joint papers have greatly advanced our understanding of the ethics and politics of relations between parents and children. Their work exemplifies a rare combination of qualities: it is bold, path-breaking, and yet rigorous and attentive to nuance. For this reason, we already owe a number of game-changing insights and argumentative strategies to Brighouse and Swift. I would number among the most significant of these a) their insistence on adults' interests in parenting as an indispensable factor in the moral and political equation; b) their emphasis on the value of *the parent-child relationship* in particular; and c) their use of the latter to work out in a systematic and principled way the rights and privileges which attend, or ought to attend, parenthood.

The above insights and strategy also drive the new book, *Family Values*. Readers already familiar with Brighouse and Swift's joint articles will not

1 Following Brighouse and Swift, I will always mean by "the family" a "nuclear" family consisting of at least one parent and at least one child.

find the authors taking a radically new approach here. Instead, the elaboration at book length of their basic line of thought has given Brighouse and Swift the space to embed their core argument within a larger and more explicit overall argumentative architectonic. My remarks here will focus on the shape of that structure and the route it offers to the conclusions Brighouse and Swift are already well known for endorsing. But I want to begin by lingering over and underlining the significant insights their work has already brought to the table, and which continue to play a prominent role in this new book.

To start with a), we owe Brighouse and Swift a great debt of gratitude for expanding the discourse around the family by highlighting the interests of (would-be) *parents* as well as those of children. I find much of the pre-Brighouse and Swift literature on the family excessively, or too exclusively, child-centred; in much of this literature families and parents are treated essentially as devices to serve children's interests. Surely, however, as Brighouse and Swift emphasize, this is only part of the story. Taking care of and raising children is a hugely rewarding and meaningful activity for many adults, one to which they freely choose to devote a substantial portion of their time and energy, and one which they may view as a central contributor to their own personal flourishing. Parenting is, quite simply, what they want to do (or among the things they want to do) with their life (Brighouse and Swift 2014: 22). Brighouse and Swift insist (their word) on the importance of this fact, maintaining that "adults' interest in parenting (and not only children's interest in being parented) helps us to understand the moral basis of the family" (2014: 176). Thus, to neglect these parent-centred factors in discussing the ethics of the family would be to omit a significant piece of the equation. I wholeheartedly agree; I will question only whether this insight and the shift in perspective which it induces receive their full due in *Family Values*.

We also owe to Brighouse and Swift a more precise specification of the *content* of the adult interest in parenting just mooted. As per insight b), Brighouse and Swift propose that parents (and those who desire to be parents) have a strong interest, specifically, in establishing and participating in a *parent-child relationship*. This is shorthand for an intimate, loving relationship with a child in which the parent has both considerable responsibilities toward the child and considerable decisional authority over the child. Brighouse and Swift argue that relationships of this distinctive kind are of great value to both parents *and* children, and (as we shall see under c)) they use this value as the linchpin for deriving further ethical and political conclusions about the family. To place a valuable relationship so explicitly at the core of family

ethics was a major conceptual advance,<sup>2</sup> and one which fits in especially well with an influential strand in recent moral philosophy.<sup>3</sup> Again I think Brighthouse and Swift are right to put the emphasis on the relationship between parent and child as the, or at least a, central ethical element when considering the family.<sup>4</sup> I will again question, however, whether they have taken the full measure of the implications of this commitment.

This last point brings us to c), Brighthouse and Swift's distinctive argumentative strategy for resolving questions about the rights and privileges that ought to attend parenthood. Their simple but innovative idea is to deploy the aforementioned value of the parent-child relationship as the *sine qua non* in assessing the merits of putative parental rights. If *failing* to accord parents a certain right or privilege would *prevent* the development of a valuable parent-child relationship, then that creates a strong moral and political case for granting parents that right or privilege, even in the face of possible moral counter-arguments.<sup>5</sup> On the other hand, if *disallowing* parents a certain right or privilege would *not* impede the development of a flourishing parent-child relationship, then that putative right or privilege stands exposed and undefended against any arguments that could be raised against it. This double-edged criterion allows us to adjudicate questions about legitimate parental rights or parental partiality in a principled way, taking us beyond mere reliance on intuition to discern their scope or limits.

As mentioned earlier, in *Family Values* Brighthouse and Swift embed these key insights within a larger argumentative superstructure, to which I will now turn. I will try to bring out some points where resistance to their conclusions can plausibly be traced back to unease with something more basic, namely their vision of the dialectical situation: their conception, for instance, of what kind of claim requires what kind of argument, or of where the burden of proof lies.

Job one, as Brighthouse and Swift see it, is to offer a “defense” (2014: xi, xii) or “justification” (2014: 5, 20, 51) of the family. And it soon becomes clear

2 They credit Schoeman (1980) with originally introducing this idea; but his account seems not to have had much influence on the subsequent literature in family ethics.

3 See for instance the work of Scheffler (2001), especially “Relationships and Responsibilities” and “Families, Nations, Strangers”, and Kolodny (2003).

4 I am pleased to see that word seems to be getting around that a parent's relationship with his child is more important to both than any financial advantages the parent might be able to procure for his child by working more (Brighthouse and Swift 2014: 136). From a recent entry in the Guardian's “My family values” series: “The people with the biggest stereotypes on boarding school were the ones who saw their parents the least... You cannot cover up for a loss of time with money” (Hassell, 2015).

5 “Parents have the right to engage in those activities and interactions with their children that facilitate the realization of the extremely valuable goods that justify the family in the first place” (Brighthouse and Swift 2014:118).

that what they have in mind is a distinctively *consequentialist* defense or justification. Their aim, they tell us, is to demonstrate that and why it is “a good thing” (2014: i, 114) that the family exists: “to explain why it is good that children be raised by parents” (2014: 48). While Brighouse and Swift do not further explain the locutions “it is a good thing” or “it is good that”, such expressions are typically used to evoke a consequentialist conception of (impersonally or objectively) good states of affairs; and Brighouse and Swift’s approach to justifying the family confirms this interpretation. The task they set themselves is to show that and how the existence of the family realizes, or at least facilitates or makes possible, a distinctive set of desirable states of affairs: to prove, in short, that the world would be objectively poorer without families in it. The “familial relationship goods” alluded to earlier are the star players in this demonstration.

Some readers, however, may already be feeling uneasy with Brighouse and Swift’s felt need to provide a justification of this kind for the family. For one thing, it may well strike readers as rather an idle question whether it is “a good thing” that families exist. It is, I take it, *practically* idle to ask whether families should exist: as far as I know, no one anywhere is seriously advocating, let alone threatening to effect, the abolition of the family. There is thus no *actual* interlocutor demanding to be convinced that the existence of the family is preferable to its nonexistence, and in that sense no *actual* threat against which the family needs to be defended.

There are two further, more theoretical reasons why a reader might doubt that there is really a question here which needs dialectically to be answered. Brighouse and Swift’s self-appointed task is to adumbrate the distinctive values and goods which the existence of the family makes possible. But one might doubt whether parents raising children requires a *sui generis* justification in terms of the distinctive values it realizes, as opposed to simply falling under a more general and less demanding moral schema. As we noted earlier, being a parent is something that a great many adults very much want to do with their life. If someone very much wants to do *x* with her life, one might think that alone creates a significant moral presumption in favour of allowing her to do *x*—regardless, it would seem, of *x*’s specific content, or of whether her (or anyone’s) doing *x* would realize important objective values.<sup>6</sup> As a significant (but not all-consuming) life activity, parenting could perhaps be compared with the choice of a particular career. If someone very much wants to be a tax lawyer (for instance), would we

6 This presumptive permission could be defeated, e.g. if *x*ing caused severe harm to the participants or to others. But this is a weaker standard of vindication than needing to establish that “it is a good thing” that the world contains people who *x*, or that people’s *x*ing realizes a distinctive set of objective values.

require proof that the universe would be objectively worse off without tax lawyers in order to think it would be presumptively wrong to prohibit her from pursuing that career?<sup>7</sup> In asking for a justification in terms of adding distinctive value to the universe, Brighthouse and Swift set a high standard; but that is to place a burden of proof on the family which some will feel the family need not bear.

To emphasize in this way the desires and choices of individual adults points toward a further reason one might be ill at ease with the way Brighthouse and Swift frame the issue. They write (2014: xi-xii) as if we as a society faced a question whose answer is to be decided collectively, namely, how we ought to arrange the bringing up of children. “In families” is of course one possible answer; but there are also other possible answers (such as “in state-run institutions”). As Brighthouse and Swift see it, if we are to select the former option we should be sure it is the right choice, i.e. that it is better than the alternatives; whence the need to demonstrate the superiority of the family to other possible arrangements. But I find this way of describing the issue puzzling. At the risk of sounding Thatcherite, I would have ventured that there is no issue facing us as a society, to be settled collectively, about how to bring up children: there are only individual adults who want to parent children.<sup>8</sup>

I have expressed skepticism about whether the family really requires a “defense” or a “justification” of the consequentialist kind that Brighthouse and Swift have in mind. But one might think it is at worst harmless to subject the family to such a test, since Brighthouse and Swift make such a convincing case that it passes. As per insight b) noted earlier, Brighthouse and Swift argue that the existence of the family *does* make possible certain distinctive goods, namely valuable parent-child relationships. A world which lacked families would be a world without those relationships, and thereby very much the poorer in at least one important respect. As it happens, Brighthouse and Swift believe that the family is also the arrangement which best meets *children’s* needs and interests. For that reason alone, “if the family did not exist, it would be necessary to invent it; its invention would be morally required” (Brighthouse and Swift 2014: xii), and the world is indeed in a better state

7 One might argue that this case is not analogous, because being a parent essentially requires the existence (and the participation in the parent’s project) of nonconsenting partners with separate interests of their own, something not true of being a tax lawyer. However, the above general schema about *x* would seem also to hold of being, say, a dairy farmer. If what someone really wants to do with her life is to look after and interact with cows—nonconsenting partners in her project who have separate interests of their own—then surely that fact alone creates a presumptive moral case for allowing her to do just that. See the previous footnote for a gesture toward when that presumption could be overridden.

8 Compare: there is no issue facing us as a society, to be settled collectively, about how to look after cows: there are only individuals who want to be dairy farmers.



with families than it would be without. By contrast, could one say that it would have been necessary to invent tax law, or dairy farming, had no one spontaneously come forward wishing to engage in those activities? We do not normally demand this of activities in order to conclude that it would be *prima facie* wrong to prevent someone from engaging in them.

Even if the family can easily be shown to meet Brighouse and Swift's high standard for justification, however, it is *not* harmless to ask for, and then to provide, such a justification. For there is a sting in the tail of Brighouse and Swift's positive argument for the family: that argument is later used to *limit* the rights and privileges which parents can be said to enjoy. As we shall see, Brighouse and Swift accept only parental rights and privileges *which must be granted if the distinctive values cited in the justification of the family are to be realized*. Any putative right or privilege which is *not* essential to the realization of those values is stricken from the list.

This is the basis for many of Brighouse and Swift's controversial conclusions, of which I will focus here on just one: that parents do not have the right to bequeath substantial wealth to their children.<sup>9</sup> Before examining how exactly they reach this conclusion, I must first, in the spirit of full disclosure, confess significant antipathy to it. I simply cannot bring myself to believe it! I am writing the first draft of this piece at my country house: an old Vermont farmhouse surrounded by pasture and fields which my family was able to purchase this past spring only thanks to an inheritance my husband received from his late mother. (We would never have been able to buy a country house on my philosopher's salary.) We are very sorry she is not getting to see her son plant fruit trees, her grandson learn the names of wildflowers, or her granddaughter pick blackberries and make preserves. But she loved her son, and the rest of us, and we know she would be deeply gratified by all the new horizons her bequest has opened up for us. Faced with this vivid awareness of what her bequest has made possible for her son and my family, I find it simply impossible to accept that my mother-in-law ought not to have been able to leave my husband that money, or that it would violate nobody's rights to prevent or prohibit people from doing any such thing.

Let us look at the argument supporting this (to me) unwelcome conclusion. I reconstruct it as follows:

- (1) "The family is justified because it produces certain goods that would otherwise not be available or ... would be much more difficult to produce" (Brighouse and Swift 2014: 56), viz., familial relationship goods, which are "hugely valuable for many adults and

9 By "substantial" I mean wealth that exceeds what would be required in order to meet the child's basic needs or to satisfy the parent's duty of care toward the child.

all children” (Brighouse and Swift 2014: 20). (justification of the family)

- (2) The scope and limits of parental rights and privileges should—indeed must (Brighouse and Swift 2014: ix, x, 5, 54, 115)—be derived from the justification of the family. (methodological premise)
- (3) More specifically, genuine parental rights and privileges are limited to the *smallest set necessary* for the realization of the goods cited in the justification of the family.
- (4) Therefore (from (1) and (3)), any supposed parental rights or privileges the *withholding* of which would *not* jeopardize the realization of familial relationship goods—otherwise put, the granting of which is not critical to establishing or participating in a valuable parent-child relationship—are not genuine parental rights.
- (5) The freedom to bequeath significant wealth to your child is not essential to establishing or participating in a valuable parent-child relationship. Such a freedom is largely *exogenous* rather than *endogenous*, to the parent-child relationship and to its value; withholding this privilege from parents would therefore not jeopardize the realization of familial relationship goods (Brighouse and Swift 2014: chapter 5; see 119 for the internal-external contrast).
- (6) Therefore (from (4) and (5)), parents do not have a right to bequeath significant wealth to their children.

Before delving more deeply into this “master” argument, I should note that Brighouse and Swift also offer what I consider to be an ill-advised narrower specification of their methodological premise:

- (2') The scope and limits of parental rights and privileges should—indeed must—be derived *solely from that portion of the justification of the family which appeals to children’s interests* (2'), however, seems clearly inconsistent with the conjunction of (1) and (2), and for that reason I propose to set it aside in the remainder of the discussion. If we are assuming that the correct account of parental rights is to be derived from the justification we offered for the family, and parents’ interests were an important element in that justification, then surely parents’ interests should not drop out of the picture as irrelevant when it is time to limn

parental rights.<sup>10</sup> If “it would be wrong to think that the well-being of children should be the sole criterion by which to assess child-rearing arrangements”, why should “the rights and duties of parenthood” be “identified entirely by consideration of *children’s* interests”? (Brighouse and Swift 2014: 121, with added emphasis and some words rearranged).

What then of the original “master” argument? We should start by noting that (2) is questionable. It is not obvious that the same considerations used to justify the very existence of the family ought to be expected to settle the parameters of parental rights—let alone that that is the *only* way properly to settle those parameters (as their “must” implies). Perhaps, having offered a consequentialist justification for the family—having established that it is “a good thing” for there to be families—we would go on to resolve questions about the scope of parental rights within such families in a completely different way. We might for example offer a *non*-consequentialist account of parental rights and privileges founded in the liberties it is proper to extend to autonomous agents as a function of their status and moral powers.<sup>11</sup> Second, (3) seems *ad hoc* even if we accept (2). Why should parental rights be limited to the *smallest set necessary for*, rather than the *largest set consistent with*, the values cited in the justification of the family? Let us grant that it’s very important that any rights or privileges accorded to parents be *consistent with* the realization of those goods. This would mean that any putative parental rights *inconsistent* with valuable parent-child relationships would need to be stricken from the list. But why strike putative parental rights that are perfectly consistent with the realization of such values?

Here I would expect Brighouse and Swift to cite the possibility that *other* considerations might militate against the granting of such rights.<sup>12</sup> If there is an independent objection to parents’ having a certain right or privilege, then we should accept the latter as a genuine right only if we need to: only if we *must* accord parents such a right in order for families to realize the values that justify their existence. Brighouse and Swift press just this possibility against the putative right to bequeath wealth to your children. There *is* a powerful objection to parents’ having such a right, in their view: *such bequests*

10 Brighouse and Swift may be assuming that any parental right that went beyond what is *required* by children’s interests would be *against* children’s interests. But this is unwarranted.

11 Frances Kamm has been a pioneer in seeing rights as expressive of the moral status of rightsholders. See Kamm (2013) for an accessible treatment.

12 In that case, (4) should strictly speaking be reworded so as to refer only to supposed parental rights or privileges *to which objections could be raised*, and (5) should make explicit that objections could indeed be raised to the putative freedom to bequeath significant wealth to your child.

*disrupt equality of opportunity.*

Let me set out the argument for that conclusion, as I see it:

- (A) All people are of equal moral worth, equally valuable (Brighouse and Swift 2014: 23).
- (B) “The fact that people’s lives are equally important has distributive implications—implications about the distribution of opportunities to flourish” (Brighouse and Swift 2014: 27). In particular, it implies that those opportunities should be distributed *fairly*.
- (C) It is *prima facie* unfair for one person to have a greater prospect of getting a desirable job or other socially produced reward than a second person of equal abilities and equal willingness to use them.
- (D) Therefore, there is a well-founded objection to, and thus a reason to prevent or prohibit, any action which results in the state of affairs described in (C).
- (E) Bequeathing significant wealth to your children *is* such an action. Therefore there is a well-founded objection to, and thus a reason to prohibit or prevent, such bequests.

If this argument is sound, then there is a morally considerable objection to granting parents a general permission to make such bequests. And if (5) in the “master” argument is also true, we cannot rebut that objection—as we might in certain other cases—by claiming that parents’ having such a permission is essential to the realization of familial relationship goods.<sup>13</sup> The alleged right to bequeath significant wealth to your children would stand silent in the dock, unable to make any (sufficiently compelling) answer to the prosecution’s case. An indictment would appear forthcoming.

Without seeking to directly assess the soundness of the argument in (A)-(E) above, I do want to comment that it seems to prove an awful lot. If there is a strong case for prohibiting or preventing parents from *bequeathing* significant wealth to their children, then there ought to be a similar prohibition on parents’ *gifting* significant wealth to their children while they (the parents) are still alive. (Otherwise I guarantee rich people will switch to the latter method.) And if parents are prohibited from bequeathing or gifting significant wealth to their children, then surely they ought to be prevented from bequeathing or gifting significant wealth to anyone else either. After all, the wealth they bequeath or gift would presumably have

<sup>13</sup> An appeal to familial relationship goods, were it permitted, would not undercut the legitimacy of the objection but would suggest that it outweighed is by something more important, and thus does not prevail all things considered. “Simply put, familial relationship goods are more important than fair equality of opportunity” (Brighouse and Swift 2014: 143).

the same disruptive effect on fair equality of opportunity whether it went to their child or to someone else;<sup>14</sup> and it would be very peculiar if parents were prohibited from giving to their children but perfectly at liberty to confer significant wealth on anyone other than their children. Finally, even the restriction to *significant* wealth appears *ad hoc* if we are concerned with disruptions to fair equality of opportunity as such. Even giving someone \$100 for a nice shirt and tie, or a good haircut, will give him a better prospect of obtaining a desirable job than he had before. According to Brighthouse and Swift's reasoning, such a gift unfairly harms all those of similar abilities (and willingness to use them) whose chances of getting that desirable job just went down.

In sum, if we are prepared to object to any action which produces a more unequal distribution of opportunities and prospects (across those of similar abilities, etc.) than the distribution which held prior to that action, there seems to be no limit to what we would have to stamp out. I suspect Brighthouse and Swift would reply by underlining that they, too, are on record as being against "pursu[ing] fair equality of opportunity wholeheartedly" (2014: 36) or "all the way" (2014: 44). Perhaps they agree that it would be ridiculous, if not intolerable, to forbid people ever to give anyone \$100. But the moral I take from this is, I suspect, different from theirs. They see an admirable ideal whose moral force is sometimes outweighed by even more powerful considerations, such as the great value of familial relationship goods (see for instance 2014:33). I, on the other hand, see a plausible-sounding principle ((C) plus (D)) whose implications on closer inspection suggest that it is *not* an attractive ideal after all.<sup>15</sup>

I would also like to take issue with (5) in the "master" argument. There is of course some sense in which bequeathing significant wealth to your child is "external" to the parent-child relationship, simply in that such bequests necessarily take place after one party to the relationship has died. Insofar as they literally postdate the person-to-person interactions which constitute a parent-child relationship, bequests take place *outside* rather than *within* the course of that relationship in a temporal sense. However, this very literal sense of "external" is not the one which is appropriate to the argument, and I think bequests cannot be so easily set aside from what is valuable in a parent-child relationship. Let me explain why.

14 You might think disadvantaged recipients would be an exception to this rule; but in fact a large gift to a disadvantaged recipient advantages him relative to what used to be his disadvantaged confrères, and thus "contravene[s] ... fair equality of opportunity" (Brighthouse and Swift 2014: 132).

15 See Stroud (2013) for more on principles which sound appealing as slogans but whose implications (ought to) cause us ultimately to reject them.

A central component of the valuable parent-child relationship is that it is a *loving* relationship. In particular, the parent in such a relationship loves her child. It is a near-truism, and one that Brighouse and Swift endorse, that when you love someone you very much want him to flourish (2014: 123, 124, 132). (Indeed, it is typical of love that you want to play some positive causal role in his flourishing.) Suppose, then, that you are in a position to expose someone you love to something that you take to be an *intrinsic* good—that is, to a potential intrinsic contributor to his well-being or flourishing. It would seem to be part of love—and thereby part of the valuable parent-child relationship—that you will want (all else being equal) to do so. As a loving parent, you will naturally seek to expose your children to music, animals, nature, and whatever else you think is non-fungible valuable. Such behaviour is *internal* or *endogenous* to love, not external to and cleanly separable from the latter.

Note that I am not speaking of wanting to *confer advantage* on your loved one, where advantage is an essentially comparative notion. (I am not claiming that it is part of love to want your loved one to be in the top decile.) I actually think—and I take this to be broadly in the spirit of Brighouse and Swift’s egalitarian ethos—that there is something disreputable about wishing for, and pursuing, *purely positional* goods for your loved ones, although it is an interesting question (which I will not take up here) whether and how this could be defended within moral theory.<sup>16</sup> By contrast, it is hard to see anything objectionable in someone’s wanting to expose her children to *intrinsic* goods: what mistake could such a person be accused of making, and what grounds could there possibly be for seeking to restrict such conduct?<sup>17</sup>

Unfortunately Brighouse and Swift think there *are* grounds for restricting it. For even exposing your children to what you take to be *intrinsic* goods may have *instrumental* effects which push your children ahead of others in the competition for socially produced rewards. This will inevitably occur if interacting with intrinsic, non-fungible goods tends to enhance skills, abilities, and character traits whose benefits are transferable to other, competitive contexts. (I would rather hope such interaction *does* tend in this way to improve your character.) When this happens, however, that will suffice to put your action under the disapproving purview of principle (D), which frowns on any action which results (even adventitiously) in a more unequal distribution of opportunities across those of similar ability, etc. than was the case prior to that action’s being performed. (D) will disapprove even if

16 Brighouse and Swift (2006) have themselves written eloquently on purely positional goods. For an argument that comparative judgements distract us from what is truly significant, see Frankfurt (1987).

17 Brighouse and Swift seem to concede the force of this worry when they discuss the idea of equal opportunity *for well-being* (2014: 42).

the action was *aimed* only at bringing your children into contact with intrinsic goods, and not at all at procuring competitive advantage for them.

It must be said that it is not at all obvious how my son's having the opportunity to gaze at the night sky far from urban light pollution, or my daughter's learning to use a scythe, is really likely to give either of them a (further) competitive advantage in the modern economy. However, I am perfectly prepared to believe that it might, through some indirect route.<sup>18</sup> If their being exposed to these activities does have that effect, then—back to that country house again!—there is, as Brighthouse and Swift see it, a moral case for keeping me from offering these goods to my children. And as we already underlined, this will be so even if the procuring of a competitive advantage for my children is not at all my *aim* in exposing them to these new experiences. For me this again casts doubt on the soundness of the essentially consequentialist egalitarian principle on which Brighthouse and Swift rely.<sup>19</sup>

More broadly, I want to suggest that egalitarians like Brighthouse and Swift are playing with fire in granting broad licence to loving parent-child relationships. From an egalitarian point of view, love is dangerous; it threatens to break out of the tight constraints on beneficence which Brighthouse and Swift seek to erect in the name of equality of opportunity.<sup>20</sup> Brighthouse and Swift might say they do not disagree that love tends to spill outside the boundaries they try to set, but in their view the balance of values favors putting a protective firewall only around the highly valuable “core” of the parent-child relationship—even though this means placing some actions taken out of love, and in the context of such a relationship, off limits.<sup>21</sup>

There is however an irony in Brighthouse and Swift's judgement of relative value on this particular point. For by their own admission, the prohibition not just of bequests, but of *all* the various ways in which parents might seek to use their superior financial resources to benefit their children (think private schooling), would have only an insignificant effect on the unequal distribution of prospects for desirable jobs, etc. across children. That is, parents' direct use of *money* to benefit their children is—it turns out—a relatively minor contributor

18 Perhaps (for instance) the patience Francesca is forced to develop as she (slowly) learns how to swing a scythe will further advantage her for desirable jobs later on.

19 Consequentialist because the test which the principle articulates is concerned solely with what *results* from our actions.

20 A more fruitful, although more radical, approach for Brighthouse and Swift's purposes might be to challenge standard understandings of love and in particular its supposed tie to wishing to benefit the loved one. See along these lines Ebels-Duggan (2008).

21 Brighthouse and Swift seem to take this line at times (2014: chapter 5, 132-137). This more nuanced view effectively concedes that such actions are indeed “internal” to love, but it maintains that the value of giving parental love more freedom to operate does not measure up to the disvalue of the resulting disruptions of fair equality of opportunity.

to inequality of opportunity. (Brighouse and Swift allude to this at 2014: 31-32 and 125-127.) Brighouse and Swift thus seem overly optimistic when they say early on that they will “offer an account of ‘family values properly understood’ ... that mitigates—*massively mitigates*—the conflict with equality” (2014: 4; added emphasis). It would appear rather that the egalitarian value to be gained by decreeing some loving actions to be beyond the pale of interpersonal justification is unequal to its cost.

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# Is There a Right to Parent?<sup>1</sup>

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## Abstract

This paper examines Harry Brighouse’s and Adam Swift’s attempt to justify the family by appeal to the interests of both children and parents. According to their dual-interest account, adults’ interest in parenting plays a role in explaining why less than optimal parents can exercise legitimate authority over children. I analyze this claim and raise doubts about the existence of any fundamental right, which is non-derivative from children’s own interests, to parent understood as a right to control the child.

**Keywords:** parents, children, right to parent

One of the main questions to which *Family Values* offers an answer is how to justify the family given what its authors—self-identified liberal Harry Brighouse and Adam Swift—call “the liberal challenge”. By “the family”, Brighouse and Swift mean a childrearing arrangement whereby a small number of particular adults stand in fiduciary, and authoritative, relationships with particular children, but which is not *exclusively* justified by reference to the child’s interest. This is an anomaly for liberals, who believe that all authoritative relationships between individuals with full moral status ought to be justified by appeal to the interest of the party over whom authority is being exercised. As self-identified liberals, Brighouse and Swift take this challenge seriously.

The family is definitely not like this. Consider: First, there exist—or we can imagine—ways to rear children alternative to the family. Brighouse and Swift list some of them:

“[s]tate-regulated quasi-orphanages, in which children are raised by trained and specialised employees; [a]rrangements, such as those associated with Kibbutzim, in which child raising is shared between “parents” and designated child-raising specialists’ and [c]ommunes

<sup>1</sup> For comments I am grateful to Andrew Williams and to participants to an open session on academia.edu and in particular to John Baker, Sally Haslanger, R J Leland, Michele Loi and Erik Magnusson.

in which a large group of adults collectively and jointly raises a group of children, with no adult thinking of herself as having any special responsibility for any particular child, and no child thinking of herself as the responsibility of any particular adult” (Brighouse and Swift 2014:70-71).

It may be that good families serve children’s interests better than any of the above alternatives – as Brighouse and Swift go on to argue. They draw on empirical literature to explain why children fare best when raised by loving and sufficiently competent adults, which are referred to as ‘adequate parents’. But, as far as I see, this is not in itself enough justification for a child-centred account of the family, that is a defense of the family by exclusive appeal to children’s interests. We do not know how many adequate parents there are around, and have no reason to think that we can identify them (especially without serious violations of personal autonomy and intimacy). It may well be that childrearing arrangements other than the family would, on average, serve children’s interests optimally, even if the best imaginable way to bring up children is to give them adequate parents.<sup>2</sup> But if there aren’t enough such parents, and if we cannot help enough people to become adequate parents, rearing children in the family may unjustifiably expose too many children to serious risks. The well-run orphanage, Kibbutz, or communal childrearing may be the best feasible arrangements as far as the children’s interests are concerned. If good versions of these arrangements— but not of the good family—are feasible on a sufficiently widespread scale, the family is to be rejected on child-centred grounds.

There is a second reason why the institution of the family as is cannot be justified on child-centred grounds. If the family was merely meant to protect children’s interests we ought to give priority of access to parenting to people who would make best parents and who are willing to take over this role. This is clearly not the case, even allowing for the possibility that we cannot—usually—tell in advance who would make the best parent. But some cases are clear-cut: when a new child is born to parents who already have numerous children, and who we have reason to think are particularly bad at parenting, liberal states nevertheless grant custody to biological parents. At the same time people who are likely to make wonderful parents and who

2 Veronique Munoz-Darde argued that the existence of the family is especially objectionable if we ought to give priority to the worst off: “whether or not a great many individuals are better off because of the existence of the family is irrelevant in settling whether the family would be one of the institutions of a just society. What matters is whether the existence of the family ensures that the least advantaged members of society are better off than they would be with its abolition”. Her own answer to this question seems to be negative (Munoz-Darde 1998-9: 42).

are more than willing to raise children remain childless due to inability to procreate and the difficulties of adoption. More generally, custody rights follow biological connections, absent special circumstances.

Now, the family defended against the liberal challenge in *Family Values* is different, perhaps very different, from the current legal institution of the family. Brighthouse and Swift argue for more limited parental rights than what existing states recognize. Nevertheless, they do want to reject, rather than bite the bullet of, the ‘best available parent’ possibility. In their own words: “Would there be anything wrong with a system that distributed children to adults in the way that maximized the realization of children’s interests, even if it left out some adults who would be willing, and adequately good, parents?” (Brighthouse and Swift 2014: 86). They think there would be. Not because children lack full moral status, which would make it unproblematic to allow parents’ own interest in authoritative relationships with children to determine what is a legitimate way of bringing them up.<sup>3</sup> Instead, they defend a dual-interest theory of what makes the family legitimate. The reason why—according to Brighthouse and Swift—it is all right to settle for childrearing arrangements that are sub-optimal for children is the way in which childrearing makes a unique and crucial contribution to a fully flourishing life.

In their elaborate account of the value of parenting, Brighthouse and Swift argue that adults have a fundamental moral right to be parents. The reason, in a nutshell, is that intimate and authoritative relationships with children are uniquely valuable for most adults; such a relationship is not “just another intimate relationship, valuable to both sides but substitutable for the adult by an additional relationship with a consenting adult” (Brighthouse and Swift 2014: 88). Rather, they have a different moral quality, make a different kind of contribution to the flourishing of adults, and so are not interchangeable with other relationships. Because childrearing makes a substantial and unique contribution to adults’ flourishing, adults are said to have an interest-based right to pursue such relationships. The unique value of parenting, according to Brighthouse and Swift, resides in the combination of four features which characterize parent-child relationships.

First, relationships between parents and children are structurally unequal, given children’s unavoidable, involuntary and asymmetrical dependency on the adults. By contrast, dependency in relationships between adults is less encompassing, often voluntary and more reciprocal. Second, parents are in charge of their children’s well-being and development to an extent to which people are not responsible for other individuals, with whom they stand in different types of relationships. To discharge this responsibility

3 “Children are individuals distinct from their parents, individuals whose interests it is the state’s job to protect and promote” (Brighthouse and Swift 2014: 5).

parents need recourse to coercion and manipulation. Third, parents unavoidably shape their children's minds—that is, their beliefs and interests. Finally, children are capable of loving their parents in a spontaneous, unconditional and non-reflective way that is not to be encountered in other kinds of loving. The first three features of the parent-child relationships generate the distinctive moral burdens of parenthood: responsibility for the well-being and development of individuals who are dependent on you and who cannot exit the relationship with you at will. According to Brighouse and Swift, it is valuable to meet this challenge, as part of a process of self-knowledge and personal development that most people find uniquely fulfilling.

The last feature of the parent-child relationship, that of spontaneous and unconditional love, points to the specific value of loving, and being loved by, children and to the source of hedonic value afforded by parenthood. It is thanks to these features that parenting is essential to the flourishing of (most) adults.

This account of parenting allows Brighouse and Swift to reject the 'best available parent' possibility, because adults' fundamental interest in parenting limits children's entitlement to being raised by the best parent who is willing to take over this role:

"Within certain limits, adults' interests in being a parent can trump children's interests in having the best possible parents. No child has a right to be parented by the adult(s) who would do it best, nor do children as a whole have a right to the way of matching up children and parents that would be best for children overall. Both scenarios could leave perfectly competent parents missing out on the goods of parenting" (Brighouse and Swift 2014: 95).

If Brighouse's and Swift's defense of a dual-interest account succeeds, then adults have a right to parent that is *sui generis*—i.e. fundamental, grounded in their own interests—rather than derivative from children's own rights to protection and care. This would not change the fact that a right to parent is an anomaly by liberal lights: liberals acknowledge no other entitlement to exercise power over another individual legitimised in part by reference to an interest—no matter how important—of the one exercising power.

But how could one go about rejecting this account of a *sui generis* right to parent? It does not look very promising to question the importance that raising children has for most of us. The evidence is very strong: most people want children, go ahead having them often in spite of serious adversity and in spite of the inevitable difficulties of the job, and many people agonize

for long periods of time over not being able to become parents. Nor does it help to note that not all people believe that parenting makes such a great contribution to their flourishing. As Brighthouse and Swift themselves note, it is possible that the flourishing of some, but not of all, people depends on being able to parent well (Brighthouse and Swift 2014: xx). Some people may be unable to parent well (even with help) and therefore parenting will not contribute to their flourishing. Other people's lives may be so rich in alternative venues to flourishing, some of which incompatible with childrearing, that they will flourish best without rearing children. But neither of these facts mean that rearing children is not essential to the flourishing of those of us who can parent well and whose flourishing is not incompatible with parenting.

More promising, one may believe that we do not have a right to pursue fully flourishing lives—but merely to pursue sufficiently flourishing lives. This is a plausible thought, in a world of competing claims over limited resources. On this view, would-be adequate and willing parents who miss the opportunity to rear children do not suffer from a rights violation provided they have other, adequate, opportunities to flourish. An interesting way of answering this challenge would be to argue that, for people who can be adequate parents and who wish to parent, the failure to rear children somehow blocks other avenues to flourishing. For instance, as in some fairy tales, grief of being childless may cast a thick shadow over every other joy, or take away the drive to engage in other projects, or otherwise undermine the ability to pursue other worthwhile goods. But this is not what Family Values argues. Another way to try to rebut this challenge would be to note that raising children is not merely a permissible—and very valuable—activity, but a morally mandatory one in the sense that each generation has a duty to bring up a minimum number of children to ensure the care of those individuals in need of assistance and the continuation of some sort or political society.<sup>4</sup> In this case, parenting would be a very peculiar activity that not only makes an essential contribution to full flourishing, but also enables individuals to flourish by doing what was their duty to do in the first place. Perhaps there is a fundamental right to aim at full flourishing, if thereby you also do your bit to discharge a collective duty. (Suppose, by analogy, that there was a duty to defend your country against unjust attack and that fighting wars was essential to most people's full flourishing. Would that be a reason to allow all would-be adequate soldiers to participate in self-defence, should they find themselves under unjust attack?)

I do not know if the last argumentative strategy could succeed, but note that in an overly populated world like ours it is very likely that the number

4 I defend this view in Gheaus (2015). For other arguments why there may be a (individual) duty to have children see Smilansky (1995).

of children that we (collectively) have a duty to rear might well be much smaller than the number of would-be adequate parents. If it were not possible for all would-be adequate parents to parent-as-dutiful-behavior, there cannot be a right to parent partly justified as dutiful behavior.

Above I have outlined what are, in my experience<sup>5</sup>, the most usual types of criticism leveled at Brighouse and Swift's defense of a right to parent. I do not aim to draw a conclusion yet: on the one hand, in their favor speaks a very powerful widespread intuition that we have a right to rear children if we would parent them adequately. On the other hand, and against their view is the very plausible liberal belief that if you are denied a chance to parent either because alternative childrearing arrangements, or other would-be parents, would serve children's interests even better, you do not suffer from the violation of a fundamental right.<sup>6</sup> In the remainder of the paper I explore an intuitive way to adjudicate between these two contradictory beliefs, and in conclusion I suggest a way of reforming childrearing in line with the liberal stance, while also vindicating the intuition that adults have a right to involvement in childrearing (a right which nevertheless falls short of a right to parent).

Much of the argumentative power of Brighouse and Swift's defense of a dual-interest account of legitimate childrearing comes from their appeal to the unique value of parenting. In turn, this value derives from the unique combination of features displayed by parenting. Since their conclusion—that there is a right to parent—coincides with an already widespread belief, it is tempting to think that a right to parent can really be justified by appeal to the combination of the four unique features of the parent-child relationship. And, since there is nothing quite like parenting in the world—that is, no other relationship that displays all of the features identified by Brighouse and Swift—this connection (between the four features and the right to parent) is difficult to test. But what if other social relationships also displayed the combination of these four features? Would we respond with the same intuition that one's interest in such a relationship can partly justify one's authority over another?

Consider the following imaginary situation, meant to show how intuitively extraordinary parents' rights are over their children (at least in the absence of certain empirical assumptions that do not figure amongst the reasons that Brighouse and Swift provide in their case for the right to parent). Imagine that, as a result of a natural cataclysm, a group of adult refugees reaches your country. They have nowhere else to go. You live under a just and benevolent

5 From numerous conferences and referee reports to work in which I describe (and endorse) their account.

6 For a convincing elaboration of this, see Vallentyne (2003).

government that automatically grants the refugees the right to stay and settle down in the country and, in due course, to become citizens. As it happens, the refugees come from a very remote culture, described by anthropologists as ‘primitive’.<sup>7</sup> They speak a language that nobody has heard of before and nobody understands, and they do not seem able to pronounce simple words in your own language. They cannot read or write, and have never been in contact with any technologically advanced civilization. They do not understand how any of the machines work, and understand complicated social rules even less. They appear scared of traffic and large crowds. Their bodies are beautiful, fragile, relatively small, and unusually agile. They quickly acquire a wonderful reputation for being uncomplicated, trusty, direct, curious, affectionate and playful.<sup>8</sup> For good reason, the belief spreads that having one of these refugees around can bring into your life a kind of joy and fun that nothing else could, and hence that an intimate relationship with one of them would be a special blessing. Moreover, these people are in much need of patient introduction into your own ways of living; somebody has to take over the job of socializing them. And you are right to think that engaging in such an extraordinary task would make a significant and unique contribution to your own personal development.

Now imagine that, after a few visits to the camp where the refugees get emergency lodging, you become particularly attached to one of them and from all you can tell the affection is reciprocal. Your new friend responds to you with spontaneous trust, joy, and unconditional attachment. You would like to spend as much time as possible with this person. Would it be a legitimate policy to allow you to lodge your new friend in your home and take upon yourself the entire responsibility, and with it the power, to ensure that her life goes well and that she acquires adequate knowledge of your society’s language, moral sensitivity and expectations, laws and customs such that she can, eventually, become an autonomous citizen? Moreover, would it be legitimate for you to have the authority to decide with whom she is allowed to spend time, and under what circumstances—i.e. to have the power to exclude others from having a relationship with her? Would it be permissible if the state gave you a right, against all others, that they do not undermine your relationship with this person?<sup>9</sup>

7 Perhaps these anthropologists are objectionably condescending; I apologize on their behalf.

8 So they are, indeed, very close to how 17th and 18th century Europeans imagined native inhabitants of America: they are a reincarnation of the *bon sauvage*.

9 This is a feature of the right to parent as defended by Brighouse and Swift: “those people given the job of parenting a particular child will have a right to parent that child in the weak sense that others will be under a duty not to undermine the relationship” (Brighouse and Swift 2014: 87).

If you had the right to do these things, your relationship with the refugee would acquire the same combination of features that characterize relationships between parents and children, and which are said to generate a powerful interest in parenting and hence the right to parent. The relationship would be asymmetrical, and very difficult to exit for the refugee; it would involve significant moral responsibility on your part, given the power you would have to protect and shape the person in your care; and it would make possible a kind of spontaneous, unconditional and unreflective love that is not usually possible between adults. If people have a right to enjoy relationships that display the above combination of features, then you should be allowed to take control of the refugee's life in the way in which parents control their children's lives.

Yet, I contend that a policy allowing you to take control of the refugee's life would be obviously unjust to the refugee, your powerful interest to pursue intimacy with her notwithstanding, unless—for whatever reason—this kind of policy would best promote the interests of the refugees. The reason that would make it unjust is not its paternalism towards the refugees. Indeed, the refugees in this example need paternalistic treatment if they are to survive at all in their new environment and if they are to become autonomous individuals with a chance to lead their own life in your society. The reason that would make it unjust for you to take control of her life is that, if it were possible to promote her current well-being and future autonomy in a different way—for instance by letting her reside in the refugee center, or by letting her move in with someone equally willing and better prepared to serve her interests—it would be unfair towards her to ask her to move in with you. This is a first, liberal response to the imaginary case.

A different, related intuitive response is that, if it were possible to promote the refugee's current well-being and future autonomy without locking her into any particular relationship, then giving you—or another private individual—authority over her would be wrong because it would make her subject to (perhaps benevolent) domination. This is a republican response. You may think that, since you have such a powerful interest in sustaining the relationship with the refugee, you are entitled to the necessary means for protecting the relationship—including the right to prevent others from forming and sustaining a close relationship with her. But a parental-like power to exclude other individuals in this way comes at too high a moral cost to the refugee, especially if is not necessary for optimal protection of her own interests. The fact that you have relational interests at stake here does not seem to make any difference.

Since the well-being and development into autonomous individuals of the refugees is a matter of public responsibility, social arrangements should



be sought that can best ensure meeting this responsibility. 'Best' may be interpreted as either 'well-being maximization' or 'ensuring a certain level of well-being in a non-dominating manner'. Possibly, concern for the refugee's well-being and respect for their moral status will indicate that they ought to live together with many other people: some fellow refugees and some of your co-citizens whose main occupation will be to provide welfare and integration to the refugees. Or, perhaps, it would be best for them to live in the home of private individuals—call them 'hosts'—but have access to a broad range of intimate and caring relationships with many of your (socially and emotionally competent) co-citizens, without needing their host's approval. In any case, it seems that it is exclusively the refugee's interests that determine the ideal way of socializing them: The host's own interest in pursuing a relationship with one of the refugees (even if this relationship was highly, and uniquely, valuable to the host) does not seem to do any work in settling the matter.

This story is obviously meant to provide a close analogy to the situation of parents and children. The two cases share the features which, according to Brighouse and Swift, generate parental rights. If your intuition is that these features cannot justify parental-like authority over the refugees, then probably they are also unable to generate a right to parent as defended in *Family Values*.

The same hypothetical case triggers a second intuitive reaction—at least, on my side. The fact that your interest in having an intimate and authoritative relationship with the refugee is irrelevant to your having rights over her. This does not mean that you do not have a right to pursue a long-lasting, intimate relationship with the refugee. Your interest in this unique relationship is, I assume, powerful enough to generate a right to pursue it. You may spend some time with her every day and provide constant company and guidance to her. You may decide to become one of the people whose main occupation is to work in the refugee home part-time or full-time until she is sufficiently autonomous to take charge of her own life and leave the refugee home. While the state would be wrong to allow would-be competent hosts to assume parental-like authority over one of the refugees, it would also be wrong to set up an institution of socializing refugees that denies citizens a chance to develop close and benefiting relationships with the refugees. If the citizens really have a powerful interest in entering and sustaining close relationships with the refugees, then it would be arbitrary to exclude some from having access to such relationships—assuming the relationships do not set back the refugee's interests—in order to benefit others. Note that the pursuit of an intimate caring relationship with a person does not require a right to exclude other individuals from pursuing such relationships with her—it

requires only that nobody else have a right to arbitrarily interrupt your relationship with this person. (This is of course consistent with the possibility that the *highest* possible degree of intimacy, as well as the most secure kind of intimacy, requires the exclusion of intimacy with others.)

Perhaps the analogy carries over, again, to the case of childrearing. Parental authority—as we have it and as it seems<sup>10</sup> to be defended in *Family Values*—comprises a right to exclude others from having close relationships with one’s child for reasons other than the protection of the child’s interest. And, as we have seen, a right to parent is justified by Brighouse and Swift by reference to the unique value of relationships of *intimacy and authority* with children. Yet, it seems to me, intimacy, more than authority, contributes to the value of the adult-child relationship. This is so especially once we acknowledge that being in a sustained intimate relationship with a child involves considerable responsibility on the part of an adult even if that adult does not play a full parental role. Indeed, the justification of a right to parent starts from the observation that for “most people, intimate relationships with others are essential for their lives to have meaning” (Brighouse and Swift 2014: 87). and progresses by noting the unique value of parent-child intimacy. Similarly, it is appeal to intimacy with a child that most plausibly explains the common intuition that people ought to be free to parent and the possibility that some people’s flourishing could be irremediably undermined if they had no children in their lives. But the most problematic element of the parental right, in a liberal perspective, is the authoritative, not the intimate, side of the relationship. If it is possible to disentangle intimacy and authority in childrearing—both analytically and practically—the intuitive support for a right to rear children might be salvaged without need of taking exception from liberal beliefs.

Therefore, I suggest that Brighouse and Swift’s case for a fundamental right to parent is only partially successful: it fails to show that appeal to adults’ interests does any work in establishing a right to control the child. But it can show how adults’ interest in relationships with children grounds an associative right: adults whose company would not be detrimental to children’s interests have a right to seek and maintain close and caring relationships with children. Yet the claim to a right to control a child’s life must be grounded exclusively in the child’s interest, in which case there is

10 “Seems” because Brighouse and Swift defend a child-centred view with respect the content of parental rights. Yet, they also say that the right to parent involves that others are “under a duty not to undermine the relationship” (Brighouse and Swift 2014: 87). But my making close friends with my neighbor’s child can—if the neighbor has no power to interrupt the relationship—undermine the child’s relationship with her parent.

no *sui generis* right to parent.<sup>11</sup>

It is possible that more people will want to reject the pertinence of the analogy between welcoming refugees and engaging in childrearing, than to refute the conclusions I draw about the just treatment of the refugees. To do this, they would likely point to some empirical features that set apart parenting from my imagined example. Unless they are adopted, children are never complete *strangers* to their parents or at least to their gestational mother, in whose body they come into existence and develop for a while. Many believe that parents are inevitably more *attached* to their own offspring than they can ever be to other children (although there is a debate on whether the explanation is to be found in the fact of gestation or in genetic relatedness; if such special attachment exists, I think that it springs from gestation<sup>12</sup>). This alleged fact contributes to the belief that, in general, (biological) parents make the best parents for particular children. So, perhaps, you are inclined to think that, should babies come into the world unrelated to any particular individuals—should they, for instance, be brought by storks—we ought indeed to set up childrearing practices that serve their interests as well as possible, including the possibility of allowing the best available parents to rear them. But, in fact, babies come into the world from the bodies of other people and so you may also think that this fact settles the question of what childrearing practices serve best the children's interests (the family) and who are the best parents (procreators). (For instance, you may be convinced by evolutionary biology.)

Therefore, the beliefs that the family is legitimate and that procreators have a (non-fundamental) right to rear their own children—that is, support for the *status quo*—can be compatible with a child-centred account of who has the right to assume authority over children. The compatibility depends on the above-mentioned beliefs that procreators are, on average, able to love their children best and that a child is best off in the custody of the person most able to love her.<sup>13</sup> If childrearing within the family really is in the vast majority of children's best interest, and if the beliefs concerning procreation and love are true, then it may be fine to settle for minor reforms of the family. But, *contra* Brighouse and Swift's account, this would be based entirely on the child's interest.

11 That is, as far as Brighouse and Swift's argument goes. For a different defense of a right to parent as part of a dual interest account of just child-rearing see Clayton (2006).

12 I discuss this in Gheaus (2012) where I analyze, more generally, the normative import of gestation for a right to rear a particular child.

13 For more on this, see Munoz-Darde (1998-9: 45-46). For a child-centred account that is compatible with the *status quo* of raising children in the family, and perhaps with the raising of children in their biological family (as a default) see Archard (2003).

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# Why the Family?<sup>1</sup>

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## **Abstract**

Among the most pressing philosophical questions occupying those interested in the ethics of the family is why should parents, as opposed to charity workers or state officials, raise children? In their recent *Family Values*, Brighouse and Swift have further articulated and strengthen their own justification of the parent-child relationship by appealing to its crucial role in enabling the child's proper development and in allowing parents to play a valuable fiduciary role in the lives of children. In this paper, I argue that the set of interests Brighouse and Swift identify as necessary for the justification of the family fails to account for the different stages and the different cultural settings that mark the parent-child relationship. In particular, I argue that their justification of the family fails to satisfy the following two desiderata: (i) that the justification for the parent-child relationship should ideally track the good-making feature(s) of the relationship that extend across its entire history, and (ii) such justification should ideally explain what is valuable about the parent-child relationship in both liberal and non-liberal family contexts. In light of my critique, I sketch an alternative account of family values, one that appeals directly to the special mode of caring we see in the parent-child relationship, a form of caring that is certainly present in non-liberal societies and that typically extends across a lifetime.

**Keywords:** family, children, parents, paternalism, autonomy, love, Brighouse, Swift

*“Ser mãe é padecer no paraíso”<sup>2</sup>*

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2 Popular Brazilian Expression: “Being a mother is like suffering in paradise” (My translation from Portuguese).

## 1. INTRODUCTION

Among the most challenging philosophical questions concerning the ethics of the family is why parents, rather than charity workers, or state officials, say, should raise children. What justifies the family as the best arrangement for the rearing of citizens who are not yet in a position to secure their own current and future interests?

One answer to this question is that the parent-child relationship is justified by some fundamental interest that adults have with regard to their biological children, such as the interest in the product of their gestational labor or genetic investment.<sup>3</sup> Another approach to this question starts from the assumption that children are extremely vulnerable and dependent and that their interests should exhaust any theory attempting to justify what is, at its core, a coercive, and therefore morally suspect, type of intimate relationship.<sup>4</sup> This child centred view of family relationships is based on the contention that the parent-child relationship can only be justified on the assumption that no other social arrangement could do a better job at securing the core interests of children. Were this empirical assumption to become unsustainable, adults would cease to have a *prima facie* right to parent.

An alternative to both these views is the “dual-interest” account of child rearing.<sup>5</sup> Those articulating this position have appealed to both the interests of children in being raised by parents and the interests of parents in raising children. The fundamental commitment of the dual-interest view is that the interests on both sides have to be balanced out and that good enough parents retain their right to parent even if it turns out that other social arrangements would do a better job at protecting and promoting the interests of children. Harry Brighouse and Adam Swift have recently further articulated and strengthened their own version of the dual interest account by defending the position that the parent-child relationship is justified by its crucial role in securing the child’s proper development and in enabling the flourishing of many adults (Brighouse and Swift 2014).<sup>6</sup>

In this essay, I argue that the specific set of interests Brighouse and Swift identify as grounds for the justification of the parent-child relationship fail to account for the different stages and the different cultural settings that mark the family. In particular, I argue that their account of family values

3 For a genetic account, see Hall (1999). For a gestational account, see Narayan (1999).

4 The coercive aspect of the relationship here is a result of the fact that due to the lack of a sufficient degree of autonomy, children cannot typically consent to partaking in the relationship. For child-centred views, see Blustein (1982); Vallentyne (2003).

5 See Brighouse and Swift (2006); Clayton (2006); MacLeod (2010); Gheaus (2012).

6 See also Rawls (1999: 265).

fails to satisfy the following two desiderata: (i) that the justification for the parent-child relationship should ideally track the good-making feature(s) of the relationship that extend across its entire history, and (ii) such justification should ideally explain what is valuable about the parent-child relationship in both liberal and non-liberal family contexts. In light of my critique, I sketch an alternative account of what is special about the family, one that appeals directly to the special mode of caring we see in the parent-child relationship, a form of caring that is certainly present in non-liberal families and that typically extends across a lifetime.

The discussion will be structured as follows. In section 2, I briefly rehearse Brighouse and Swift's arguments for their dual-interest account of child rearing. In section 3, I motivate two desiderata for a successful theory of what justifies the parent-child relationship and argue that Brighouse and Swift's account, as it stands, cannot meet them. In sections 4 and 5, I sketch an alternative justification for the parent-child relationship that overcomes the challenges raised in the previous section, and briefly discuss some of its implications.

## 2. BRIGHOUSE AND SWIFT ON FAMILY VALUES

Let us start our inquiry by briefly rehearsing Brighouse and Swift's argument in favor of taking the family to be the best institutional setting for the rearing of children.<sup>7</sup> According to the authors, there are a number of interests on the part of children that ground their right to be raised by at least one parent.<sup>8</sup> First, children are highly dependent on adults for their most basic emotional and biological needs. Second, children are profoundly vulnerable to the quality of other people's decisions, and the sort of paternalistic treatment they are subjected to in childhood can significantly impact how well their lives go as a whole. Third, children are capable of eventually developing a capacity for autonomy and so are significantly different from other vulnerable individuals who will never become capable of attending to their own interests. Brighouse and Swift believe that, when taken together, these interests give children an overarching interest to be 'manipulated' and 'coerced' into doing what is good for them, or what will prepare them for becoming autonomous later on in their lives (Brighouse and Swift 2014: 62-70).

<sup>7</sup> Like Brighouse and Swift (2014: XI), I will employ the concept of "the family" to refer to the parent-child relationship in the context of this discussion. Note that I do not take a stand on whether or not other intimate relationships should also be picked out by this concept.

<sup>8</sup> For Brighouse and Swift (2014: 53-54), A has a right to X, when A's interest in doing X or having X is weighty enough that it gives rise to a duty on the part of others that they allow A to do X or that they provide A with X. Moreover, whether an interest in doing X or having X is weighty enough to give rise to a duty on others will depend on the importance of X and the costs that come with the provision of X.

It is certainly true that children's lack of autonomy and vulnerability makes it appropriate that others act paternalistically towards them, but there is still a further question as to why such paternalism should come primarily from adults acting within the context of a private and intimate family relationship.<sup>9</sup> For Brighouse and Swift, the answer lies in the fact that such relationships are typically marked by love and that love renders the exercise of paternalism more effective (Brighouse and Swift 2014: 71). The underlying empirical assumption here is that a loving relationship between a child and a competent parent allows the latter to exercise authority with knowledge of the former's unique dispositions, and with the sort of spontaneity and care that encourages the child to see the parent as her central disciplinary model (Brighouse and Swift 2014: 73). For the authors, the quality time which parent and child typically spend together, and the intimacy that develops as a result, are so central to the effective exercise of paternalism, that there cannot be many of these relationships in a child's life (Brighouse and Swift 2014: 73).<sup>10</sup>

If Brighouse and Swift are correct, we now have the beginning of a story that purports to explain what is so special about the parent-child relationship:

- I. Children need paternalistic treatment to enjoy the goods of childhood and to develop the capacities they need later on in adulthood.
- II. Such paternalistic treatment will be more effective or successful if exercised in a context of an intimate loving relationship.
- III. Competent parents can typically exercise paternalism in a context of an intimate loving relationship.

Conclusion: Children have a basic interest in being cared for by at least one, but not too many, competent parents.

So far, so good, but this does not yet give us a dual-interest account. In order to explain why it is good for adults to parent children even when children could conceivably fare better under alternative arrangements, we need to say something about the interest *parents* have in playing their own role in the relationship. For Brighouse and Swift, adults have a strong interest in playing the *fiduciary* role that secures the child's present and future well-being. That is, the interest that some adults have in parenting is precisely to be in a loving relationship where they can act paternalistically towards a child, guaranteeing her basic needs and seeing to it that she develops the cognitive, emotional, physical, and moral resources she needs to become an autonomous person later on in her life (Brighouse and Swift 2014: 86-90).

<sup>9</sup> Brighouse and Swift (2014: 67) write that "paternalism involves manipulating or coercing another person with the purpose of serving her good".

<sup>10</sup> Note that Brighouse and Swift (2014: 70) also recognize that the exercise of paternalism should be constrained by the child's stage of development.



Here then is the final justificatory step taken by Brighouse and Swift in favor of their dual-interest account of child rearing:

- IV. Some competent adults are not only capable of exercising paternalism, but have an interest in playing such a fiduciary role within the context of a loving relationship.<sup>11</sup>

Conclusion: All children have a strong interest in being cared for by at least one, but not many competent parents, and some adults have a strong interest in parenting. These interests are sufficiently weighty, and the costs involved in securing them are sufficiently reasonable, so as to ground the right of children to have at least one parent, and the right of competent adults to parent. The balancing of these interests also justifies the family as the best socio-institutional arrangement for the rearing of children.<sup>12</sup>

### 3. TWO DESIDERATA: CONTINUITY AND PLURALISM

In the previous section, we learnt that for Brighouse and Swift, the need for paternalism within the context of a loving relationship ultimately grounds the right of children to have at least one parent and that the same paternalism grounds a (conditional, limited) right of adults to parent children. The aim of this section is to take a step back and think about what we want a theory of family values to deliver, as well as evaluate how Brighouse and Swift's dual-interest account fares with regards to such theoretical aims.

To begin with, Brighouse and Swift's fiduciary account certainly points in the right direction by starting with the recognition that children typically fare better if they can count on at least one competent adult to actively attend to their well being. The account also seems to capture something important about how there can be a weighty interest on the part of adults to be in a relationship with children that cannot be replaced by other kinds of intimate relationships, such as relationship with a pet, or a friend. But do Brighouse and Swift really get to the heart of the matter when they point to the interest of children in being subjected to this sort of loving paternalism and the interests of parents in exercising loving authority as part of the parental role? That is, do they succeed in identifying the most basic property or set of properties that justify the existence of the family even in a context where other actual and conceivable arrangements could do a better job at securing the interests of children?

11 As Brighouse and Swift (2014: 86) put it, "[i]t cannot be substituted by other forms of relationship, and it contributes to the parent's well-being so substantially, and in a manner so congruent with the interests of children, that it grounds (a conditional, limited) right to parent".

12 For the rights theory endorsed by the authors, see *supra-note* 8.

In the remainder of this section, I argue that although Brighouse and Swift's fiduciary account helps us make much progress on the ethics of the family, it does not, as it stands, meet two important desiderata. First, their account fails to explain what is special about the parent-child relationship once the child is capable of attending to her own present and future well-being. It therefore fails to explain what is good or valuable about children having parents and parents having children across a lifetime. Let us call this the "continuity desideratum". Second, by arguing that part of what justifies the fiduciary role of the parent is its ability to secure the child's future autonomy, their account fails to justify the parent-child relationship outside a liberal family context, where parents might lack the disposition in seeing to it that their adult child becomes capable of forming and pursuing her own conception of the good. Let us call this the "pluralism desideratum". I will discuss each desideratum in turn.

### *3.1. Continuity*

Let me begin by motivating the continuity desideratum, which is that, all else being equal, a successful justification for the child-parent relationship should also be able to explain why it is good that parents have children and children have parents not only during the former's childhood but also across a lifetime. To make sense of this idea, let us imagine a world that is very similar to ours but where society has structured procreation and parenting differently, and where only elderly members of society become parents and where children are conceived and gestated in high-tech government laboratories. Let us also imagine that the rationale for this arrangement is efficiency since citizens are more productive if they spend their adult lives fully engaged in the workforce and then later in life, once they have retired, they will have more time to invest in their parental role. Finally, let us assume that quality of life and life expectancy are such that children typically have at least one sufficiently healthy parent during childhood and adolescence, but typically not during their adulthood.

As becomes clear, this society is one in which both parent's and children's interests, as identified by Brighouse and Swift, are fully met but where it seems that something deeply valuable is lost. What is lost, I take it, is the value for both parent and child in enjoying an intimate and loving relationship that typically extends across different phases of their lives, and that provides the child with the on-going benefit of being subjected to an intense and robust mode of caring by the parent (I will defend this claim in more detail in the following section). If I am right that the parent-child relationship retains its value even when there is no more need for the exercise of paternalism on the part of the parent, then we should ideally aim for a justification of the family

that does not depend on features that are only present in childhood, but that can explain what is valuable about the parent-child relationship as it extends across time.<sup>13</sup>

At this stage, a proponent of Brighouse and Swift's fiduciary account might endorse the continuity desideratum, but deny that the authors fail to meet it in their own justification of the family. The response here would be to appeal to the fact that Brighouse and Swift also give a lot of weight to the role of love in their discussion, and that as a result of love's continuity, their fiduciary account will hold no matter which developmental stage or life phase parties find themselves in.

This would indeed be a charitable reading of their discussion, and later I sketch an account that does appeal to the role of love in explaining what is so special about the parent-child relationship. However, as it stands, it is not clear that this interpretation is available to Brighouse and Swift because their account of why adults have an interest in parenting appeals to the interest that parents have in exercising loving *authority* over the lives of children. Indeed, for Brighouse and Swift, love comes in by playing an important, yet supportive role, in the effective exercise of paternalism.<sup>14</sup> As they explain:

“The fiduciary aspect remains central. Grandparents, or parent's friends, or nannies, can have close relationships with children, and when they go well, those relationships will be conducive to the child's interests and valuable to the adults too. Reading bedtime stories, providing meals, and so on, will be contributing to the well-being of both. Still, there's something distinctively valuable about being the person who not only does those things oneself but has the responsibility to make sure they get done, sometimes by others, and the authority to decide quite how they get done” (Brighouse and Swift 2014: 93).

But even if the above passage was somewhat misleading and it was true that Brighouse and Swift were primarily interested in love itself, they would still need a further argument to justify the interest that adults have in parenting given that adults can enjoy relationships of love and intimacy with people other than their children. The challenge here is that love *per se* cannot get a dual-interest account off the ground because such an account is aimed at explaining what is special about the parent-child relationship in particular, not loving relationships more generally.

13 To be sure, as the child goes through different developmental stages, there are contingent features of each stage that will provide distinct sources of *pleasure* to the parent. However, it does not follow from this fact that the identity of the relationship changes so dramatically that what made it valuable when the child was a toddler is no longer present when she is middle-aged.

14 As Brighouse and Swift (2014: 92) put it, “[t]he relationship as a whole, with its particular intimate character and the responsibility to play the specific fiduciary role for the person with whom one is intimate in that way, is what adults have an interest in”.

Before I move on to the second desideratum, let me dispel one potential concern with the discussion so far. The concern might be that the continuity desideratum does not apply to Brighouse and Swift's fiduciary account because theirs is an exercise in political philosophy, not value theory. Perhaps what these authors are ultimately interested in doing, so the concern goes, is justifying a relationship where one party lacks exit options and is wholly dependent on the other party for having her basic interests protected and promoted. What motivates the concern here is that the authors might not be answering the question of what is valuable about the parent-child relationship *tout ensemble*, but rather explaining why it is permissible for adults to enter and maintain intimate relationships with non-consenting children.

One reason why this response is unsatisfactory is that the inability of the child to exit a parent-child relationship is not a necessary feature of this sort of relationship and that it is possible for there to be intimate relationships where the child actually enjoys exit options. These are, for instance, relationships where a parent lacks custody rights over the child and decides to give the child a lot of space to choose whether or not, and to what extent, to partake in the relationship. One might think that the enjoyment of exit options on the part of the child dispels the need for justification in such cases, but I take it that the degree of intimacy involved at all stages of the relationship, and the mere possibility that society could be arranged differently, suffice for making the parent-child relationship, at its most general level, proper subject of philosophical justification. It would therefore be unsatisfying if Brighouse and Swift were solely in the business of explaining why it is permissible for there to be relationships between competent parents and children where the latter have no prospect of exiting the relationship.

### 3.2. *Pluralism*

Let me now turn to the second desideratum, which is the claim that a successful justification for the parent-child relationship must also be able to justify such relationships in non-liberal family contexts. As mentioned earlier, Brighouse and Swift believe that one of the reasons children need parents is that within the context of an intimate loving relationship, parents have an interest to ensure that children acquire the skills they need in order to become autonomous later on in their lives. For them, this privileged position on the part of parents goes as far as to give parents "a duty to try and ensure that the child will become an autonomous agent, someone capable of judging, and acting on her judgement, about her own interests" (Brighouse and Swift 2014: 90).

Before I explain why this focus on autonomy is problematic for the fiduciary account, let me endorse the more general claim that children have

a weighty interest in becoming self-determining in adulthood. Let me also note that such capacity for autonomy can be cashed out in different ways and elsewhere I have argued that children have a weighty interest in developing some basic agential skills, such as critical thinking, self-esteem and imagination precisely in order to make life choices that sufficiently track their own values and aspirations, as opposed to the values and aspirations of their parents, community leaders and religious authorities (Ferracioli 2015).<sup>15</sup> I am therefore in deep agreement with Brighouse and Swift in thinking that something goes wrong when children fail to acquire the skills they need to live adult lives that are genuinely their own.

However, as I see it, Brighouse and Swift are too quick in linking this particular interest on the part of children with the fiduciary role of parents. That is, they are too quick in assuming that parents are typically capable and willing to ensure that their child develop the agential skills needed to make their own life choices as opposed to choices that blindly follow religious tradition or cultural expectations (Ferracioli and Terlazzo 2014; Ferracioli 2015). Indeed, it is a well-known sociological fact that many parents in non-liberal cultural contexts do not value autonomy themselves and actually want their child to uncritically endorse what they take to be deep truths about the world. The result here is that Brighouse and Swift's inclusion of the capacity for autonomy in the list of interests that ground a dual-interest account makes it the case that only autonomy-promoting parents have a right to parent, because only they have the disposition to protect the interest that the child has in becoming autonomous, and so to protect one of the interests that, according to the fiduciary account, justify the family in the first place.

Proponents of the fiduciary account might respond by resisting the pluralism desideratum, and by arguing that in fact only parents who are committed to the development of autonomy have a right to parent because only they are genuinely in a position to secure the very weighty interest of children in becoming sufficiently self-determining. But this response would deny the obvious and morally relevant fact that outside liberal family contexts, parents still manage to enjoy a great degree of intimacy, love and affection with their children, and that the lives of all parties go much better as a result of partaking in such loving relationships.<sup>16</sup> Moreover, this response also fails to see that the right of children in becoming sufficiently

<sup>15</sup> See also Meyers (1987).

<sup>16</sup> Note that this position is compatible with the claim (which I do not make here) that, all else being equal, being raised by liberal parents is superior to being raised by authoritarian ones. These are compatible claims because all we need for justifying the parent-child relationship is that the relationship meets some sufficiency requirement. Outside the enterprise of justification, we can certainly rank styles of parenting according to some independent moral criteria.

autonomous can instead correlate with a duty on the part of the state to create a neutral system of compulsory public education where children acquire the agential skills required for the exercise of autonomy later on in their lives (I return to this point later).<sup>17</sup>

#### 4. PARENTAL LOVE AND THE GOOD LIFE

In the previous section, I argued that the best candidate for a theory of what justifies the family should not appeal solely to features of childhood but rather to features of the parent-child relationship that extend across the entirety of the relationship. I have also argued that such an account should explicitly include the interest of adults in entering into intimate and loving relationship with children irrespective of a lack of disposition on their part to see to it that their child becomes sufficiently self-determining. In this section, I sketch an account that can successfully meet these two desiderata.

So what is this valuable feature that both parents and children have an interest in? The answer is actually quite simple: a robust form of caring, or what is commonly (but mistakenly) known as “unconditional love”.

To begin with, let me make the obvious point that strictly unconditional love is neither feasible nor desirable. It is not feasible because there can be psychological limits on the human capacity to love when love is reciprocated with physical violence, abuse or complete disregard to one’s well being. Even a small child might stop loving a parent when the love she gives is reciprocated with extreme forms of violence and abuse. But even if it is possible for some people to love unconditionally, it still not something they have an interest in doing simply because unconditional love is not on the whole desirable. Indeed, it is important for person’s self-respect and self-esteem that they place certain minimum conditions on the giving of love, such as the condition that they be treated with some degree of respect and generosity, and that their beloved will, for instance, not offend against the most basic demands of morality. The thought here is that even a devoted parent should try hard to stop loving an adult child who turns out to be an unrepentant mass murderer.

So if unconditional love is neither feasible nor desirable, what kind of love do children and parents have an interest in? And what makes this love sufficiently distinct from other kinds of love that allows us to get a dual-interest account off the ground? The love both children and parents have an interest in is parental love, which is of such magnitude and robustness that it *typically* differs from other kinds of love.

<sup>17</sup> For the role of compulsory public education in the fostering of autonomy, see Ferracioli and Terlazzo (2014); Ferracioli (2015).

Let me start with a rough definition of parental love: *a type of love whereby the agent cares so much about the good of her beloved, that she is robustly disposed to take on a great deal of personal cost in order to advance the good of her beloved.*

If I am right that parental love can be so defined, then children have an interest in being cared for by parents as opposed to charity workers or state officials because they have an interest in being at the receiving end of a mode of caring that is of significant magnitude and robustness (Ferracioli 2015). That is, children have an interest in an intimate relationship with an adult who cares so much that the child's life goes well, that she is disposed to take on a great deal of costs to advance the child's interests over the course of that relationship. Moreover, children have an interest that such disposition on the part of the parent remains robust across time and counter-factual worlds.<sup>18</sup> A child who enjoys parental love, so this view goes, will continue to enjoy it as she becomes older and even if the sacrifices involved become extraordinary.

To illustrate the point, we need only think of the hardships we might encounter in our adult lives, and the people most likely to continue advancing our interests should such hardships arise. If, for instance, we acquired a severe illness that made us incapable of attending to our own basic needs, or if we became so depressed that we could hardly respond to the world around us, the people most likely to continuously advance our interests would be our parents, not friends or lovers.

The same is true of childhood. Charity and orphanage workers might be able to adequately meet the basic needs of children under their care, but they will not move town or country in order to ensure that a sick child will get a special kind of medical treatment.<sup>19</sup> They are also unlikely to spend all of their discretionary time inventing games and activities so as to continuously stimulate a child who suffers from autism spectrum disorder, for instance. And in any case, they will certainly not spend their whole lives trying to find a child that has disappeared. Charity and orphanage workers will of course typically do what morality or their job description require—the trouble is that, at times, human beings, being the vulnerable creatures they are, need much more than that.<sup>20</sup>

If I am right that children have an interest in being the recipient of parental love so that across a lifetime, they will enjoy a caring relationship

18 For the notion of a modally demanding value, see Pettit (2008).

19 For a defence of the claim that children can have all their interests secured in an orphanage, see Cowden (2012).

20 For a more detailed discussion of this claim, see Ferracioli (2014).

robustly, then the next question is: why do parents have an interest in providing such robust mode of caring? That is, what do parents have to gain by being in a relationship where they are disposed to take on so much personal cost for the sake of someone else?

As I see it, the interest that parents have in the relationship is precisely to enjoy the moral value of loving someone so deeply that one becomes significantly disposed to advance her good in ways comparable to the advancement of their own good. Indeed, the interest in parenting is nothing above and beyond an interest in being in a relationship where one cares so deeply about how well someone else's life goes that one is disposed to take on the sort of costs that not even morality can demand from moral agents.<sup>21</sup> This sort of disposition for a deep mode of caring *within the context of* an intimate relationship is a great source of meaning—it enriches the lives of adults significantly, despite the fact (or perhaps even partly because) life often feels like “suffering in heaven”.

In the previous section, I noted that a general interest in love would not get us a dual-interest account off the ground because adults can partake in a myriad of loving relationships, such as the relationship one has with a friend or lover. And if I am right then, why think that friendships and romantic relationships cannot exhibit the sort of robust care we see with the parent-child relationship?

At this stage, it is important to clarify exactly what the shape of the claim is. I have not argued that parents *necessarily* feel parental love. We know all too well that some parents do not experience robust modes of caring. I have also not argued that other relationships *necessarily* fail to exhibit the features of parental love so far discussed. It is certainly conceivable that some romantic relationships and friendships might give rise to equally robust modes of caring—it is just that they are significantly less likely to do so. Indeed, while it is true that some extraordinary individuals might make all sorts of significant sacrifices to advance the good of a friend, friendships are typically marked by more reasonable forms of cost-taking and by less robust modes of caring. The same is true of romantic relationships. While some people would stick with a romantic partner under almost any circumstances, most romantic relationships are contingent on many facts remaining true, such as shared interests, physical attractiveness, financial stability, loyalty, and so and so forth. The modes of love we see in these other loving relationships are therefore not typically as robust as parental love. For those adults who want to *maximize* their chance of experiencing robust forms of caring, there

21 And of course, such disposition for caring needs to be expressed in the context of an intimate relationship because the relationship itself provides the necessary conditions for effectively acting on the disposition when the need arises.



will be an interest in parenting. A strong interest in caring about someone else robustly within the context of an intimate relationship then gets us a dual-interest off the ground.

## 5. DISPERSED AUTHORITY AND THE GOOD OF CHILDREN

In the previous section I sketched an account that meets the two desiderata motivated earlier: it captures the vulnerability of childhood but it is not exhausted by it. It also makes sense of parent-child relationships in non-liberal family contexts, where parents might lack the willingness in seeing to it that their child becomes sufficiently autonomous but still have the disposition to take on a great deal of costs to advance many of her other interests. Before concluding, I shall briefly discuss some of the implications of justifying the parent-child relationship by appealing to the robust mode of caring constitutive of parental love.

One implication is that a parental love account can leave open how much authority parents can legitimately exercise in a context of the parent-child relationship. So while Brighouse and Swift vindicated the current model of parental authority by arguing that parents had *an interest* in exercising authority over children, the account sketched above would be compatible with a world where parents exercised much less authority over children, and where governments would exercise much more through the provision of a myriad of compulsory public services. For those who worry about growing levels of child obesity and the ill effects on children of the anti-vaccination movement, for instance, the parental love account comes with the benefit of not giving parental authority any justificatory role, and so being much more congenial to state interference in areas such as children's diet and immunization, for instance.<sup>22</sup>

A second, and related, implication is that a parental love account does not make the right to parent conditional on a parents' ability to foster a capacity for autonomy. It therefore endorses the claim that the right of children to become autonomous correlate instead with an obligation on the part of the state to create a neutral system of compulsory public education where children can develop the agential skills required for autonomy without being steered towards any particular conception of the good (Ferracioli and Terlazzo 2014; Ferracioli 2015). Now, of course, it is true that such an account

22 Indeed, whilst Brighouse and Swift discussion leads to the odd result that adults who do not value autonomy lack the right to parent, a parental love account can recognize that their interest in parenting is on a par with the interest of those who do value autonomy, while still limiting the ability of all parents to deny their children the opportunity to acquire the agential skills required for autonomy.

would still make the right to parent conditional on the parent not actively interfering with the fostering of autonomy by the state, and so there would still be a negative duty on the part of the parent not to deny one's child access to public education. The important point to recognize here, however, is that there is an important difference between expecting a parent to respect state interference in the family via a system of compulsory public education, and expecting her to foster herself a capacity she finds detrimental to the pursuit of the good life. The latter, but not the former, is simply overly demanding.

A third and final implication of appealing to the value of parental love when justifying the family is that such an account is, in principle, more liberal with regard to the number of parents a child can potentially have. Recall how Brighouse and Swift emphasize that their account can only support a small number of parents for each child (at some stage in the discussion, they even stipulate that there should be no more than four parents in a child's life (Brighouse and Swift 2014: 71)). As they explain, "intimate but authoritative relationships between children and a small number of particular adults, relationships in which the adults have considerable discretion over the details of how the children are raised, is the best arrangement for raising children, taking into account all the interests at stake" (Brighouse and Swift 2014: XII). A parental love account, on the other hand, allows for more dispersed authority among parties who care robustly for a child, and so, in principle, allows for more than four parents (but as Brighouse and Swift recognize, the question of which adults should parent each child is a separate and independent question (Brighouse and Swift 2014: 49)). And in fact, this is already taking place with modern family arrangements where children are loved deeply by their parents, stepparents, and godparents. Insofar as it is feasible and desirable for the child to enjoy a loving relationship with each one of them, it seems odd (if not somewhat disrespectful to the child) to artificially limit the size of the family just so that each adult can exercise more authority over her life.

## 6. CONCLUSION

In this essay I have engaged with the question of "why is it good for children to be raised by parents, and good for parents to raise children" (Brighouse and Swift 2014: IX). And in particular, I have asked whether Brighouse and Swift answer to this question delivers a successful justification of the parent-child relationship. While I have argued that their account fails on two desiderata and that an account in the vicinity might be superior, I believe the fiduciary account still stands out for helping us make significant progress on the foundational question of what is so special about the family.

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# Advantage, Authority, Autonomy and Continuity: A Response to Ferracioli, Gheaus and Stroud

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## **Abstract**

We address three critiques of our book *Family Values: The Ethics of Parent-Child Relationships* (Brighouse and Swift 2014), published simultaneously with this reply. In response to Stroud (2016), we emphasize the specificity of parents' rights, and the modesty of our claims about them, challenging her *laissez faire* position on parents' right to confer advantage on their children, and stressing the merely illustrative role that we give to fair equality of opportunity. In response to Gheaus (2016), we clarify our “dual-interest” approach and the content of the adult interest in parenting, while defending the claim that that interest is relevant to the justification of arrangements for the raising of children. In response to Ferracioli (2016), we explain our views about how many adults may properly parent a child, the significance of children's autonomy, and the value of continuing relationships between parents and their adult children.

**Keywords:** family, children, right to parent, autonomy

## INTRODUCTION

It is gratifying to have our views subjected to such careful attention. Much of our response will consist of clarification—explaining what we are and, perhaps more importantly, are not trying to do. Our argument is wide-ranging in that we address a series of issues concerning the ethics of parent-child relationships that are often treated separately, and ambitious in that we offer a novel and unified theoretical approach to those topics. But in other ways it is modest, more modest than it has seemed to some readers.

Between them, our three critics offer a varied and contrasting set of objections. Stroud (2016) focuses on the egalitarian or distributive dimension of our argument, challenging our views about the limited scope of parents' rights to confer advantage on their children. Gheaus (2016) addresses rather what we call the liberal challenge to the family: issues concerning the moral basis of the right to parent and of parents' rights over their children. While Stroud is enthusiastic about our "expanding the discourse around the family by highlighting the interests of (would-be) *parents*" (2016: 1, original emphasis), it is precisely our willingness to give adults' interests any role in justifying childrearing arrangements that troubles Gheaus. Ferracioli (2016), for her part, endorses a dual-interest approach like ours but thinks we have misidentified the interests!

Stroud raises the most general methodological questions. She generously credits us with some 'game-changing insights and argumentative strategies' (2016: 180) but it soon emerges that in her view we are playing the wrong game! So we begin by explaining what game we are and are not playing, and why we think it's the right one. Those explanations underlie our approach to parental partiality and parents' rights to confer advantage on their children, which is the substantive aspect that Stroud criticizes. They also provide a framework for discussing key issues raised in the other papers. It is precisely because there is something morally distinctive, *sui generis* we might say, about claiming rights to control another human being that Gheaus is doubtful about our dual-interest account. Our attempt to explain those rights depends on our specific conception of the parental role as fusing love and intimacy, on the one hand, and authority or control, on the other—a fusion that is challenged by both Ferracioli and Gheaus.

## 1. BEING SPECIFIC

Stroud wonders both why we want a *sui generis* justification of parents' rights and why we limit them to the minimum necessary. The answer is that we regard parents' rights as distinctive, and distinctively problematic, in two ways that she appears not to. On the distributive side, parents' rights and duties to act partially towards their children conflict with ideals such as equality of opportunity; children will have better or worse prospects in life depending on their parents' ability and willingness to confer advantage on them. This challenge demands an account of why exactly parents should be free to do things to, for, or with their children that benefit them relative to others, and what they should be free to do. The liberal challenge, on the other hand, arises from the fact that parent and child have distinct and sometimes conflicting interests, and children are vulnerable and non-consenting parties to the relationship. We need an explanation of why exactly adults

should have rights over children, which adults should have them, and what those rights should be.

For us, then, the family raises specific justificatory questions that require specific responses, and explain why, for us, parents' rights are the minimum compatible with the kind of parent-child relationship that will realize familial relationship goods for its participants. Like many liberal theorists, we see relationships involving some people exercising authority over the lives of non-consenting others as *prima facie* problematic. That exercise requires justification, and limitation, because those subject to that authority can properly demand an account of why they should be, or should have been, subject to *those* people within *that* domain of decision. Like many egalitarian theorists, we think that relationships creating inequalities of opportunity are *prima facie* problematic. Those inequalities require justification, and limitation, because those on the wrong end of them can properly demand an account of why they should be worse off than others just because they were raised by different parents.

To be sure, the liberal challenge is more *distinctively* problematic. Controlling other non-consenting human beings requires special justification; that's why parents' rights to exercise authority over their children pose peculiar problems. Indeed, they trouble Gheaus enough for her to argue that "the claim to a right to control a child's life must be grounded exclusively in the child's interest, in which case there is no *sui generis* right to parent" (2016: 202). Benefitting others, by contrast, is commonplace. People routinely act partially in favor of particular others—friends, lovers, co-religionists, compatriots—and these other types of relationship might be invoked to justify their doing so. Indeed, one might doubt that relationships of *any* kind are required to justify inequality-creating interactions. Plausibly, there is a general prerogative—one that has nothing at all to do with relationships, valuable or otherwise—not only to pursue one's self-interest but also to confer benefits on others in ways that depart from equality. Indeed, conferring benefits on others might be part of what it is in one's self-interest to do.

Stroud seems surprisingly unconcerned on both counts. For her (2016: 183),

"one might doubt whether parents raising children requires a *sui generis* justification in terms of the distinctive values it realizes, as opposed to simply falling under a more general and less demanding moral schema... [B]eing a parent is something that a great many adults very much want to do with their life. If someone very much wants to do *x* with her life, one might think that alone creates a significant moral presumption in favor of allowing her to do *x*—regardless, it would seem, of *x*'s specific content, or of whether her (or anyone's) doing *x* would realize important objective values".

We are not sure quite what counts as a “presumption”, but for us—as for Gheaus - the specific content of  $x$  in the child-raising case puts the burden of justification on those claiming the right to engage in that particular activity. It is problematic to claim the right to control the current life, and influence the future life, of another human being by appeal to considerations other than that other’s own interests.

According to Stroud (2016: 184), “there is no issue facing us as a society, to be settled collectively, about how to bring up children: there are only individual adults who want to parent children”. As a claim about how parents should be allowed to raise their children this is false. Our society is constantly making collective decisions on such controversial questions as what kind of discipline parents should be permitted to exercise, what forms of medical treatment they should be permitted to administer or obstruct, what kind of education they should be permitted or required to provide for their children. But it also looks mistaken as a claim about whether there should be parent-child relationships—or, according to our stipulation, “families”—at all. The mere fact that individual adults want to parent children is not sufficient to establish the moral propriety of their doing so.

Her view on the distributive side is also surprisingly *laissez faire*. Readers may disagree with our view that parents do not have the right to bequeath substantial wealth to their children, but surely few will reject it so quickly. Disclosing that an inheritance from her husband’s mother made possible the purchase of the Vermont farmhouse in which she wrote the first draft of her paper, she writes (2016: 185):

“She loved her son, and the rest of us, and we know she would be deeply gratified by all the new horizons her bequest has opened up for us. Faced with this vivid awareness of what her bequest has made possible for her son and my family, I find it simply impossible to accept that my mother-in-law ought not to have been able to leave my husband that money: that it would violate nobody’s rights to prevent or prohibit people from doing any such thing”.

Let us assume that the sum in question was indeed justly her mother-in-law’s in the first place; that she had the moral, and not merely the legal, right to *any* say over it. Even so, it is strange to think that one could assess whether she had the right to bequeath it to her son merely by awareness, however vivid, of the value of the bequest to her and its beneficiaries. Suppose that the state had taxed the inheritance sufficiently to make purchasing the farmhouse impossible. Would awareness of what could have been enjoyed in the absence of that tax make such a constraint on the bequest similarly “impossible to accept”?

We and Stroud, then, approach these matters from very different perspectives. But we must also emphasize the limits of our ambition. The flip side of our offering a *sui generis* treatment of parent-child relationships is that we do not address all the rights that adults may properly claim with respect to the children they parent; we confine ourselves to those that invoke the fact that the adult is the child's parent. We want to know when "because I am your parent" is a good answer to the question "Why do you have the right to do that to, or with, me?" We want to know when "because I am her parent" is a good answer to the question "Why do you have the right to do that for her?" (see Brighouse and Swift 2014: 120).

Other good answers to such questions might be available. Perhaps parents have permissions, deriving from sources other than the familial relationship, that permit them to pursue their own projects in ways that will affect what they may legitimately do, all things considered, by way of exercising authority over their children's lives (see Brighouse and Swift 2014: 121-2). Perhaps they have permissions to confer benefits on anybody they like, including their children, which derive from a more general moral schema of the kind that Stroud mentions. It would be a different task to engage with those other justifications. As far as our theory of parents' rights is concerned, we are interested only in what kinds of partiality, and what exercises of authority, can be justified specifically on the ground that the other person involved is a child one is parenting.

So Stroud is mistaken in attributing to us (2016: 182) the view that "if *disallowing* parents a certain right or privilege would *not* impede the development of a flourishing parent-child relationship, then that putative right or privilege stands exposed and undefended against any arguments that could be raised against it" [original emphasis]. The putative right or privilege stands, for us, exposed and undefended only against the kind of argument that appeals to the fact that the alleged right or privilege holder is the child's parent. Indeed, when assessing what, all things considered, they should be free to do with respect to their children, we acknowledge the relevance not only of parents' other roles or statuses but also of more indirect factors such as incentive considerations (see Brighouse and Swift 2014: 130-1).

Our contribution on the distributive side pursues a suggestion from Samuel Scheffler, for whom parental partiality raises, in a particular form, the general issue of the "distributive objection" to special responsibilities that arise in the context of valuable relationships: "The problem with such responsibilities is ... that they may confer unfair benefit. ... [S]pecial responsibilities give the participants in rewarding groups and relationships increased claims to one another's assistance, while weakening the claims



that other people have on them”. Scheffler (2003: 102) observes that his account “is compatible with the view that the strength of one’s responsibilities depends on the nature of the relationships that give rise to them, and on the degree of value that one has reason to attach to those relationships. *As far as the content of the responsibilities is concerned, we may assume that this too depends on the nature of the relationships in question . . .*” [added emphasis]. Our aim is to put the parent-child relationship under the microscope while allowing that a host of other considerations will be relevant to questions of legitimate parental partiality, all things considered, in any particular circumstances. It is compatible with recognition both that other relationships may generate other distributive claims and that individuals may enjoy prerogatives to favor themselves and others in ways that make no reference to relationships at all.<sup>1</sup>

Whether we are playing the right game, or even a game worth playing, depends, then, on how important it is to identify, and isolate, this particular kind of justification. In our view, parents’ rights to exercise authority over their children *are* typically and substantially defended by appeal to the specific thought that the adults in question are indeed the child’s parents. We acknowledge that rights to benefit children are, by contrast, more often presented in a more general frame: “It’s my money and I can do what I want with it. If I want to leave it to my children or spend it on their education, that’s up to me”. But even here, distinctively familial considerations are often invoked, especially in attempts to justify blocking egalitarian measures. (“My job is to promote my child’s interests; you violate my rights as a parent if you interfere with my capacity to do that by, for example, limiting bequest, or restricting my freedom to spend my resources on her education”.) The task of identifying and isolating “family values properly understood”, and thereby exposing as unwarranted many such normative appeals to “the family”, seems to us a game well worth the candle.

## 2. CONFERRING ADVANTAGE

That remains true even if, as Stroud (2016: 191-192) claims, “the prohibition not just of bequests, but of *all* the various ways in which parents might seek to use their superior financial resources to benefit their children (think private schooling), would have only an insignificant effect on the unequal distribution of prospects for desirable jobs, etc. across children. That is, parents’ direct use of *money* to benefit their children is—it turns out—a relatively minor contributor to inequality of opportunity (Brighouse and

1 A “relationship goods” approach may be relevant to those also. For an initial schematic move in one particular direction, see Brighouse and Swift (2011).

Swift allude to this at 31-32 and 125-127.)” She thinks (2016: 192) that this admission makes “overly optimistic” our claim that our “account of ‘family values properly understood’ ... mitigates—*massively mitigates*—the conflict with equality” [original emphasis]. But any appearance of tension between these two claims is illusory; dispelling that illusion may help to clarify our aim further.

The first is an empirical point about existing societies. Given current reward schedules, and the mechanisms by which people reach their places in the distribution, the direct use of parents’ money to benefit children may indeed be less significant contributors to inequalities of opportunity, between children raised in different families, than parent-child interactions of the kind endorsed and protected by our theory. The second is an observation about the kind of society that would be compatible with our account: it is perfectly possible to respect, and promote, what is important and valuable about the family without allowing parent-child relationships to produce anything like the inequalities of opportunity that they currently do. One way of doing this would be by reducing the extent to which children who participate in those relationships also benefit, in other ways, from doing so—that extent depends on how other social institutions are designed (see Brighouse and Swift 2014: 33). At present, “family values” are often invoked to defend not only the interactions within the relationships but also the conferral of external benefits that they currently involve. By rejecting the claim that parents (*qua* parents) have the right to confer advantage on their children in ways that conflict with fair equality of opportunity, we challenge that defense.

The game is still worth the candle, we believe, even when we add a further caveat: although we invoke “familial relationship goods” to identify the interests that ground parents’ rights, we are explicit that the rights we are talking about are *prima facie* only. Indeed, strictly speaking, the category of “familial relationship goods” is intended only to isolate those parent-child interactions that are “susceptible to justification by appeal to the parent-child relationship” (see Brighouse and Swift 2014: 146). Some of those goods, and hence some of the interactions that produce them, are worthy of protection even when they conflict with fair equality of opportunity. Others – such as the loving general promotion of one’s child’s interests – are not, we claim, weighty enough to warrant the cost in terms of that distributive value.

Just as one might have rights to benefit one’s children that do not derive specifically from the fact that one is their parent, so too one might *not* have, all things considered, the right to do things for them that one has, *prima facie*, in virtue of being their parent. Perhaps, in a world where some lack what they need for mere survival, much of the time and energy spent by

affluent parents on the provision even of core familial relationship goods, for themselves and their children, exceeds the scope of any plausible right—especially where parents have more than one child. Having identified a criterion for evaluating parent-child interactions as important contributors to valuable familial relationships, and so *prima facie* protected by parents' rights, we offer a judgment about the considerations at stake in the conflict between the advantage-conferring aspects of familial relationship goods, on the one hand, and fair equality of opportunity, on the other. But we explicitly refrain from offering judgments about the rights that parents have, all things considered, in circumstances (which we take to be our own) where the distributive ideal with which those rights might conflict is more urgent than fair equality of opportunity (see Brighouse and Swift 2014: 143-5) We similarly refrain from considering what kinds of conferrals of advantage on children might fall under the parental duty of care – the discharge of which is justified even where it conflicts with fair equality of opportunity – in circumstances where societal arrangements mean that those children face the risk, as adults, of falling into poverty or lacking medical treatment.<sup>2</sup> A lot more is needed to get from (i) a criterion for identifying which parent-child interactions are and are not important enough to be worth protecting even where they conflict with fair equality of opportunity to (ii) all things considered evaluations of particular prescriptions—whether political policies or individual actions—in our current circumstances. Indeed, a lot more is needed even, more modestly, to identify the precise content of parents' rights in those circumstances.

Stroud doubts that fair equality of opportunity can bear the weight we put on it. We invoke that distributive principle as a criterion for distinguishing between different types of familial relationship goods. The “core” goods, as we term them, are important enough to be worthy of protection even when that undermines fair equality of opportunity. (Though, as just noted, parents would have no complaint were institutions to be designed in such a way that that conflict was reduced or even eliminated.) But the good of *generally* having one's interests promoted by a loving parent is not, we say, important enough to be worthy of similar protection; it should yield to children's interest in competing on fair terms with others. We agree with her that fair equality of opportunity is not a hugely weighty principle—we emphasize its limitations, and the importance of other distributive values, several times (see Brighouse and Swift, 2014: 33-5, 38-45, 143-8). Maybe we are wrong to claim that, were it the only distributive consideration at stake, it could serve as a constraint on interactions in which the parent is lovingly motivated generally to further

2 For remarks on this issue in the specific case of school choice, see Swift (2003: 119-125). Brighouse and Swift (2014) attempts no analogous discussion of the more general issue.

the child's interests. If so, that would be an objection to our proposed particular weighting of the conflicting values, not to our methodological approach.

But we should also point out that our account of the *core* familial relationship goods leaves plenty of room for parental spontaneity and discretion in the way that they relate to their children (see Brighthouse and Swift 2014: 140-3). That, combined with the recognition that loving parents will be spontaneously motivated to benefit their children quite generally, seems to us to leave sufficient room for the concern in question. In so far as the things that parents do to benefit their children are done as an inevitable part of a healthy loving relationship, they are protected by our theory. Again, though, our view is that the familial relationship itself cannot plausibly be invoked to defend any resulting conferral of advantage that gives children better chances than they would enjoy under fair equality of opportunity. The fact that one is spontaneously motivated to benefit one's children, and healthy relationships require space for spontaneity, explains why one should be free to act on those motivations, but provides no objection to societal attempts to limit, or even eliminate, the impact of those actions on children's prospects of the kind with which fair equality of opportunity is concerned.

### 3. CLAIMING AUTHORITY

According to Gheaus (2016: 196), “a right to parent is an anomaly by liberal lights: liberals acknowledge no other entitlement to exercise power over another individual legitimized in part by reference to an interest—no matter how important—of the one exercising power”. Our dual-interest theory—and our positing different grounds for the right *to* parent and the rights *of* parents—is an attempt to strike the right balance between the interests of the different participants in the relationship. But we need to be clear about what exactly it means to have a dual interest theory, and where exactly adults' interests come into the picture.

To clarify our approach, and our attempt to strike the right balance between the interests at stake, notice that there are at least three somewhat different issues under discussion:

- I. How children should be raised. Here our argument for the family – for parent-child relationships – defends that practice against alternatives such as their being reared by professionals in state-run childrearing institutions.
- II. The content of parents' rights: what rights parents can properly claim with respect to their children in virtue of being those children's

parents. One can know that children should be raised by parents without having a full specification of parents' rights.<sup>3</sup> Here we challenge conventional views that grant parents extensive rights to confer advantage on their children and to shape their children's values.

- III. How to match up children and adults in families. One can know that children should be raised by parents and what rights their parents should have without knowing who should parent, or by parented by, whom. Here, *inter alia*, we reject both the view that genetic connection establishes an adult's claim to parent a child and the claim that children have a right to be parented by the best available parent.

In our view, different considerations are relevant to addressing these different issues. With regard to (ii), the content of parents' rights, our account is exclusively child-centered. The rights in question are those needed properly to discharge the role of parent, which role is itself entirely fiduciary. But it's a separate question, of type (iii), who has the right to *be* a parent, and our answer to that question invokes the adult interest in fulfilling the role (see Brighouse and Swift 2014: 121). Understanding this position depends on keeping in mind the specific point with which we started: that parents' rights are specifically the rights one has *qua* parent. The right to parent, by contrast, is one that one has, if one has it, simply as an adult.

Clarifying the structure of our view does not show it is valid, or even coherent, but before moving on to that challenge, we can illustrate it further by attempting to address one of Gheaus' concerns. She is troubled, *inter alia*, by the right of parents to exclude others from having close relationships with their children, and attributes to us the view that parental authority includes a right to exclude those others "for reasons other than the protection of the child's interest" (2016: 202). But, for us, the duty on the part of others not to undermine the relationship between parent and child, like the right of parents to exclude others where it is likely to do so, derives entirely from children's interests in the relationship (see Brighouse and Swift 2014: 87). It is precisely because—and only in so far as—it would be bad for children to have their familial relationships disrupted that parents have a right to exclude others from forming relationships with their children. That right, like all parents' rights, is limited by, and justified in terms of, that fiduciary consideration. This is consistent with children having interests in relationships with other adults and indeed with facilitating such relationships being part

3 Of course this is not an entirely separate enterprise. To justify the family just is to justify a child-raising arrangement in which particular adults have certain rights over the children they parent (see Brighouse and Swift, 2014: 86-7). Still, the detailed and careful specification of the rights that one has, *qua* parent, is sensibly conceived as a further task, to be carried out after one has done enough to answer the first two questions.

of parents' fiduciary role.

Gheaus may object that the right to exclude is not properly characterized as a right one that one has *qua* parent. Rather, she might suggest, it should be seen as an aspect of the right *to* parent. After all the right to parent includes the right to exclude others. Something of this kind, indeed, is true of all parents' rights: the relationship involves various rights (and duties), so in claiming the right *to* parent one is claiming the rights *of* a parent. If, as we think, adults' interests are relevant to deciding who has the former, then they are obviously relevant to deciding who gets the latter. So adult interests do indeed come into the story that explains why they have the right to exclude others from relationships with particular children; they come in as considerations taken into account by the procedure that grants to adults the (entirely fiduciary) rights that they have with respect to the children they parent. Gheaus may yet be right to reject our view: we have not yet defended the claim that adults' interests are indeed relevant considerations. But we doubt that those adults who, as a result of the allocation, are excluded from relationships with those particular children, have a valid complaint. Their exclusion is the outcome of the right way of deciding who should get to exclude.

Let's think about Gheaus' refugees. In her scenario, the refugees seem *only* to be refugees. There is a question about how they should be socialized into the host community but no suggestion that, having been socialized, they might in turn be involved in the socialization of future waves of refugees. Suppose, instead, that migration is expected to continue, and that most of the current refugees, having been socialized, will come to have a strong interest in playing a socializing role for those future refugees. Suppose we agree with Gheaus (2016: 201) that "it is exclusively the refugees' interests that determine the ideal way of socializing them". Which way of socializing refugees does in fact serve these refugees' interests best?

The answer will surely take into account not only their interests *qua* refugees, but also the future or prospective interest they are likely to develop, *qua* prospective socializers. Imagine asking a refugee how she would like to be socialized: "Would you rather be socialized in whatever way was best for you, or in a way that meant that your opportunity to take your turn in socializing future refugees did not depend entirely on whether you were the best available socializer?" Wouldn't she reply: "I'm not sure I understand the question. The way of socializing me that's best for me *is* the one that is best for me over my life as a whole. If it's very valuable for me to have the opportunity to socialize future refugees, then the system of socializing that would be best for me, over my life as a whole, is unlikely to be one that makes that opportunity depend entirely on my being the best available socializer

of any one of them”.

This is one sense in which a theory of childrearing arrangements could be “dual interest”: it takes into account people’s interests both as children and as the adults those children will become. If, as we claim, and Gheaus does not deny, many adults do indeed have a weighty interest in parenting a child, then so do the children who are going to become those adults. They are the same people. On this interpretation, a child-centered view might be one that regarded as relevant only people’s interests *as children*, i.e. during the period of life in which they are children.

Such a position is deeply implausible. Children’s interests in that sense are indeed important, and we agree that there has been a tendency to overemphasize the view of children as “adults in the making”, to see them too much as “becomings” and not enough as “beings”, and to underplay the value of what we might think of as the intrinsic or special goods of childhood. But, in standard cases, nobody would seriously suggest that we could assess childrearing practices by ignoring their formative impact on the adults that children become. Indeed, this understanding of what it would mean for a theory to be child-centered would run contrary to standard usage in the literature. When philosophers talk about children’s interests in how they are raised, they include their developmental interests, their interest in developing capacities that will benefit them when they reach adulthood.

Those, like us, who frame their views in terms of a contrast between the childrearing interests of children and adults actually intend something different: by “children’s interests” we mean simply all those interests in how they are raised, including those that will affect their lives as adults, *except* the interest they will have, as adults, in how children are raised. We are interested in people’s lifetime interest in childrearing arrangements, but we separate out that particular adult interest for analytical purposes, and to show how giving it its proper weight qualifies the extent to which their *other* interests should determine those arrangements. A child-centred account, on this interpretation, would treat that adult interest as irrelevant to the question of how children should be raised. That too strikes us as implausible.

To be clear, on this construal, a dual interest view does not guarantee that any particular child will be raised by the particular adult(s) who would in fact have been best for her over her lifetime. Nor do children collectively have a claim to that particular allocation of adults to children that will be best, overall, for children over their lifetimes. The point is not that, once we have the right account of children’s lifetime interests, they do have a claim to the best available parents after all. Rather, they should be parented according to *childrearing arrangements*—understood as a *way of arranging the raising of children* and, more specifically, a way of arranging who is parented by whom—that

is best for them over their lifetime.

The rationale for a dual interest view is that the price, for children themselves, of being parented according to childrearing arrangements in which children are parented by their best available parents will be too high. Discussing how much we owe children, Matthew Clayton (2015: 251) points out that: “What is best for us as children ... may not be best for us taking our lives as a whole when we factor in the costs of fulfilling the duty to provide the best childhood for any offspring we might have”. Similarly, the way of arranging the raising of children that is best for us “as children” may not be best for us taking our lives as a whole, when we factor in the costs of fulfilling the duty to provide children with the best way of raising them “as children”.

An entirely child-centered way of arranging the raising of children, in either of the senses we have identified, will be costly in two different ways. First, it could leave adults who have a weighty interest in parenting unable to do so simply because there would not be any children for whom their parenting would be best. Second, less obviously, and empirically less plausibly, it could require adults who have no interest in parenting—indeed whose lives would go much worse—to serve in that role, simply because, as it happened, enlisting their services would be optimal for children. Thinking about people’s interests over the life course, this surely gets the intra-individual balance of interests wrong.

What about a child who will never reach adulthood, so has no interest in being able to parent? It might seem that her interests are decisive against the claims of any would-be parents. But what drives our intuition in that case may be not the fact that she is a child but rather that her life’s shortness, and her failure to develop into adulthood, mean that she will be so badly off, on a lifetime view, that her interests during the short time that she has should be regarded as decisive. Think instead about children whose lives will otherwise go normally, but who, as it happens, have no interest in themselves becoming parents. It is true that we cannot say to them that *their* lifetime interests are better protected by a way of arranging childrearing that gives some weight to the adult interest in parenting. But it is not clear to us why the interests of adults who do have that interest should be ignored altogether. Imagine a parent saying to her child: “I know that someone else would have done a better job of parenting you. I know, further, that you will not personally benefit from the way in which our society’s childrearing arrangements protect people’s interests in becoming parents. But I hope you agree that it was so wonderful for me to get to be your parent that you don’t have any complaint against me for parenting you, despite not being the person who would have parented you best, or, more relevantly, not being the parent you would have had under a system that regarded children’s



interests as the only ones that matter. After all, I was good enough". Of course there is a question about quite how much worse than the relevant alternative a parent could be before the child did indeed have a complaint; that is the question of whether "good enough" should be construed in absolute or comparative terms (see Shields 2016). But to resist Gheaus' objection we need only defend the view that adults' interests should play some role in deciding childrearing arrangements.

Two considerations, both raised by Gheaus' example, might seem to lend support to the view that only children's interests should count. One is the suggestion, more than hinted at by the analogy with refugees, that children are in a parlous state and in need of rescue. This would correspond to the thought that childhood is a "predicament", an unfortunate state, certainly inferior to adulthood (Schapiro 1999). Suppose childhood *is* a predicament from which people need to be rescued. Would it follow that they should be rescued in the way that was best for them, without any regard to the interests of the rescuers? When we think of refugees, of course, we typically imagine them to be not only in desperate need through no fault of their own but also victims of injustice. But unless we regard children as wronged simply by being brought into existence, we doubt the analogy holds. Indeed, in standard rescue cases it's not obvious that potential rescuers have to rescue in the best possible way, and with no regard to the costs, to them, of different ways of rescuing. In the case of children, we need to keep in mind that, for all we know, children may go on to have much better lives, overall, than those who parent them—even if their interests are not the only ones that determine how they are raised. With that clearly in mind, why should we only think about them when deciding how they should be raised?

Perhaps, however, the problem is specifically that the child is subject to the authority of the parent. She needs others to exercise control over her and, as we have said, there is something distinctively problematic about one person claiming a right to authority over another on grounds other than that other's interests. This is what Gheaus (2016: 200) calls 'the republican response': "if it were possible to promote the refugee's current well-being and future autonomy without locking her into any particular relationship, then giving you—or another private individual—authority over her would be wrong because it would make her subject to (perhaps benevolent) domination". This frames the point in relation to issue (i): should children be raised by parents (in families) at all? But it applies also to issue (iii). Grant, for the sake of argument, that it is best for children to be raised in families. One might still think it objectionable, on republican grounds, to

subject particular children to the authority of particular adults except on the grounds that the matching-up of children to adults is optimal for the children.<sup>4</sup>

It is misleading to give too much emphasis to the idea that parents have an interest in exercising authority as such. Gheaus is more careful, but Ferracioli (2016: 217) claims that we vindicate “the current model of parental authority” by arguing that parents have an interest in “exercising authority over children”. Our exposition of the adult interest emphasizes the normative significance of the particular *combination* of features of the parenting relationship (see Brighouse and Swift 2014: 88-93). It’s valuable to play the fiduciary role, and to have responsibility for decisions affecting the child’s upbringing, in the context of a relationship with other distinctive features, which might be summarized as loving intimacy. Controlling, or exercising authority, plays a key role in our analysis because this is the distinctively troubling aspect of the relationship, and the one that has led some theorists to develop entirely child-centered accounts. But that does not mean that it is the interest in controlling, or exercising authority, that does the work on the adult side. Someone who wanted to parent in order to control or exercise authority over a child would be badly missing the point.

Both Gheaus and Ferracioli press us on the way in which our account of the parent-child relationship fuses intimacy and authority. We emphasize the value to the child of experiencing her parent as both loving and authoritative, as well as the adult interest in having some responsibility for and discretion over how she conducts her relationship with her child. (Imagine the reading of prescribed bedtime stories as the dutiful execution

4 At the end of her paper, Gheaus considers how the way that children come into the world might relate to the question of how they should be raised and, if parented, who should parent them. It is, as she says, surely an important disanalogy between children and her refugees that children already have connections of various kinds to particular adults. Although she talks about biology, an analytically distinct—though empirically often associated—connection should perhaps be particularly salient to those worried by the idea of adults appealing to their own interests to justify claims to parent children. What’s objectionable, for Gheaus, is an adult claiming a parenting relationship with a child on the ground that the relationship will benefit the adult. In general terms, we might say, the adult is using the—non-consenting—child as a means to the adult’s ends. If Gheaus thinks that would be troublesome in a world where babies were brought by storks, she should surely be much more concerned about a world, like our own, where babies are typically produced *in order* to serve the interests of those producing them. It seems less problematic to allow hosts’ socializing interests to influence how refugees are socialized than it is to allow adults’ interests to influence how children are raised *when those adults have deliberately created the children and have done so in order to claim a parental relationship with them*. That really does look like using children as a means to one’s own ends. Rather than a gestatory relationship helping to establish a right to raise a particular child, as she has elsewhere suggested (Gheaus 2012), perhaps an adult’s interests should count *less* where she has deliberately created the being that now stands in need of rescue-by-authority from his predicament.

of state directives.) But interesting questions arise about the extent to which, and ways in which, these two features need to go together, and how they might come apart while preserving the essential core of the relationship.

In thinking about this, it might be useful to distinguish *micro*-authority, understood as the day-to-day regulation, disciplining, and control of the child, from *macro*-authority, understood as the making of big picture decisions, such as where the child goes to school, whether she eats meat, whether she attends religious services, and so on. We already insist that the weighty familial relationship goods at the heart of our account could be produced in parenting regimes that gave parents much less discretionary authority than they currently enjoy on macro-issues, so we think of ourselves as attempting to limit the authoritative dimension to the minimum necessary. Those goods are surely hard to produce when parents are having to deny or conceal too much of themselves, or to raise their children in ways that they regard as deeply misguided. But we are in principle sympathetic to Gheaus' suggestion (2016:202) that (macro) authority and intimacy might be disentangled in so far as that can be done without undue cost to relationship goods.

Like Gheaus, Ferracioli objects to our claim that both adults and children have an interest in the adult simultaneously loving, caring for, and having considerable authority over, the child. The family as we understand it is coercive, the parent exercising power over the child, and we claim that children need at least *one* person who *both* loves them and exercises discipline over them. Children need one person to love them because being loved is a precondition for their healthy emotional, moral, cognitive, and even physical development. They—especially when they are very young—need someone who disciplines them because they are inexperienced in the world (they do not, for example, know what is dangerous) and lack the kind of self-control necessary fluently to exercise agency. And they need these roles to be played by a single person because that person will then more successfully guide them understand and regulate their emotional reactions to the world and develop the tendency to react appropriately to it. Someone who disciplines them without loving them or being loved by them may, perhaps, be able to get them to comply with commands through fear, or charisma, but the important developmental aim of disciplining a child is not to secure their compliance in the moment, but to get them, over time, to internalize disciplinary regulation. This is one reason why children can only have a limited number of parents—we don't know the number, but in the book we suggest that four might be the limit.

Ferracioli sees this as a drawback, and poses an alternative that would allow for “more dispersed authority among parties who care robustly for a child, and so, in principle, allows for more than four parents”. For her (2016:

218), “this is already taking place with modern family arrangements where children are loved deeply by their parents, stepparents and godparents ... it seems odd to artificially limit the size of the family just so that each adult can exercise more authority over her life”.

Our suggestion that a child cannot have more than four parents is a conjecture, not a stipulation. We just don't know how many parents (in the sense of lovers who also discipline) a child can have. But too many—and we suspect that five would be too many—carries risks. First the child may not receive sufficiently harmonized information about how to interpret and interact with the world. Adults have different parenting styles, conveying different messages; though all five may discipline the child well, for example, her development may be impaired by too many mixed signals. Second, she may not be well enough cared for, because the coordination costs escalate as the number of caregivers increases. Consider a typical day with a toddler. You look after the toddler for 6 hours, and then a second parent takes over while you go to work for a while. To look after the toddler well the second parent needs a good deal of information—what mood is she in today? How might it affect her behavior? When did she last eat and did she eat well? Is a tooth bothering her? Did she nap well, or not at all? Has anything happened that might produce a delayed reaction? It is easier to convey this information well if the other parent has spent a good deal of time with her recently; partly because he then has a good deal of the necessary background information about the child, but also because his skills of caring for her are still in good shape. The more transitions the child makes among adults, the leakier the information bucket, and the rustier the carers' skills. Finally, as the number of parents with authority increases, the potential for disputes about what the interests of the child are and how to meet them escalates, as do the costs of resolving them, while the prospect of resolution diminishes. Already, with just two parents, this can be difficult. The reason to limit the number of parents, then, is not so that any individual can exercise more authority over a child's life, but so that children's interests can be better realized

All that said, our claim that parents rightfully have authority over their children does not imply a vision of a cramped, socially isolated, nuclear family. It is in children's interests that parents exercise considerable authority over them, and others must be careful not to undermine the parent-child relationship. But over the course of their childhoods children have a profound interest in having relationships with a variety of suitable adults: it helps them to see alternative ways of being an adult, and alternative ways of dealing with the world, giving them resources to reflect on who they really are, what they really value, and how to conduct themselves. Parents have a duty to facilitate and encourage those relationships (see Gheaus 2011).

#### 4. ACCOMODATING PLURALISM

Ferracioli proposes two desiderata for a justification of the family: it should account for the value of the family over the life-course (2016: 201-212); and it should be pluralistic, in that it should be able to justify the family in “non-liberal cultural contexts” (2016: 212-214). Our theory, she says, satisfies neither. It fails on the first because it focuses on relationship goods produced by the interactions between parent and child during the latter’s childhood; those goods are, for the most part, no longer produced once the child has become an independent adult. It fails on the second because of its emphasis on parents’ obligation to facilitate their child’s autonomy; parents in some non-liberal cultural contexts are indifferent or hostile to the development of autonomy but still “manage to enjoy a great degree of intimacy, love and affection with their children, and ... the lives of all parties go much better as a result of partaking in such loving relationships” (2016: 213).

Let’s start with pluralism. Ferracioli (2016: 213) claims that we are “too quick in assuming that parents are typically capable and willing to ensure that their child develop the agential skills needed to make their own life choices...” and “fail to see that the right of children in becoming sufficiently autonomous can instead correlate with a duty on the part of the state to create a neutral system of compulsory public education” (2016: 213-214). But we assume neither that parents will be motivated to facilitate autonomy nor that, even if so motivated, they will be able to do so without a cooperative environment, such as the right kind of schooling and a reasonably fluid and pluralistic culture. When the environment is not supportive – when, for example, adequate schooling is unavailable, or, as for some Black families in some American cities, access to it puts children in physical danger—parents are raising children in non-ideal circumstances. As we have said, we make no attempt at the complex task of weighing the different considerations that apply to parents in such circumstances. Nevertheless, in liberal societies, autonomy is an important achievement, and parents who successfully resist the development of their children’s autonomy in a liberal society are wronging those children. More, they are losing something valuable for themselves—the challenge of raising a child to independence, aiming to enable her to separate herself from them, while hoping that, nevertheless, they can remain close.

The value of autonomy—and of raising a child to be autonomous—enable us to say something about what is wrong with illiberal societies and societies that, although not illiberal, permit environments in which parents’ concern for their children’s wellbeing rightly inclines them not to facilitate their

children's autonomy. One thing that is wrong is just this: that they make it harder, or dangerous, for children to become autonomous, and make it harder, or wrong, for parents to experience the good of raising a child to become autonomous. It also enables us to say something about what parents do wrong when unduly insistent that their child "uncritically endorse what they take to be deep truths about the world" (Ferracioli 2016: 213).

Does our theory justify the family in non-liberal cultural contexts? Assume that non-liberal contexts are characterized by indifference or hostility to autonomy: parents do not aim to make their children autonomous and independent, and the social environment does not take up the slack, as it were, so autonomy is neither valued as an aim, nor an achieved as an outcome. In such contexts the family can still be valuable, and can still be justified, and our theory does explain why: parents can still oversee children's development, and both parties can enjoy intimate, close, loving relationships and enjoy familial relationship goods. But both parties are also missing something of great value—a vital developmental interest of children is neglected, and parents miss out on the distinctively rewarding challenge of acting as a fiduciary for someone whom one is raising to full independence of thought and word and deed.

Someone who did not value autonomy, or was even hostile to it, could accept a great deal of our theory, while rejecting the claims we make about the importance of autonomy for children, and the distinctive value of fostering autonomy as part of the fiduciary obligation toward children. She would offer different content for children's interests, and hence for the adult interest in acting as a child's fiduciary, but could nevertheless think we have said enough that is right both to justify the family, and to vindicate, for example, our analysis of legitimate parental partiality.

## 5. VALUING CONTINUITY

Ferracioli's second desideratum for a successful justification of the parent-child relationship is that it can explain the continuing value of the relationship between parent and child after the child has reached adulthood. While we agree that there is great value to such relationships—and we think our theory explains it—we reject her view if it is understood as proposing an adequacy condition on a justification of the family. We nevertheless found this objection helpful in clarifying what the project of justifying the family is.

The task of *justifying* the family is different from the task of *exposing all of the good-making features* of the family. Ferracioli's description of the

value of continuing relationships between parent and child beyond the latter's childhood does, indeed, seem to us to be a description of something very good in human relationships, that the family (or something very like it) makes possible. In justifying the family, though, we are trying to justify a distinctive arrangement that, given its unusual character and, in particular, its assignment of considerable discretion in the use of coercive power to some human beings over others who are asymmetrically dependent and vulnerable, appears to call for justification. A principle of parsimony seems in order: we should invoke just those good-making features that are needed in order to do the justificatory work, and no more. We do think that the good of continuing relationships in adulthood adds to the value of the family, but invoking it to justify arrangements of this kind is not necessary and, in fact, probably does no work, because the relationship it refers to is among consenting adults.

Anticipating this response, Ferracioli (2016: 212) rejects it as follows:

“One reason why this response is unsatisfactory is that the inability of the child to exit a parent-child relationship is not a necessary feature of this sort of relationship and that it is possible for there to be intimate relationships where the child actually enjoys exit options. These are, for instance, relationships where a parent lacks custody rights over the child and decides to give the child a lot of space to choose whether or not, and to what extent, to partake in the relationship. One might think that the enjoyment of exit options on the part of the child dispels the need for justification in such cases, but I take it that the degree of intimacy involved at all stages of the relationship, and the mere possibility that society could be arranged differently, suffice for making the parent-child relationship, at its most general level, proper subject of philosophical justification. It would therefore be unsatisfying if Brighouse and Swift were solely in the business of explaining why it is permissible for there to be relationships between competent parents and children where the latter have no prospect of exiting the relationship”.

We are not sure whether we understand the case properly. If the child had exit options from the start of the relationship it seems to us that it just isn't a parent-child relationship. Is the child mature enough that a responsible parent is justified in giving her *exit* options, as opposed to on the one hand making the choice for her (because he is in the rare situation of having good reasons to believe she will be much better off without him) or, on the other, giving her temporary space to spend less time with him? If so, then it is not clear that he is, any longer, a parent to her because, even before she exits, he is no longer playing the fiduciary role. In any case, we agree with Ferracioli

that something is going wrong in this relationship, and we agree that our theory does not explain what is going wrong, but we are not unsatisfied with this.

That said, we think that our justification of the family does help to explain the value of the continuation of the parent-child relationship into the child's adulthood. In general, it is good for people to continue intimate relationships with others, and it is easy to see why, for the parent, continued intimacy with an adult whom he has raised from childhood would be especially good. It is similarly easy to see why the loss of that relationship might be devastating. For the child, continuing into adulthood a relationship with someone who has overseen her development, but from whom she is now independent, is distinctively valuable, and in ways that go beyond the disorientation likely to result from the ending of the relationship.

## CONCLUDING COMMENT

It is delightful to have one's work read at all. To have it read carefully, thoughtfully, and engaged with by excellent critics is an honor. We're grateful to the editors for prompting the critics and to the critics for giving us such rich food for thought.

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