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RECONSTRUCTING CONSTITUTIONAL PUNISHMENT

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ABSTRACT

Constitutional orders punish—and they punish abundantly. However, analysis of the constitutionality of punishment tends to be reactive, focusing on constitutional violations. Considered in this light, the approach to constitutional punishment rests on conditions of unconstitutionality rather than proactively on the constitutional foundations of punishment as a legitimate liberal-democratic practice. Reactive approaches are predominantly informed by moral theories about the conditions under which punishment is legitimate. In contrast, proactive approaches call for a political theory of punishment as a legitimate practice of polities. This Article integrates the reactive and proactive approaches by bridging the divide between moral and political theories of punishment.

Using the jurisprudence of the United States Supreme Court as representative of a global trend in constitutional punishment doctrine, this Article engages details of case law to show how the integration of reactive and proactive approaches might work. The differences between the two approaches and the theories that inform them may seem too subtle to matter. They stand, however, across a large constitutional space, and their differences translate into important doctrinal, normative, and practical consequences. Nonetheless, despite the differences between these competing approaches, this Article contends that their integration in the

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articulation of the foundations of punishment as a legitimate constitutional practice are well within the reach of existing constitutional doctrines in liberal democracies and beyond.

The Article argues that constitutional punishment ought to rest upon five principles. First, constitutional orders must take constitutional ownership of punishment as coerced vulnerability created and imposed by such orders. Second, state violence in the form of punishment must be conceived and designed as cruelty-free, and practiced under this regulative ideal. Third, respect for individuals as the embodiment of dignity must be actively affirmed through, rather than simply not violated by, punishment. Fourth, this affirmation of human dignity through punishment entails that punishment must meet morally justified penological objectives and take seriously the moral agency of those subject to it. Finally, punishment that fails the above conditions must be fully redressable and adequate preventative remedies must be available and accessible. If doctrine is reformed just enough to rest on these principles, the necessary conditions of legitimate constitutional punishment would be met.

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INTRODUCTION

A. The Problem

Constitutions are supposed to constitute legal and political orders. Once such an order has been established, whatever its specific characteristics, the problem becomes how to maintain and reproduce the order over time. Here constitutionalism—the complex process of constitutional conservation, adaptation, and reproduction of legal and political orders—steps in. The tasks of constitutionalism universally implicate violence: constitutional orders repress some forms of violence while creating or perpetuating others, the expression and deployment of which the constitutional orders regulate.[1]

Of all forms of constitutional violence, none is more commonly deployed than punishment for criminal offenses. Perhaps no other has historically been more necessary. From time immemorial, societies have looked to the imposition of punishment to promote their most cherished values and to protect those societies from the dangers they fear most. And modern societies depend upon constitutional punishment as much as pre-modern ones depended on repressive royal, religious, and social sanctions.

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1. That violence is implicated in the constitution and reproduction of social orders has been recognized throughout the ages. For examples across different intellectual traditions, see THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR (Rex Warner trans., Penguin Books rev. ed. 1972); THOMAS HOBBES, LEVIATHAN (Richard Tuck ed., Cambridge Univ. Press 1996). For a rigorous and insightful discussion of punishment that starts with Hobbes, see generally Alice Ristroph, *Respect and Resistance in Punishment Theory*, 97 CALIF. L. REV. 601 (2009); WALTER BENJAMIN, *Critique of Violence*, *in* REFLECTIONS: ESSAYS, APHORISMS, AUTOBIOGRAPHICAL WRITINGS 277 (Edmund Jephcott trans., 1978); HANNAH ARENDT, ON VIOLENCE (1970); Jacques Derrida, *Force of Law: "The Mystical Foundation of Authority"*, 11 CARDOZO L. REV. 920 (1990); and, more recently, DOUGLASS C. NORTH, JOHN JOSEPH WALLIS & BARRY R. WEINGAST, VIOLENCE AND SOCIAL ORDERS: A CONCEPTUAL FRAMEWORK FOR INTERPRETING RECORDED HUMAN HISTORY (2009).

So powerful are the need and will of constitutional orders to punish that individuals facing the criminal law invariably find their constitutional rights—including in some cases the right to life—at stake in the process. When we consider all of the factors—legitimate and spurious—that lead to conviction, criminal law emerges as the arena where social misfortune, biological chance, blameworthy aspects of character and will all face off with the unrivaled power of legal and political orders.[2] But despite the inherent imperfections of such a process—and herein lies the problem this Article addresses—if constitutional orders are to be legitimate, at least some kinds of punishment must also be legitimate. Importantly, in this context, punishment is not just something constitutional orders inflict on the criminally liable; punishment is something constitutional orders do to themselves. How and why a constitutional order imposes punishment is a key determinant of its character. Historically, no type of constitutional order has raised the bar of legitimate punishment higher than the liberal democratic type where citizens are engaged in self-government.[3] And yet, liberal democratic constitutional orders punish—and they punish abundantly. Despite this fact, such orders only partially and reluctantly take ownership of punishment. They only look at punishment indirectly, concerned with its outer limits rather than with the conditions under which they could own punishment as one of the central institutions of modern constitutionalism.

This traditional approach—focusing on criteria for constitutionally impermissible punishment—is attractive for two main reasons. First, the focus on the outer limits of punishment draws considerable traction from the cultural aversion of liberal democracies to punitive practices. Punishment is inherently violent, and liberal democratic sensibilities reject violence, at least violence close to home. Second, this reactive approach to punishment follows a path of doctrinal argument untrammeled by deeper questions of law, politics, and morality, thus posing only limited challenges to broader issues of social justice.

On this second point, American constitutional law is paradigmatic. The United States Constitution gives legislatures and administrations considerable latitude in deciding what and how to punish. However (the

2. No modern thinker fully understood this collision before Hegel. *See* G.W.F. HEGEL, PHILOSOPHY OF RIGHT (T.M. Knox trans., 2000). Alan Norrie does justice to this aspect of Hegel's philosophy of law in his book, ALAN NORRIE, LAW, IDEOLOGY AND PUNISHMENT: RETRIEVAL AND CRITIQUE OF THE LIBERAL IDEAL OF CRIMINAL JUSTICE (1991).

3. For a sophisticated and illuminating study of self-governance through constitutionalism, see Vlad Perju, *Cosmopolitanism and Constitutional Self-Government*, 8 INT'L J. CONST. L. 326 (2010).

reactive approach quickly adds) the powers to criminalize and punish are not unlimited. The precise boundaries the Constitution sets for punishment then become the central question, one usually answered by reference to due process and Eighth Amendment violations.

This type of reactive approach certainly has a place in the constitutional theory of punishment. But it is insufficient in fatal ways. In fact, the reactive take on punishment is behind many of the injustices and dysfunctionalities that plague liberal democratic punishment. These issues will never be satisfactorily addressed until liberal democratic constitutions take on the problem of articulating the principles that would give punishment a legitimate place at the center of their constitutional stage—a problem that requires a proactive approach.

Rather than discard the reactive approach altogether, this Article proposes an approach to this problem that brings together the traditional reactive concern with the limits of punishment and a new proactive search for foundations. In the process, it integrates the political and moral theories of constitutional punishment. The differences this new approach makes may seem too subtle to matter. However, below the surface, the integrative approach has significant doctrinal, normative, and practical consequences, as I shall show. Ultimately, this integration offers the best hope for rescuing constitutional punishment from the depths to which it has sunk under the reactive approach.

B. Nature of the Argument

This Article is long and dense, in an attempt to do justice to the problem it faces. In Part I, legal theory engages the concrete details of case law using American constitutional doctrine as an example of a global fixation with reactive approaches to punishment.[4] The traditional approach

4. *See* Farmer v. Brennan, 511 U.S. 825 (1994); Brown v. Plata, 131 S. Ct. 1910 (2011). Cases involving prison conditions in light of the right against cruel punishment have received comparatively little attention in the literature. This list of relevant cases can be taken as a good starting point for research in this area of the law: Wilkinson v. Austin, 545 U.S. 209 (2005); Hope v. Pelzer, 536 U.S. 730 (2002); Hope v. Pelzer, 240 F.3d 975 (11th Cir. 2001); Farmer v. Brennan, 511 U.S. 825 (1994); Helling v. McKinney, 509 U.S. 25 (1993); Hudson v. McMillan, 503 U.S. 1 (1992); Wilson v. Seiter, 501 U.S. 294 (1991); Whitley v. Albers, 475 U.S. 312 (1986); Rhodes v. Chapman, 452 U.S. 337 (1981); Bell v. Wolfish, 441 U.S. 520 (1979); Hutto v. Finney, 437 U.S. 678 (1978); Estelle v. Gamble, 429 U.S. 97 (1976) (recognizing deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and uncertain infliction of pain proscribed by the Eighth Amendment); Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, 428 U.S. 153 (1976). More recently, Baze v. Rees, 553 U.S. 35 (2008), reaffirmed the "sure or very likely to cause . . . needless suffering" standard of *Helling*, 509 U.S. at 33, and the "substantial risk of serious harm" standard of *Farmer*, 511 U.S. at 842, when assessing risk of future harm that could constitute cruel punishment. Always

to punishment taken in these cases has serious limitations, particularly in the ways it defines punishment, cruelty, and rights. I shall argue, however, that these cases rest upon premises that provide the basis for arriving at principles that can establish punishment as a legitimate constitutional practice.

Part II takes a proactive, reconstructive approach to constitutional punishment, redefining *punishment*, *cruelty*, and *right* in light of five principles of legitimate constitutional punishment.[5]

At the beginning of this section, I propose a set of *integrative principles* that are necessary, but almost certainly not sufficient, for punishment to earn its place at the center of the constitutional stage alongside other pillars of liberal-democratic constitutions such as term limits and elections, separation and limitation of powers, justiciable rights, and judicial review.

The integrative principles are the following: *First*, constitutional orders must take ownership of punishment as coerced vulnerability created and imposed by them. *Second*, state violence in the form of punishment must be cruelty-free, both as conceived and as practiced. *Third*, punishment must proactively affirm, rather than simply refrain from violating, respect for each person as a free and equal embodiment of human dignity. *Fourth*, the affirmation of human dignity through punishment entails that punishment must both meet morally justified penological objectives and to take seriously the moral agency of those subject to it. *Finally*, punishment

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important for anyone interested in public law remedies for institutional harm is Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), 334 F. Supp. 1341 (M.D. Ala 1971), 344 F. Supp. 373 (M.D. Ala. 1972), sub nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). The European Court of Human Rights has also confronted the problem. *See* Saadi v. Italy, 37201 Eur. Ct. H.R. 06 (2008); Devrim Turan v. Turkey, 897 Eur. Ct. H.R. 02 (2006); Rohde v. Denmark, 69332 Eur. Ct. H.R. 01 (2005); Bekos and Koutropoulos v. Greece, 15250 Eur. Ct. H.R. 02 (2005); Mouisel v. France, 67263 Eur. Ct. H.R. 01 (2002); Valasinas v. Lithuania, 4458 Eur. Ct. H.R. 98 (2001); Peers v. Greece, 28584 Eur. Ct. H.R. 95 (2001); Dougoz v. Greece, 40907 Eur. Ct. H.R. 98 (2001); Kudla v. Poland, 30210 Eur. Ct. H.R. 96 (2000); Labita v Italy, 26772 Eur. Ct. H.R. 95 (2000); V. v. United Kingdom, 24888 Eur. Ct. H.R. 94 (1999); T. v. United Kingdom, 24724 Eur. Ct. H.R. 94 (1999); Erdagoz v. Turkey, 127 Eur. Ct. H.R. 945/746 (1997); Vilvarajah et al. v. United Kingdom, 13163 Eur. Ct. H.R. 87 (1991); Ireland v. United Kingdom, 5310 Eur. Ct. H.R. 71 (1978). Other relevant domestic and international judicial pronouncements are mentioned throughout this Article.

5. The argument here may be seen either as one that starts from within existing doctrines in order to push them out of their conceptual limitations, or as one that seeks to achieve a reflective equilibrium between existing doctrines and a set of exogenous principles designed to, over time, bend the existing doctrines to conform to those principles as their content continues to be worked out in the process. Either way, this Article's theoretical intervention remains stubbornly close to existing doctrines. Roberto Unger has characterized such an approach to legal analysis as "deviationist doctrine." *See* ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 15, 88–90 (1986).

that fails to meet the above conditions must be fully redressable, and adequate preventative remedies must be available and accessible to all. If constitutional orders were reformed just enough to reflect these principles, constitutional punishment would find its proper place in constitutionalism.

C. Integrating Moral and Political Theory

The importance of integrating moral and political theories of punishment—a key feature of my approach—will not be obvious to all readers. In connection with his constitutional theory of punishment, Alan Brudner writes that "a constitutional theory of the penal law's general part provides a more unified and ethically satisfying picture of it than any version of a moral theory."[6] The reason for this explanatory superiority, he explains, is that:

> Whereas a moral theory sees the penal law's general part as embodying the principle that moral evil and only moral evil ought to be blamed and censured, a constitutional theory sees it as reconciling state coercion with the agent's inviolability. The best theory of the penal law's general part . . . is a theory about when it is permissible for the state to coerce a free agent, not a theory about when it is appropriate for a community to blame and censure a member's moral character.[7]

Such a focus on the political and constitutional theory of punishment is helpful but incomplete, and also too far removed from existing constitutional doctrine. In American criminal law, for example, the conditions for the infliction of punishment must be tied to rationally defensible penological objectives if such punishment is to pass constitutional muster.[8] Because these objectives are subject to moral evaluation, if a reconstruction of constitutional punishment is to gain any traction in actual doctrine, the inquiry into the political theory of punishment must connect with the moral inquiry. Ultimately, coherence and intelligibility demand that both inquiries be integrated in a search for the moral as well as the political principles upon which legitimate

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6. ALAN BRUDNER, PUNISHMENT AND FREEDOM: A LIBERAL THEORY OF PENAL JUSTICE 325 (2009). Professor Brudner writes in the criminal law philosophy tradition of Kant and Hegel. *See* IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE (John Ladd trans., 1965) (1797) [hereinafter KANT, JUSTICE]; HEGEL, *supra* note 2.

7. BRUDNER, *supra* note 6, at 325–26.

8. *E.g.*, United States v. Gementera, 379 F.3d 596, 600 (9th Cir. 2004).

constitutional orders may take ownership of punishment as a legitimate, routine constitutional practice.

Easier said than done, of course. Punishment by definition entails *prima facie* violatons of rights to individual liberty, social status, bodily integrity, property, and even life. These *prima facie* violations raise a significant first order obstacle to punishment as a routine constitutional practice. As a consequence, even after reaching an affirmative answer to the first order question of *whether* punishment is constitutional,[9] the second order question remains as to *how* to use constitutional punishment. Whereas the first order question is one of political theory of the constitution, the second order question pertains to the morality of means and ends of punishment as practiced in a given polity. All too often, theories of punishment fail to speak to both questions in an integrating architectonic. And yet, without an integrative paradigm, one that rests punishment on constitutional *as well as* on moral theory, we cannot fully articulate the foundations and reach of constitutional punishment as a practice consistent with the freedom, equality, and dignity of self-governing citizens.

I am certainly not alone in the search for an integrative paradigm. Starting with the first social contract theories, legal and political theorists have searched for the conditions upon which constitutional orders may legitimately engage in punishment.[10] Much more recently, Jeffrie Murphy

9. Some have argued that societies would be better off without punishment. *See, e.g.*, DEIRDRE GOLASH, THE CASE AGAINST PUNISHMENT: RETRIBUTION, CRIME PREVENTION, AND THE LAW (2006).

10. For scholarship bearing on the all-important inquiry into the political-constitutional and moral theories of criminal law and punishment, among others cited throughout, *see generally* Markus D. Dubber, *Legitimating Penal Law*, 28 CARDOZO L. REV. 2597 (2007); GLANVILLE L. WILLIAMS, CRIMINAL LAW: THE GENERAL PART (1953); GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW (2000); GEORGE P. FLETCHER, THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, AND INTERNATIONAL (2007); NICOLA LACEY, STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES (1988); David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 85 (2004); David Luban, *Hannah Arendt as a Theorist of International Criminal Law*, 11 INT'L CRIM. L. REV. 621 (2011); DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION (2010); Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115 (2007); Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. L. REV. 359 (2005); John Gardner, *On the General Part of the Criminal Law*, *in* PHILOSOPHY AND THE CRIMINAL LAW 205 (Antony Duff ed., 1998); ALAN NORRIE, PUNISHMENT, RESPONSIBILITY, AND JUSTICE: A RELATIONAL CRITIQUE (2000); JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003); LINDSAY FARMER, CRIMINAL LAW, TRADITION AND LEGAL ORDER: CRIME AND THE GENIUS OF SCOTS LAW, 1747 TO THE PRESENT (1997); Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 OR. L. REV. 97 (2002); CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART (Stephen Shute & A. P. Simester eds., 2002); PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW (R.A. Duff & Staurt P. Green eds., 2011); PAUL W. KAHN, SACRED VIOLENCE: TORTURE, TERROR, AND SOVEREIGNTY (2008); Seana Valentine Shiffrin,

has argued that a morally "retributive theory [of punishment] really presupposes what might be called a 'gentlemen's club' picture of the political relation between man and society . . . ."[11] How then, Murphy asked, are we to reform our retributive practices in line with the social realities of poverty, alienation, prejudice, and structural duress?

> [W]e may really be forced seriously to consider a radical proposal. If we think that institutions of punishment are necessary and desirable, and if we are morally sensitive enough to want to be sure that we have the moral right to punish before we inflict it, then we had better first make sure that we have restructured society in such a way that criminals genuinely do correspond to the only model that will render punishment permissible—i.e., make sure that they are autonomous and that they do benefit in the requisite sense.[12]

In another compelling intervention, Alice Ristroph has argued that "[e]very crime is a collective endeavor."[13] If a polity were really to take responsibility for its criminal law as an enterprise of the political community, it

> might scrutinize the accusations it makes and the acts it criminalizes. Even if the polity were satisfied that the bounds of its substantive criminal law were properly drawn, it would then examine the extent to which social and political conditions within its control contributed to the commission of . . . crimes. And even if the polity were satisfied that it had defined the criminal law fairly and secured a just social order, it would also have to consider the political and social consequences of its responses to criminal acts. If its penal policies caused significant harm to individuals and communities, a responsible polity would not dismiss such harms as collateral consequences to justified violence. It would seek to address those harms, to mitigate them, perhaps to compensate for

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Harm and Its Moral Significance, LEGAL THEORY 18, Special Issue 03 (2012)**;** LARRY MAY, CRIMES AGAINST HUMANITY: A NORMATIVE ACCOUNT (2005); Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421 (2004); JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE (1990).

11. Jeffrie G. Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFF. 217, 240 (1973). *Contra* HERBERT MORRIS, ON GUILT AND INNOCENCE: ESSAYS IN LEGAL PHILOSOPHY AND MORAL PSYCHOLOGY (1976).

12. Murphy, *supra* note 11, at 243.

13. Alice Ristroph, *Responsibility for the Criminal Law*, *in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 107 (R.A. Duff & Stuart P. Green eds., 2011).

> them. Such scrutiny and remedial action would be difficult, but that is what it means to take responsibility.[14]

Murphy's and Ristroph's views are as morally and politically persuasive as, regrettably, they are ideologically distant from the long and intricate constitutional jurisprudence on crime and punishment in liberal democracies around the world, notably in the United States.[15] In contrast, the integrative paradigm I propose calls for constructive doctrinal reorientation rather than radical doctrinal creation. Using the example of American constitutional law, this Article builds on doctrinal elements already present in national courts' constitutional jurisprudence. The paradigm it proposes casts these elements in the new light of conceptual therapy and reconstruction under the shaping inflection of regulative principles. Its proximity to existing doctrine makes the new reconstructive paradigm more likely to find acceptance than those paradigms that suggest an approach that is more foreign to existing law.

An additional reason for flying close to the ground of existing doctrine is that in the context of American politics and, increasingly, around the world, the judiciary is the most promising agent of reasoned reform in many areas of social progress. Observers of this phenomenon often argue that the democratic pedigree of the judiciary is inferior to that of elected representatives.[16] In this Article, I leave aside the question of whether that is or is not the case. The focus here is upon one characteristic shared by both judicial and legislative law: both begin with choice. In their work on judicial policymaking, Malcolm Feeley and Edward Rubin distinguish judicial interpretation from judicial policymaking.[17] Whereas

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14. *Id.* at 124. Interestingly, Brazil has taken leadership in providing financial support to qualifying families of the incarcerated. Still, in that country, Congress is currently debating a legislative initiative to stipulate and guarantee the right of minors to have meaningful regular contact with their incarcerated parents.

15. I have contributed to the type of structural criticism and reconstruction defended by Murphy and Ristroph. *See* Paulo Barrozo, *Punishing Cruelly: Punishment, Cruelty and Mercy*, 2 CRIM. L. & PHIL. 67 (2008) [hereinafter Barrozo, *Punishing Cruelly*]; Paulo Barrozo, *The Jurisprudence of Cruelty in Criminal Law* (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1916910 [hereinafter Barrozo, *Jurisprudence of Cruelty*].

16. *E.g.*, ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? (1996); JEREMY WALDRON, THE DIGNITY OF LEGISLATION (1999).

17. MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 1–13 (1998). Empirical studies have confirmed that the discourse of "judicial restraint" is often just that. Indeed, surveying 842 Supreme Court cases between 1977 and 2003, Bailey and Maltzman found that Justices Thomas, Scalia, and Kennedy were the least deferential to Congress in the twenty-six year period covered by the study. *See* Michael A. Bailey & Forrest Maltzman, *Does Legal Doctrine Matter? Unpacking Law and Policy Preferences on the U.S. Supreme Court*, 102 AM. POL. SCI. REV. 369 (2008). A related matter is

interpretation appeals to authoritative sources as a guide to the substance of judicial decisions, judicial policymaking appeals to law only as a source for courts' jurisdiction to exercise policy authority over a discrete subject-matter domain. For example, and according to this distinction, in their sustained efforts to reform prisons beginning in the mid-1960s, American federal courts used the Eighth Amendment "not as a source of standards, but as a basis for judicial jurisdiction."[18] Once the federal courts established their Eighth Amendment jurisdiction over federal, state and local punishment, they designed interventionist policies derived from "correctional literature, sociology, and their own perceptions of political morality."[19]

The sweeping policy intervention of federal courts lost momentum in the 80s and has since suffered severe backlash from American courts, starting with the Supreme Court. Of even greater consequence to the future of constitutional punishment in the United States is that this intervention failed to leave behind a doctrinal structure consistently codifying the moral and political impulses behind the reforms, leaving unparented the work of courts in the reformist era. In other words, policy choices made by federal courts during the interventionist phase never matured into a fully developed doctrine of the foundations of legitimate constitutional punishment: they never went beyond the reactive fixation with criteria of constitutional violation.

Recently, the Supreme Court has revisited the problem of prisons in the United States in *Brown v. Plata*. Despite the apparent boldness of the Court's remedy, the shortcomings of a merely reactive approach to constitutional punishment were made clear once more when the Court narrowed the horizon of judicial remediation to two unattractive choices: blunt and poorly related remedies, or no remediation at all.[20]

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whether and to what extent a managerial rationality has impacted the operation and institutional identity of courts. For an almost real-time analysis of the emergence of managerial rationality in complex criminal courts, see Máximo Langer & Joseph W. Doherty, *Managerial Judging Goes International but Its Promise Remains Unfulfilled: An Empirical Assessment of the ITCY Reforms*, 36 YALE J. INT'L L. 241 (2011).

18. FEELEY & RUBIN, *supra* note 17, at 14.

19. *Id.*

20. *Brown v. Plata* affirms a remedial order from a federal three-judge panel for California to bring its prison population down to 137.5% of system capacity. 131 S. Ct. 1910, 1923 (2011). The panel was convened under the authority of the Prison Litigation Reform Act and unified two class actions proposed by mentally disabled and physically ill or challenged prisoners, respectively. The first class action, *Coleman v. Brown*, was originally filed in 1990. *Brown v. Plata* was originally filed in 2001.

Reflecting the weaknesses of the traditional reactive approach to punishment that they instantiate, these judicial policies continue to fall through the cracks of both the political theory of constitutional punishment and the constitutional morality of both the means and ends of punishment. In taking an integrative, reconstructive approach to the question of constitutional punishment, this Article shows a way out of this predicament.

I. TRADITIONAL UNCONSTITUTIONAL PUNISHMENT: THE AMERICAN EXAMPLE

Like most liberal democracies, the prison system in the United States is, as the Supreme Court recognizes, cruelty-ridden. One of the most disturbing features of this predicament is that the unconstitutional punishment doctrine developed by the Supreme Court directly and indirectly enshrines some of that cruelty. This doctrine is the cumulative result of legal analyses and choices concerned with the stipulation and management of standards of violation. That this has happened in the United States is puzzling, for here, more than in any other country, the courts have intervened extensively in an effort to rectify structural and system-wide cruel conditions of punishment. In this section, I reconstruct the jurisgenesis of American unconstitutional punishment doctrine, with heuristic focus on conditions-of-confinement Eighth Amendment cases.

In *Hutto v. Finney* (1978),[21] the Supreme Court stipulated that confinement is a form of punishment that attracts Eighth Amendment scrutiny. Confronting the question of whether double-celling constitutes cruel and unusual punishment, in *Rhodes v. Chapman* (1981), the Court started to cut back from *Hutto* by deciding that deprivations associated with overcrowding of prisons do not amount to punishment.[22] The *Rhodes* Court held, however, that "[c]onditions in prison must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment," adding that conditions ought to be considered "alone or in combination" in order to determine whether they "deprive inmates of the minimal civilized measure of life's necessities."[23] In the constitutional lineage of *Hutto* and

21. 437 U.S. 678 (1978).

22. *See* Rhodes v. Chapman, 452 U.S. 337, 348 (1981).

23. "[C]onditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society" *Id.* at 347.

Rhodes, the Supreme Court reaffirmed in *Helling v. McKinney* (1993), that "the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment."[24]

Before *Helling*, the Supreme Court confronted a crucial doctrinal choice in *Wilson v. Seiter* (1991).[25] Time and again, petitioners would come to the Court claiming incidents that occurred during confinement amounted to cruel punishment in violation of the Eighth Amendment. However, for the most part, those incidents were considered just that, incidental—and not, strictly speaking, punishment for which an explicit decree could be found in either the relevant statute or sentence. In *Wilson*, the Court confronted a momentous doctrinal choice about whether to define punishment for Eighth Amendment purposes via a path leading through consideration of structural conditions of punishment or through consideration of the actual intention of state actors involved in the stipulation, application or management of punishment.

Had the *Wilson* Court taken the structural path, it would have been forced to recognize that confinement necessarily subjects prisoners to specific as well as system-wide conditions, rendering prisoners vulnerable to unconstitutional harm. Thus, incidents occurring during confinement would be seen as part of the punishment, even when not specifically mentioned in statutes or sentences, and therefore brought within the purview of the Eighth Amendment. Taking the path of intention would mean instead that absent explicit provisions in law or sentences, the Court would only recognize as punishment incidents intentionally inflicted by prison officials. The Supreme Court in *Wilson* chose the latter definitional track,[26] holding that absent explicit legal or judicial provision, events in the context of confinement are subject to the purview of the Eighth Amendment only if inflicted by officials acting with at least deliberate indifference. With this decision, the application in *Estelle v. Gamble* (1976) of a deliberate indifference standard to the narrower issue of lack of

24. Helling v. McKinney, 509 U.S. 25, 31 (1993). The Eighth Amendment was implicitly incorporated in the Fourteenth Amendment Due Process Clause in State of Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947), but it was not until Robinson v. California, 370 U.S. 660 (1962), that the incorporation was overtly affirmed.

25. 501 U.S. 294 (1991).

26. Under the state action doctrine, heightened scrutiny is alert to findings of constitutional violations on the sole basis of impact, thus dispensing with interrogation of the mens rea of public officials and their surrogates. As I show below, the current Eighth Amendment doctrine finds liable state action only when culpable conduct of state agents is present.

adequate medical care in prisons was extended to encompass all other cases of conditions of confinement.[27]

Against this jurisprudential background, the Supreme Court came to *Farmer v. Brennan* (1994).[28] I turn now to how the Court's opinion in *Farmer* articulated the conceptions of punishment, cruelty, the right against cruel punishment, and remedies that characterize the Court's reactive, unconstitutional punishment doctrine. At stake in the *Farmer* opinion is how the decision "equilibrated" the justiciability of cruelty claims, the substance of the right against cruelty, and the remedies apportioned to it.[29] It is worth noting that the equilibration achieved in *Farmer* is fully reflected several years later in *Brown v. Plata* (2011).

A. Punishment

Dee Farmer, a male-to-female transgender inmate acting on her own behalf, filed a *Bivens* suit against several federal prison officials in their official only or official and personal capacities, depending upon the person. In her suit, Farmer alleged:

> [R]espondents either transferred petitioner to USP-Terre Haute or placed petitioner in its general population despite knowledge that the penitentiary had a violent environment and a history of inmate assaults, and despite knowledge that petitioner, as a transsexual who "projects feminine characteristics," would be particularly vulnerable to sexual attack by some USP-Terre Haute inmates.[30]

Indeed, less than two weeks after the transfer, Dee Farmer was beaten and raped by another inmate in her own cell.[31] This, Dee Farmer claimed, "amounted to a deliberately indifferent failure to protect [her] safety, and thus to a violation of [her] Eighth Amendment rights."[32] For the harm suffered, Farmer "sought compensatory and punitive damages, and an

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27. *See* Estelle v. Gamble, 429 U.S. 97 (1976).

28. 511 U.S. 825 (1994). *Farmer v. Brennan*, a case against federal prison officials, allows for doctrinal analysis to proceed without being sidetracked by problems arising in the area of sovereign immunity.

29. *See* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And their Connections to Substantive Rights*, 92 VA. L. REV. 633 (2006).

30. *Farmer*, 511 U.S. at 830–31.

31. *Id.* at 830.

32. *Id.* at 831.

injunction barring future confinement in any penitentiary, including USP-Terre Haute."[33]

In *Farmer*, the Supreme Court faced what would be another momentous doctrinal choice. Should it keep, relax, or harden the *Wilson* deliberate indifference standard? The Court chose to affirm it,[34] but with a significant twist.[35] On its face, the deliberate indifference standard evokes criminal negligence. Under the Model Penal Code, criminal negligence occurs when an agent neglects a substantial and unjustifiable risk associated with his conduct, and of which he failed to become aware when he should have.[36] If, oblivious to a risk he should know, the agent proceeds in his conduct and causes criminal harm, he acts in a criminally negligent way. Deliberate indifference would seem to attract a similar should-have-known standard.

Instead, the *Farmer* majority analogized the *Wilson* deliberate indifference standard to criminal recklessness. In the Model Penal Code definition, recklessness is conduct that consciously disregards a substantial and unjustifiable risk of harm.[37] Creating a recklessness-like requirement for each discrete aspect of punishment, the Court opined that "[*b*]*ecause . . . prison officials who lacked knowledge of a risk cannot be said to have inflicted punishment*, it remains open to the officials to prove that they were unaware even of an obvious risk to inmate health or safety." This upgrading of deliberate indifference from negligence to recklessness acquired dramatic dimensions when compounded with the requirements of

33. *Id.* Congress has since passed the Prison Rape Elimination Act of 2003. 42 U.S.C. § 15606 (2003). PREA created the National Prison Rape Elimination Commission, charged with recommending to the Attorney General "national standards for enhancing the detection, prevention, reduction, and punishment of prison rape." 42 U.S.C. § 15606(e)(1) (2003). Finally in 2012, the Department of Justice issued the National Standards to Prevent, Detect, and Respond to Prison Rape. *See* 28 C.F.R. § 115 (2012). The standards include a requirement "that inmates be screened for risk of being sexually abused or sexually abusive and that screening information be used to inform housing, bed, work, education, and program assignments. The goal is to keep inmates at high risk of victimization away from those at high risk of committing abuse." DEPT. OF JUSTICE, NATIONAL STANDARDS TO PREVENT, DETECT, AND RESPOND TO PRISON RAPE 6 (2012), *available at* http://ojp.gov/programs/pdfs/prea_final_rule.pdf.

34. The *Farmer v. Brennan* Court vacated the Court of Appeals judgment in favor of Farmer, remanding the case to the District Court for further evidentiary search and judgment. *Farmer*, 511 U.S. at 851.

35. On the culpability standard in *Farmer v. Brennan*, see Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881 (2009), criticizing the Supreme Court's decision in *Farmer v. Brennan* to raise the standard of culpability of prison officials for cruelty in violation of the Eighth Amendment from the equivalent to criminal negligence ("gross negligence," in the Court's parlance) to criminal recklessness.

36. MODEL PENAL CODE § 2.02 (1962).

37. *Id.*

effective defense stipulated by the Court. "[P]rison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, *even if the harm ultimately was not averted*. A prison official's duty under the Eighth Amendment is to ensure reasonable safety . . . ."[38]

In *Farmer*, the Supreme Court did recognize the vulnerability-creating aspect of confinement, writing that "*having stripped* [*prisoners*] *of virtually every means of self-protection* and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course."[39] Why then resist the derivation of the logical legal consequence from this recognition, namely that punishment is a structure-connected predicament? Whatever the reasons, the fact is that the *Farmer* opinion, now quoting from *Rhodes*,[40] fell back to the intentional paradigm in the definition of punishment, proclaiming that "[b]eing violently assaulted in prison *is simply not part of the penalty* that criminal offenders pay for their offenses against society."[41]

The doctrinal reduction in the ontology of punishment in *Farmer* was, in conclusion, twofold. First, the reduction assessed the specific circumstances of an individual's punishment through the lens of the abstract, the general penalty that the law prescribed and the actual sentence handed down. Second, the reduction required intention on the part of officials for any harm in the punitive context to be technically considered punishment under the purview of the Eighth Amendment. In terms of the ontology of punishment, the current cruel punishment doctrine applicable to the context of confinement combines objective textualist (stipulation in statute or sentence) and subjective motivationalist (the intentionalism of reckless deliberate indifference on the part of state actors) elements in the definition of punishment. This combination, I argue below, is seriously underinclusive.

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38. *Farmer*, 511 U.S. at 844 (emphasis added) (citation omitted) (internal quotation marks omitted). The forgotten lesson here is that of the dissent in *Resweber*: "The intent of the executioner cannot lessen the torture or excuse the result." State of Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 477 (1947) .

39. *Farmer*, 511 U.S. at 833 (emphasis added).

40. 452 U.S. 337 (1981).

41. *Farmer*, 511 U.S. at 834 (emphasis added) (citation omitted) (internal quotation marks omitted).

B. Cruelty

Consistent with its reactive focus on violations, the Supreme Court's definition of cruelty under the Constitution mirrors its definition of punishment. Objectively, a sufficiently severe harm amounts to cruelty if the punitive agency that caused it did so pursuant to a statute or sentence found to have violated the relevant general constitutional limitation on punishment. Subjectively, when not a stipulation of law or sentence, any harm must be recklessly caused or so allowed to take place by prison officials. Because of its reliance on an objectively ascertainable prohibitory norm and on intentional agency, the resulting understanding of cruelty combines objective and subjective elements, to which I return below in Part II. For now, I just point to the main aspects of objective and subjective conceptions of cruelty.

Reflecting an objective conception of cruelty, in *Farmer* the Supreme Court followed a traditional two-sided heuristic of cruelty. In the first leg of the heuristic, following Justice Stevens' concurring-dissenting opinion in *Hudson v. Palmer*,[42] *Farmer* reaffirmed that "gratuitously allowing the beating or rape of one prisoner by another serves no legitimate penological objective . . . ."[43] In the second, citing *Estelle v. Gamble*[44] for authority and quoting *Trop v. Dulles*,[45] *Farmer* concluded that gratuitous beating or rape does not conform to "evolving standards of decency."[46] Bringing together the two sides of the heuristic—legitimate penological objectives and evolving moral standards—a harm reaches the cruelty threshold in the infliction of punishment only when brutality and suffering are penologically inexpedient and shocking to society's standard of decency.[47] To this understanding of cruelty, *Farmer* adds the rejection of the view that the cumulative effect of different aspects of the confinement condition can result in cruelty. It is not as if, the Court said, "all prison conditions are a seamless web for Eighth Amendment purposes."[48] Thus, if brutality and deprivation by official conduct are found not to serve legitimate

42. *See* Hudson v. Palmer, 468 U.S. 517, 541 (1984) (Stevens, J., dissenting).

43. *Farmer*, 511 U.S. at 833 (emphasis added) (citation omitted) (internal quotation marks omitted).

44. 429 U.S. 97 (1976).

45. Trop v. Dulles, 356 U.S. 86, 101 (1958).

46. *Farmer*, 511 U.S. at 833 (citation omitted).

47. To appeal to popular standards of decency is to outsource constitutional interpretation to the social creation of value-facts. Space is not available to explore here this practice of outsourcing.

48. Wilson v. Seiter, 501 U.S. 294, 305 (1991).

penological objectives or to be abhorrent in public opinion, they would violate constitutional limitations on punishment and the resulting harm would meet objective definitional requirements of cruelty.

Reflecting a subjective conception of cruelty, the *Farmer* opinion stipulated that if penologically unnecessary brutality against inmates and the resulting suffering were recklessly inflicted or allowed to occur by prison officials (or prescribed by legislators or sentencing judges), the resulting harm would meet the subjective definitional element of cruelty. *Farmer* concluded that prison officials are liable under the Eighth Amendment for their deliberate indifference toward the "health and safety" of inmates only if prison officials can be shown not only to have known that inmates faced a "substantial risk of serious harm," but also "disregard[ed] that risk by failing to take reasonable measures to abate it."[49]

In *Farmer*, the petitioner specifically argued that without an objective standard for "deliberate indifference," prison officials would have an incentive not only to disregard "obvious dangers," but to defensively avoid exposure to any knowledge about such dangers, with a potentially devastating systematic impact.[50] The Court responded to petitioner's claim with an argument that was rather off the mark. It wrote:

> Under the test we adopt today, an Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.[51]

The Court's response misfired because in trying to justify the adoption of a criminal recklessness-like standard of culpability for Eighth Amendment violations, it redundantly stipulated that the requirements of the recklessness standard were not those of the knowledge standard. The Model Penal Code defines "knowing" criminal conduct as the agent's awareness "that it is practically certain that his conduct will cause such a result."[52] Thus, when the Court said that a petitioner "need not show that a prison official acted or failed to act believing that harm actually would

49. *Farmer*, 511 U.S. at 848. It is like having to sue, under applicable lemon law, the Ford Motor Company's factory employee that actually assembled the malfunctioning brake of your car.

50. *See* Dolovich, *supra* note 35.

51. *Farmer*, 511 U.S. at 842.

52. MODEL PENAL CODE § 2.02 (1962).

befall an inmate," it was actually just saying that the standard is not "knowledge," not justifying why it should be that of "recklessness."

Adumbrating the subjectivism of criminal recklessness in the concept of cruelty, the Court further argued:

> The Eighth Amendment does not outlaw cruel and unusual "conditions"; it outlaws cruel and unusual punishments." . . . [A]n official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot be condemned as the infliction of punishment.[53]

"This Court's cases," *Farmer* added, "mandate inquiry into a prison official's state of mind, . . . and it is no accident that the Court has repeatedly said that the Eighth Amendment has a 'subjective component.'"[54] Hence, without the mens rea of the agent, cruelty prohibited by the Eighth Amendment cannot be found. This subjectivism in the definition of cruelty thus coheres remarkably with the subjectivism in the definition of punishment discussed above.

The Supreme Court's peculiar combination of objectivism and subjectivism in the jurisprudence of cruelty is more than a doctrinal misstep—it shows deficiency in realism. It does not even come close to capturing the reality of cruelty in prisons and jails. There are many ways in which a particular legal doctrine can fail. It can be unfair, unrealistic, or inexpert. The definition of cruelty emerging from the *Farmer* judgment is all these things.

C. Right

When the Supreme Court selected intentionalism over structuralism in the definition of punishment, and when it restricted cruelty to the specific combination of objective and subjective elements analyzed above, it set itself up, for all practical and theoretical purposes, for a misunderstanding of the substance of the right against cruel punishment. How deeply this narrow focus on conditions of unconstitutionality affects the Eighth Amendment right jurisprudence is also clear in *Farmer*.

Current reactive constitutional punishment doctrine attaches both negative and positive obligations to the Eighth Amendment right. In *Farmer*, the Court posited that "[t]he Eighth Amendment places *restraints* on prison officials, who may not, for example, use excessive physical

53. *Farmer*, 511 U.S. at 837–38.
54. *Id.* at 826 (quoting Wilson v. Seiter, 501 U.S. 294, 299 (1991)).

force against prisoners."[55] *Farmer* also asserted the Amendment "imposes *duties* on these officials, who must provide humane conditions of confinement," including basic necessities such as food, clothing, and shelter, as well as medical care and safety.[56] Setting aside for a moment the doctrinal problems with intentionalism in this area, one might think that under the Eighth Amendment the Court bans conditions of confinement that do not meet the basic necessities of life and safety. However, the Court's definition of punishment prevents it from going in that direction when defining the substance of the right not to be cruelly punished. So much so that, as noted above, the Court proclaimed that "the Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments.'"[57]

Transposing this understanding of the Eighth Amendment right onto cases in which, as in *Farmer*, the proximate agent of cruelty was another inmate, the Court has decided that not all injuries inflicted by prisoners on each other attract the Eighth Amendment-based tort-like liability for prison officials or the government under whose authority the prison operates. For a prison official to be liable, two requirements must be present: "First, the deprivation alleged must be, objectively, sufficiently serious[58] . . . . The second requirement follows from the principle that 'only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.'"[59] These two requirements map almost perfectly onto the distinctions made in the two previous sections between objective and subjective aspects of the Court's conceptions of punishment and cruelty.[60]

The substance of the Eighth Amendment right that emerges from *Farmer*, in specular relation to *Farmer*'s conceptions of punishment and cruelty, is disturbing. The government's direct Eighth Amendment obligations are limited to the kind, intensity, and proportionality of

55. *Id.* at 832 (citing Hudson v. McMillan, 503 U.S. 1 (1992)) (emphasis added).

56. *Id.* (citing Hudson v. Palmer, 468 U.S. 517, 526–27 (1984)) (emphasis added). The Court in *Brown v. Plata* would again return to the problem of prisoners' health, only this time within a causational chain linked back to overcrowding.

57. *Id.* at 837.

58. "[A] prison official's act or omission," says the Court, "must result in the denial of the minimal civilized measure of life's necessities. For a claim . . . based on failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm." *Id.* at 834 (citation omitted) (internal quotation marks omitted).

59. *Id.* (citations omitted) (internal quotation marks omitted).

60. As I have argued, the Court defines punishment objectively as that which is stipulated in a statute or sentence, or subjectively as deprivations caused by the reckless deliberate indifference of prison officials. In relation to cruelty, cruelty is objectively found when serious harm suffered by inmates is penologically inexpedient and shocking to the general standard of decency. Subjectively, cruelty obtains when officials act recklessly, causing serious harm or allowing it to be caused.

punishment stipulated in its criminal statutes or in the sentences of its judges.[61] In an inversion of state action doctrine, responsibility for any cruelty inflicted on prisoners not based on the text of statute or sentence falls upon prison officials only if they act with reckless deliberate indifference. The universe of cruel punishment left outside this binomial of text and intention is large and potentially expansionist.

There is yet another aspect of the Court's understanding of the substance of the Eighth Amendment—one that bears directly on the questions of the constitutional and political theory of the general part of the criminal law. Article 1, Section 8 of the Constitution invests Congress with all "necessary and proper" legislative power for the discharge of its constitutional mandate. Among the many laws that Congress enacts under this constitutional authority are, naturally, a myriad of criminal statutes. The legitimacy of society's interest in social order, personal security, and other interests and values promoted by criminal statutes is not in dispute. In the criminal justice system, the legislative, executive, and judicial branches are expected to operate jointly to keep society orderly and criminal conduct in check. The coercive nature of the operation of any effective system of criminal justice is undeniable and unavoidable. But all this takes place within the confines of a constitutional order premised on life, liberty, property, dignity, and the rejection of cruel punishment. In legitimate constitutional orders, the fundamental core or the minimum content of individual rights are only surrendered in extraordinary circumstances. In legitimate constitutional punishment, they are at most compromised. In short, they are to be made proportional to, or compatible with, other competing high constitutional values.

There is, therefore, a prima facie clash of constitutional principles in the constitutional ordering of criminal justice. What does this clash mean for how we understand the substance of the Eighth Amendment right?

If one takes the understanding of the Eight Amendment right as it has implicitly and explicitly emerged in *Farmer* as an answer to this question, one is bound to be disappointed. To do so would be to misunderstand the nature of fundamental rights in general, and the right against cruel punishment in particular, to force a compromise with penological objectives (especially those legitimized on extra-constitutional grounds), to make the right dependent on majoritarian consensus about civilizational

61. Taking into account variations from federal to state jurisdiction, and among the various state jurisdictions, decisions of parole boards may conceivably meet the textualist requirement. For due process-based criticism of punishment enhancement at the sentencing stage, see Frank R. Herrmann, 30=20: "*Understanding" Maximum Sentence Enhancements*, 46 BUFF. L. REV. 175 (1998).

standards, or to shield the punitive state behind the culpability of its agents. Fundamental rights are *fundamental* and *rights* for a reason. They are supposed to resist expediency, oppose opinion, and obligate the state, its actors, and its proxies.

Centering analysis of constitutional punishment on moral, ideological, or managerial disputes about what renders punishment unconstitutional has certainly created an unconstitutional punishment doctrine. This doctrine, as it currently stands, has its own legal, moral, and political problems. The negative sociological consequences of this doctrine are well known. But as we step back and look at the long arc of constitutional evolution, an even greater problem appears. Indeed, the orchestration over time of an entire line of jurisprudence concerned with violation of a fundamental right has distracted intellectual, moral, and political vigor from the essential task of understanding the nature and foundations of constitutional punishment in legitimate constitutional orders.

The failure to nurture a dialogue on the substance of constitutional punishment has detrimentally affected the reactive doctrine. This negative impact is especially apparent in the justiciability of rights violation claims and the remedies attached to findings of constitutional breach. The *Farmer* opinion once again illustrates the point, well summarized in the decision syllabus which tells us that the criminal recklessness standard "will not foreclose prospective injunctive relief, nor require a prisoner to suffer physical injury before obtaining prospective relief."[62] Let us probe this claim in the context of the "equilibration" of the substance, justiciability, and remedies of a right that arise out of the line of cases that I have been analyzing up to *Brown v. Plata*.[63]

To start, it is helpful to concede that the applicability of the Eighth Amendment is limited to the context of punishment. How then are we to determine what counts as punishment? In answering this fundamental question, the Supreme Court recognizes only two kinds of punishment:

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62. *Farmer*, 511 U.S. at 826–27.

63. In its simplest formulation, "equilibration" refers to the way courts adjust the three points (substance of the right, justiciability, and remedies) of the doctrinal equation of any fundamental right in order not to be forced into adopting remedies that they, for a variety of reasons, do not favor. *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991). "Equilibration" seems also to be a phenomenon of equitable jurisdiction broadly defined. Zygmunt J.B. Plater sheds light on the "balancing of equities" practice in equitable jurisdiction by identifying three analytically different balancing or equilibrating stages, namely "threshold balancing" (analogous to justiciability in rights equilibration theory), "determination of contending conducts" (analogous to determination of the substance of rights being equilibrated), and "discretion in fashioning remedies" (the remedial stage in rights equilibration). *See* Zygmunt J.B. Plater, *Statutory Violations and Equitable Discretion*, 70 CALIF. L. REV. 524 (1982).

first, that which is formally designated as such in criminal statutes and sentences, and, second, the deprivation or violence that is inflicted upon prisoners by prison officials whose conduct displays reckless (deliberate) indifference. Absent either objectively (textually) stipulated or otherwise culpably inflicted harm, no Eighth Amendment claim of cruelty in the context of imprisonment is justiciable because no punishment would have taken place.[64]

This narrow definition of what counts as punishment shapes the substance of the right against cruel punishment. While facially cruel punishment as per statute or sentence is now relatively less frequent, cases such as *Brown v. Plata*, which address claims of cruel conditions of confinement, continue to reach the courts. In adjudicating the small portion of these claims coming before it, the Supreme Court has decided that only cruelty that can be causally connected to omissive or comissive reckless (deliberate) indifference on the part of officials is punishment forbidden by the Eighth Amendment. Thus, for all practical purposes, the substance of the Eighth Amendment right may be formulated as a right against prison officials' intentional brutality or reckless indifference that causes severe suffering. It is easy to see how the narrow definition of punishment corresponds to a narrow understanding of the substance of the Eighth Amendment right.

The narrow conception of the right in turn leads to a restrictive approach to justiciability. Under the reactive constitutional punishment doctrine, only claims of cruel conditions of confinement that point to deliberately indifferent conduct by officials are actionable. The narrow definition of the right and the corresponding restrictive approach to justiciability lead, next, to a frugal approach to remedies. Except for injunctions, which are very difficult to obtain under the current doctrinal framework, remedies for the violation of the Eighth Amendment tend to amount to damages recovered against prison officials. *Brown v. Plata* would appear to carry some promise in this regard, to which I will return in a moment.

These developments leading up to *Farmer* and *Brown* defined the way the Eighth Amendment right, the justiciability of violation claims, and remedies were equilibrated after the culpability standard was approximated to criminal recklessness. In order to qualify for injunctive relief to prevent harm in violation of the Eighth Amendment, the plaintiff in *Farmer* had to prove that in their "current attitudes and conduct," prison

64. *See* Wilson v. Seiter, 501 U.S. 294 (1991).

officials showed reckless and deliberate indifference.[65] The Court clarified:

> An inmate seeking an injunction on the ground that there is a contemporary violation of a nature likely to continue, must adequately plead such a violation; to survive summary judgment, he must come forward with evidence from which it can be inferred that the defendant-officials were at the time the suit was filed, and are at the time of summary judgment, knowingly and unreasonably disregarding an objectively intolerable risk of harm, and that they will continue to do so; and finally to establish eligibility for an injunction, the inmate must demonstrate the continuance of that disregard during the remainder of the litigation and into the future. In so doing, the inmate may rely . . . on developments that postdate the pleadings and pretrial motions, as the defendants may rely on such developments to establish that the inmate is not entitled to an injunction. If the [trial] court finds the Eighth Amendment's subjective and objective requirements satisfied, it may grant appropriate injunctive relief.[66]

In relation to the recklessness standard, the petitioner in *Farmer* quite reasonably argued the recklessness test would entail that prisoners would first have to be victims of cruelty "before obtaining court-ordered correction of objectively inhumane prison conditions."[67] In response, the Court posited that "[i]t would, indeed, be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them. But nothing in the test we adopt today clashes with that common sense."[68] The Court then added:

> Petitioner's argument is flawed for the simple reason that one does not have to await the consummation of threatened injury to obtain preventive relief. Consistently with this principle, a subjective approach to deliberate indifference does not require a prisoner

65. *Farmer*, 511 U.S. at 845 (citing Helling v. McKinney, 509 U.S. 25, 36 (1993)).

66. *Id.* at 845–46 (relying on Hutto v. Finney, 437 U.S. 678, 685–88 (1978), for authority with regard to injunction as a remedy for prison conditions that are objectively offensive to the Eighth Amendment) (citations omitted) (internal quotation marks omitted).

67. *Id.* at 845.

68. *Id.* (citing *Helling*, 509 U.S. at 33; Pennsylvania v. West Virginia, 262 U.S. 553, 593 (1923)) (internal quotation marks omitted).

> seeking a remedy for unsafe conditions to await a tragic event such as an actual assault before obtaining relief.[69]

However, there is very little in the Court's opinion to give hope that petitioners would be able to overcome the high bars that the Court's equilibration of justiciability and remedies raised on the basis of narrowing the substance of the right.

This situation was not created by the Court alone. Only a year after *Farmer*, and four years after *Wilson*, Congress passed the Prison Litigation Reform Act of 1995 (PLRA). The PLRA requires exhaustion of all available administrative remedies before a suit with respect to prison conditions can be brought in federal court.[70] In *Woodford v. Ngo*,[71] the Supreme Court interpreted this requirement to include the retrospective obligation of having followed administrative procedures that were once available even when they are no longer so. The PLRA framework also authorizes the courts to summarily dismiss any claim for which there is no effective or timely remediation. Another aspect of the statute is that it closes the courts' doors to claims of "mental and emotional injury suffered while in custody without a prior showing of physical injury."[72] Finally, the statute gives defendants the prerogative to waive the right to reply to any Section 1983 prisoner suit without the usual "admission of allegations" consequence. Under this provision, courts may require defendants to reply only if a court concludes plaintiffs have a prima facie "reasonable opportunity to prevail on the merits." The PLRA also decrees "no relief

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69. *Id.* (citing *Pennsylvania*, 262 U.S. at 593; *Helling*, 509 U.S. at 33–34) (internal marks omitted).

70. Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) (2013).

71. 548 U.S. 81 (2006).

72. Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) (2013). Contrast this to the definition of torture in 18 U.S.C. § 2340. There we read that:

> (1) "[T]orture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;
>
> (2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from—
>
> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
>
> (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
>
> (C) the threat of imminent death; or
>
> (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality . . . .

18 U.S.C. § 2340 (1994).

shall be granted to the plaintiff unless a reply has been filed." In effect, the combination of these two principles not only narrows justiciability to a keyhole; it allows defendants to decide in some cases whether or not the plaintiff will have the opportunity to pursue relief.

If I am right about the doctrinal reorientation developed in the second part of this article, the PLRA stands on shaky constitutional grounds, and the justiciability of cruel punishment claims under *Wilson* and *Farmer* is by no means on firmer constitutional basis. However, as they now stand, the combination of constitutional jurisprudence and statutory framework poses burdens and restrictions that violate the letter, the structure, and the spirit of the Constitution. For all its good intentions, *Brown v. Plata* serves to illustrate this point.

The lower *Coleman v. Brown* and *Plata v. Brown* courts found that medical and mental health care provided to the plaintiff classes in California prisons violated their Eighth Amendment right against cruel punishment. After many years of remedial attempts overseen by Masters and Receivers, the two cases were unified and brought under a three-judge panel. The panel found that after a period of insufficient progress, regress set in. Overpopulation, the panel established, was the principal cause of conditions bearing on the provision of mental health and medical care to prisoners. Accordingly, the panel concluded that without reduction of the prison population, no remedial solution would likely succeed in the future. Following those findings, the panel ordered a reduction of the California prison population to 137.5% of capacity within 2 years, except if equitable adjustments were recommended due to changed conditions or the state presented viable alternatives. This was the order upheld by the Supreme Court in *Brown v. Plata*.

At first glance, the injunctive remedy affirmed by the Supreme Court in *Brown* turns its Eighth Amendment jurisprudence in a new bold direction. However, a close examination of the decision places it squarely within the inherited confines of reactive, unconstitutional punishment doctrine.

To start, the remedy is too blunt. While it helpfully focuses on a structural, system-wide factor that leads to cruel treatment of many individual prisoners, the remedy fails to directly address any specific violation. A second problem is that there is no guarantee that those who have suffered a violation of their Eighth Amendment right would directly benefit from early release if it were to be granted.[73] If members of the

73. The *Brown v. Plata* Court acknowledges this fact. Unfortunately, that Court does not come close to being persuasive about why this is not a problem to constitutionally vitiate the way the remedy will apparently be implemented. 131 S. Ct. 1910, 1937–39 (2011).

plaintiff classes are not freed as redress for the violations they personally suffered, there is very little to indicate that their mental health and medical care will improve substantially. Although the general prison population will decrease, the number of prisoners in need of care and the quality and number of staff available to provide the care will not, *ceteris paribus*, necessarily have changed. Finally, even if those eventually released include members of the plaintiff classes, there is no further post-release redress awarded. But a simple question may suffice to unveil the limitations of the pedigree from which *Brown* descends: taking the reasoning and remedy assignment of *Brown* seriously, why would it be constitutional for California to incarcerate, in the next two years, individuals with even moderate mental health and medical needs?[74]

The blame for this predicament should not rest solely with legislators and constitutional courts, though. Again in the example of the United States, the very history of the constitutional text shows how much the criminal justice system is entwined with cruelty and degradation of human dignity. Adopted just seven decades after the Eighth Amendment, the Thirteenth Amendment of 1865 recognizes the right not to be enslaved or placed in involuntary servitude,[75] "except," it adds, "as a punishment for crime whereof the party shall have been duly convicted . . . ."[76] During the years preceding the Civil War, slavery and involuntary servitude became increasingly unacceptable to the American public. Yet the Civil War generation, who saw two percent of their friends, family, and neighbors die in a devastating war to abolish slavery,[77] found it acceptable to reserve involuntary servitude as a form of punishment. This reservation illustrates well the depth of the stigma against the convict.[78]

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74. One could also criticize the Court for enabling procrastination on the part of the state. The end of the Court's decision truly provides a "with all deliberate speed" recipe. *See id.* at 1945–46.

75. This right to freedom from enslavement and involuntary servitude, incidentally, is the only right in the federal constitutional framework that indisputably dispenses with the requirement of state action. While courts have held prison officials liable for damages under the Eighth Amendment, this liability, of course, still depends upon state action, which in these cases is found in "imprisoning." That prison officials are made to pay, in their private capacity, tortious damage under the Eighth Amendment is an example of the confusion that presides over Eighth Amendment doctrine.

76. U.S. CONST. amend. XIII, § 1.

77. *See* DREW GILPIN FAUST, THIS REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR (2008).

78. This is not to say racial and penal stigmatizations do not intersect. We have seen time and again that they indeed do. This issue often comes back to the Court, as, for example, in McCleskey v. Kemp, 481 U.S. 279 (1987), and the discussion therein of the racial breakdown of death penalty statistics (in this case the Baldus study, showing by regressive analysis the disparity in capital sentencing of blacks in general and in particular of those accused of homicide against whites). The Court was nevertheless not convinced.

However, despite the ambivalence just noted, constitutional history and structure warrant a paradigm change. Indeed, structural interpretation of the Constitution suggests that the framers understood well the heightened vulnerability of the investigated individual and the convict.[79] The Eighth Amendment protection against cruelty is a specific individual right and an obligation cast by the Constitution and its agents on the state.[80] The Framers certainly witnessed how easily otherwise legitimate punishment can veer into cruelty. We know that nature and society exhibit a cyclorama of cruel events every day, and while the law is sometimes indifferent to this spectacle of brutality and suffering, it is not always so. When it is not, as in the case of the clause against cruel punishment, we expect it to work fairly and efficiently.

And yet, looking back to the jurisprudential landscape presented here, it is difficult to imagine that the Supreme Court will be able to repair the many shortcomings in its unconstitutional punishment doctrine without a change in the constitutional paradigm. Internal doctrinal as well as political reasons stand in the way. It is to a new paradigm that I now turn. In the new paradigm, violation is moved to the constitutional back seat and the focus turns to the foundations of punishment as a legitimate, routine constitutional practice.

II. RECONSTRUCTING CONSTITUTIONAL PUNISHMENT: FIVE PRINCIPLES

Reactive unconstitutional punishment doctrine, I have pointed out, betrays a profound embarrassment with punishment. It only reluctantly takes ownership of punishment as an exercise in toleration. Ironically, this turning of the constitutional gaze away from punishment has only made the practice of punishment more brutal and more constitutionally

79. "What has distinguished our ancestors?—That they would not admit of tortures, or cruel and barbarous punishment," said Patrick Henry in the Virginia ratifying convention debate on June 16, 1788. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 447 (Jonathon Elliot ed., Burt Franklin 1888).

80. In the Eighth Amendment doctrine, "unusual" means either punishment that is disproportional to the respective offense or shocking to the community's evolving standard of decency. *See* Anthony F. Granucci, "*Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CALIF. L. REV. 839 (1969). *See also* Robinson v. California, 370 U.S. 660 (1962); R. v. Smith, [1987] 1 S.C.R. 1045 (Can.), wherein the Supreme Court of Canada struck down mandatory sentencing under the Narcotics Control Act as cruelly disproportionate; Steele v. Mountain Institution, [1990] 2 S.C.R. 1385 (Can.), wherein the Supreme Court of Canada found a violation of the cruel punishment clause of the Charter where "[r]espondent's imprisonment had long ago reached the point at which he had derived 'the maximum benefit from imprisonment.' His incarceration was longer than that served by the vast majority of the most cruel and callous murderers and was of doubtful benefit given the unavailability of psychiatric treatment."

repulsive. Punishment is not going anywhere though. Punishment's place is at the center of the constitutional stage. The other option is to continue to hide it in human warehouses.

In this part of the Article, the five integrative principles are woven into the reconstruction of constitutional punishment doctrine.[81] These principles combine reactive and proactive elements as well as moral and political arguments. They speak to the policing of the outer limits of punishment, as in the example of Eighth Amendment jurisprudence in the United States. But more importantly, these principles also seek to reconstruct punishment in such a way that it will rest on foundational constitutional values such as order, equality, justice, freedom, and human dignity.

A. Punishment, Vulnerability, and Human Dignity

Much of current constitutional punishment doctrine around the world turns, as the analysis in Part I exemplified, on the definition of punishment. In this Section, I discuss the textual, experiential, intentional, and structural elements in the ontology of punishment. I also explore the proper place of legitimate penological objectives in the context of a comprehensive doctrinal framework for constitutional punishment. The thesis of this section is twofold: (1) a proper definition of punishment must emphasize structuralism, complementing it with intentionalism; and (2) the best way to understand punishment is to see it as the imposition of generalized coerced vulnerability.

1. Redefining Punishment as Generalized Coerced Vulnerability

Moral theories of criminal law condition the legitimacy of punishment on the purposes it is believed to serve. Among these purposes are atonement and expiation, compliance with retributive duties, expression of society's moral disapproval, greater social wellbeing through general and

81. To recapitulate: First, constitutional orders must take constitutional ownership of punishment as coerced vulnerability created and imposed by them. Second, state violence in the form of punishment must be conceived and designed as cruelty-free, and practiced under this regulative ideal. Third, respect for individuals as the embodiment of human dignity must be actively affirmed through—rather than simply not violated by—punishment. Fourth, this affirmation of human dignity through punishment entails that punishment must meet morally justified penological objectives and take seriously the moral agency of those subject to it. Finally, punishment that fails the above conditions must be fully redressable and adequate preventative remedies must be available and accessible.

special deterrence or incapacitation, and rehabilitation.[82] The purposes of punishment and what, if anything, could serve to legitimize it will be discussed below. Here, I focus exclusively on the distinct and equally important problem of the ontology of punishment, which is central to our political and constitutional understanding of punishment.

The ontological inquiry seeks to identify the essential and distinctive elements of legal punishment, rather than under what set of conditions and purposes punishment can be deemed morally legitimate. Perhaps surprisingly, there is considerable consensus about the constitutive elements of punishment.[83] Disagreement concerns what amounts to foreground and background in the definition.

No one disputes that punishment is a form of state coercion or that it has textual, experiential, intentional, and structural elements.[84] The challenge is in how to understand and weigh these elements in the search for an adequate definition. Textualism is a type of nominalism. It defines punishment as that which is specified as such in statutes, sentences, and administrative decisions or guidelines. Experientialism seeks to capture the specificity of punishment vis-à-vis other negative legal sanctions by asking how a given sanction is experienced by those subjected to it.[85] If a sanction is experienced as punitive, then punishment it is.[86] Intentionalism relies on the intentions of legislators, sentencing judges or correctional officials in order to determine what types of impacts on the lives of those subject to negative sanctions constitute punishment in the technical sense. Finally, structuralists focus on the isolated and cumulative impacts or main restrictions that sanctions impose in order to determine whether the definitional tipping point into punishment has been reached.

Textualism takes a semantic path to a dead end. The example of confinement illustrates this point. To objectively understand punishment solely as the type, place, and duration of deprivations stated in statutes,

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82. Deontological, consequentialist, and perfectionist foundations have been offered for these purposes of punishment. Although important in a general sense, resolution of the questions arising in those discussions is not essential for the argument developed in this Article.

83. *See, e.g.*, A READER ON PUNISHMENT (R.A. Duff & David Garland eds., 2d ed. 1995).

84. I have created these categories in order to more precisely distinguish elements that are lumped together in the current literature on the ontology of punishment.

85. The literature on the Eighth Amendment has in part been attuned to the experience of punishment. *See* Thomas K. Landry, *"Punishment" and the Eighth Amendment*, 57 OHIO ST. L.J. 1607, 1610 (1996); Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111 (2007). For an opposing view, *see* David Gray, *Punishment as Suffering*, 63 VAND. L. REV. 1617 (2010).

86. In this case, impeachment, deportation, disbarment, and civil confinement may all be considered legal sanctions of the punishment subtype.

sentences, or prison regulations is to seriously misunderstand the all-encompassing and capillary impact of coerced confinement on the life of the incarcerated. This is, however, exactly the path Justice Thomas would have us take, when he writes in his concurrence in *Farmer*, "I adhere to my belief expressed in *Hudson* and [*Helling*] that judges or juries—but not jailers—impose 'punishment.' . . . Conditions of confinement are not," he concludes, "punishment in any recognized sense of the term, unless imposed as part of a sentence."[87]

The textualist cure for this under-inclusiveness would be a virtually endless, and therefore also impractical, list of impositions that all sentences to confinement necessarily imply. It is of course of little help to say that what defines punishment is the type, place, and duration of confinement and all that follows from these, for the point of contention is precisely what part of the manifold consequences of confinement is punishment for moral and political-constitutional purposes. As we have seen, in its unconstitutional punishment doctrine, the United States Supreme Court has rejected a purely textualist approach, recognizing that the Eighth Amendment "could be applied to some deprivations that were not specifically part of the sentence but were suffered during imprisonment," as far as reckless deliberate indifference is implicated.[88]

Experientialism, when understood as an inquiry into how each individual receives the impact of sanctions, offers an unmanageable framework. Its inspiration is, nonetheless, noble. In his concurrence in *Farmer*, Justice Blackmun made an eloquent case for experientialism, writing that the "Court's unduly narrow definition of punishment blinds it to the reality of prison life." He then invited consideration of

> a situation in which one individual is sentenced to a period of confinement at a relatively safe, well-managed prison, complete with tennis courts and cable television, while another is sentenced to a prison characterized by rampant violence and terror. Under such circumstances, it is natural to say that the latter individual was subject to a more extreme punishment.[89]

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87. Farmer v. Brennan, 511 U.S. 825, 859 (Thomas, J., concurring) (citations omitted) (internal quotation marks omitted).

88. Wilson v. Seiter, 501 U.S. 294, 297 (1991).

89. *Farmer*, 511 U.S. at 855 (Blackmun, J., dissenting). The quoted passage doesn't refer to the different effects on different individuals of the same set of sanctions, but rather to the differences across institutions at which individuals may serve their sentences. Both types of comparison rest on the experience of punishment.

But can mass criminal justice systems be expected to conduct inquiries into the way each person subjectively experiences the sanctions imposed upon him or her? And the shortcomings of the experientialist approach are not limited to its impracticality. Rather than being sensitive to equal protection concerns, individualized criteria for findings of punishment would open the floodgates to distinctions on the basis of differences in ex ante levels of refinement, comfort, cultivation, sensibility, and sense of entitlement.

The more privileged the life a convict has led, the more he will suffer from the imposition of a particular set of sanctions. Correspondingly, the purview of constitutional review would, arguably, afford him greater protection than it would those with less privileged ex ante lives. It would, in short, tend to perpetuate unequal hedonistic baselines. This is not, however, the reason why the Supreme Court has rejected experientialism, at least since *State of Louisiana* ex rel. *Francis v. Resweber* (1947).[90] The reason rests, rather, with the Court's insistence on a finding of mens rea on the part of the agent of punishment. Only where "wanton infliction of pain" was present, the Court has held, could violation of the Eighth Amendment be found, "regardless," (in the *Wilson* language) "of the actual suffering inflicted."[91]

Intentionalism[92] fares better than experientialism, but only slightly. It is more robust because it is impossible to properly interpret any practice, including punishment, without questioning the meaning ascribed to it by those involved in the practice itself. Hence, the *point* of punishment cannot be ascertained without an investigation into the purposes that state agents who distribute sanctions have in mind. That investigation is inextricable from mentalist considerations about the intentions of such agents when they engage in punitive courses of action. Thus, the Supreme Court's choice in *Wilson* to look to "intention" rather than "structure" was a choice for ontological intentionalism in the definition of punishment. The Supreme Court's preference for intentionalism is also reflected in the treatment of the state of mind requirement for findings of cruelty under the Eighth Amendment: "[a]n intent requirement is implicit [in the Eighth Amendment] ban on cruel and unusual punishment."[93]

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90. *See* State of Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463 (1947).

91. *Id.*; Wilson v. Seiter, 501 U.S. 294, 297 (1991).

92. *See* GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 25–42 (1998) [hereinafter FLETCHER, CONCEPTS].

93. *Wilson*, 501 U.S. at 294 (emphasis omitted) (petitioner alleging cumulative effect of prison conditions—overcrowding, noise, insufficient locker space, inadequate heating and cooling, overall

An intentionalist conception of punishment is adequate only where it is most promising—that is, at the macro or system-wide level of punishment where, for instance, intention on the part of a legislative body to enact a form of punishment or widespread practice that operates under the convention that it is indeed engaged in punishment. At this level of generality and pattern-producing effects, intentionalism translates into quasi-objectivism. It is true, though counterintuitive, that the more objective intentionalism is rendered in this sense, the more promising it is from a definitional standpoint.

At the macro level, intentionalism connects concrete individualized punishments to the myriad decisions of all branches of government that, over time, put in place a particular criminal justice system. Those decisions are best understood as a series of cumulative policy choices. As Justice Blackmun stated in his *Farmer* concurrence:

> When a sheriff or a marshall [sic] takes a man from the courthouse in a prison van and transports him to confinement . . . this is our act. We have tolled the bell for him. And whether we like it or not, we have made him our collective responsibility. We are free to do something about him; he is not.[94]

Intentionalism thus clarifies a limited but profoundly important point about constitutional politics: constitutional orders *choose* to punish specified conduct, and they choose to punish it in some specific ways. Every time a public official sends someone into confinement or keeps him there because of his conduct, that macro choice at the level of the criminal justice system is renewed at the individual level.

Structuralism best articulates the ontology of punishment, advancing a version of objectivism that is illuminated by manageable concessions to subjectivism. Let us approach the structuralist view indirectly at first, again using doctrines of the United States Supreme Court as example.

The Court has disfavored a wholesale use of structuralism in the definition of punishment. This rejection is most clear in the position the Court takes on the punitive nature of civil confinement. In *Kansas v. Hendricks* (1997)[95] and *Seling v. Young* (2001),[96] plaintiffs claimed that

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unsanitary conditions, and housing with mentally and physically ill inmates—constituted cruel punishment prohibited by the Eighth Amendment).

94. Farmer v. Brennan, 511 U.S. 825, 854 (Blackmun, J., concurring) (emphasis omitted) (internal quotation marks omitted).

95. *See* Kansas v. Hendricks, 521 U.S. 346 (1997) (affirming constitutionality of civil confinement under the Kansas Sexually Violent Predator Act).

96. *See* Seling v. Young, 531 U.S. 250 (2001) (upholding constitutionality of State of

Kansas and Washington civil confinement acts were punitive *as applied* to them. The Supreme Court disagreed, ruling that legislation found to impose civil consequences could not be punitive in nature, regardless of the concrete restrictions imposed.[97] Following this logic, the Court decided that civil statutes raise no questions of constitutional punishment. For instance, protections under the doctrines of double jeopardy, ex post facto law and punishment, or Eighth Amendment cruelty do not apply to civil confinement.[98]

Courts that follow this view are wrong, both as a matter of law and of policy. And most do follow it. However, it is still open to courts to adopt structuralism as a path of jurisprudential progress. Let me indicate how.

Confinement is the principal, though sometimes only latent, restriction criminal justice systems impose as punishment. The primary impact that involuntary confinement has on those subjected to it is a generalized coerced vulnerability. As we know, not all types of involuntary confinement and consequent vulnerability can be considered punishment constitutionally speaking. At this point, structuralism is ready to be complemented by intentionalism to the extent that it identifies the *point*, in terms of stated or presumed objectives, of episodes of confinement. Intentionalism's contribution becomes relevant in that according to it only restrictions *chosen* by the state as a matter of criminal justice policy as sanction for the violation of its laws are punishment.

The mutually supportive relationship between intentionalism and structuralism may be further explained with an example from the literature on the topic. H.L.A. Hart's well-known definition of the "central case" of punishment has five necessary elements: (i) "pain or other consequences normally considered unpleasant"; (ii) "for an offence against legal rules"; (iii) "of an actual or supposed offender for his offence"; (iv) "intentionally administered by human beings other than the offender"; and (v) "imposed and administered by an authority constituted by a legal system against which the offence is committed."[99]

Washington's Community Protection Act).

97. For a rigorous and insightful discussion of the problem of intentionality and moral permissibility in this context, see Vincent Chiao, *Punishment and Permissibility in the Criminal Law*, 32 L. & PHIL. 729 (2013).

98. *See* Ingraham v. Wright, 430 U.S. 651, 667 (1977). In *Ingraham*, a school discipline case in which the Court found the Eighth Amendment non-applicable outside punishment for crime, the Court reasoned that the Eighth Amendment limits the criminal justice system in three dimensions: (1) what conducts can be criminalized, (2) what types of punishment can be inflicted, and (3) the necessary proportionality between crime and punishment.

99. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 4–5 (2008).

In Hart's ontology of punishment, intentionalist and structuralist components combine. The requirements designated by the phrases, "[*f*]*or* an offense" and "*intentionally* administered," refer to the state of mind of key agents in the imposition of punishment.[100] It is because these agents, acting under the authority of law, ascribe the meaning of punishment to the restrictions they impose on others, that we are able to interpret their punitive practice as such, thus distinguishing that practice from other forms of legal sanction and extra-legal retribution. Furthermore, in Hart's definition, the intentionalist element is the link between offense and punishment, whereby the latter is seen as legal retribution for the former.[101] But if this were the end of the story we would be back to the shortcomings of intentionalism discussed above. At this point structuralism comes to the rescue. The combined "unpleasant" consequences of official punitive choices create the structural predicament of coerced vulnerability. The central ontological case of punishment is therefore to be found in the *coerced vulnerability* that punitive intentions engender.

Punishment is a key manifestation of the authority and power of the state in the creation of vulnerability through asymmetrical dependency. The ordinary relationship between individuals and the state is of course predicated on overwhelming power asymmetry.[102] How much more, then, is this asymmetry increased when individuals are stripped, by the deployment of punitive power, not only of multiple fundamental rights, but also, in many cases, of initiative and control over the most basic needs of life? The restrictions that this vulnerability imposes on those who come under it are often crushing. In the words of the Supreme Court, "[t]o incarcerate, society takes from prisoners the means to provide for their own needs. Prisoners are dependent on the [s]tate for food, clothing, and necessary medical care." The Court also added that "[a] prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society."[103]

Robert Goodin has shown that relationships of dependency or vulnerability are morally objectionable if they meet four criteria: (i) "[t]he

100. *Id.* State of mind includes both motivation and intention.

101. For an interpretation of H. L. A. Hart's concept of punishment in light of constitutional doctrine, see FLETCHER, CONCEPTS, *supra* note 92, at 25–42 (arguing for necessity to appeal to motivationism as way to get to what I have been calling point of punishment).

102. Even for the most resourceful individual members of most states, their private power is no match for the instruments of power states have at their disposal or can mobilize if needed.

103. Brown v. Plata, 131 S. Ct. 1910, 1928 (2011).

relationship embodies an *asymmetrical* balance of power"; (ii) "[t]he subordinate party *needs* the resources provided by the relationship in order to protect his vital interests"; (iii) "[f]or the subordinate party, the relationship is the *only source* of such resources"; and (iv) "[t]he superordinate party in the relationship exercises *discretionary control* over those resources."[104] When the relationship fails to meet any of these criteria, Goodin adds, "our moral objection to the relationship is diminished."[105]

Consider once again confinement, the archetypical case of modern punishment.[106] Punishment of individuals always involves or can be resolved in confinement. When confined as punishment, individuals become dependent upon the state and its agents for the most basic necessities of life, such as movement, relationships, nutrition, shelter, hygiene, health care, rest, and safety. Some of these specific necessities, such as security of the person and property, have independent constitutional status. Others are usually regulated at the infra-constitutional level or left to the discretion of parole and prison officials. In any event, in the context of confinement, the state has de jure or at least de facto monopoly over resources to meet such basic needs. Moreover, the discretion of the state and its agents over allocation of and access to monopolized resources that meet basic needs of prisoners is large, albeit not unlimited as a matter of law. And wherever the state's monopoly is broken by the intrusion of alternative forms of resource access (such as bribery, underground markets, gang affiliation, etc.), the vulnerability of prisoners is increased rather than decreased.

Once we accept that coerced vulnerability is integral to punishment and that it creates moral and political-constitutional obligations on the part of the state, the next step is to assess penal incidents and circumstances that prima facie are of questionable legitimacy as instantiations of constitutional punishment.[107]

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104. ROBERT E. GOODIN, PROTECTING THE VULNERABLE: A REANALYSIS OF OUR SOCIAL RESPONSIBILITIES 195–96 (1985).

105. *Id.* at 196.

106. All punishment involves the creation of some form of vulnerability, even if it is restricted to financial or reputational vulnerability. These other punishments deserve attention that cannot be given in this Article.

107. That is the case even where, say, illegitimate impacts of the coerced vulnerability are revealed only after punishment ceases. In such cases remedies required by legitimate constitutional punishment would be due as far as proximate or remote causes of undue harm can be traced back to the coerced vulnerability of punishment.

The emphasis on structuralism complemented by intentionalism informs an ontology of punishment that improves on prevailing constitutional doctrines, serving as basis for the reconstruction of punishment as a central constitutional institution in liberal democracies. Under the reconstructed definition I propose, *punishment is a sanction imposed by state agents for norm violation that directly imposes, requires, or may result in a structural predicament characterized by generalized coerced vulnerability vis-à-vis the state and its agents*.

With punishment thus redefined, three related constitutional questions remain. First, what are the merits of the idea, espoused by constitutional doctrines everywhere, that legitimate penological objectives may render constitutionally legitimate sanctioning schemes or practices that would otherwise not belong in a constitution? Second, and considering how repellent cruelty is deemed to be in liberal democratic constitutionalism, whether any particular instance of cruelty can ever be constitutional? Third, how punishment vitiated by cruelty is to be remedied under the principle that punishment failing to satisfy the other four reconstructive principles of constitutional punishment must be fully redressable? Any sound answer to these questions will have to traverse the integrative territory where constitutional politics and constitutional morality meet. To this path I now turn.

2. Penological Purposes and Moral Agency in Punishment

The analysis in Part I expounded the tendency of reactive constitutional punishment doctrine to find cruelty only when brutality and suffering are penologically inexpedient and shocking to society's standards of decency.[108] In *Farmer*, I have noted, the United States Supreme Court held that "gratuitously allowing the beating or rape of one prisoner by another serves no legitimate penological objective . . . ."[109] The implication here is clear. Were a legitimate punitive objective present, the existence of such a legitimate purpose would weaken, if not altogether disallow, rights claims under legal protections of bodily integrity and against cruelty.[110] This doctrinal tendency is mistaken as a matter of both law and morality.

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108. I leave aside the question of an independent proportionality standard under the Eighth Amendment.

109. Farmer v. Brennan, 511 U.S. 825, 833 (citation omitted) (internal quotation marks omitted).

110. Indeed, penological objectives excuse deprivation and suffering all the time in case law. This jurisprudence would also condemn deprivation that "may result in pain and suffering which no one suggests would serve any penological purpose." Estelle v. Gamble, 429 U.S. 97, 103 (1976) (citing

That only punishment that can be shown to meet penologically legitimate purposes may be inflicted is a necessary but not sufficient condition of legitimate constitutional punishment. In this section I argue that the argumentative resources of deontologist and consequentialist justifications of punishment run out before either can fully justify peremptory bans on cruelty, thus ill serving the principle that state violence in the form of punishment ought to be conceived and practiced as cruelty-free. Indeed, nothing in deontologism or consequentialism completely rules out cruel punishment; sometimes these theories even seem to require it. The prima facie compatibility of legitimate penological objectives and cruelty rests on the fact that none of the recognized penological objectives fully incorporates the principle of human dignity.[111]

To understand the complex justificatory landscape where punishment, equality, freedom, and dignity intersect, we must consider two levels of moral justifications for punishment. The first and more abstract level concerns the justification of public intervention as conducive to the liberty and security of individuals generally. The second and more specific level addresses the justification of that intervention in its punishment subtype. The latter is then a special case of the former. Although the analytical and practical differences between these two levels are clear, their importance has often eluded traditional constitutional punishment doctrines.

Focusing on the first order level of justification, three different but not necessarily incompatible types of arguments are usually provided to support public interference with individual liberty: the harm principle, the surrogacy or paternalistic principle, and the social morality principle.

The harm principle justifies interference with the agent's liberty interests when her conduct causes or is (significantly) likely to cause relevant harm to others.[112] It is important to note that the harm principle,

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Gregg v. Georgia, 428 U.S. 153, 182–83 (1976)). Justice Scalia picks up this thread in his majority opinion in Wilson v. Seiter. 510 U.S. 294, 296–306 (1991).

111. I will show *infra* that a sound conception of cruelty depends in part upon a clear understanding of severe disrespect to human dignity.

112. As John Stuart Mill writes:

> [The] principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. . . . The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

JOHN STUART MILL, *On Liberty*, *in* ON LIBERTY AND OTHER ESSAYS 14 (John Gray ed., Oxford Univ. Press 1998). *See also* JOHN STUART MILL, *Considerations on Representative Government*, *in* ON

strictly speaking, only justifies obstructive intervention. The logic behind this principle does not ordinarily justify ex post facto intervention, for even justification based on the deterrent or preventive effects of the intervention would have to meet two stringent criteria. First, the means of deterrence or prevention has to be specific, acting upon, and solely upon, the agent likely to cause or causing harm to others. Further, second, the deterrent or preventive effect of the intervention would have to be not only possible, but certain.[113] Here retributive or utilitarian arguments, none of which is intrinsic to the logic of the harm principle, would have to be imported.

The surrogacy principle[114] justifies intervention limiting the liberty of individuals in order to prevent or obstruct self-inflicted harm or self-created vulnerability to harms potentially and unintentionally caused by others. In this case, intervention is justified because the person suffering it will ultimately be better off as a result of the intervention.[115] Because the surrogacy principle only justifies obstructive or preventive intervention (such as to compel someone to wear a helmet and use a seat-belt), no one, after being self-harmed or harmed because of a self-inflicted condition of vulnerability, would be better off as a result of suffering additional harm in the form of paternalistic intrusion on her liberty interests, let alone when this intervention comes in the form of punishment.[116]

As with the harm principle, the logic behind the surrogacy principle does not justify ex post facto intervention, except when justifications based on the deterrent effects of the intervention can meet three criteria, which are even more stringent than those required by the harm principle. First, deterrence has to be specific. That is, the agent deterred has to be the one potentially self-harmed or self-made vulnerable to harm by others.

LIBERTY AND OTHER ESSAYS 205 (John Gray ed., Oxford Univ. Press 1998).

113. Of course, the mere threat of punishment may have important deterrent effects and therefore make prima facie plausible the argument that the "harm principle" would recognize a reason for threatening punishment and, by extension, for deterrence. The argument fails, simply, in finding within the logic of the harm principle an authorization to consider legitimate utilitarian interference with individual freedom (i.e., "let's threaten in order to deter"). The harm principle, as introduced by Mill, is not a tool to reduce crime; its utilitarian justification is in its fitness or usefulness in creating a social environment that fosters the production of means for greater happiness.

114. Or "paternalistic," as Gerald Dworkin and most of the literature name it.

115. The classical formulation is found in Dworkin: "[b]y paternalism I shall understand roughly the interference with a person's liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests or values of the person being coerced." Gerald Dworkin, *Paternalism*, *in* PHILOSOPHY OF LAW 271, 271 (Joel Feinberg & Jules Coleman eds., 1999).

116. But if one considers that such harm could prevent future self-harming, then loyalty to the logic of the principle would require one to classify this harm as a forward-looking preventive intervention, and not as a backward-looking harm or punishment.

Second, the deterrent effect must also be at least highly probable, if not certain. Finally, third, the intervention would have to be significantly less harmful than the self-inflicted harm or condition of vulnerability.[117] Here again, retributivist and utilitarian arguments extraneous to the logic of the surrogacy principle would have to be imported, with particularly disturbing consequences.

Finally, some have offered the social morality principle as justification for public intervention in individual freedom.[118] This principle justifies society or state-sponsored intrusion in the lives of individuals either to act upon them or to act upon society though them. More specifically, under this model, public intervention acts upon individuals with the aim of leading them, frequently through punishment, to the internalization of and compliance with hegemonic morality. Public intervention may alternatively act by obstructing or deterring social agents from engaging in courses of action contrary to the standards of public decency that they perhaps resist, thus reinforcing those standards at both symbolic and enforcement levels. Public intervention acts upon society when it expresses, confirms, and reinforces hegemonic morality, thus playing an important role in the social and cultural reproduction of that morality.

Unlike the two preceding principles, the logic of the social morality principle invites ex post facto intrusion in addition to ex ante obstructive and preventive intrusion. Whenever intervention is more effective than non-intervention in fostering elements of hegemonic social morality, such intervention is justified. Clearly, consequentialist arguments lie at the core of the logic of social morality.

One obvious question that the political theory of constitutional punishment raises in relation to the social morality approach is who

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117. Dworkin proposes less stringent principles restricting paternalistic intervention:

> I suggest in closing two principles designed to achieve this end.
>
> In all cases of paternalistic legislation there must be a heavy and clear burden of proof placed on the authorities to demonstrate the exact nature of the harmful effects (or beneficial consequences) to be avoided (or achieved) and the probability of their occurrence. The burden of proof here is twofold—what lawyers distinguish as the burden of going forward and the burden of persuasion. That the authorities have the burden of going forward means that it is up to them to raise the question and bring forward evidence of the evils to be avoided. . . . In addition the nature and cogency of the evidence for the harmfulness of the course of action must be set at a high level. . . .
>
> Finally I suggest a principle of the least restrictive alternative. If there is an alternative way of accomplishing the desired end without restricting liberty although it may involve great expense, inconvenience, et cetera, the society must adopt it.

Dworkin, *supra* note 115, at 280.

118. The classical locus of the principle in contemporary criminal law is the work of PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1965).

determines what is moral for whom. Who is to be the judge? In the United States, constitutional doctrine has struggled to determine where, at any particular point in time, we look to discover the evolving standards of social morality. On its face, one may think that there are actually two distinct questions here. The first concerns what public morality prescribes. The second concerns what moral wrongs are injurious to society. Patrick Devlin, and the United States Supreme Court in some criminal cases, conflate the two categories. Everything that is morally wrong, it will follow from the conflation, is also potentially injurious to society. Thus, what seemed to be a double test is really a single one—the "average-citizen test" of public morality. There is no guarantee of protection for liberty interests independent of the average-citizen's moral sensibility.[119]

The three traditional principles that seek to justify public intervention in individual lives fail seriously. But even if one were successful in making a general case for public intrusion in the lives of individuals, the punitive kind of intervention would still require specific, first order justification. Every punishment is a form of public intervention in the freedom and security rights of individuals under liberal democratic constitutions. While public intervention in general is almost always unwelcome and unpleasant, it is not necessarily harmful beyond those inconveniences. Public intervention is, one might say, an inevitable and yet affordable price constitutions exact in the name of order and other social coordination objectives. Punishment, in contrast, is by nature harmful beyond mere inconvenience or obstruction.

A necessary qualification of this two-level justificatory process is that there must be logical consistency between the upper and lower levels of justification. The general justification for governmental intervention in individual lives cannot be at odds with the justification for any concrete punishment inflicted.

Classical retributivist and utilitarian justifications of punishment include retribution for offenses, socialization or re-socialization of offenders, protection of social order and the safety of individuals (to be achieved by punishing actual offenders and by obstructing or deterring potential offenders), and expression of socially dominant morality.

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119. An example given by Devlin is homosexuality:

> There is, for example, a general abhorrence of homosexuality. We should ask ourselves in the first instance whether, looking at it calmly and dispassionately, we regard it as a vice so abominable that its mere presence is an offence. If that is the genuine feeling of the society in which we live, I do not see how society can be denied the right to eradicate it.

Id. at 17.

Retributivism appeals to a sense of proportion between a past harmful event and a future legal consequence triggered by it. The requirement of proportionality to a harmful event in the past means that the past event establishes, at the same time, the minimum and maximum limit of the retribution. In the case of punishment for crime, the retributive role of punishment is to return to the offender a harm commensurate to the one she caused. According to this conception of retributivism, the more accurately punishment reflects the offense that triggered it, the more just it is. Thus, retributivism is a justificatory argument connected to past conduct. Any consideration of the future consequences of punishment is alien to the logic of retributivism.[120]

In the history of criminal law, retributivism has been motivated by one or more of the following aims: (i) vengeance, where the core element is the state of mind of those linked to the retribution either as victim of the offense or as state officials acting as proxies of the victim; (ii) compensation, where the core element is an attempt to reestablish the *status quo ante*; (iii) annulment, where the rationale is an attempt to ideally heal, annul, or atone for the violation of the legal or moral order, rendering it once again unblemished;[121] and, finally, (iv) satisfaction of

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120. Once again, in Kant's formulation we read:

> Judicial Punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be manipulated merely as a means to the purposes of someone else and can never be confused with the objects of the Law of things [Sachenrecht] . . . The law concerning punishment is a categorical imperative, and woe to him who rummages around in the winding paths of a theory of happiness looking for some advantage to be gained by releasing the criminal from punishment or by reducing the amount of it . . .

IMMANUEL KANT, *The Metaphysics of Morals*, *in* PRACTICAL PHILOSOPHY (Mary J. Gregor ed. & trans., 1996) (1797); KANT, JUSTICE, *supra* note 6. It is important to note that every actual retributivist theory (including Kant's) includes a caveat excluding punishments that are incompatible with personal dignity. Some, like that of R.A. Duff, characterize punishment as designed to promote personal autonomy, thus inherently precluding punishments that are incompatible with it (though Duff's is more a moral reform theory than a retributivist one).

121. Hegel, building on Kant's views on the matter, gives the classical formulation of retributive idealism:

> The infringement of right as right is something that happens and has positive existence in the external world, though inherently it is nothing at all. The manifestation of its nullity is the appearance, also in the external world, of the annihilation of the infringement. This is the right actualized, the necessity of the right mediating itself with itself by annulling what has infringed it. . . .
>
> [T]he injury from the point of view of the particular will of the injured party and of onlookers is only something negative. The sole positive existence which the injury possesses is that it is the particular will of the criminal. Hence to injure or penalize this particular will as a will determinately existent is to annul the crime, which otherwise would have been valid, and to restore the right.

social indignation, where the central characteristic is a general state of mind that bases blameworthiness on hegemonic morality. But however its motivation is conceived—to avenge, to compensate, to annul, or to express—retributivism is committed to proportionality between offense and retribution.

In contrast, utilitarianism looks forward. Broadly speaking, utilitarianism bases its assessment of conduct on the probability that such conduct will produce certain outcomes. Whether a course of action is justified depends upon its propensity to bring about desirable outcomes or avert undesirable ones. Although the evaluation of some outcomes as more desirable than others lies in the past, the outcome itself and the conduct conducive to it necessarily lie ahead. Any attempt to condition the justification of any course of action on an event in the past is alien to the utilitarian justificatory system. The future is the time of utilitarianism, and efficiency its ruler.

According to Jeremy Bentham, utilitarianism uses punishment as a tool to achieve four objects: (i) "to prevent . . . all sorts of offences whatsoever"; (ii) "to induce [an offender] to commit an offence *less* mischievous, *rather* than one *more* mischievous"; (iii) "[w]hen a man has resolved upon a particular offence, the object is to dispose him to do *no more* mischief than is *necessary* to his purpose"; and, finally, (iv) "whatever the mischief be, . . . to prevent it at as *cheap* a rate as possible."[122] To achieve these objectives, punishment is subject to a series of rules, which Bentham thus articulates: (i) "[t]he value of the punishment must not be less in any case than what is sufficient to outweigh that of the profit of the offence";[123] (ii) "[t]o enable the value of the punishment to outweigh that of the profit of the offence, it must be increased, in point of magnitude, in proportion as it falls short in point of certainty"; (iii) "[p]unishment must be further increased in point of magnitude, in proportion as it falls in point of proximity";[124] (iv) "[w]hen a

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HEGEL, *supra* note 2, at 69 (internal citation and marks omitted). Hegel goes on to write, "[t]he annulment of the crime is retribution in so far as (*a*) retribution in *conception* is an 'injury of the injury,' and (*b*) since as existent a crime is something determinate in its scope both qualitatively and quantitatively, its negation as *existent* is similarly determinate." *Id.* at 71. *See generally* HEGEL, *supra* note 2.

122. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 165 (J.H. Burns & H.L.A. Hart eds., Oxford Univ. Press 1996) (internal footnote omitted). For a defense of utilitarianism in punishment, see Mirko Bagaric, *In Defence of a Utilitarian Theory of Punishment: Punishing the Innocent and the Compatibility of Utilitarianism and Rights*, 24 AUSTL. J. LEG. PHIL. 95 (1999).

123. BENTHAM, *supra* note 123, at 166 (internal footnotes omitted).

124. *Id.* at 170.

punishment, which in point of quality is particularly well calculated to answer its intention, cannot exist in less than a certain quantity, it may sometimes be of use, for the sake of employing it, to stretch a little beyond that quantity which, on other accounts, would be strictly necessary"; and, finally, (v) "[i]n particular, this may sometimes be the case, where the punishment proposed is of such a nature as to be particularly well calculated to answer the purpose of a moral lesson."[125]

Placed in the broader context of the history of criminal law, utilitarian justifications of punishment have taken the following forms: education, where the aim of punishment is to educate or reeducate the offender (rehabilitation through socialization); security, either by removing the offenders' material conditions to offend (incapacitation) or by undermining the actual or potential offenders' calculations otherwise favoring crime (special and general deterrence); and expression, where what is being expressed is any value promoted by majorities or by a relevant elite with access to the means of punishment (such as lustration, shaming, etc.).

To briefly recapitulate, punishment is a special kind of public intrusion in the lives of individuals. As such, punishment must pass two tests to be morally justified. First, punishment must meet the moral justification for general public intervention with individuals' otherwise constitutionally protected prerogatives. Second, punishment must meet the moral justification for the infliction upon individuals of the particular form of harm constituted by punishment. Arguments for each of these tests fall into families, which can then be organized to form two levels of a justificatory system, each corresponding to one of the tests. The two levels of justification have a complementary relationship to each other, a relationship qualified by the requirement of non-contradiction.

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125. *Id.* at 171 (internal footnote omitted).

	Harm Principle	*Surrogacy Principle*	*Social Morality Principle*
Retributive Vengeance	(1) *inconsistent*	(8) *inconsistent*	(15) *inconsistent*
Retributive Compensation	(2) *inconsistent*	(9) *inconsistent*	(16) *inconsistent*
Retributive Annulment	(3) *inconsistent*	(10) *inconsistent*	(17) *inconsistent*
Retributive Expression	(4) *inconsistent*	(11) *inconsistent*	(18) *consistent*
Utilitarian Reeducation	(5) *consistent*	(12) *consistent*	(19) *consistent*
Utilitarian Social Safety	(6) *consistent*	(13) *consistent*	(20) *consistent*
Utilitarian Expression	(7) *inconsistent*	(14) *inconsistent*	(21) *consistent*

A table may help visualize consistencies and inconsistencies in the interactions between the two levels of arguments. The arguments of the more abstract justificatory level run along the top axis: the harm principle (HP), the surrogacy or paternalistic principle (SP), and the social morality principle (SMP). Of the lower justificatory level the following illustrative arguments are placed down the left axis: retributive vengeance (RV), retributive compensation (RC), retributive annulment (RA), retributive expression (RE), utilitarian reeducation (UE), utilitarian social safety (US), and utilitarian expression (UEX).

The table shows succinctly that the harm and surrogacy principles do not justify, except with the most stringent requirements as discussed above, the ex post facto intervention which characterizes retribution. Cells 7 and 14 show that utilitarian expressionism does not meet the requirements for ex post facto enforcement of the harm and surrogacy principles. Moreover, cells 5, 6, 12, and 13 refer to the cases where only obstruction or prevention appears to justify a utilitarian aim. Cells 15, 16, and 17 are consistent with the conclusion that vengeance, compensation, and annulment only indirectly and remotely serve the social morality principle. On the other hand, cells 18, 19, 20, and 21 help show why retributive expressionism, utilitarian education, utilitarian security, and utilitarian expressionism are among the preferred enforcement and reproduction devices of hegemonic morality.

Thus, punishment may consistently be justified only in the cases of cells 5, 6, 12, 13, 18, 19, 20, and 21, which from now on I will refer to as the *consistent lineages of justification of punishment*. With these lineages in mind, I now turn to the question of whether they are in line with the principle that state violence in the form of punishment ought to be conceived and practiced as cruelty-free. If they are not, then the adequate role that penological objectives may play in the foundations of constitutional punishment needs to be redimensioned.

There are two questions here, or rather two sides to the same question. The first is whether any of the consistent lineages of justification for any given penologically legitimate punishment is able to offer sufficient reason to show that cruel punishment is impermissible. If the consistent lineages of justification for punishment render morally legitimate a punishment that should otherwise be considered cruel in light of constitutional principles, then appealing to those lineages has very limited constitutional significance. In this case, one must conclude that legitimate penological objectives do not command a sufficiently comprehensive treatment of the problems of cruel punishment.[126] A comprehensive treatment of the problem of cruel punishment would require different conceptions of both punishment and cruelty.[127] The complementary question is then what role remains in the foundations of constitutional punishment for considerations of penological legitimacy.

It turns out that it is not difficult to answer the first question of whether consistent lineages of justification of punishment allow, disallow, or remain neutral in relation to cruelty. In the cases of cells 5 and 6, there is nothing intrinsic to the logic of these lineages of justification that would lead to a ban on cruelty whenever cruelty promises efficiency in achieving reeducation or social safety. The lineages of justification appearing in cells 12 and 13 do provide some justification for the prohibition of cruelty, except when society, the law, or the courts prescribes values for individual life that are regarded as superior to abstention from cruelty, in which case cruelty as a means of promoting those values would be justifiable. Turning to cells 18 through 21 (where what is at stake is whether the social

126. The claim here is not that we are unable to achieve a comfortable social consensus on matters relating to punishment. By and large, and for better or worse, we have. Social consensus is not a by-product of the consistency and soundness of moral or legal theories, but rather the combination of practices, beliefs, history, and less demanding discursive practices. What I am saying is that our current moral and legal theories have an important gap that cannot be closed by the mere logical extension of their indwelling dominant principles.

127. *See* Barrozo, *Punishing Cruelly*, *supra* note 15; Barrozo, *Jurisprudence of Cruelty*, *supra* note 15.

morality principle can be served by retributive expressionism, utilitarian reeducation, utilitarian social safety, or utilitarian expressionism), the answer here cannot be given *a priori*. The answer depends upon the predominant social morality, among other factors. What is clear, though, is that if other values are ranked higher than human dignity and the repudiation of brutality, then cruel means to achieve retributive expressionism, utilitarian reeducation, utilitarian social safety, or utilitarian expressionism would be justified, insofar as they do not shock the dominant social morality. This much is implied in the United States Supreme Court's reliance upon legitimate penological objectives in cruel punishment heuristics.

An unavoidable conclusion emerges from this analysis. The principle that punishment ought to be conceived and practiced as cruelty-free cannot hinge on traditionally justified penological purposes.

What, then, is the role of inquiry into legitimate penological objectives in the foundations of constitutional punishment? One of the five principles of the reconstruction of constitutional punishment is that affirmation of human dignity through punishment entails that punishment ought both to meet morally justified penological objectives and to take seriously the moral agency of those subject to it. This principle indicates a primarily negative role for legitimate penological purposes. Any punishment that lacks a legitimate penological objective has no place on the constitutional stage. However, the moral justification of punishment also has a positive role to play in the integrative theory. Unless punishment serves legitimate penological objectives, even if it is not cruel, it also has no place in liberal democratic constitutionalism, for punishing someone for banal aims is not an acceptable deployment of state violence.

B. Cruelty in the Practice and Regulative Ideals of Punishment

If punishment is to be embraced by liberal democracies as one of their core constitutional practices, punishment must find constitutional foundations that include but are not to be reduced to penologically legitimate ends. One such constitutional foundation is that punishment be conceived as cruelty-free and practiced under this regulative ideal. Only then would respect for individuals as the embodiment of human dignity actively be affirmed through punishment.

In an important methodological passage in *A Theory of Justice*, John Rawls explains the relationship that moral theory must keep with what he

calls our "moral capacity."[128] This capacity is the basic intellectual equipment that allows individuals to evaluate conduct, facts, events, characters, states of affairs, and institutional arrangements in moral terms. "Now," writes Rawls:

> [O]ne may think of moral theory at first . . . as the attempt to describe our moral capacity . . . . By such a description is not meant simply a list of the judgments on institutions and actions that we are prepared to render . . . . Rather, what is required is a formulation of a set of principles which, when conjoined to our beliefs and knowledge of the circumstances, would lead us to make these judgments with their supporting reasons were we to apply these principles conscientiously and intelligently.[129]

The theory of cruelty faces a similar challenge, one that, as in the case of Rawls' theory of justice, has moral as well as political implications.

The first task in the redefinition of cruelty is no doubt to design a conceptual landscape capacious enough to overlap with the diversity of phenomena that moral capacity rejects as cruel. But this conceptual landscape would have to be such that it not only captures the full expanse of the moral capacity to find cruelty in the world, but also illuminates and empowers this capacity, raising it to higher levels of understanding of the moral entailments of findings of cruelty. In liberal democratic constitutionalism, findings of cruelty and their moral entailments already have constitutional stature. The task is to gain clarity about and to deepen the commitment of constitutionalism to the rejection of cruelty in punishment.

Definitions of cruelty in constitutional doctrine and history of legal thought combine objective and subjective elements, revealing the interplay of four conceptions of cruelty that distinctively select and combine these elements. I label these conceptions *agent-objective*, *agent-subjective*, *victim-subjective*, and *agent-independent/victim-objective*.[130] This section

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128. *See* JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999). Richard Rorty, abandoning all pretensions to rationally-coerced universalism, nonetheless assigns a similar task to philosophy when he says "the most philosophy can hope to do is to summarize our culturally influenced intuitions about the right thing to do in various situations," adding that those who share this view "see the point of formulating such summarizing generalizations as increasing the predictability, and thus the power and efficiency, of our institutions, thereby heightening the sense of shared moral identity that brings us together in a moral community." RICHARD RORTY, *Human Rights, Rationality, and Sentimentality*, *in* 3 TRUTH AND PROGRESS: PHILOSOPHICAL PAPERS 167, 171 (1998).

129. RAWLS, *supra* note 129, at 41.

130. *See* Barrozo, *Punishing Cruelly*, *supra* note 15; Barozzo, *Jurisprudence of Cruelty*, *supra* note 15.

argues that only the context-sensitive application of these four conceptions is able to match the condemnation of cruelty.

1. Agent-Objective Cruelty

In his concurring opinion in *Wilson*, Justice White, interpreting the line of prison conditions cases to date in American constitutional law, concluded that, "[i]n truth, intent simply is not very meaningful when considering a challenge to an institution, such as a prison system."[131] In *Furman*, the Court expressed the view that:

> [T]he history of the Eighth Amendment confirm[s] beyond doubt that the death penalty was considered to be a constitutionally permissible punishment. It is, however, within the historic process of constitutional adjudication to challenge the imposition of the death penalty in some barbaric manner or as a penalty wholly disproportionate to a particular criminal act. And in making such a judgement in a case before it, a court may consider contemporary standards to the extent they are relevant.[132]

In yet another landmark case, the United States Supreme Court stated, "punishment must not be grossly out of proportion to the severity of the crime."[133] These passages articulate an agent-objective conception of cruel punishment.

An agent-objective conception of cruelty adopts as a definitional criterion the violation of an objective norm of behavior—"standard of behavior" or "proportion to the severity of the crime," for instance—that causes great suffering.[134] According to this conception, the state of mind of the agent of cruelty is of secondary importance—"intent simply is not very meaningful . . . ."[135] In his concurrence in *Farmer*, Justice Stevens wrote that he continued "to believe that a state official may inflict cruel and unusual punishment without any improper subjective motivation . . . ."[136] Once a legal norm is breached, causing a victim to suffer considerable

131. Wilson v. Seiter, 501 U.S. 294, 310 (1991).
132. Furman v. Georgia, 408 U.S. 238, 420 (1972).
133. Gregg v. Georgia, 428 U.S. 153, 173 (1976) (citation omitted).
134. As far as I know, Lucius Seneca first expounded this conception in his De Clementia. The essay, written in A.D. 55 or 56, was addressed to his pupil, the then young emperor Nero. *See* 1 SENECA, MORAL ESSAYS 356 (J.W. Basore trans., 1985).
135. Farmer v. Brennan, 511 U.S 825, 857.
136. *Id.* at 858 (Stevens, J., concurring).

pain, the question of whether the agent's motivation was "wanton and unnecessary"[137] carries no definitional weight.

This may be the conception most familiar to originalist and culturalist interpreters of the Eighth Amendment to the United States Constitution. For them, "unusual" in the constitutional language does the job of referring the interpreter to customary norms of punishment. Subjective elements set aside, "unusual" permits exclusively behaviorist findings of cruelty.

In the context of punishment, voluntary mercy and strictness are the relevant subjective aspects on the part of the agent. Strictness may degenerate into cruelty and mercy into pity. A just punitive system would chart a course for strictness and mercy that avoids both cruelty and pity. But what makes this conception of cruelty objective is that the test for strictness, cruelty, mercifulness, and pity is found in a norm of conduct. Accordingly, agent-objective cruelty obtains when the agent of punishment causes significant pain while breaching a norm of strictness. The agent's motivation—that is, his harshness or hedonistic interest in the pain of the other—becomes irrelevant. Similarly, empathy for the suffering of the victim would amount to undue influence of passion over reason.[138]

According to the agent-objective conception, punitive cruelty is that which fills the behavioral gap between sufficient and excessive punishment as stipulated by a norm of behavior. This understanding of cruelty looks to whether penological goals such as retribution, reeducation, and deterrence comply with the relevant applicable norms. This conception presupposes the victim's suffering, as long as it results from conduct in breach of an objective norm.

2. Agent-Subjective Cruelty

Consistent with the previous definition of cruelty, the agent-subjective conception also presupposes a suffering victim and necessitates action or omission that causes this suffering through the violation of a normative standard of behavior. However, under this second conception, cruelty occurs only when the deviant behavior is accompanied by the specified

137. *See* Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

138. Seneca explains: "[p]ity is a weakness of the mind that is over-much perturbed by suffering, and if any one requires it from a wise man, that is very much like requiring him to wail and moan at the funeral of strangers." SENECA, *supra* note 134, at 443.

mens rea.[139] The mens rea requirement can vary from negligence, to purpose, to delight in causing intense suffering.

To appeal again to the American example, all current Eighth Amendment jurisprudence related to the responsibility of officials for conditions of imprisonment aligns, as seen in the *Farmer* example, with this conception of cruelty:

> The Eighth Amendment outlaws cruel and unusual "punishments," not "conditions," and the failure to alleviate a significant risk that an official should have perceived but did not, while no cause for commendation, cannot be condemned as the infliction of punishment under the Court's cases. . . . This Court's cases "mandate inquiry into a prison official's state of mind," . . . and it is no accident that the Court has repeatedly said that the Eighth Amendment has a "subjective component."[140]

Long before this articulation, the Supreme Court affirmed in *Resweber* that "[t]he fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution. There is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution."[141] Section 210.6 of the Model Penal Code, which in this regard is no different from other penal codifications in advanced common and civil law jurisdictions, also adopts an agent-subjective conception of cruelty when it stipulates that an especially cruel murder "manifesting exceptional depravity" aggravates the crime.[142]

Both the agent-objective and agent-subjective conceptions of cruelty presuppose an understanding of legal order permanently vulnerable to violation, through both action and intention, by agents who have free will. In light of this presupposition, punishment is seen as the means to restore, through retributive or expressive means, the violated legal order, thus symbolically if not more concretely bringing it back to its ex ante authority. To punish, according to this view, is to establish, confirm, or

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139. The first systematic articulation of this definition that I am aware of is found in Thomas Aquinas' *Summa Theologiae*, published from 1265–1272, in particular Questions 2a2ae 157 and 159, dedicated to De Clementia et Mansuetudine and De Crudelitate, respectively, as part of his writings on the virtue of temperance. *See* THOMAS AQUINAS, SUMMA THEOLOGIAE Q. 157, 159 (Fathers of the English Dominican Province trans., 1947).

140. *Farmer*, 511 U.S. at 826 (as summarized in the reporter syllabus).

141. State of Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 464 (1947).

142. MODEL PENAL CODE § 210.6 (1962) (§ 210.6 withdrawn by the American Law Institute in 2009).

increase the authority of the challenged order,[143] hence the insistence that the inflicted punishment not also violate, objectively or subjectively, the legal order it seeks to restore.

A fundamental difference between objective and subjective agent-based conceptions of cruelty emerges from the consideration of the mental elements involved. Objective conceptions are content with mere voluntariness of cruel behavior, which amounts simply to an absence of duress. The subjective conception, however, insists on some form of hedonistic relationship with suffering or, at the very least, criminal-like culpability. Hence, the resulting conception of cruelty is one in which, if not "sadism,"[144] at least "deliberate indifference,"[145] must be present.

Furthermore, while agent-objectivism focuses on behavior and outcome, the agent-subjectivist understanding relaxes the outcome requirement in the context of punitive practices. In an anti-consequentialist move, agent-subjectivism comes close to dispensing altogether with the results of brutal action in the stipulation of the definitional core of cruel punishment. Correspondingly, this understanding does not require that deeds intended to mitigate suffering achieve palpable success either. In this case, righteous intention and sincere attempt are sufficient.

Agent-subjectivism thus drives motivation[146] to the core of the concept of cruel punishment, making it rest on that which motivates cruel and merciful behaviors. When applied to punitive power, mercy reveals unequivocal inclination toward the relief of suffering. In this context, mercy consists of a judgment of proportion and moderation. It is through the intermediation of a judgment of both proportion and moderation that society or the state may justly relieve suffering. Because proportion is a measure taken in light of law as a general parameter, relief of suffering is motivated, in the case of mercy, by a consideration alien to the passive experience of the agony of pain. Likewise, the relief of torment required by merciful motivations coexists with any intention on the part of the tormenter. That is why, when granting some respite from punishment,

143. Radicalized versions of this view are found in Kant's and Hegel's criminal law idealism.

144. *See* Whitley v. Albers, 475 U.S. 312, 313 (1986).

145. *See* Wilson v. Seiter, 501 U.S. 294 (1991). "Deliberate indifference" is to be understood, the Court tells, as analogous to criminal recklessness. *See Farmer*, 511 U.S. at 835.

146. Intent and motivation are, analytically speaking, distinguishable. Intention is the projection into the world of mentalist forces such as motivation. For example, I can say that motivated by A, I did B to C with the intention of undermining his enjoyment of D, where A may be something quite different from D, say a desire that C will give me money to stop doing B.

mercy does it from "a certain sweetness of disposition"[147] that discourages infliction of pain on others.

This perspective frames cruel punishment as the result of action inspired by an inadequate sense of proportion, disposition, or temperament. And with this, the mental disposition of the agent of cruelty is brought into the concept of cruelty. Whereas the agent-objective perspective considers divergence from a prescribed norm—a positive or natural norm, or a binding social or political norm thought to advance the public good—a necessary condition for cruelty in agent-subjectivism is a special state of mind of its agent. In the latter, it is in the intersection of the objective (what objectively occurs) with the subjective (what takes place in the conscience of the agent) that cruelty is determined. According to this conception, cruelty occurs only when suffering caused by excessive punishment is not prevented or mitigated because the agent intends or rejoices in the victim's suffering.

At least since the thirteenth century, the hope associated with the rejection of cruelty in punishment was that a rational decision to relieve suffering caused by punishment and a disposition of temper toward mercy would unite in the struggle to free humankind of this scourge.[148] Modern criminal law has also been obsessed with human fault and redemption.[149] Inhuman inclinations such as cruelty are seen as ever-recurring reminders of humanity's basest capacities. No matter how honorable in comparison to other creatures the human condition is, humanity's membership in the animal kingdom condemns individual humans to experience, during their fragile and transitory existences, both purely animal and exclusively human inclinations. Most animal inclinations certainly fly under the radar of law. The conflicted condition of humankind renders each person susceptible to legal fault and reparation solely in relation to that much of their fault that is exclusively human, such as excess in punishing. The rest, according to this outlook, is fate.

3. Victim-Subjective Cruelty

What would the definition of cruelty look like from the perspective of its victims? From a perspective that relies comparatively less on objective

147. AQUINAS, *supra* note 139, Q. 157, Art. 3.

148. An important source of writing of the eleventh century was Anselm of Canterbury. *See* ANSELM OF CANTERBURY, THE MAJOR WORKS (Brian Davies & G.R. Evans eds., 2008).

149. For a history of criminal law doctrine in the United States, see Gerald Leonard, *Towards a Legal History of* American *Criminal Theory: Culture and Doctrine from Blackstone to the Model Penal Code*, 6 BUFF. CRIM. L. REV. 691 (2003).

or subjective aspects of cruel agency and more on insight into what it must feel like to suffer cruelty, no matter the perpetrator? The United States Supreme Court has likewise failed to fully adopt this conception of cruelty. In *Furman*, the Court recognized that "[p]ain, certainly, may be a factor in the judgment. The infliction of an extremely severe punishment will often entail physical suffering."[150] The *Furman* Court went on to add, "the Framers also knew that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation. Even though there may be involved no physical mistreatment, no primitive torture, severe mental pain may be inherent in the infliction of a particular punishment."[151] In his dissent in *Gregg v. Georgia* (1976), Justice Brennan epitomized victim-subjectivism, writing that "[d]eath is . . . an unusually severe punishment, unusual in its pain, in its finality, and in its enormity . . . ."[152] The victim-subjective conception of cruelty flips the semantic structure of the previous agency-oriented conceptions onto its head. Under this definition, cruel punitive agency is presupposed and the experience of the victim occupies the definitional center. This change means, first, that the perspective from which to understand cruelty is that of the suffering subject and, second, that the crudeness of moral sensibility may count more than reason in circumstances of reasonable disagreement about jurisprudential questions of meaning or metaphysical questions about desert or affliction.[153]

Thus, the victim-subjective conception of cruelty developed alongside a non-metaphysical conception of law and politics, parallel to a contextualizing and demystifying conception of authority, and on the basis of intuitionist or naturalist moral theory.[154] When there is nothing else to

150. Furman v. Georgia, 408 U.S. 238, 271 (1976) (citation omitted).

151. *Id.* (citations omitted) (internal quotation marks omitted).

152. Gregg v. Georgia, 428 U.S. 153, 230 (1976).

153. The moral and legal thought of Michel de Montaigne is the first modern source to articulate the victim's perspective on the definition and evaluation of cruelty. *See* MICHEL DE MONTAIGNE, *On Cruelty*, *in* THE COMPLETE ESSAYS 472–88 (M.A. Screech ed. & trans., 2003). Montaigne, we should not forget, is a self-proclaimed champion of contradictions, if thought is to better reflect life as it is. An analysis of Montaigne's ideas on law, customs, natural and social orders etc., would be helpful to understand the emergence, in modern times, of the experiential conception of cruelty. This analysis, unfortunately, cannot be accommodated within the bounds of this Article.

154. See, as another example of this epistemological outlook, the work of David Hume. The oft-cited passage reads:

> But what have I here said, that reflections very refin'd and metaphysical have little or no influence upon us? This opinion I can scarce forbear retracting, and condemning from my present feeling and experience. The *intense* view of these manifold contradictions and imperfections in human reason has so wrought upon me, and heated my brain, that I am ready to reject all belief and reasoning, and can look upon no opinion even as more probable or likely than another. Where am I, or what? From what causes do I derive my existence, and to

law and customary norms than their contextual nature and the culture-specificity of their claims to authority, focus should be directed to the differences that concretely matter and directly appeal to sensibilities. Concrete suffering, proponents of this perspective proclaim, provides such a focal point.

This change nevertheless does take place in a broader cultural environment. In writing about the origins and nature of our civilization, Freud sought to "represent the sense of guilt as the most important problem" in its development.[155] The price to be paid for civilization should also be clear, "for our advance in civilization is a loss of happiness through the heightening of the sense of guilt."[156] It is, to a large measure, the cultivation of a sense of guilt and a softer and more expressionist approach to the morals of punishment, rather than a rationalistic approach, that characterize the victim-subjective perspective. Consequently, the experiential definition of cruelty avoids arid doctrinal disputes about norms, conscience, desert, free will, motivation, and intention. What matters, in definitional terms, is the great suffering caused by punishment.

Proponents of this perspective argue that "[n]o action can be properly called virtuous, which is not accompanied with the sentiment of self-approbation."[157] It is therefore this very sentiment of self-approbation or, once that sense is lacking, guilt, that curbs any inclination toward cruelty and through which cruelty would be found to be incompatible with civilized punishment. Even if, from a cognitive point of view, normative universalism seems impossible, it is still not *a priori* impossible for us to

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> what condition shall I return? Whose favour shall I court, and whose anger must I dread? What beings surround me? And on whom have I any influence, or who have any influence on me? I am confounded with all these questions, and begin to fancy myself in the most deplorable condition imaginable, inviron'd with the deepest darkness, and utterly depriv'd of the use of every member and faculty.
>
> Most fortunately it happens, that since reason is incapable of dispelling these clouds, nature herself suffices to that purpose, and cures me of this philosophical melancholy and delirium, either by relaxing this bent of mind, or by some avocation, and lively impression of my senses, which obliterate all these chimeras. I dine, I play a game of back-gammon, I converse, and am merry with my friends; and when after three or four hour's amusement, I wou'd return to these speculations, they appear so cold, and strain'd, and ridiculous, that I cannot find in my heart to enter into them any farther.
>
> Here then I find myself absolutely and necessarily determin'd to live, and talk, and act like other people in the common affairs of life.

DAVID HUME, A TREATISE OF HUMAN NATURE 268–69 (P.H. Nidditch ed., 2d ed. 1978) (1739–1740).

155. SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 97 (James Strachey ed. & trans., 1989).

156. *Id.*

157. ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 178 (D.D. Raphael & A.L. Macfie eds., 1982).

have the empathetic experience of fellow-feeling for others. It is in the capacity to understand the feelings of other persons, not in the impossibility of understanding and internalizing their worldviews, that inspiration and justification are found for mitigating the horrors of punitive cruelty.

The appeal of the victim-subjective conception of cruelty is made directly to the audience of ordinary people who, in their mundane existences, live between the extremes of the rational control of their brutal inclinations and the "affable nature" of a personality "which of itself finds indulgence and vice distasteful . . . ."[158] According to this approach to cruelty, punitive virtue is often earned in a battle with the self. Punitive decency finds its foundation in the victory of the gentle over the brutal self.

Victim subjectivism displays, in equal doses, epistemological frugality and moral pessimism. Indeed, victim subjectivism often finds it safer to rely on sensibility than on reason, and is ready to settle for imperfect systems of government as far as they guarantee equal protection from the cruelty and other inhumanities people have learned to fear most. This same type of moral pessimism is, of course, found in the liberal tradition of legal and political thought.[159]

Compassion[160] is the major inspiration for the revolt against cruelty. It is the image of intense suffering that triggers in the mind of the observer an idea of what the pain and suffering of another being must be like. This representational task is, by definition, that of compassion: to make it possible to import into one's mind the feelings of others. And once this enlargement of one's sensory universe incorporates pain and terror, one is bound to see the world from the perspective of suffering. Victim-subjectivists seem to believe that this sensibility is teachable.[161]

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158. MONTAIGNE, *supra* note 153, at 476–77.

159. *See* JUDITH N. SHKLAR, *The Liberalism of Fear*, *reprinted in* POLITICAL THOUGHT AND POLITICAL THINKERS 3–20 (Stanley Hoffmann ed., 1998).

160. The centrality of compassion to modern legal, political, and moral thought cannot be overestimated. It suffices to point out how important compassion was for Montaigne, Rousseau, Adam Smith, and Hume.

161. "My advice would be that exemplary severity intended to keep the populace to their duty would be practiced not on criminals but on their corpses." MONTAIGNE, *supra* note 154, at 483. *See, e.g.*, JUDITH N. SHKLAR, ORDINARY VICES (1984); RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY (1989) (inspired by Shklar's connection between a victim-subjective conception of cruelty and a particular tradition of liberal thought); John Kekes, *Cruelty and Liberalism*, 106 ETHICS 834 (1996) (resists, in the name of conservatism, the liberal claim to monopoly over concerns with cruelty).

The victim-subjectivist conception of cruelty thus tends to be less technical than those formed by its counterparts examined above. What it does is put forward a necessary, if insufficient, element of the definition of cruelty: the victim's suffering. It is in the act of causing suffering, in the actual victimization, at the time it happens, that cruelty takes place. There is no cruelty, no matter how disproportionate a course of action or how nefarious its intent, unless suffering is present. This conception of cruelty is, of course, as dependent upon agency as the agent-dependent conceptions were on presupposing a suffering victim. What matters for their analytical distinction is the foregrounding and backgrounding choices—semantic and normative—that place either the victim of cruelty (in his suffering) or the agent of cruelty (in his behavior or state of mind) at the center of the notion of cruelty. In victim-subjectivism, all allusions to acts or states of mind are subjected to the controlling criterion of suffering.

Whereas suffering is a non-definitional factual premise for agent-based definitions of cruelty, on the victim-based definition it is pain that imbues the acts and omissions implicated in causing it with their ultimate cruel nature.[162] Were it not for the screams and groans of a suffering being, there would be no cruelty, despite any conceivable hedonistic gratification on the part of the agent of torture or other forms of brutality. Without the victim's extreme suffering, the same acts blamable under agent-based conceptions of cruelty transubstantiate into innocent acts under victim subjectivism.[163] In the victim-subjective conception of cruelty, the state of mind of agents of cruelty adds only a qualification to cruelty, a degree, as it were, of culpability.

The punitive outlook emerging from victim-subjectivism is clear: the types, amount, and methods of punishment are to be humane and show structural compassion. The political impact of this conception of cruelty and the accompanying urge to educate sensibilities to cruelty are immense. Because compassion could conceivably reach degrees of moral generalization that the idiosyncrasies of individual mental faculties would probably not allow on a cognitive basis, compassion becomes the instrument *par excellence* of punitive moderation. If knowledge cannot be

162. "If I had not seen it," says Montaigne, "I could hardly have made myself believe that you could find souls so monstrous that they would commit murder for the sheer fun of it . . . ." MONTAIGNE, *supra* note 154, at 484. However, it is in the "the pitiful gestures and twitchings of a man dying in agony, while hearing his screams and groans" that one finds "the farthest point that cruelty can reach . . . ." *Id.*

163. "My advice would be that exemplary severity intended to keep the populace to their duty would be practised not on criminals but on their corpses . . . ." *Id.* at 483.

relied upon for the betterment of society, compassion can. Once the perspective of the suffering subject of cruelty is brought into the normative imagination, a whole new normative territory is open for liberal democratic constitutionalism.

4. Agent-Independent, Victim-Objective Cruelty

The conceptions of cruelty discussed above are reductionist in important ways. They can solely capture the cruelty that takes place within the confines of the binomial agency/pain, where cruelty obtains only when a certain pain threshold is reached as result of certain types of conduct accompanied by relevant mentalist elements (|agency/pain| = cruelty). The agent-independent, victim-objective conception changes this binomial. The causation/indignity pair is substituted for agency/pain, and now cruelty is the case when a grave violation of human dignity, which in normal circumstances would reach the pain threshold for cruelty, is caused by an agent or impersonal institutions, structures, or contexts (|human cause/indignity| = cruelty).[164]

Constitutional jurisprudence in most liberal democratic jurisdictions has considered and by and large rejected agent-independent causation in the definition of cruelty. In *Wilson*, the United States Supreme Court stipulated that:

> Petitioner, and the United States as amicus curiae in support of petitioner, suggests that we should draw a distinction between "short-term" or "one-time" conditions (in which a state of mind requirement would apply) and "continuing" or "systemic" conditions (where official state of mind would be irrelevant). We perceive neither a logical nor a practical basis for that distinction. The source of the intent requirement is not the predilections of this Court, but the Eighth Amendment itself, which bans only cruel and unusual *punishment*. If the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental

164. One interesting parallel can be drawn between this definition of cruelty and the definition of torture in the Inter-American Convention to Prevent and Punish Torture. Article 2 reads: "Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish." Inter-American Convention to Prevent and Punish Torture art. 2, Dec. 9, 1985, O.A.S.T.S. No. 67.

> element must be attributed to the inflicting officer before it can qualify.[165]

This rejection was, however, under-predicted by the jurisprudence of the Court. In *Furman*, one finds the acknowledgement that systemic subjection of minorities vitiates any penal system that unequally allocates punitive burdens against such minorities.[166] Justice Marshall said it better:

> [T]he burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society. . . . Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape. So long as the capital sanction is used only against the forlorn, easily forgotten members of society, legislators are content to maintain the status quo, because change would draw attention to the problem and concern might develop. Ignorance is perpetuated and apathy soon becomes its mate, and we have today's situation.[167]

In an oft-cited passage, the Supreme Court has considered the human dignity aspect of cruelty. Justice Brennan's opinion in *Furman* contains the most extensive and deepest effort to date to reflect on the nature of cruel punishment in the context of American constitutionalism. The opinion sought to articulate the four principles under which violations of the Eighth Amendment prohibition on cruel and unusual punishments were to be determined. The principles, of which the first is most important, were the following: (i) "a punishment must not be so severe as to be degrading to the dignity of human beings"; (ii) "that the [s]tate must not arbitrarily inflict a severe punishment" (iii); that the "severe punishment must not be unacceptable to contemporary society"; and, finally, (iv) "that a severe punishment must not be excessive. A punishment is excessive under this principle if it is unnecessary . . . ."[168]

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165. Wilson v. Seiter, 501 U.S. 294, 300 (1991).

166. In his concurrence, Justice Douglas wrote:

> The words "cruel and unusual" certainly include penalties that are barbaric. But the words, at least when read in light of the English proscription against selective and irregular use of penalties, suggest that it is "cruel and unusual" to apply the death penalty—or any other penalty—selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board.

Furman v. Georgia, 408 U.S. 238, 244–45 (Douglas, J., concurring).

167. *Id.* at 365–66 (Marshall, J., concurring).

168. *Id.* at 271, 274, 277, 279 (Brennan, J., concurring).

But how realistic would it be to expect extant constitutional doctrine to adopt the principle that respect for the person as free and equal embodiment of human dignity ought to be proactively affirmed through, rather than simply not violated by, punishment? Fairly realistic, actually. In *Furman*, the United States Supreme Court affirmed that dignity is the value underlying the Eighth Amendment. In another important passage, the Court explained that:

> The barbaric punishments condemned by history, punishments which inflict torture, such as the rack, the thumbscrew, the iron boot, the stretching of limbs and the like, are, of course, attended with acute pain and suffering. When we consider why they have been condemned, however, we realize that the pain involved is not the only reason. The true significance of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.[169]

But well before *Furman*, the Court had already stated that "the basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[170]

More recently, the human dignity aspect of cruelty would find echo in Justice Blackmun's concurrence in *Farmer*.[171] However, doctrine must be reconstructed to make it consistent with the principles that state violence in the form of punishment ought to be conceived and practiced as cruelty-free and that respect for the person as a free and equal embodiment of human dignity ought to be proactively affirmed through, rather than simply not violated by, punishment. One step in this reconstruction is precisely the articulation of a conception of cruelty that includes but also reaches beyond the confines of the agency-pain relationship, beyond active agency and its motivations, and beyond the actual and conscious suffering

169. *Id.* at 272–73 (citations omitted) (internal quotation marks omitted).

170. Trop v. Dulles, 356 U.S. 86, 100. Justices Cardozo's and Frankfurter's substantive due process jurisprudences are equally rich in the consideration of human dignity as a fundamental constitutional value. That in recent years the Court and commentators have made much of a contrast between libertarian and dignitarian constitutions, classifying the U.S. Constitution among the former is therefore ahistorical.

171. Farmer v. Brennan, 511 U.S. 825, 851–58 (Blackmun, J., concurring). An antecedent can be found in the arresting language of Justice Murphy's dissent in In re Yamashita, 327 U.S. 1, 26 (1946) (Murphy, J., dissenting).

of its victims. How would such a conception impact our understanding of cruelty in the context of punishment?

If law is not pure logic, it is certainly not pure cost-benefit pragmatism either.[172] Discoveries in the social sciences and psychology as well as insight into the requirements of justice have shaped criminal law. For example, one of the important lessons taught by the sciences and reflection on the nature and requirements of justice is that to fully grasp cruelty in the world, discrete agency and conscious suffering are not necessary definitional criteria. A conception of cruelty must sometimes transcend discrete agency and conscious suffering in order to be responsive to the moral capacity to reject cruelty.

On the victim-objective, agent-independent conception, agency is complemented, if not altogether replaced, by impersonal causation, and the concern with suffering is expressed as a principled commitment to inherent human dignity, even where sentience is not fully present. The moral and legal significance of vulnerability is also important to this conception of cruelty, which requires integration of the preoccupation with punitive agency and intention and the stipulation of the structural aspects of justice and vulnerability. It also asks for the sublimation of concern with suffering into the stipulation of what dignity demands.[173]

It is, I would claim, the proper exercise of legal reasoning that calls forth the fourth conception of cruelty. If you start out from the acceptance of legal reasons for constraining power's brutality and suffering-causing tendencies, and think hard enough about them—avoiding inconsistencies, following normative entailments, spelling out practical requirements, and seeking universalizability[174]—you will at some point in the development of a comprehensive theory of cruelty find the necessity of complementing agent-based and victim-subjectivist conceptions with a victim-objective, agent-independent view. In other words, once pain-causing agency is set under legal scrutiny and a concern with suffering is given legal and moral priority, consistent reasoning should force consideration of structural causation and suffering-independent justifications for caring for others. As far as the law is concerned, this push is best understood as part of the

172. *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW (1881).

173. Germany is still the leading jurisdiction in developing and enforcing a legal conception of human dignity. Article 1 of the Basic Law for the Federal Republic of Germany reads "[h]uman dignity shall be inviolable. To respect and protect it shall be the duty of all state authority." GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [BASIC LAW], May 23, 1949, BGBl I (Ger.).

174. Universalizability in the Kantian sense, meaning the potential shown by select normative formulations to achieve universal validity. More below on moral universalization and criminal law..

operation of practical legal reasoning that, through forces internal to itself, leads to dissatisfaction with principles that are not pushed to their logical conclusions.[175] This is not a light proposition, I realize, but not all true propositions are uncontroversial.

Nevertheless, once more is said about it, I expect the reader will recognize in her or his own views and in prevalent legal and moral institutions the marks of the victim-objective, agent-independent conception of cruelty. The reason for this prevalence is in part historical. The evolution of the understanding of cruelty is not an unfamiliar story. As modern Western societies moved from the naturalization of poverty,[176] rigid social hierarchy, and brutality towards the conception of misery as human-made, to the equality of all as being legally and morally required, and to a more subtle and encompassing understanding of human suffering, legal systems came to increasingly display the marks of these shifts.[177] The

175. An earlier articulation of the type of practical reason relevant here is found in Kant, who postulated the existence of a "dialectic of reflection," founded on the recognition that "it is an essential *principle* of every use of our reason to push its cognition to consciousness of its *necessity* . . . ." IMMANUEL KANT, *Groundwork of the Metaphysics of Morals*, *in* PRACTICAL PHILOSOPHY 108 (Mary J. Gregor ed. & trans., 1996) [hereinafter KANT, *Groundwork*].

176. The American colonial and post-colonial economic experiences were central to this movement. *See generally* HANNAH ARENDT, ON REVOLUTION (1963).

177. A phenomenon taking place at the crossroads of consciousness and experience, the intricacies of these changes beg explanation. Nonetheless, this cannot be provided here. *See* Barrozo, *Jurisprudence of Cruelty*, *supra* note 15, where I argue that the classical sociological explanations of the development of modern criminal law are insufficient to account for the nature and direction of its development. These explanations include attribution of causal weight to: processes of instrumental and intra-systemic rationalization; macro-shifts in the forms of collective consciousness; political strategizing of empowered elites in the face of distributive pressures exerted by an electoral populace under conditions of democracy or revolutionary threat; changes in the nature and capillarity of power; occasional crystallization of opinion into social movements, institutions, and so on, thus defeating their competitors in the open market of ideas; and changing conceptions of law on the part of jurists. Even when not totally directionless, these factors are at least highly underdetermining of structure and content. In *The Jurisprudence of Cruelty in Criminal Law*, I complement and rectify these classical explanatory models proposed by MAX WEBER, ECONOMY AND SOCIETY (Guenther Roth & Claus Wittich eds., Univ of Calif. Press 1978). Weber is quite aware, though, that without consideration of material and ideal interests, rationalization is a highly undertermining process. An early statement of this awareness is found in MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 38 (Routledge 2001) (1904), where Weber writes "one may . . . rationalize life from fundamentally different basic points of view and in very different directions. Rationalism," he adds, "is an historical concept which covers a whole world of different things." *See also* EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (W.D. Halls trans., The Free Press 1997) (1893); KARL MARX, *Manifesto of the Communist Party*, *in* THE MARX-ENGELS READER 469–500 (Robert C. Tucker ed., 1978); KARL MARX, *Critique of the Gotha Program*, *in* THE MARX-ENGELS READER 525–41 (Robert C. Tucker ed., 1978); KARL MARX, *The Eighteenth Brumaire of Louis Bonaparte*, *in* THE MARX-ENGELS READER 594–617 (Robert C. Tucker ed., 1978) (and the suspicion against the welfare state in neo- and post-Marxist thought); MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., 1979); JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS (John Gray ed., Oxford Univ. Press 1998); ALAN WATSON, THE EVOLUTION OF LAW (1985).

emerging legal structure of the fourth conception of cruelty has three pillars that reflect this historical development. These pillars are inherent human dignity, negative structure, and positive structure.

Consider first the idea of inherent dignity.[178] As modern criminal and constitutional law advanced, concern with suffering developed in two directions. First, it expanded to encompass not only human life but all sentient life.[179] In the second direction of development, the initial concern with suffering has also advanced to encompass non-sentient, unaware, or unconscious human beings.[180] To contemporary observers, this latter development appears interlaced with secularized philosophies proclaiming that human life has inviolable status and overriding moral and legal preeminence.[181]

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178. The idea has both natural law, Kantian, and, maybe surprisingly, utilitarian roots. The first two are more familiar origins. The latter can be seen in the way utilitarian thought came under the influence of the idea of human dignity. J.S. Mill modified the idea of happiness to include the entailments of a "sense of dignity" each person naturally possessed. According to Mill, the utilitarian calculation needs to factor in individual dignity in the evaluations of the collective state of affairs. In this respect, the oft-cited passage—the "Socrates passage"—is in MILL, *supra* note 178, at 140. For the intellectual history of the idea, see MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING (2012). For a learned and transjurisdictional analysis of the legal meanings and applications of the concept, see Luís Roberto Barroso, *Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse*, 35 B.C. INT'L & COMP. L. REV. 331 (2012).

179. Under the pressure of the accusation of speciesism, it has been proposed that the value of life be extended to all sentient life. *See generally* PETER SINGER, ANIMAL LIBERATION (HarperCollins 2002) (1975). Of course, the concern with cruelty is not restricted to law and morality, either. My soap bar label reads: "Chamomile: cruelty-free, biodegradable, natural, no artificial colors."

180. Examples would include crimes against the dead, regulation of terminal care, euthanasia, abortion, etc. Law's concern with the non-sentient is a double-edged sword, though. It is worthwhile to note that both in its protective and punitive modes, the law shows interest in the human person not only beyond one's sentient self, but also after one's life has ended. For an excellent, and, to my knowledge, the first, systematic study of various ways in which contemporary law reacts to the inevitability of human finitude, see RAY D. MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD (2010). Madoff offers "super capital punishment" as an example of criminal law reaching beyond life in order to punish the deceased. She explains:

> A critical, though largely forgotten, issue involving the historical treatment of dead bodies was the practice of desecrating the body as punishment for particularly egregious crimes. An early example of the phenomenon occurred on 30 January 1661. On that day the bodies of the regicides Oliver Cromwell, Henry Ireton, and John Bradshaw were exhumed, dragged to London's place of execution, Tyburn, on hurdles, and hanged before a crowd of thousands. At sunset, the bodies were taken down, decapitated, and buried in a pit under Tyburn, while the heads were placed on spikes atop Westminster Hall. Dismemberment of the body was understood by many as a way of punishing the traitor beyond the grave.

Id. at 21.

181. Here is the archetypical formulation of this idea in the Kantian corpus:

> Rational nature is distinguished from the rest of nature by this, that it sets itself an end. This end would be the matter of every good will. But since, in the idea of an absolutely good will without any limiting condition (attainment of this or that end), abstraction must be made altogether from every end to be effected (this would make every will only relatively good), the end here must be thought of not as an end to be effected but as an independently existing

While judgments and opinions influenced by experience—whether as custom, tradition, or partisan politics—suffer from the exaggerated influence of the transitory forces of under-reflective experience, legal reasoning, when successful, can reach and articulate principles capable of standing with relative independence vis-à-vis those influences and yet receive the seal of legal authority. It was from the relative independence from experience and the possibility of legal authority through reason that the idea of inherent dignity and its derivative duties first gained the momentum that led to its codification in virtually every place where democracy and liberalism combined.[182] But why should we care when suffering on the part of the subject is not present? What is the basis for caring for the unconscious or unaware in the way we often do?

The argument is that inherent dignity values not so much any specific individual as the humanity in each of them. The insight here is not that humanity instrumentally needs individuals in order to more completely manifest the whole spectrum of attributes and capacities of the species. More important to the law is the understanding that human membership is both a necessary and sufficient condition of entitlement, despite any idiosyncrasy or individual characteristic, to the equal unconditional status of a dignified being. Once touched by humanity, each individual is granted special dignity. This outlook clearly transcends initial concerns with actual suffering in the first three conceptions of cruelty. From within it, observers are able to see and reject cruelty even where suffering is absent.

> end, and hence thought only negatively, that is, as that which must never be acted against and which must therefore in every volition be estimated never merely as a means but always at the same time as an end. Now, this end can be nothing other than the subject of all possible ends itself, because this subject is also the subject of a possible absolutely good will; for, such a will cannot without contradiction be subordinated to any other object. The principle, so act with reference to every rational being (yourself and others) that in your maxim it holds at the same time as an end in itself, is thus at bottom the same as the basic principle, act on a maxim that at the same time contains in itself its own universal validity for every rational being. For, to say that in the use of means to any end I am to limit my maxim to the condition of its universal validity as a law for every subject is tantamount to saying that the subject of ends, that is, the rational being itself, must be made the basis of all maxims of actions, never merely as a means but as the supreme limiting condition in the use of all means, that is, always at the same time as an end.

KANT, *Groundwork*, *supra* note 176, at 86–87 (emphasis omitted).

182. Sometimes, though, the word cruelty is omitted. Article 3 (Prohibition of Torture) of the European Convention for the Protection of Human Rights and Fundamental Freedoms does not mention the word cruelty, reading instead "no one shall be subject to torture or to inhuman or degrading treatment or punishment." European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 221. For a study of Article 3, see JOHN COOPER, CRUELTY: AN ANALYSIS OF ARTICLE 3 (2003).

The perspective from human dignity has also enabled criticism of courses of action, individual or collective predicaments, and states of affairs even when confronted with the complacency, unawareness, or indifference of those subjected to them. In fact, this kind of putative representation of the victimized other has become common practice not only in the courts of law, but also in constitutional politics and social movements everywhere. Absent the ability to articulate the normative basis for claims made on behalf of those persons unable or unwilling to make such claims themselves, law, society, and politics would look very different from how they do today.

But human dignity is only half of the story of the fourth conception of cruelty. The other half refers to the structural causes of (and favoring conditions for) cruelty. Structural causes or conditions can be said to be positive or negative. Negative structures function by restricting opportunities to escape cruelty or by maintaining in place favorable, though not often independently causally sufficient, conditions for cruelty. Given a certain alignment of negative structures, even well-intended acts of love can be proximate causes of cruelty. Positive structures, on the other hand, actively set in place and facilitate causes of cruelty or otherwise forge types of relationships in which cruelty thrives. Given a certain alignment of positive structures, even heroic acts of deliverance will not be enough to save victims from cruelty. If you wanted to point to one institution that embodies both the negative and positive structural conditions of cruelty, you could point to the American prison system.

To acknowledge the causal relevance of negative structures is to concede that institutions never come to social life at a perfectly isonomic starting point for their members. When they emerge, institutions tend to crystallize existing social arrangements and distributive patterns, a crystallization that seldom survives critique leveled from the perspective of justice.[183] The ensuing responsibility for legal analysis is clear. Such analysis must interrogate the subtleties of the interaction between existing institutions and the prevalence of rights violations, an interaction that the

183. Mill writes:

> Laws and systems of polity always begin by recognizing the relations they find already existing between individuals. They convert what was a mere physical fact into a legal right, give it the sanction of society, and principally aim at the substitution of public and organized means of asserting and protecting these rights, instead of the irregular and lawless conflict of physical strength. Those who had already been compelled to obedience became in this manner legally bound to it.

JOHN STUART MILL, *The Subjection of Women*, *in* ON LIBERTY AND OTHER ESSAYS 475 (John Gray ed., Oxford Univ. Press 1998).

social sciences have shown to be constantly hidden behind the opacity of the mechanisms of social cohesion, behavioral patterns, and common opinion.

Speaking to the predicament of women in Victorian society, J.S. Mill, the great modern critic of negative structures, pointed to the way in which social structure negatively influenced their opportunities to escape suffering, rendering them, on the contrary, considerably more vulnerable to cruelty and exploitation.[184] "[S]ex is to all women," Mill wrote, "peremptory exclusion . . . ."[185] It was a form of exclusion that, because of the largely stealth and negative operation of its structural components, remained widely unarticulated, if not completely hidden.[186] Invisible, its victims were thus condemned to "the feeling of a wasted life" and suffering without much, if any, sympathy from the rest of society.[187] The point here is the development of an awareness of structures that functionally render specific categories of individuals particularly vulnerable. In the predicament of the most vulnerable everywhere, the institutional apparatus of negative structure accrues barriers to collective acts of resistance. This result is caused by either the dispersion of the directly affected, or the immediacy and proximity of the impact of negative structures. Once again, just think of American prisons.

With the practical and institutional mechanisms of negative structure come its ideological components, the influence of which appears to naturalize or otherwise legitimize their potential for cruelty. Who has not heard in response to the criticism of prisons as hotbeds of cruelty that everyone there chose that fate, and that bad things are part of incarceration anyway? Justice Thomas wrote in his concurrence in *Farmer*: "Prisons are necessarily dangerous places; they house society's most antisocial and violent people in close proximity with one another. Regrettably, 'some level of brutality and sexual aggression among [prisoners] is inevitable . . . .'"[188]

As with the defense of the inherent-dignity part, the condemnation of negative structures is concerned with empowerment and protection of the individual. Legal analyses of negative structures, however, sometimes reveal their distinct impact on groups or categories of persons as well. When we examine the development of the Supreme Court's equal

184. *Id.* at 581–82.
185. *Id.* at 581.
186. *Id.*
187. *Id.*
188. Farmer v. Brennan, 511 U.S. 825, 858–59 (Thomas, J., concurring) (alteration in original).

protection jurisprudence, it is clear how much their inspiration and meaning reflect the critique of morally spurious negative structures as instruments of cruelty, suffering, humiliation, brutality, disempowerment, and vulnerability.

Shifting attention to the problem of positive structures, the third pillar of agent-independent victim-objectivism, analyses of their impact show that diffuse agency through macro-institutional arrangements can actively and directly cause cruelty. The causal force of positive structure already figured prominently, if in a rustic and under-developed form, in Plato's jurisprudence, as the initial exchanges in *Laws* illustrate.[189] Only recently, however, has the preoccupation with the impact of positive structures acquired the status of a cause célèbre and a canonical theme of criminal and constitutional law.

By now, it should be clear how reflection about negative structure and positive structure comes full circle with the value of inherent human dignity. The ideal of human dignity is made more palpable when awareness is encouraged of the impersonal factors that operate contrary to it. Today, it seems that only those prepared to pay a great intellectual price can be oblivious to the pervasiveness of negative and positive structures.

5. Cruelty Redefined

Cruelty often comes to its victim as an existential cataclysm. Justice Blackmun wrote in his concurrence in *Farmer* that cruel (rape, in that case) punishment "not only threatens the lives of those who fall prey to their aggressors, but is potentially devastating to the human spirit. Shame, depression, and a shattering loss of self-esteem accompany the perpetual terror the victim thereafter must endure."[190] He was, of course, correct. But it is not always that episodes of cruelty make so conspicuous an entrance onto the stage of human suffering. Because of that, one must beware of definitions of cruelty, such as the first three, that are unable to capture stealthy cruelty. Agent- (objective and subjective) and victim-based conceptions of cruelty turn out to be insufficiently capacious to accommodate the kinds of impersonal causation, lack of malign intentions, and even absence of the victim's consciousness, that are involved in countless cruel inflictions in the context of punishment.

The redefinition of cruelty I propose incorporates all subjective and objective criteria, although not as necessary conditions. However, unlike

189. *See* PLATO, LAWS (R.G. Bury trans., Harvard Univ. Press 1926).
190. *Farmer*, 511 U.S. at 853 (Blackmun, J., concurring) (citation omitted).

the agent-objective, agent-subjective, and victim-subjective conceptions, I propose to define cruelty solely on the basis of a causation-indignity binomial. This binomial captures all essential elements of cruelty while avoiding the under-inclusiveness of the first three conceptions. Thus defined, cruelty is the case whenever a grave violation of human dignity, that in normal circumstances would reach the suffering threshold for cruelty, is caused by an agent or impersonal institution, context, or structure (|human cause-indignity| = cruelty).

Thus redefined, cruelty refers to severe violations of the respect, consideration, and care commanded by the dignity individuals embody. This is true whenever (although not solely when) those violations evoke the suffering threshold (severe harm) familiar to the agent- and victim-based conceptions. In this preferred definition, cruelty is attributable not only to personified agency and identifiable intention, but also to the existence and operation of impersonal factors that shape the circumstances surrounding the victims of cruelty, leaving those victims relatively more vulnerable to violations of their dignity. These impersonal factors are identifiable in light of the cruelty they engender or facilitate, and not the other way around. This conception meets the demand that respect for the person as a free and equal embodiment of human dignity ought to be proactively *affirmed through* rather than simply *not violated by* punishment.

C. Rights and Punishment: The Example of the Right Against Cruelty

It is not uncommon for a fundamental constitutional right to be articulated as a rule shaped by a clash between two or more important constitutional principles. The right against cruel punishment presents just such a case. But unless the conception of right is properly understood, the reconstruction of constitutional punishment will remain shaky. In what follows, I offer a value theory of the right against cruel punishment and explain a few of the individually identifiable privileges, powers, actionable rights, and immunities that constitute this fundamental right.

1. Rights Redefined

There is in liberal democratic constitutionalism a broad acknowledgement of the legal and moral authority of constitutional rights. This acknowledgement does not translate, however, into a universal consensus about the substance of those rights. Instead, questions about the substance of rights are contentious and more often than not pursued with

disappointing results. This outcome is unsurprising given the centrality of these rights to the manifold dimensions of the lives of right-holders,[191] and considering the long list of duties, incapacitations, liabilities, and disabilities[192] these rights impose on their states. This section contributes to the remediation of this situation.[193]

The substance of fundamental rights depends upon two kinds of considerations.[194] The first consideration is whether the right is better understood as protecting privileged will,[195] interest,[196] or value.[197] The second consideration is what constitutional principles, if any, inform the constitutional norm upon which a fundamental right is founded. I discuss these questions in relation to the right emerging from the principles that state violence in the form of punishment ought to be conceived and practiced as cruelty-free and that respect for the person as free and equal embodiment of human dignity ought to be proactively affirmed through rather than simply not violated by punishment.

Will theories of rights imply that constitutional rights protect privileged wills by reserving a legal sphere within which the individual will is absolute or semi-absolute.[198] A classic example is the freedom of contract right expounded in *Lochner v. New York* (1905). In that case, the United States Supreme Court defined the liberty to form and enter into a contract as a right to the exclusion of all extraneous interferences with the will of the parties.[199] This notion of rights was dominant in the nineteenth century, but has fallen out of favor. Its explanatory power in relation to the right

191. It has been correctly said that the rights of individuals evolved "from the protection of the sensibilities of their bodies to protection of the sensibilities of their souls." EUGEN EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 362 (Walter L. Moll trans., 1936). The interesting parallel with the evolution of punishment is not to be forgotten here. For the changes in punishment, see FOUCAULT, *supra* note 178.

192. *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

193. This section draws from Paulo Barrozo, *Finding Home in the World: A Deontological Theory of the Right to be Adopted*, 55 N.Y. L. SCH. L. REV. 701 (2011) [hereinafter Barrozo, *Finding Home*], where I first published my value conception of rights. I here modify and expand on that work in this regard.

194. Naturally, rights may be described in light of different sets of criteria. In this Article I approach the fundamental structure of rights via the nature of that which they protect at the core. For alternative approaches, see the following, in addition to other works cited in this section: Janneke Gerards & Hanneke Senden, *The Structure of Fundamental Rights and the European Court of Human Rights*, 7 INT'L J. CONST. L. 619 (2009).

195. *See* FRIEDRICH CARL VON SAVIGNY, SYSTEM OF THE MODERN ROMAN LAW (William Holloway trans., 1867).

196. *See* JOSEPH RAZ, THE MORALITY OF FREEDOM (1986).

197. *See* Barrozo, *Finding Home*, *supra* note 193.

198. *See* SAVIGNY, *supra* note 195.

199. *See* Lochner v. New York, 198 U.S. 45 (1905).

against cruelty and to have one's dignity affirmed even through punishment is nearly nil.

The current prevalent conception of rights sees them as mechanisms to safeguard privileged individual interests over the interests of the state and third parties.[200] In *Lawrence v. Texas*, the United States Supreme Court recognized the petitioner's interest in engaging in intimate sexual conduct as privileged vis-à-vis Texas' interest in regulating the matter.[201] Similarly, when the *Farmer* Court stated that "[t]he Eighth Amendment places *restraints* on prison officials, who may not, for example, use excessive physical force against prisoners,"[202] it extended protection to a prisoner's interest in being free from excessive physical coercion. Likewise, when the same Court ruled that the Eighth Amendment "imposes *duties*" on prison officials to provide "humane conditions of confinement," it effectively held that these duties are means to a prisoner's interest in the necessities of life, such as food, clothing, shelter, medical care, and safety.[203]

Under the *interest* conception, constitutional rights operate to allocate primacy to selected interests against competing ones. Despite the plasticity of the interest conception of rights to describe in its own terms the broad category of rights, it is unable to capture the dignitarian essence of rights in a reconstructed theory of constitutional punishment. As an alternative, I propose that rights be understood through the lens of protected *values*.

The value theory of rights submits that a right protects individuals or groups as embodiments or agents of values, such as human dignity, liberty, or equality. Legal systems often allocate initiative to individuals or groups to protect the values they embody through justiciable claims. The result is a system of rights claims and enforcement mechanisms at least as decentralized as those systems afforded by the will and interest conceptions. However, unlike its contenders, the value theory of rights can adequately justify why, absent an individual's ability or willingness to protect the value he embodies, authority or obligation to do so can be transferred to or jointly held by third parties.

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200. *See* RAZ, *supra* note 196.

201. Lawrence v. Texas, 539 U.S. 558 (2003).

202. Farmer v. Brennan, 511 U.S. 825, 832 (citing Hudson v. McMillan, 503 U.S. 1 (1992)) (emphasis added).

203. *Id.* (emphasis added).

Compare the basic structure of a justiciable constitutional right as formulated by the three theories.

(1) According to will and interest theories:

Constitutional norm N gives A the right to make decisions on B without interference from I

OR

Constitutional norm N gives A the right to pursue interest B without interference from I.

(2) According to the value theory:

Constitutional norm N protects value B in A as against I,

where the protection of value includes:

Empowering A to promote B as against I

AND

Under certain conditions empowering others to protect B in A as against I.

(3) In the example of punishment by confinement, the value conception of the rights not to be cruelly punished and to see the individual's dignity affirmed though his punishment may be thus expressed:

Constitutional norm N protects the human dignity of prisoners as against the state's punitive power and authority,

including by:

(a) Primarily allocating to prisoners the power of legal initiative to claim this right in the course of promoting the human dignity they embody;

(b) Creating an obligation for the state to guarantee the rights, privileges, powers, and immunities into which this right can be disaggregated; and

(c) Creating the obligation for the state to remedy, by a combination of retrospective compensatory and prospective protective remedies, any violation of this right

WHERE

(d) Punishment by confinement is defined as a retributive sanction (for a norm violation) that directly imposes a coerced vulnerability on the sanctioned party, including that which results in any significant deprivation and negative impact on the life of the confined; and

(e) Cruelty in confinement is defined as a grave violation of human dignity that will, in normal circumstances, reach the suffering threshold for cruelty, whether it be caused by an agent, impersonal institution, or context.

Constitutional rights norms usually stem from a value compromise. Fundamental values are complex entities and so are the constitutional norms that promote, protect, and reflect them. These constitutional norms are of varied nature. Some confer attributions, powers, and prerogatives on various governmental entities; others protect values through fundamental rights norms. A "complete constitutional right"[204] expressed as a rule embodies at least one principle. Often, as I have noted, such a right incorporates two or more clashing principles. Inherent in the rights norm and principle(s) is a series of instrumental relational legal positions expressed as rights to do something, powers, and/or liberties.

In constitutional orders, the principles of personal equality, freedom, and dignity, on one side, and social order, on the other, frequently collide. In the criminalization of conduct, the intensity of the collision between liberty and order is intensified.[205] Constitutional rights in the context of punishment are therefore best understood and interpreted as a result of this collision. They encapsulate a central clause of any constitutional compromise: the state can take away personal liberty and create coerced vulnerability in order to punish violations of some of its most important laws, but in doing so it guarantees those being punished the protection against cruelty and the active promotion of their dignity.

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204. *See* ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (2004).

205. That is the case even if you consider liberty to be liberty to pursue some morally justifiable ends and not any personally chosen end. *See generally* JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? (1996).

2. Disaggregating the Right Against Cruelty

I have argued that punishment coerces people into greater vulnerability, and that rights as tools to protect fundamental values embodied by individuals can be unbundled into different subcategories of entitlements and guarantees, each with its corresponding allocation of initiative, responsibility, and remedy. I have also shown that cruelty has objective and impersonal elements in addition to subjective and personal ones. I now detail the disaggregation of the constitutional right into which is translated the principle that state violence in the form of punishment ought to be conceived and practiced as cruelty-free.

In the reconstructed paradigm for constitutional punishment advanced in this Article, once there is a finding of cruelty in the context of punishment, a non-exclusionary system of responsibilities attribution must follow. This system of responsibility includes strict liability for governmental entities (and their corporate proxies) and different degrees of responsibility for individuals (including judges, prison officials, and other inmates). As previously discussed, a "complete constitutional right" defines a multidimensional series of instrumental relational legal positions (vis-à-vis the values they promote) expressed as rights to something, powers, and/or liberties.

Wesley Hohfeld helpfully identifies the following basic "jural" conceptions: right, no-right, privilege, duty, power, disability, immunity, and liability.[206] These legal categories are then used by Hohfeld to create an analytical framework made operational by pairs of opposition and correlation.

The opposite pairs are the following:

Right or No-Right

Privilege or Duty

Power or Disability

Immunity or Liability

206. *See* Hohfeld, *supra* note 193.

And these are the correlative pairs:

Right v. Duty

Privilege v. No-Right

Power v. Liability

Immunity v. Disability

The logic of the analytics of opposition and correlation is simple but powerful.[207] In legal relationships, such as those involving constitutional rights in the context of punishment, a party's position vis-à-vis some other party falls under at least one of these categories: right or no-right, privilege or duty, power or disability, and immunity or liability. The object of these legal relationships can be, for example, for one of the parties to be kept away from a general male prison population if she is a male-to-female transgendered person. Thus, if party *P* has a right vis-à-vis party *P'* in relation to a specific legal object *O*, party *P* cannot have a simultaneous No-Right vis-à-vis party *P'* in relation to the same object *O*. This proviso is equally valid for all the other pairs.

Things become even more interesting when we get to correlative pairs. In reality, opposite legal categories never confront each other, for where one opposite is present, the other, by definition, cannot be. The confrontation is with correlatives. Hence, if a party *P* has a Right in relation to a specific legal object *O*, it necessarily follows that there is a party *P'* out there with a corresponding Duty in relation to the same legal object. If *P* has a Privilege in relation to *O*, *P'* can claim No-Right in relation to it; if *P* has a Power in relation to *O*, *P'* is Liable to endure the exercise by *P* of her Power; and if *P* has an Immunity in relation *O*, *P'* is Disabled from exercising any claims or interests in relation to *O* vis-à-vis *P*. And so on.

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207. For those impatient with all this analytical paraphernalia, let me quote Hohfeld:

> If, therefore, the title of this article suggests a merely philosophical inquiry as to the nature of law and legal relations—a discussion regarded as more or less as an end in itself—the writer may be pardoned for repudiating such a connotation in advance. On the contrary, . . . the main purpose of the writer is to emphasize certain oft-neglected matters that may aid in the understanding and in the solution of practical, every-day problems of the law.

Id. at 20. There is an undeniable Aristotelian logic of identity and difference in Hohfeld's analytics. In opposition, the conceptualism in the European thought of the nineteenth century was inspired by the gymnastics of working pure the basic legal concepts inherited from the Romans through the hands of the Justinian codification, although this discussion is beyond the scope of this Article.

In complex legal relations such as those governed by constitutional rights, the right-holder occupies the center of a field of correlative dimensions of the right, in potential opposition to any number of other legal agents. Prisoners are a case in point. A few examples will help illustrate how correlated pairs would work in the case of confinement.

If prisoner *P* has a Right to be protected from other violent inmates, it necessarily follows that the state has a corresponding Duty to keep her protected at all times during confinement. If prisoner *P* has the Privilege to be released from prison at the end of her sentence, the state can claim No-Right to keep her there longer. If prisoner *P* has the Power to undergo a gender reassignment, the state is Liable to endure this change. If prisoner *P* has an Immunity in relation to torture, the state is Disabled from torturing her.

In another case, prisoner *P* has a Right (in a vertical relationship with the state) not to be a victim of cruelty for the duration of the punishment inflicted by the state, a punishment that is marked by coerced vulnerability. Additionally, prisoner *P* has other Rights, Privileges, Powers, and Immunities (horizontally) in relation to officials, contractors, other inmates, and so on, and (horizontally or vertically) vis-à-vis the state in situations outside of the cruelty context. Suppose that while in custody, *P* is tortured, robbed, denied access to elections, bullied, humiliated, denied normal visits, placed in solitary confinement, starved, prevented from engaging in religious observance, suffers from mild food poisoning, has the papers containing his latest brilliant song lyrics taken from him, has his iPod accidentally damaged, is the victim of fraudulent loans, and breaks his fingers in a basketball game. How do we sort this all out? The correlational pairs help.

This analysis merely gestures toward a remedies approach consistent with the principle that if any violation of the first principles of constitutional punishment occurs, that ought to be fully redressable, and adequate preventative remedies ought to be available and accessible to victims of the violation. While being punished, prisoners are in several simultaneous and consecutive legal relationships with the state-as-prison, individual prison officials, contractors, other inmates, and so on. Some of these relationships place inmates in Right, Privilege, Power, and Immunity positions. Violations of these positions pose the question of redress. Unless legally justifiable or excusable, these violations warrant remediation. What kind of remediation do they warrant? That will depend,

among other factors, on the nature of the position violated and the legal status of the violator.[208]

Sorting out violations and corresponding remedies is a complex enterprise. Prisoner *P* is entitled to *retrospective* compensatory and punitive damages, *prospective* injunctive relief, and *retrospective/prospective* declaratory injunctions against the state for cruelty (for the torture included in the example above, certainly, and possibly for additional actions described, depending on the context) in violation of a constitutional right. On the other side of this legal relation, vis-à-vis the legal object "cruelty-free punishment," stands the state in a correlational Duty. Such a Duty includes both a guarantee of cruelty-free punishment and a remedy for its objective performance failures. This Duty to remedy rights against cruelty violations is independent of other tort or contract-like damages prisoner *P* may be entitled to recover against officials, contractors, and other inmates.

Prospective remedies pose a challenge to the legal system in most cases where they are used. One direction forward-looking remedies could take is complex litigation with managerial intervention by courts, as with school desegregation, redistricting, prison reform, etc. Additionally, and accompanying any symbolic value of declaratory judgments, one can imagine partial suspension or temporary limitation of punitive powers (generally, in relation to a category of offenses, or specifically, in relation to an individual prisoner) as a perfectly plausible injunctive relief.[209]

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208. In the United States, the sovereign immunity of the federal states matters in the case of their prison facilities. As already noted above, in this Article I intentionally disregard state sovereign immunity problems. With Ex parte Young, 209 U.S. 123 (1908), the Supreme Court, in order to vindicate both the supremacy clause and the due process clause of the Fourteenth Amendment, affirmed that violations by non-federal state actors of individual rights are also justiciable in federal court. However, in order to make it compatible with the interpretation of the state sovereign immunity clause of the Eleventh Amendment, two anomalous fictions were created. First, the Court stated that state agents acting unconstitutionally could not possibly be acting for or as the state, but solely in their private capacity. In their private capacity, state agents could be sued for offenses to constitutional individual rights. However, since the Bill of Rights creates a vertical system of rights, the rights recognized therein are attracted only where the state action requirement is met. The Court then considered that requirement met when the offender is a state actor. Nevertheless, since the first fiction has already established that in this case the state actor acts in her private capacity only, a second fiction had to be created to consider this acting as a private party as satisfying the state action requirement. This is, by and large, where we still are doctrinally in the United States.

209. Remember here that the Eighth Amendment rule strikes a proportion between the principle of freedom and the authority to punish in the name of social order.

In any event, whether facing harm caused by agents, structures, or a combination of both, correlative pairs help determine the appropriate remedial course:

> Right A → violation of duty created by A → responsibility → remedy
>
> Privilege B → nonexistent right (no-right) claimed/acted upon by non-right holder A as against B → responsibility → remedy
>
> Power C → liability resisted/denied → responsibility → remedy
>
> Immunity D → nonexistent power (disability) claimed/acted upon as against D → responsibility→ remedy

In the legal universe, an offense made to a constitutional right is in a category of its own. Here, justice is called on not only to compensate for damages incurred by the victim, but also, and more significantly, to bring conditions, causes, and agents of violation back under the authority of the constitutional order. While tortious reparation remains a private matter, remediation of wrongdoing in breach of a constitutional right is a question central to the moral character of polities. Reconstructed constitutional punishment makes violations of rights in the context of punishment fully redressable and makes adequate preventative remedies available and accessible to all.

3. Further Implications for Remedies and Judicial Policymaking

This Article articulated four conceptions of cruelty according to the types of agency, causality, and victimization involved. All four types plague punishment, and it would be unwarranted to expect that one type of remediation would efficiently prevent and fairly redress all of them. I have also argued for a value conception of fundamental rights. According to this conception, reconstructed constitutional punishment not only protects the human dignity of prisoners against the state's punitive power and authority; it must actively promote that dignity through punishment. It does so, first, by primarily allocating to individuals being punished the legal initiative to claim rights in the course of promoting the human dignity those individuals embody. Second, a value theory of constitutional rights in the context of punishment interprets such rights as creating an obligation for the state to guarantee the rights, privileges, powers, and immunities into which those rights disaggregate. Finally, a value theory of rights creates an obligation for states to remedy rights violations by a

combination of retrospective compensatory and prospective protective remedies.

Furthermore, I have suggested a way to disaggregate the Eighth Amendment right. The logic of disaggregation obeyed the general analytical scheme where:

> Right A → violation of duty created by A → responsibility → remedy
>
> Privilege B → nonexistent right (no-right) claimed/acted upon by non-right holder A as against B → responsibility → remedy
>
> Power C → liability resisted/denied → responsibility → remedy
>
> Immunity D → nonexistent power (disability) claimed/acted upon as against D → responsibility → remedy

It would go well beyond the scope of this paper to detail matters any further. In the spirit of only laying out the foundations of integrative constitutional punishment, the following table may help show what mode of legal analysis might lead to the appropriate remedial fine-tuning that reconstructed constitutional punishment demands.

Ex ante remedies	Violation of prisoner right	Violation of prisoner privilege	Violation of prisoner power	Violation of prisoner immunity
Agent-subjective cruelty	Remedy 1	Remedy 2	Remedy 3	Remedy 4
Agent-objective cruelty	Remedy 5	Remedy 6	Remedy 7	Remedy 8
Victim-subjective cruelty	Remedy 9	Remedy 10	Remedy 11	Remedy 12
Agent-independent, victim-objective cruelty	Remedy 13	Remedy 14	Remedy 15	*Ex post* remedies

For example, if we focus on the instances of cruelty described in *Farmer*, it is clear that their adequate remediation would involve a combination of retrospective and prospective remedies. Furthermore, those remedies would need to be tied to the particular type of cruelty inflicted and to the rights, privileges, powers, and immunities into which the substance of the Eighth Amendment could be disaggregated *in casu.*

The picture that emerges from the analytical distinction of types of cruelty and the disaggregation of the fundamental right against cruelty is a

complex one. A fitting remedial system would unavoidably be complex too,[210] and at times intrusive.[211] But the challenge of complexity is more than paid off by efficiency and fairness once the branches of government adjust to the policy and the equitable measures required by it. Until they do so, punishment will not find its proper foundation in liberal democratic constitutionalism.

CONCLUSION

In his study of the British constitution, A.V. Dicey noted that "[t]he proclamation in a constitution or charter of the right to personal freedom, or indeed of any other right, gives of itself but slight security that the right has more than a nominal existence," and in order to be assured of the actual existence of a right, observers "must consider both what is the meaning of the right and, a matter of even more consequence, what are the legal methods by which its exercise is secured."[212] It was in such a spirit that the reactive doctrine of unconstitutional punishment emerged and evolved. I have showed the limitations of this approach. In order to reconstruct punishment, this Article sought to combine high theory and close attention to the doctrinal ground using examples of American constitutional jurisprudence.[213]

I recognize that reactive punishment doctrine is committed to the rejection of cruelty and to the affirmation of human dignity, albeit in partial and convoluted ways. The history of the constitutionalization of punitive coercion shows, for example, the institutional imprint of the rejection of cruelty. This rejection lies at the root of the shift from absolutist and totalitarian conceptions of state police power to a

210. The Supreme Court has recognized that "[o]nly a multifaceted approach aimed at many causes, including overcrowding, will yield a solution." Brown v. Plata, 131 S. Ct. 1910, 1937 (2011).

211. It is worth noticing that the Supreme Court and the federal judiciary have not shied away from intrusion when required by constitutional enforcement. "Courts," it has recently reaffirmed, "may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration." *Id.* at 1928–29.

212. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 124 (Liberty Classics 1982).

213. As far as I am concerned, jurists have a long-standing and healthy tradition of cannibalizing insights and findings produced by scholars working in philosophy and in the natural and social sciences. The accusation often leveled from these quarters to the effect that jurists are superficial philosophers and amateur social scientists misunderstand both the urgency and complexity of the concrete problems for which jurists are called to offer solutions and also overlooks the epistemological fact that the mind of the jurist is supposed to accompany law wherever law goes. Contemporary law, as we all know, goes everywhere. None of this, though, should be interpreted as claiming there is no way to distinguish the good from the poorly done cannibalization of philosophical insights and scientific findings.

constitutional commitment to curb the will of states to punish.[214] The jurisprudence of the United States Supreme Court exemplifies this shift.

It is, however, puzzling and disturbing that, at the beginning of the twenty-first century, even liberal constitutional orders—let alone others—have yet to take full ownership of punishment as a routine, legitimate constitutional practice. Part of the explanation for this failing must be that convicts constitute one of the most "discrete and insular" minorities of any country.[215] An overwhelming majority of convicts already find themselves (by social and biological accident, by choice, or, most often, by a combination of these factors) at the confluence of marginalizing circumstances (from race and destitution to undocumented migratory status, disability, ghettoization, and poor education) well before they are convicted of a crime.

If this were not enough, the political disenfranchisement, andsocial invisibility (or stigmatization as the price of social visibility) of convicts have historically rendered them susceptible to political exploitation.[216] Time and again, electoral politics has depicted voters as all-too-vulnerable potential victims[217] in calling for ever more radical punitive agendas.[218] It

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214. The claim here is a causal one. The reader might, however, consider the relations among the relevant variables to be one of functionality or strong correlation. I believe the cognitive gains in adopting functional or correlational explanations in this case would be comparatively small, but still significant. For a history of the ancient and medieval origins of police power to its contemporary manifestation in criminal law and procedure, see generally MARKUS DIRK DUBBER, THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT (2005).

215. United States v. Carolene Products Co., 304 U.S. 144, 152–53 (1938). Scholarship on footnote Four is abundant. Robert Cover rightly calls attention to the fact that "organized baiting of minorities has been one of the levers for manipulating masses since the advent of modern politics. "It represents," Cover concludes, "a failure of politics not only in the nonprotection of the victim group, but also in the deflection and perversion of other public purposes." ROBERT COVER, *The Origins of Judicial Activism in the Protection of Minorities*, *in* NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER (Martha Minow et al. eds., 1995). The truth of Cover's diagnosis is perfectly applicable to confined minorities in general.

216. The Prison Litigation Reform Act of 1995 (PLRA) proves the point. I will return to the PLRA below. For now, even cursory examination of the statute will show the immense burdens it places on prisoners. Section 1983 civil rights litigation. In Woodford v. Ngo, 548 U.S. 81 (2006), that burden was made even heavier by the unreasonably pro-defendant interpretation the court provided of the administrative exhaustion of remedies clause of PLRA.

217. The "prison revolving door" and "Willie Horton" campaign ads of Bush against Dukakis in the 1988 presidential election are examples of the practice.

218. It is therefore unsurprising that in such a climate, according to the Bureau of Justice Statistics, 2,299,116 prisoners were held in federal or state prisons or in local jails. William J. Sabol & Heather Couture, *Prison Inmates at Midyear 2007*, BUREAU OF JUSTICE STATISTICS BULLETIN (June 2008), http://www.bjs.gov/content/pub/pdf/pim07.pdf. Of these, over 11,000 were minors. About thirty percent of the total number of individuals held in confinement had allegedly committed drug and public-order related offenses. A growing body of literature analyzes this phenomenon. An ambitious work connecting mass incarceration, electoral politics, and governance is JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY

is a further complicating factor that criminal justice-related rights in liberal constitutions are rarely seen as statements of universal rights. Because those rights usually come into force only when the criminal justice apparatus singles out an individual suspect from the broader population, and because those rights are primarily seen from a remedial angle, perceptions are easily manipulated to give the impression that their role is to shelter the criminal. No one doubts that the social subset of criminal convicts includes the perverse, the cruel, and the violent,[219] but it also enfolds the innocent and poor, the mentally ill and disabled, the abused and neglected, the stigmatized and the persecuted. Faced with these social and cultural challenges, the doctrines of unconstitutional punishment evolved into their present stunted and misshapen form in liberal democratic constitutionalism.

But the historical process that in liberal democratic polities brought investigation, prosecution, trial, sentence, and punishment under constitutional purview was only partly about controlling the power of the state. It was also about the expression of consideration for the humanity of the investigated, prosecuted, tried, sentenced, and punished. At stake in this process is, ultimately, the very type of legal and political order that constitutionalism constitutes and maintains.[220]

Measured against these aspirations, the current state of unconstitutional punishment doctrine is a challenge to our patience and faith in humanity. Law, however, cannot indulge in despair, neglect, or oblivion. At its best, a society's legal system is an expression of that society's hopes for ever greater efficacy in producing just outcomes. If we wish to live up to common hopes for a just and decent criminal justice system, one that liberal democratic constitutions will own as a central element of their constitutional architecture, we must take on the task of translating that need for just outcomes into doctrinal details and institutional improvements. The failure to do so wrongs not only those directly victimized by unconstitutional punishment—it wrongs the whole body

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AND CREATED A CULTURE OF FEAR (2007).

219. Justice Thomas wrote in his concurrence in *Farmer v. Brennan*, "[p]risons are necessarily dangerous places; they house society's most antisocial and violent people in close proximity with one another. Regrettably, some level of brutality and sexual aggression among [prisoners] is inevitable . . . ." 511 U.S. 825, 858 (alteration in original) (internal quotation marks omitted).

220. In its well-known 1999 opinion on the constitutionality of the use of coercive physical means in the interrogation of terrorism suspects, the Israeli Supreme Court rightly reminded us, "[t]his is the destiny of democracy [that] not all means are acceptable to it, and not all practices employed by its enemies are open before it," adding that, "[a]lthough a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand." Pub. Comm. Against Torture in Israel v. Israel, 38 I.L.M 1471, 1484 [1999].

politic. Reactive constitutional punishment theory has tried to address these concerns, and much in that effort has been promising. The best way forward, however, is to develop, from the doctrinal elements already present in current jurisprudence, a new paradigm for constitutional punishment.

Constitutions, I have reminded the reader, do not ban all manifestations of private and public violence. Of all forms of constitutional violence, none is more commonly deployed than punishment for criminal offenses. Is it ever legitimate, this Article asked? Yes, upon a fivefold principled foundation that integrates moral and political theories of constitutional punishment at the same time as it integrates reactive and proactive doctrinal translations of those principles.

The five foundational principles of constitutional punishment change the normative curvature of the political and moral spaces of punishment. They stipulate that constitutional orders must take ownership of punishment as coerced vulnerability, that punishment must be conceived and practiced as cruelty-free, that dignity must be proactively affirmed through rather than simply not violated by punishment, that punishment must both meet morally justified penological objectives and to take seriously the moral agency of those subject to it, and that punishment that fails to do these things must be fully redressable and stand a fair chance of being prevented.

In law, doctrinal mistakes and moral failures mutually reinforce each other. This Article has sought to break this link by showing the limits of reactive punishment theory and by articulating principles capable of sustaining the legitimacy of punishment as a constitutional practice that polities may adopt in clear conscience and with eyes wide open. Punishment is here to stay. We would do better to take ownership of it on sound political and moral foundations. Doing so would make us all safer. More importantly for the liberal democratic experience of self-government, doing so means that we would not need to ask the moral conscience of the people to look the other way when their states punish.