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Lapidation and Apology

Cass R. Sunstein[†]

ABSTRACT

Groups of people, outraged by some real or imagined transgression, often respond in a way that is wildly disproportionate to the occasion, thus ruining the transgressor's day, month, year, or life. To capture that phenomenon, we might repurpose an old word: lapidation. Technically, the word is a synonym for stoning, but it sounds much less violent. It is also obscure, which makes it easier to enlist for contemporary purposes. Lapidation plays a role in affirming, and helping to constitute, tribal identity. It typically occurs when a transgressor is taken to have violated a taboo, which helps account for the different people and events that trigger left-of-center and right-of-center lapidation. One of the problems with lapidation is that it often accomplishes little; it expresses outrage, and allows people to signal their identity, but does no more. Victims of lapidation might be tempted to apologize, but apologies can prove ineffective or even make things worse, depending on the nature of the lapidators. Some forms of lapidation can and should be regulated, consistent with First Amendment principles, but the primary responses must come from the private sector.

This is not a sermon, not exactly, but we begin with a passage from the Gospel according to John:

*Jesus went unto the mount of Olives.
And early in the morning he came again into the temple, and all the people came unto him; and he sat down, and taught them.
And the scribes and Pharisees brought unto him a woman taken in adultery; and when they had set her in the midst,
They say unto him, Master, this woman was taken in adultery, in the very act.
Now Moses in the law commanded us, that such should be stoned: but what sayest thou?
This they said, tempting him, that they might have to accuse him. But Jesus stooped down, and with his finger wrote on the*

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*ground, as though he heard them not.
 So when they continued asking him, he lifted up himself, and
 said unto them, He that is without sin among you, let him first
 cast a stone at her.
 And again he stooped down, and wrote on the ground.
 And they which heard it, being convicted by their own con-
 science, went out one by one, beginning at the eldest, even unto
 the last: and Jesus was left alone, and the woman standing in
 the midst.
 When Jesus had lifted up himself, and saw none but the
 woman, he said unto her, Woman, where are those thine accus-
 ers? hath no man condemned thee?
 She said, No man, Lord. And Jesus said unto her, Neither do I
 condemn thee: go, and sin no more.¹*

The English language needs a word for what happens *when a group of people, outraged by a real or imagined transgression, responds in a way that is disproportionate to the occasion*, thus ruining the transgressor's day, month, year, or life.² I propose that we repurpose an old word: *lapidation*.³ Technically, the word is a synonym for stoning, but it sounds much less violent. That is a major advantage, but as I understand it here, lapidation need not be literally violent. It might include threats, or provoke threats, and it might even provoke or include violence, but it is hardly actual stoning. The proposed term is also obscure, which is again an advantage; its obscurity makes it easier to enlist it for contemporary purposes.

To see what I have in mind, consider some diverse examples:

1. Ronald Sullivan is a Harvard Law professor who joined the team of lawyers defending Hollywood producer Harvey Weinstein against charges of rape and sexual abuse. A group of students rallied and protested against him, attacked his character, and called for his removal as Faculty Dean at Winthrop House. Their call succeeded. Harvard ended Sullivan's deanship.⁴

¹ *John* 8:1–11.

² It is of course fair to ask what counts as a disproportionate response, and who decides whether it does. I bracket that question here and simply assume that the response counts as disproportionate.

³ See generally Darius Rejali, *Studying a Practice: An Inquiry into Lapidation*, 18 CRITIQUE: CRITICAL MIDDLE E. STUD. 67 (2001).

⁴ See Kate Taylor, *Harvard's First Black Faculty Deans Let Go Amid Uproar Over Harvey Weinstein Defense*, N.Y. TIMES (May 12, 2019), <https://www.nytimes.com/2019/05/11/us/ronald->

2. Noah Carl is a young sociologist who was awarded a fellowship at Cambridge University's St. Edmund's College. Carl has published research on trust and intelligence in well-regarded journals. He has also written some shorter and less formal papers, involving immigration and racial differences, that some readers found offensive. An investigation was duly undertaken, and Carl was asked to leave St. Edmund's.⁵
3. Representative Ilhan Omar made some statements, provocative or perhaps worse, about Israel and its American supporters. The comments provoked a flood of outrage.⁶ She ultimately received numerous death threats.⁷
4. At various points in her career, Senator Elizabeth Warren has claimed that she has Native American ancestry. Those claims affected her candidacy for presidency, in part because President Donald Trump refers to her as "Pocahontas."⁸
5. In 2017, former Senator Al Franken was accused of having engaged in sexually aggressive behavior, including unwanted touching. He was essentially forced to resign from the U.S. Senate.⁹

Each of these cases involves lapidation as I understand it here. In some cases, lapidation is based on a lie, a mistake, or a misunderstanding. In such cases, people are lapidated even though they did nothing wrong.¹⁰ They might have made some kind of misstatement and so have been misinterpreted by reasonable listeners. Even so, they did not intend to say what they were heard to say.

sullivan-harvard.html [https://perma.cc/5VE2-BSRE].

⁵ See Richard Adams, *Cambridge College Sacks Researcher over Links with Far Right*, GUARDIAN (May 1, 2019), <https://www.theguardian.com/education/2019/may/01/cambridge-university-college-dismisses-researcher-far-right-links-noah-carl> [https://perma.cc/S6GP-EFU6].

⁶ See Zack Beauchamp, *The Ilhan Omar Anti-Semitism Controversy, Explained*, VOX (Mar. 6, 2019), <https://www.vox.com/policy-and-politics/2019/3/6/18251639/ilhan-omar-israel-anti-semitism-jews> [https://perma.cc/8PWQ-GM95].

⁷ See Associated Press, *Rep. Ilhan Omar Says She's Getting More Death Threats After Trump Tweet*, L.A. TIMES (Apr. 15, 2019), <https://www.latimes.com/politics/la-na-pol-ilhan-omar-trump-tweet-9-11-story.html> [https://perma.cc/LW4Y-3XVQ].

⁸ See Gregory Krieg, *Here's the Deal with Elizabeth Warren's Native American Heritage*, CNN (Oct. 15, 2018), <https://www.cnn.com/2016/06/29/politics/elizabeth-warren-native-american-pocahontas/index.html> [https://perma.cc/888K-2VAC].

⁹ See Elana Schor & Seung Min Kim, *Franken Resigns*, POLITICO (Dec. 7, 2017), <https://www.politico.com/story/2017/12/07/franken-resigns-285957> [https://perma.cc/JJ4H-E6G7].

¹⁰ Readers can make up their own minds about the category in which the cases in text should be taken to fall.

In other cases, the transgression is real, and lapidators have a legitimate concern. They are right to complain and to emphasize that people have been saddened, hurt, or wronged. The problem is that they lose a sense of proportion. They want heads to roll. Someone makes a mistake, or a foolish or offensive comment, and lapidators come out in force, often in a state of frenzy. Usually they are led by *lapidation entrepreneurs*, who have their own agenda. They might be concerned with self-promotion. They might be concerned with promoting a cause or with defeating an opponent, for whom the lapidation victim is taken to stand, or can be made to stand. They may want to make the occasion for lapidation stand for the opponent, so that the opponent, or the cause for which they stand, *is* that occasion. (“He is Spartacus,” more or less.) Lapidation entrepreneurs may unleash something horrific. That might be intentional.

To be sure, we can ask hard questions about the precise definition. If there is a small burst of outrage on campus or on social media, ought we to speak of lapidation? If people receive threats in the mail, have they been lapidated? The best answer is that while some cases are de minimis or a matter of trivial concern, lapidation can occur even when the number of participations is low, and the outcry is not exactly loud. Even if a few stones are thrown, people might get hurt. At the very least, they might feel threatened or despised. In some cases, they might lose their reputation, their jobs, their opportunities, and their friends; they might be in some sense “canceled.”¹¹

Can lapidation be justified? As defined here, it cannot be. No one should doubt that groups of people, offended or outraged by statements or actions, can be entirely right. What they seek, and what they do, may not be disproportionate. Recall that lapidation, as understood here, occurs when a response to a statement or action is disproportionate. We might therefore have hard cases, in which reasonable people dispute whether lapidation is involved. What Senator Franken did was worse than inappropriate. But it might well be doubted that he should have been forced to resign.

In ancient times, people were lapidated for adultery and idolatry.¹² This is a clue to what triggers the practice. Like its old namesake, contemporary lapidation typically occurs when a person or institution *has violated a taboo*. Lapidators operate as a kind of private police force,

¹¹ See, e.g., Braktkton Booker, *White Woman Who Called Police on Black Bird-Watcher in Central Park Has Been Fired*, NPR (May 26, 2020), <https://www.npr.org/2020/05/26/862230724/white-woman-who-called-police-on-black-bird-watcher-in-central-park-placed-on-le> [<https://perma.cc/9KFF-5V88>].

¹² See Vincent J. Rosivach, *Execution by Stoning in Athens*, 6 CLASSICAL ANTIQUITY 232, 232 (1987); Catherine E. Winiarski, *Adultery, Idolatry, and the Subject of Monotheism*, 38 RELIGION & LITERATURE 41, 44 (2006).

enforcing some intensely held moral or political commitment that (in their view) is at risk.¹³ That explains why lapidation comes in such diverse shapes and sizes, and why lapidation helps signal and constitute tribal identity. People with different moral or political values, and different kinds of affiliations, will be inclined to lapidate in accordance with those values and affiliations. Cases that seem, to some people, to be self-evidently justified and proportionate responses will seem, to other people, to be unambiguous lapidations.

Left-of-center lapidators typically point to what they see as racist, sexist, and homophobic behavior.¹⁴ #MeToo produced some lapidation. To be sure, some of the #MeToo movement was justified and hence does not count as lapidation at all; consider the case of Harvey Weinstein.¹⁵ But other cases are much less clear. Identification of those cases would produce a great deal of controversy, but if what is involved is highly inappropriate flirting, and a suggestion of a fully consensual relationship (without any hint of sanctions for a refusal), a very strong collective response might plausibly be counted as lapidation.

Right-of-center lapidators tend to focus on what they see as disloyalty, disrespect for authority, a despicable lack of patriotism, or hypocrisy (a particular favorite, for especially interesting reasons). In his work on moral foundations, Jonathan Haidt contends that conservatives place a far greater emphasis than liberals on authority, loyalty, and purity.¹⁶ Haidt's work illuminates the distinctly right-of-center nature of some kinds of lapidation. When someone suggests some kind of disloyalty, particularly to the nation itself, right-wing lapidators tend to come out in force.

George Orwell's *1984* is unquestionably the greatest fictional account of lapidation – the most astute, the most precise, the most attuned to human psychology.¹⁷ One of its defining chapters explores the Two Minutes Hate, which helps to establish and maintain Big Brother's regime.¹⁸ As Orwell describes it, the Hate begins with a flash of a face on a large screen. It is Emmanuel Goldstein, the Enemy of the People.

¹³ See, e.g., Robert F. Worth, *Crime (Sex) and Punishment (Stoning)*, N.Y. TIMES (Aug. 21, 2010), <https://www.nytimes.com/2010/08/22/weekinreview/22worth.html> [<https://perma.cc/J9RM-F3D7>].

¹⁴ See, e.g., Booker, *supra* note 11.

¹⁵ See generally *Harvey Weinstein Timeline: How the Scandal Unfolded*, BBC NEWS (May 24, 2019), <https://www.bbc.com/news/entertainment-arts-41594672> [<https://perma.cc/7DNM-N8Y4>].

¹⁶ See JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* (2014).

¹⁷ See GEORGE ORWELL, 1984 15–20 (1949).

¹⁸ *Id.*

Goldstein produces fear and disgust. He was once a leader in the Party, but he abandoned it and became a counterrevolutionary. Condemned to death, he managed to escape and to disappear. “He was the primal traitor, the earliest defiler of the Party’s purity.”¹⁹ Goldstein was ultimately responsible for heresies and treacheries of all kinds. In the first thirty seconds of the Hate, Goldstein’s voice is heard, as he denounces the party and calls for freedom of multiple kinds.²⁰

The result is to produce rage and fear in the audience, and to do so immediately. Somehow Goldstein managed to remain a serious threat. Wherever he was, he commanded a kind of shadow army, a network of conspirators. He was the author of a terrible book, including all the heresies.²¹

In the second minute of the Hate, people become frenzied. They leap and shout, trying to drown out Goldstein’s maddening voice. Children join in the shouting. Orwell’s hero, Winston, finds himself unable to resist. He too begins to shout, and also to kick violently. On his part, this was no mere show. “The horrible thing about the Two Minutes Hate was not that one was obliged to act a part, but, on the contrary, that it was impossible to avoid joining in.”²² No pretense was necessary: “A hideous ecstasy of fear and vindictiveness, a desire to kill, to torture, to smart faces with a sledgehammer, seemed to flow through the whole group of people like an electric current, turning one even against one’s will into a grimacing, screaming lunatic.”²³

Despite loathing Big Brother, Winston felt his feelings “changed into adoration, and Big Brother seemed to tower up, an invincible, fearless protector, standing like a rock” against various threats. And as his hatred mounts, it turns sexual. Winston fantasizes about raping and murdering the girl who is standing behind him.²⁴

At that point, the Hate rises to its climax. Goldstein’s voice becomes that of an actual bleating sheep, and for a moment, his face is transformed into that of a sheep. Big Brother’s face then fills the screen, powerful, comforting, and mysteriously calm. Big Brother’s actual words are not heard, but they are felt, as a kind of reassurance. At that point the Party’s three slogans appear on the screen:

¹⁹ *Id.* at 15.

²⁰ *See id.* at 16.

²¹ *Id.* at 17.

²² *Id.* at 17–18.

²³ *Id.* at 18.

²⁴ *Id.* at 18–19.

WAR IS PEACE

FREEDOM IS SLAVERY

IGNORANCE IS STRENGTH.²⁵

A member of the audience seems to pray to Big Brother. For thirty seconds the audience chants in his honor, in “an act of self-hypnosis, a deliberate drowning of consciousness by means of rhythmic noise.”²⁶ Winston chants with the rest, for “it was impossible to do otherwise.”²⁷

What makes lapidation possible? A lot of the answer is provided by the process of “group polarization,” which means that when like-minded people speak with one another, they tend to go to extremes.²⁸ (By like-minded people, I mean people who tend to agree with one another.) More specifically, groups of people, engaged in deliberation together, typically end up in a more extreme position in line with the tendencies of group members before deliberation began. This is the phenomenon known as group polarization. Group polarization is the usual pattern with deliberating groups, having been found in numerous studies involving many countries.²⁹

It follows that a group of people who think that immigration is a serious problem will, after discussion, think that immigration is a horribly serious problem; that those who dislike the Affordable Care Act will think, after discussion, that the Affordable Care Act is truly awful; that those who approve of an ongoing war effort will, as a result of discussion, become still more enthusiastic about that effort; that people who dislike a nation’s leaders will dislike those leaders quite intensely after talking with one another; and that people who disapprove of the United States, and are suspicious of its intentions, will increase their disapproval and suspicion if they exchange points of view. Indeed, there is specific evidence of the latter phenomenon among citizens of France.³⁰ When like-minded people talk with one another, they usually end up thinking a more extreme version of what they thought before they started to talk. It should be readily apparent that enclaves of people, inclined to rebellion or even violence, might move sharply in that

²⁵ *Id.* at 19.

²⁶ *Id.* at 20.

²⁷ *Id.*

²⁸ See Cass R. Sunstein, *The Law of Group Polarization*, 10 J. POL. PHIL. 175, 176 (2002). I draw on that treatment here.

²⁹ ROGER BROWN, *SOCIAL PSYCHOLOGY* 200–48 (2d ed. 1986)

³⁰ See *id.* at 224.

direction as a consequence of internal deliberations. Political extremism is often a product of group polarization.

Suppose that people begin with the thought that Ronald Sullivan probably ought not to have agreed to represent Harvey Weinstein, or that Al Franken did something pretty bad. If so, their discussions will probably make them more unified and more confident about those beliefs, and ultimately more extreme. A key reason involves the dynamics of outrage.³¹ Whenever some transgression has occurred, many people want to appear at least as appalled as others in their social group.³² That can transform mere disapproval into lapidation.

Why do people lapidate? Consider this claim from Sandra Cason, a protestor in the 1960s:

If I had known that not a single lunch counter would open as a result of my action I could not have done differently than I did. If I had known violence would result, I could not have done differently than I did. I am thankful for the sit-ins if for no other reason than that they provided me with an opportunity for making a slogan into a reality, by turning a decision into an action. It seems to me that this is what life is all about.³³

This is a claim about the *expressive* nature of some political action. It captures something important about lapidation—a sense that consequences are irrelevant. Note Cason’s proud suggestion that she “could not have” acted differently even if her action were futile, and even if her action were productive of violence and in that sense perverse.

We can better understand the expressive nature of some political actions by reference to a distinction, often made within behavioral science, between two families of cognitive operations in the human mind: System 1, which is fast, automatic, and intuitive, and System 2, which is slow, calculative, and deliberative.³⁴ When people recognize a smiling face, add two plus two, or know how to get to their bathroom in the middle of the night, System 1 is at work. When people first learn to drive, or multiply 563 times 322, people must rely on System 2. System 1 tends to be expressive; System 2 tends to focus on consequences.

³¹ See Craig McGarty et al., *Collective Action as the Material Expression of Opinion-Based Group Membership*, 65 J. SOC. ISSUES 839, 851 (2009).

³² See David Schkade et al., *Deliberating About Dollars: The Severity Shift*, 100 COLUM. L. REV. 1139 (2000).

³³ JAMES MILLER, *DEMOCRACY IS IN THE STREETS: FROM PORT HURON TO THE SIEGE OF CHICAGO* 52 (1987).

³⁴ See DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011).

System 1 is also associated with identifiable behavioral biases. People often show “present bias,” focusing on the short-term and downplaying the future.³⁵ For better or for worse, most people tend to be unrealistically optimistic.³⁶ In assessing risks, people use heuristics, or mental shortcuts, that often work well, but that sometimes lead them in unfortunate directions.³⁷ With respect to probability, people’s intuitions go badly wrong, in the sense that they produce serious mistakes, including life-threatening ones.³⁸ Lapidation is typically a matter of System 1—quick, automatic reaction to a real or perceived transgression.³⁹ In behavioral terms, Cason’s action was the product of System 1.

Compare these words from Herbert Simon:

We are all Expressionists part of the time. Sometimes we just want to scream loudly at injustice, or to stand up and be counted. These are noble motives, but any serious revolutionist must often deprive himself of the pleasures of self-expression. He must judge his actions by their ultimate effects on institutions.⁴⁰

Lapidation is often expressive, not based on a judgment about its effects on institutions. When people lapidate, they may think that they are achieving something important. Even if lapidation is a grossly disproportionate response to the action in question, in the sense that it is based on a lie or a falsehood, or is an excessive response to an admitted wrong, maybe lapidators are bringing about desirable social change. By targeting someone, and making that person stand for some kind of evil, lapidators might be able to attract widespread attention and spur reform.

At a minimum, lapidators may succeed in ruining a reputation or forcing a resignation. When their cause is just, that may be valuable and in a sense good, and it might lead to much more. But if social change is the goal, it is reasonable to ask whether the immense amount of time and emotional energy expended on lapidation would be better spent elsewhere—especially because a real person, or real people, are being

³⁵ For references and discussion, see CASS R. SUNSTEIN, *WHY NUDGE?: THE POLITICS OF LIBERTARIAN PATERNALISM* (2015).

³⁶ See TALI SHAROT, *THE OPTIMISM BIAS: A TOUR OF THE IRRATIONALLY POSITIVE BRAIN* (2011).

³⁷ See Kahneman, *supra* note 34.

³⁸ For a powerful demonstration, see Daniel L. Chen et al., *Decision-Making Under the Gambler’s Fallacy: Evidence from Asylum Judges, Loan Officers, and Baseball Umpires*, 131 Q.J. ECON. 1181 (2014).

³⁹ See Daniel Kahneman & Cass R. Sunstein, *Indignation: Psychology, Politics, Law* (John M. Olin Law & Economics, Working Paper No. 36, 2000).

⁴⁰ See HERBERT A. SIMON, *MODELS OF MY LIFE* 281 (1991).

hurt in the process. Recall that by definition, lapidation is a disproportionate response to the action in question, and in general, it is best to live in accordance with the principle that the good ends do not generally justify bad means.

For its victims, lapidation can be a horror, a kind of living nightmare. In some cases, they receive death threats. Even when their security is not at risk, they carry a stamp of shame. They may never fully recover.

In response, what should the objects of lapidation do? A tempting answer is simple: They should apologize. Put to one side the moral question and assume that their goal is solely strategic: to make it stop. Is an apology a good idea?

It might be. An apology might give the lapidators a sense that they have won. At least this is so if the apology is taken as not merely an admission of wrongdoing but also as a kind of self-abasement, groveling, a way of begging for forgiveness.⁴¹ Lapidators might think: We have achieved what we want to achieve. Now let us move on.

But there is an alternative possibility. Lapidators might smell blood. They might think that they have received the equivalent of a confession, which means that lapidation will continue until there is some kind of execution (a retreat from public life, a forced resignation, even a criminal prosecution). Everything depends on the distribution of emotions and beliefs on the part of lapidators – on how merciful and focused they are inclined to be.

It is important and true that lapidators might feel, or be, quite weak, or relatively powerful, and they might be using whatever tools they have. They might think that collective outrage is all they have. They might be right. But the consequence might be to ruin individual lives, for a short or long time, and the victims of lapidation might not be able to do much about it.

There is not a great deal of empirical work on this topic, but some evidence suggests that this admittedly vague account is broadly correct, and that apologies will often fail. Richard Hanania conducted an experiment in which respondents were given two versions of real-life events in which public figures made controversial statements (and were lapidated).⁴² In one version, the offender apologized; in the other, he did not.

⁴¹ Cf. Michael P. Haselhuhn et al., *How Implicit Beliefs Influence Trust Recovery*, 21(5) PSYCHOL. SCI. 645 (2010).

⁴² See Richard Hanania, *Does Apologizing Work? An Empirical Test of the Conventional Wisdom*, BEHAVIOURAL PUB. POL'Y (2015), <https://www.cambridge.org/core/journals/behavioural-public-policy/article/does-apologizing-work-an-empirical-test-of-the-conventional->

The first event involved Senator Rand Paul, who seemed to suggest that the Civil Rights Act of 1964 was wrong to forbid private discrimination on the basis of race.⁴³ The second event involved Lawrence Summers, at the time president of Harvard University, who offered controversial statements about why there were so few women scientists and engineers.⁴⁴

For example:

Version 1 (Apologetic):

*In response, Rand Paul quickly took an apologetic tone and backtracked, saying he would never repeal the Civil Rights Act. In the years since, observers argue that he has been bending over backwards to make up for his original statements, particularly through minority outreach. He now says he does not question any aspect of the Civil Rights Act. Paul won his Senate seat, and still serves to this day.*⁴⁵

Version 2 (Non-apologetic):

*In the days after the controversy, Paul refused to explicitly apologize for his statements. He went on the offensive, claiming that his opponents were engaging in unfair political attacks. In response to one interviewer, he said “What is going on here is an attempt to vilify us for partisan reasons. Where do your talking points come from?” Paul won his Senate seat, and still serves to this day.*⁴⁶

After respondents were shown one or the other version of the story, they were initially asked: “How offensive did you find Paul’s comments when reading about them?” They were also asked whether the controversy made them less likely to vote for Paul. For Summers, the experiment was similar, except respondents were asked, “Should Summers have faced negative consequences for his statements?”⁴⁷

For Paul, the apology had no effect in aggregate. For liberals, the apology appeared to have a negative effect, but it fell short of

wisdom/D34F1D89E6FF6A6E32C22C75F0C5FE24 [https://perma.cc/5N32-46C4].

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

significance. For Summers, the apology turned out to have a (significant) negative effect in aggregate. Disaggregating across groups in the Summers case, the negative effect was especially large among women and liberals; there was no significant effect one way or the other among men, conservatives, and moderates. For both Summers and Paul, the effect of an apology was to make women more supportive of punishment, but there was no effect on men. There was *no* group, in either case, that was less inclined to punish the offender as a result of an apology.⁴⁸

It is not clear how to generalize these intriguing findings. Suppose that a politician offends the political right, by saying (for example) that the United States is a force for evil in the world and should own up to its misdeeds; that those who want to regulate abortion believe in male supremacy, and are seeking to preserve it; that hunting should be banned; or that no white person can possibly understand what it is like to be African American. We might imagine something like the mirror image of the findings just described: Perhaps conservatives would seek more punishment while liberals would be unmoved. Or perhaps an apology would have a beneficial effect, leading people, on average, to be less inclined to favor punishment.

To obtain further perspective on these questions, I conducted a survey on Amazon's Mechanical Turk, presenting four scenarios on a random basis to different groups of 400 Americans, and asking whether an apology would make people more inclined to support a public official, less so, or neither:

1. Suppose that a recent nominee for the position of Secretary of State said, a few years ago, "I think the United States should apologize for the many terrible things that it has done in the world." Suppose that the comment has caused a great deal of controversy. If the nominee said, "I apologize for that statement; it was foolish of me to say that," would you be:
2. Suppose that a presidential candidate said, a few years ago, "People who want to ban abortion just don't care about women." Suppose that the comment has caused a great deal of controversy. If the candidate said, "I apologize for that statement; it was foolish of me to say that," would you be:
3. Suppose that a presidential candidate has been accused, by a number of women, of inappropriate touching—of getting too close to them, of hugging them too much, of hugging them

⁴⁸ Hanania, *supra* note 42.

too long. Some of the women have said, "I felt violated." If the candidate said, "I apologize for what I did; it was not right, and I will cease and desist," would you be:

4. Suppose that a nominee for the position of Attorney General said, a few years ago, "Gays and lesbians are violating God's will. Marriage should be between Adam and Eve, not Adam and Steve." Suppose that the comments have become controversial. If the nominee said, "I apologize for that statement; it was offensive, hurtful, and wrong," would you be:

In all four questions, the general tendency was for people to become less rather than more inclined to support a political figure as a result of an apology. In the first question, 41.5 percent said that they would be less inclined to support; 23 percent said that they would be more inclined to support; 35.5 percent said neither. In the second question, 41.5 percent said that they would be less inclined to support; 23 percent said that they would be more inclined to support; 35.5 percent said neither. In the second question, 36.5 percent said that they would be less inclined to support; 19.95 percent said that they would be more inclined to support; 43.55 percent said neither. In the third question, 29.38 percent said that they would be less inclined to support; 24.94 percent said that they would be more inclined to support; 45.68 percent said neither. In the fourth question, 36.84 percent said that they would be less inclined to support; 21.8 percent said that they would be more inclined to support; 41.35 percent said neither.

In a diverse set of cases, then, an apology tended to decrease rather than to increase support for people who said or did offensive things. To be sure, there were interesting demographic differences. In the first question, Democrats were far more likely to be less inclined to support (50.29 percent as opposed to 17.71 percent), whereas Republicans were equally divided (33 percent as opposed to 32 percent), and independents were in the middle (37.19 percent as opposed to 23.97 percent). In the second question, apologies made both Democrats and independents less inclined rather than more inclined to support (42.35 percent/17.87 percent for Democrats, 43/15 for Republicans), whereas Republicans were made more inclined rather than less inclined to support (24 percent less inclined to support, 32 percent more inclined to support). In the third question, both Democrats and Republicans were equally likely to become less inclined or more inclined to support, but puzzlingly, independents were made more inclined to support (42/22). In the fourth questions, Democrats (33/26.9), independents (41.5/13.3), and Republicans (36.5/24) were *all* inclined to be less supportive.

The differences here are intriguing, but the general lesson is clear. Across the relevant populations, apologies did not make people more inclined to support wrongdoers. To be sure, they did affect significant numbers of people in a positive way, and we could certainly devise scenarios in which the most relevant group would be moved in a positive direction by an apology. But to date, we have little evidence for the proposition that apologies are generally effective at decreasing the opprobrium directed at real or imagined wrongdoers.

Is lapidation protected by the First Amendment? To answer that question, we need to know some details. Are lapidators engaging in libel? Is what they are saying true or false? In my view, the constitutional issue deserves extended attention, with an emphasis on the inadequacies of existing constitutional law.⁴⁹ For present purposes, some general points will have to suffice; I will paint with a very broad brush.

There is no lapidation exception to the First Amendment. A vehement but factual attack on a public official or private citizen, not containing falsehoods, will almost certainly receive constitutional protection.⁵⁰ Sarcasm and satire are certainly protected, and even if the line is crossed to hatred and rage, the same conclusion follows.⁵¹ It follows that under existing doctrine, a central question—and, usually, the central question—is whether the lapidation contains falsehoods. If it is, it might be defamatory, and regulable under the current constitutional standards, sharply distinguishing between public and private figures.⁵² Under the familiar test: For public figures, a lapidator might be held liable if he or she knew that what was said was false, or acted with reckless indifference to the question of truth or falsity.⁵³ Some lapidations are indeed defamatory, and objects of lapidation can obtain compensation under existing constitutional standards. It is a fair question whether those standards should be rethought in the modern era, so as to allow more people to recover than currently can.⁵⁴

There is also a question whether some forms of lapidation might be counted as “fighting words.”⁵⁵ By definition, we are speaking of personal

⁴⁹ For a start, see Cass R. Sunstein, *Falsehoods and the First Amendment*, 33 HARV. J. L. & TECH. 388 (2020).

⁵⁰ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988).

⁵¹ *Id.*

⁵² See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–81 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347–48 (1974).

⁵³ *Sullivan*, 376 U.S. at 279–81.

⁵⁴ For an argument to this effect, see CASS R. SUNSTEIN, *LIARS: FREE SPEECH IN AN AGE OF DECEPTION* (forthcoming 2021).

⁵⁵ See generally *Chaplinsky v. New Hampshire*, 315 U.S. 569 (1942); *Gooding v. Wilson*, 405

attacks, and even if they do not contain falsehoods, they might amount to a form of bullying, potentially falling within what was, at one point, an unprotected category, and what might still qualify as that.⁵⁶ Here, it might seem, is an opportunity for constitutional restrictions on the most extreme forms of lapidation. On the other hand, the fighting words doctrine was created before the post-1960 flowering of free speech doctrine, and it is doubtful that current law would permit much regulation of attacks on public figures that do not contain falsehoods. The reason is that in general, such attacks do not count as fighting words, which means that such figures must respond with their own words, and not by invoking courts.⁵⁷ Still, it is a fair question whether some highly personal lapidations can be seen as fighting words; here is an area that deserves further attention.

If lapidation is generally protected by the First Amendment, notwithstanding the multiple harms that it causes, there is all the more reason for private institutions, including social media providers, to reduce or even stop it, including under the rubric of prevention of bullying and also the spread of misinformation.⁵⁸ We could easily imagine more aggressive standards, designed to protect against bullying as such. We could also imagine reforms from social media companies, designed to reduce the dissemination of falsehoods that are part and parcel of

U.S. 518 (1972). Note that the “fighting words doctrine,” as it is sometimes called, has not received serious attention from the Supreme Court for many decades. Modern forms of personal attack, and bullying, would appear to justify new attention.

⁵⁶ See *Chaplinsky*, 315 U.S. at 572.

⁵⁷ See *Hustler Magazine*, 485 U.S. at 57.

⁵⁸ See Sunstein, *supra* note 49; see also *Community Standards, Bullying and Harassment*, FACEBOOK, <https://www.facebook.com/communitystandards/bullying> [<https://perma.cc/7UCR-XMWT>], and in particular this excerpt, which is an excellent start:

Bullying and harassment happen in many places and come in many different forms, from making threats to releasing personally identifiable information, to sending threatening messages, and making unwanted malicious contact. We do not tolerate this kind of behavior because it prevents people from feeling safe and respected on Facebook.

We distinguish between public figures and private individuals because we want to allow discussion, which often includes critical commentary of people who are featured in the news or who have a large public audience. For public figures, we remove attacks that are severe as well as certain attacks where the public figure is directly tagged in the post or comment. For private individuals, our protection goes further: we remove content that’s meant to degrade or shame, including, for example, claims about someone’s sexual activity. We recognize that bullying and harassment can have more of an emotional impact on minors, which is why our policies provide heightened protection for users between the ages of 13 and 18.

Context and intent matter, and we allow people to share and re-share posts if it is clear that something was shared in order to condemn or draw attention to bullying and harassment. In certain instances, we require self-reporting because it helps us understand that the person targeted feels bullied or harassed. In addition to reporting such behavior and content, we encourage people to use tools available on Facebook to help protect against it.

Id.

lapidation. To be sure, there are hard line-drawing problems here. But an understanding of the problem of lapidation casts new light on the debate over misinformation on social media,⁵⁹ and underlines the importance of new steps to reduce the spread of falsehoods.⁶⁰ Community standards might well be rethought with lapidation in mind.

We should not lapidate lapidators. But we might remind them of the words of a great opponent of lapidation: “He that is without sin among you, let him first cast a stone.”⁶¹

⁵⁹ Soroush Vosoughi et al., *The Spread of True and False News Online*, 359 SCIENCE 1146 (2018).

⁶⁰ See Philip Lorenz-Spreen et al., *How Behavioural Sciences Can Promote Truth, Autonomy and Democratic Discourse Online*, 4 NAT. HUM. BEHAV. 1102 (2020).

⁶¹ *John* 8:1–11.