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## **CRUEL AND UNUSUAL WHAT? TOWARD A UNIFIED DEFINITION OF PUNISHMENT**

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### ABSTRACT

*This Article argues for an expanded understanding of legal punishment for American courts to use. Punishment, on this new view, includes all significant harm caused by state actors' retributive intent and most significant harm that befalls someone as a result of the state seeking retribution against her. What commends this new definition is not that it tracks lexicographers' or metaphysicians' understandings of punishment; rather, this new definition aims to track relevant moral and political considerations. Importantly, the proposed definition results from an attempt to reason from the perspective of someone harmed by state practices, as that perspective has greater moral import than perspectives of courts, lawmakers, or corrections officials.*

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\* Law & Humanities Fellow, Northwestern University. I would like to dedicate this Article to my friend and teacher Alan Mills. It was Alan who first made me think that courts' understandings of punishment might be too narrow. Alan also read the very first drafts of this Article and offered valuable feedback. Many other friends have generously offered their feedback and suggestions on various iterations of this project, and I thank them all, especially Shari Diamond, Joshua Kleinfeld, the members of the JD-PhD Colloquium at Northwestern, and the editorial board at the *Jurisprudence Review*.

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## INTRODUCTION

The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment.<sup>1</sup> To interpret this prohibition, one needs first to construe *punishment*, and only after that, can one determine whether something, which already counts as punishment, is so cruel and unusual that the Constitution forbids it. So it would seem. Reasonable as this strategy sounds, the United States Supreme Court has declined to employ it. Instead, the Court has largely tried to sidestep the question of what should count as punishment, or the *punishment question*.

In sidestepping the punishment question for the Eighth Amendment, the Court has tried to directly address the question of what counts as cruel and unusual punishment. As a result, the Court, at best, ‘tips its hand’ about an answer to the punishment question. When the Court holds that some happening qualifies as cruel and unusual punishment, that happening, *a fortiori*, is punishment.<sup>2</sup> Alternatively, on occasion, one may surmise that a happening that is held not to violate the Eighth Amendment is constitutionally valid because it is not punishment at all.<sup>3</sup> Neither inferences from constitutional violations nor surmising from non-violations yields a general answer to the punishment question. In the absence of an answer to this question, we face legal confusion, problems for the rule of law, and a greater chance of injustice. Though some scholars laud sidestepping strategies of this kind,<sup>4</sup> the aforementioned harms vastly outweigh the benefits.

The Court’s sidestepping strategy raises problems not only in the Eighth Amendment context, but also elsewhere. The punishment question must be answered in order to interpret several other constitutional provisions. The word “punishment” and its cognates only occur seven times<sup>5</sup> in the Constitution<sup>6</sup> and mostly in minor clauses; however, the

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1. U.S. CONST. amend. VIII.

2. *See, e.g.*, *Helling v. McKinney*, 509 U.S. 25, 37 (1993) (holding that exposure to secondhand smoke may count as cruel and unusual punishment for prisoners required to share a cell with a smoker).

3. *See, e.g.*, *Ingraham v. Wright*, 430 U.S. 651, 664 (1977) (“the Eighth Amendment does not apply to the paddling of children as a means of maintaining discipline in public schools” because its function is to limit “the power of those entrusted with the criminal-law function of government.”)

4. *See, e.g.*, CASS SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

5. U.S. CONST. art. I, § 3, cl. 7; U.S. CONST. art. I, § 5, cl. 2; U.S. CONST. art. I, § 8, cl. 6; U.S. CONST. art. I, § 8, cl. 10; U.S. CONST. art. III, § 3, cl. 2; U.S. CONST. amend. VIII; U.S. CONST. amend. XIII, § 1.

6. U.S. CONST. For comparison, “Congress” occurs over sixty times, “court” occurs ten times, “freedom” just once.

concept of punishment is implicated in numerous, weighty constitutional provisions. The Ex Post Facto Clauses deny Congress<sup>7</sup> and the states<sup>8</sup> power to punish for actions that were not criminal at the time of action.<sup>9</sup> This obviously implicates the question of what counts as punishment.<sup>10</sup> The Double Jeopardy Clause,<sup>11</sup> *inter alia*, prevents multiple punishments for the same offense.<sup>12</sup> The Fifth Amendment announces more procedural protections for defendants in criminal cases, such as the right against self-incrimination,<sup>13</sup> the right to indictment by grand jury,<sup>14</sup> and the requirement of proof of guilt beyond a reasonable doubt.<sup>15</sup> These protections also implicate the notion of punishment because arguably one distinguishes between civil and criminal cases, in part, by claiming that the latter always features punishment.<sup>16</sup> The procedural protections of the Sixth Amendment, which include the Speedy Trial Clause,<sup>17</sup> the Confrontation Clause,<sup>18</sup> the guarantee of trial by impartial jury,<sup>19</sup> and the right to counsel even when one cannot afford it,<sup>20</sup> implicate the notion of punishment for the very same reason.

This spate of provisions amply demonstrates that the Constitution requires courts to develop an answer to the punishment question. With

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7. U.S. CONST. art. I, § 9, cl. 3.

8. U.S. CONST. art. I, § 10, cl. 1.

9. *See* *Calder v. Bull*, 3 U.S. 386, 390 (1798) (opinion of Chase, J.) (“The prohibition considered in this light, is an additional bulwark in favour of the personal security of the subject, to protect his person from *punishment* by legislative acts, having a retrospective operation. I do not think it was inserted to secure the citizen in his private rights, of either property, or contracts.”) (emphasis added).

10. *See* *Weaver v. Graham*, 450 U.S. 24, 28 (1981) (“The *ex post facto* prohibition forbids the Congress and the States to enact any law which imposes a *punishment* for an act ‘which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.’”) (emphasis added) (footnote omitted) (quoting *Cummings v. Missouri*, 71 U.S. 277, 325–26).

11. U.S. CONST. amend. V.

12. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106 (2003) (“Under this Clause, once a defendant is placed in jeopardy for an offense, and jeopardy terminates with respect to that offense, the defendant may neither be tried nor punished a second time for the same offense.”).

13. U.S. CONST. amend. V.

14. *Id.*

15. *In re Winship*, 397 U.S. 358, 364 (1970) (“the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).

16. *See, e.g.*, Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 781–82 (1997); Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679, 685–86 (1999) (explaining that American criminal law paradigmatically punishes).

17. U.S. CONST. amend. VI.

18. *Id.*

19. *Id.*

20. *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963).

these provisions in mind, the Court has offered some guidance in answering the punishment question,<sup>21</sup> but as we will see below, the Court has still failed to provide a workable answer.<sup>22</sup> Given the need to answer the punishment question and the problems with the Court's current strategies of addressing the question, we need to develop a working definition of punishment.

The goal of this Article is to develop such a definition. The layout of the Article is as follows. Part I explains what an answer to the punishment question would look like and why we need one. Part II examines the Court's sidestepping strategy in the Eighth Amendment context. Part III looks at the Court's attempt to define punishment in a criminal-civil distinction case and shows why this yields unsatisfactory answers to the punishment question. Part IV looks beyond the courts to appraise a definition of punishment offered by a legal commentator. This definition, though a step in the right direction, is both over-inclusive and under-inclusive. Part V offers a new definition, which improves upon the mistakes highlighted in Part IV. Finally, Part VI concludes the article with a brief summary and defense of the argumentative strategy.

## I. THE NEED FOR A DEFINITION

In order to make a persuasive case that the Court should adopt my particular definition of punishment, we must first see why the Court needs any definition of punishment and, indeed, what a definition of punishment is and how one should evaluate different definitions of punishment.

I proceed by first clarifying what a definition of punishment must have in order to count as a definition at all. Next, I explain the standard by which to judge definitions of punishment. After that, I offer some reasons why a court might want to adopt a general definition instead of proceeding case-by-case, tipping its hand in the direction of an answer. With those reasons in mind, I then argue that the benefits of providing a general answer to the punishment question far outweighs the costs identified by judicial minimalists like Cass Sunstein.

### *A. What is a Definition of Punishment?*

Time and again, commentators from within and without the courts have noted that the United States Supreme Court has failed to offer a general

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21. See, e.g., *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

22. See *infra* Part II.A.

definition of cruel and unusual punishment. This criticism is all the more apt when one notes that the Court has not only failed to state the necessary and sufficient conditions under which a punishment becomes cruel and unusual but also that the Court has said almost nothing in the Eighth Amendment context about the conditions that must be met for something to count as punishment at all. To appreciate this failure, we must first see what offering a definition requires.

To define *punishment* (or anything), one must go beyond giving examples.<sup>23</sup> To note, as many courts have in passing, that incarceration, denationalization, disqualification from public office, hanging, solitary confinement, and hard labor are instances of punishment, is not to define it. Giving examples merely suggests sufficient conditions for punishment.

Also, to define *punishment* or anything, one must go beyond mentioning features that all punishments have in common. To note, as many courts have, that all punishment is painful or that all punishment is only rightly bestowed on those duly convicted of an offense, is also not to define it. These claims about what all punishments share may very well be correct, but they merely state necessary conditions for something to count as punishment. Offering necessary conditions alone does not define punishment because other things may have the same features. For instance, it might be true that all punishments are painful, but losing a presidential election is also painful, as are losing a friend to illness and losing a lawsuit. As none of these latter pains are rightly called punishment, at least not ordinarily, the necessary condition “is painful” does not yet define *punishment*.

To offer a proper definition requires a set of necessary and sufficient conditions. Such a set would name not only what all punishments have in common but also what is unique to punishment. Against this standard of defining a concept, we will later judge the long and sordid history of the Court’s Eighth Amendment jurisprudence.

### *B. Defining, not Discovering, Punishment*

Having settled what a definition must include—a set of conditions that all and only punishments share—we must now figure out how to judge various candidate definitions. We should judge any effort to define punishment by its likelihood to help us achieve the practical ends set by the Eighth Amendment and the other clauses of the Constitution that

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23. See, e.g., PLATO, *Euthyphro*, in PLATO: COLLECTED DIALOGUES 169–85 (Edith Hamilton & Huntington Cairns eds., Lane Cooper trans. Princeton Univ. Press 1941) (c. 400 B.C.E.).

invoke the notion of punishment. That is to say, the definition must track that thing which we should forbid lawmakers to impose without prior notice (via the Ex Post Facto Clauses),<sup>24</sup> which is the same thing which we should prohibit the state from imposing on someone without proving beyond a reasonable doubt that she was legally culpable (via the Due Process Clauses),<sup>25</sup> which is the same thing that we say ought not be excessive or cruel (via the Cruel and Unusual Clause).<sup>26</sup> If a purportedly good definition fails on any of these measures, that definition is wrong.

One might call this method of evaluating answers to the punishment question, a *pragmatist* method, for it focuses our attention on practical matters, such as what we should forbid or allow, as opposed to metaphysical matters, like the true nature of punishment or what determines the content of our concepts. This pragmatist method foils the view of those who think our definition should approximate or represent some transcendent sense of punishment, which was always there waiting to be discovered.<sup>27</sup> Call that latter approach a *representationalist* approach. Space does not allow for any full-scale argument for the pragmatist approach and against the representationalist approach, for that project deserves its own article- or book-length treatment. Instead, one might note two things. First, celebrated philosophers have long held that representationalist attempts to answer Platonic “What is *x*?” questions are all bound to fail.<sup>28</sup> If one accepts those influential arguments, the pragmatist approach should look enticing. Second, more recent theorists have held that, even if it were possible to answer “What is *x*?” questions in the representationalist way, we ought not to attempt that when we are tasked with trying to define moral or political terms.<sup>29</sup> These recent theorists claim that defining moral and political terms is a task that, by its

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24. U.S. CONST. art. I, § 9, cl. 3; U.S. Const. art. I, § 10, cl. 1.

25. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

26. U.S. CONST. amend. VIII.

27. That type of idea lies behind Justice Scalia’s claim that “An intent requirement is either implicit in the word ‘punishment’ or is not; it cannot be alternately required and ignored as policy considerations might dictate.” *Wilson v. Seiter*, 501 U.S. 294, 301–02 (1991). For reasons I make clear later in the text of this Article, he is precisely wrong. Policy considerations do dictate how to construe *punishment*, since our task is construing terms in order to have effective, just government, not construing terms to publish a lexicon.

28. See, W. V. O Quine, *Two Dogmas of Empiricism*, 60 THE PHIL. REV. 20, 20–43 (1951) (arguing that representationalist analysis relies on a unspecifiable type of synonymy); LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 65–67 (1953) (arguing that we cannot offer necessary and sufficient conditions for terms in the representationalist way; we can only talk about family resemblances).

29. See CHRISTINE KORSGAARD, SOURCES OF NORMATIVITY 114 (Cambridge Univ. Press 1996); Liam Murphy, *Concepts of Law*, 30 AUSTRAL. J. LEGAL PHIL. 1 (2005).

very nature, calls on us to think about our practical ends, and thus, we should evaluate our definitions in light of those ends. These two sets of concerns—skepticism on the one hand and embracing the practical turn on the other—lead one to adopt a pragmatist way of deciding which definition of punishment to accept.

*C. What is a Definition Good For?*

One might agree with my account of what a definition of punishment requires and agree with a pragmatist account of how to choose the right definition while remaining dubious about whether the Court should offer any definition of punishment in the first place. Below, I consider and reject a key reason to object to my suggestion, but before that, I make the positive case for courts to define punishment.

The Court should adopt a definition of punishment because failing to do so creates three big problems. Without a definition of punishment, lower courts face increased legal confusion, all those subject to a legal regime confront rule of law issues, and some potential plaintiffs suffer injustice.

The possibility of legal confusion requires little elaboration. Obviously, when the Court fails to provide a general answer to the punishment question, it leaves open questions that lower courts must answer on their own. This inevitably leads to disagreement among different jurisdictions and confusion until the Court decides to rule on the issue.

More troubling than legal confusion are the rule of law problems that attend the Court's failure to answer the punishment question. For the rule of law to be respected in a polity, the laws that govern subjects ought to be prospective, clear, coherent, and promulgated (as opposed to secret).<sup>30</sup> Arguably, the degree to which the Constitution embodies the rule of law diminishes without a clear answer to the punishment question. Subjects should know, in advance of a lawsuit, what counts as punishment, so they can know what cannot happen to them before they receive due process or which happenings ought to be tested to see if they are too cruel and unusual to be imposed. Knowing this information in advance of a case allows persons to plan their lives, to be ruled by law and not the whims of others. This is the value of prospectivity. Those subject to a legal regime should also be able to understand the connection between one ruling on an issue related to the punishment question and another such ruling.

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30. This list of factors is taken from JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 270–73 (1980).



Otherwise, the law lacks clarity and coherence. Without clarity and coherence, the law is not predictable, and subjects are ruled by what appear to be personal whims and not law. Finally, if there is some underlying, unified understanding of punishment that informs various norms that will ultimately govern subjects of a legal regime, those should be publicly announced, not hidden until some later time. That is to say, when law is not promulgated, subjects of a legal regime are not governed by law, but by whims.

Most troubling of all is the injustice that potential plaintiffs face when the Court refuses to offer a general definition of punishment. Convicted felons, for instance, regularly face many harms during and after a period of incarceration.<sup>31</sup> It is not totally clear which of these count as punishment in the absence of an answer to the punishment question. Second-hand smoke from other inmates always counts,<sup>32</sup> sexual assault from other inmates sometimes counts,<sup>33</sup> loss of voting rights as a result of conviction never counts.<sup>34</sup> When there is a case of first impression, felons are in a difficult position. Without a general definition of punishment to guide them, they do not know when to seek legal redress. If the felons decide to try to seek redress anytime they suspect that their constitutional rights were violated, which seems like the dominant strategy, they may be unable to find professional help. Very many plaintiffs' attorneys operate on a contingency fee basis<sup>35</sup> and may be unwilling to take the financial risk of suing the government with a novel theory. This means that potentially successful suits may not be litigated. That, in turn, means that legal wrongs will not be redressed, all because the Court will not adopt a general definition of punishment.

To recap, answering the punishment question is valuable because it will lessen legal confusion, respect the rule of law, and prevent a certain class of injustices from happening.

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31. Joshua Kaiser, *Revealing the Hidden Sentence: How to Add Legitimacy, Purpose, and Transparency to 'Collateral' Punishment Policy*, 10 HARV. L. & POL'Y REV. 123, 130–44 (2016); Joshua Kaiser, *We Know It When We See It: The Increasingly Tenuous Line between "Direct Punishment" and "Collateral Consequences"*, 59 HOW. L.J. 341, 342 (2016).

32. *Helling v. McKinney*, 509 U.S. 25, 35 (1993).

33. *Farmer v. Brennan*, 511 U.S. 825, 833–38 (1994).

34. *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974).

35. Adam Shajnfeld, *A Critical Survey of the Law, Ethics, and Economics of Attorney Contingent Fee Arrangements*, 54 N.Y.L. SCH. L. REV. 773, 774 (2010) ("Contingent compensation arrangements for legal representation are . . . ubiquitous").

#### *D. Against Judicial Minimalism*

Despite these benefits, some would oppose my suggestion that the Court answer the punishment question, on the grounds that the Court should avoid broad, theoretically ambitious decisions, especially on factually or ethically complex matters. This view is typically called *judicial minimalism*. Since Professor Cass Sunstein is one of the most ardent supporters of judicial minimalism, I focus on his arguments in favor of the view. After looking at Sunstein's case for judicial minimalism, I explain why we should still hope for an answer to the punishment question.

Judicial minimalism, on Sunstein's version of it, has two dimensions. The minimalist is against wide and deep judicial decisions. A decision is *wide* when it announces a rule statement that covers many issues, perhaps even 'beyond' those raised in the case at hand; it is *narrow* if the rule statement only decides a smaller universe of issues or perhaps just the case-at-hand. For instance, suppose in a case before a court, a prisoner sues under the Eighth Amendment, alleging that she was sexually assaulted by a corrections official. While a narrow decision might hold that the sexual assault violated the Eighth Amendment, a wide decision might hold that any unwelcome sexual behavior that a corrections officer displays toward a prisoner violates the Eighth Amendment. In a *deep* decision, the court offers reasons to support its rule statement that abstract away from the particulars of the case and focus on more general matters; a *shallow* decision features very particular, local reasons or perhaps even no reasons at all. For instance, suppose again we have the prisoner who has suffered sexual assault, and further suppose that the court has the narrow holding. While a shallow decision might justify the holding by talking about the details of the encounter and analogizing it to other decisions, a deep decision might justify the holding by talk of what cruelty is, why prohibiting its use in punishment promotes ideals to which the nation has long been committed, and why sexual assault of prisoners flouts these ideals. The judicial minimalist prefers decisions that focus squarely on the particulars of the case and that avoid these more sweeping justifications of judicial action.

If the Court were to offer a general answer to the punishment question, its decision would be deep and also wide. A decision with an answer to the punishment question contained therein will certainly be deep. Any case where punishment is implicated only requires the Court to say *that* that happening is punishment or is not; it is a further step down the road toward depth to explain *why* that happening is punishment or is not; and it

is a still further step to explain why any happening is punishment. It is this ‘still further’ step that is answering the punishment question. Also, a decision with an answer to the punishment question is likely to be wide. Any case where punishment is implicated only requires the Court to say what should happen in the case at hand. If, however, the Court ventures an answer to the punishment question, it suggests a way to handle lots of other cases.

Having explained judicial minimalism and explained why my suggestion conflicts with the call of judicial minimalists, we now turn to explaining why Sunstein supports judicial minimalism. His book *One Case at a Time* contains four key reasons to support judicial minimalism: (1) judicial minimalism reduces the judicial workload and intellectual burden of judges, (2) judicial minimalism will produce fewer wrong decisions, (3) judicial minimalism promotes deliberative democracy, and (4) judicial minimalism properly respects reasonable pluralism.

### 1. *Workload*

Judicial minimalism recommends a course of action that is easier than answering the punishment question in terms of the workload for judges. Coming up with a general theory of punishment is intellectually taxing, and forging agreement on a multi-member court is probably even more taxing.<sup>36</sup> However, this consideration should not carry much weight. Consider another judicial strategy to see why.

Whenever lower courts hear constitutional challenges, they could just invariably rule in favor of the government, and when the Supreme Court gets petitions for certiorari, it could roundly reject all of them. Call this *the bizarre strategy*. The bizarre strategy would vastly reduce the judicial workload. Because it is also wildly unjust, the bizarre strategy is a non-starter. Reflecting on this strategy shows that even a massive potential to reduce judicial workload has less normative weight than the potential for injustice. Any more just strategy obviously trumps the bizarre strategy, and this seems right even when we recall that, in most constitutional challenges, plaintiffs do not prevail anyway.<sup>37</sup> In other words, the outcomes of a just judicial strategy and the bizarre strategy would largely

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36. SUNSTEIN, *supra* note 4, at 4.

37. See Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CAL. L. REV. 915, 940 (2011) (showing that both facial and as-applied constitutional challenges generally fail in Supreme Court litigation, though success is not rare, as many legal commentators assume). One cannot generalize these results to all constitutional challenges, such as those in lower courts; thus, it is consistent with Fallon’s findings that constitutional challenges only rarely succeed.

coincide, with relatively few substantive injustices. Still, the fact of great procedural injustice is more than enough to remove the bizarre strategy from consideration. The preceding argument should lead one to think that, if strategies that reduce the judicial workload are to be preferred, this is only when the more work-intensive strategy features no great advantage in terms of justice.

If we accept that thought, then the judicial minimalist actually faces a problem. In the absence of an answer to the punishment question, we do get injustice, injustice for some plaintiffs and rule of law problems for all, which is its own version of injustice. Neither of these should be borne merely to save time and sweat.

## 2. *Better Decisions*

The second reason to support judicial minimalism, according to Sunstein, is the thought this strategy will yield better decisions than a suggestion like my own, which calls for a decision of width and depth. Sunstein list four reasons why we are likely to get better decisions:

- (1) judges, like all of us, are sometimes in a better position to know *that* something is right than *why* something is right,<sup>38</sup>
- (2) judges are ill-equipped to evaluate philosophical/theoretical arguments,<sup>39</sup>
- (3) circumstances may change in unforeseen ways,<sup>40</sup> and
- (4) judges, like all of us, have bounded rationality.<sup>41</sup>

Despite these important considerations, we should be unconvinced that judicial minimalism leads to better decisions. One can agree, for instance, that sometimes people are better at seeing *that* something is right than seeing *why* it is right, and one can further agree that when folks start pontificating about why something is right when they are only apprised of the fact of its rightness, they are likely to err. Nevertheless, it is a commonplace that people sometimes understand general principles and are bad at applying them. When that human tendency is in play, minimalism looks like a mistake because a minimalist decision could reach the wrong outcome *and* fail to include the broad general statements that would be correct.

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38. SUNSTEIN, *supra* note 4, at 15.

39. *Id.* at 247.

40. *Id.* at 48.

41. *Id.* at 52 (1999).

Also, while circumstances may change in unforeseen ways, but it is not clear why such changes would tend to invalidate broad rulings instead of tending to vindicate broad rulings. Even if changing circumstances did show broad rulings to be often wrong, that provides no reason for courts to decide cases as narrowly and shallowly as possible. That offends the rule of law. Instead, courts should admit their fallibility and be ready to change course, if they find they have erred. Much the same applies to thinking of judges' bounded rationality.

Finally, one might resist Sunstein's skepticism about judges' intellectual capacities, especially with respect to federal appellate court judges. Since the question is empirical, not much can be said without recourse to empirical data. From the armchair, though, it might be wondered why, on Sunstein's picture, law professors become so adept with theoretical discussion while federal appellate judges, some of whom are drawn from the professoriate, most of whom are drawn from the same elite law schools as the professoriate, remain so comparatively dense.

### 3. *Deliberative Democracy*

A third reason to endorse judicial minimalism is the fact it accords with a vision of America as a deliberative democracy.<sup>42</sup> By this, Sunstein means two things. First, guided by judicial minimalism, judges will permit and promote more discussion about the deep issues raised by their cases than they would if they merely decided the deep issues on their own. More discussion is a good thing in a deliberative democracy because this form of democracy urges broad-based participation from citizens and for policy outcomes to result from reasoned debate. Second, guided by judicial minimalism, judges will allow the elected branches of government to settle the deep questions that arise in their cases. This is admirably democratic for it allows the reasoned debates from civil society, not debates within judges' chambers, to determine important, deep issues.

It is hard to argue with deliberative democracy as an ideal. What I can do instead is offer an obvious fact and see what follows. The United States Constitution, which contemplates an unelected supreme court<sup>43</sup> with judicial review,<sup>44</sup> obviously does not see deliberative democracy as the *sine qua non* of the constitutional order it creates. Some matters are supposed to be insulated from the majority will, even if the majority will

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42. *Id.* at 4–5.

43. U.S. Const. art. III, § 1.

44. *Marbury v. Madison*, 5 U.S. 137 (1803).

has been shaped only by reasoned debate in the public sphere with everyone participating on equal footing, as some versions of deliberative democracy demand. For instance, the President cannot be recalled just because we lose faith in her abilities, Congress cannot select the Cabinet members, and federal judges cannot be popularly elected. All of these would allow for more democracy, but that is not the world the Constitution envisions. Deliberative democracy, at best, is one virtue among many that our constitutional order should try to embody to some extent. Knowing the whole story about the standards that govern us before we face their consequences—that is another virtue, a rule of law virtue. Arguably, this is a more important virtue for our order to embody, in part, because it is nowhere contravened in the Constitution. If forced to choose between deliberative democracy and the rule of law, that is, forced to choose between shirking and answering the punishment question, courts should promote the rule of law and answer the punishment question.

The preceding has presupposed that judicial minimalism actually promotes deliberative democracy in the first place, but this is debatable. A minimalist (or piecemeal) approach to deciding cases that implicate the punishment question will suggest partial answers to the question over time. In obeying minimalism, courts will, thereby, remove various issues from public debate and will check any intervention from the elected branches, short of constitutional amendment. The only way to prevent this would be having judgments without decisions and eliminating *stare decisis*.

Thus, the full response to the judicial minimalist is that (1) enthusiasm for deliberative democracy weakly supports judicial minimalism, (2) even if deliberative democracy strongly supported judicial minimalism, the Constitution weakly supports deliberative democracy.

#### 4. *Reasonable Pluralism*

The final reason Sunstein marshals is the fact that judicial minimalism allows us to respect reasonable pluralism.<sup>45</sup> Reasonable pluralism is the idea that, even if there is a single right answer to certain moral and political questions, we can expect reasonable people, who are free to think for themselves, to arrive at different answers to those questions. To respect reasonable pluralism, say Sunstein and other political liberals like John Rawls<sup>46</sup> and Martha Nussbaum,<sup>47</sup> our political order should not rely on

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45. SUNSTEIN, *supra* note 4, at 41.

46. JOHN RAWLS, *POLITICAL LIBERALISM* 139–40 (1996).

what it deems to be the correct answer to these controversial questions. To do so would disrespect the persons who reasonably disagree with the putative right answers.<sup>48</sup> Judicial minimalism allows judges to recognize and respect reasonable pluralism, because the rulings that courts would render would be shallow and thus would avoid discussing the controversial matters that would occasion disrespect.

Pace Sunstein, Rawls, and Nussbaum, I do not see why it is, in any way, disrespectful to rely on controversial premises about which people reasonably disagree when deciding issues of policy. Seeing no disrespect at all, it is hard for me to assuage the worries of those that do. I can only offer as support for my side the fact that the government makes decisions of this kind in other circumstances where few think that disrespect has occurred. When the government houses a piece of art in its national galleries or awards someone an National Endowment for the Arts grant, it essentially claims that certain pieces of art have great aesthetic merit or that certain people have great artistic talent. This is a matter about which people reasonably disagree. Still, no one is disrespected by these practices. Though I may find Barbra Streisand's music to be intolerable schmaltz, when she received the National Medal of Arts,<sup>49</sup> I was not, in any way, wronged or disrespected.

Even if deep decisions are not necessarily disrespectful and thus to be rejected on that ground, Sunstein is right that avoiding contentious issues may be useful in our pluralistic society. As Sunstein notes, it is a good thing "to make it possible for people to agree when agreement is necessary, and to make it unnecessary for people to agree when agreement is impossible."<sup>50</sup> All the same, when thinking about this good in relation to answering the punishment question, two things must be noted. First, it is doubtful that agreement on a definition of punishment is impossible. Second, however good it might be to forge easy agreements instead of

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47. Martha C. Nussbaum, *Perfectionist Liberalism and Political Liberalism*, 39 PHIL. & PUB. AFF. 3, 20.

48. Rawls sometimes speaks of the need to respond in his way to reasonable pluralism as a necessary strategy for maintaining the stability of a society. RAWLS, *supra* note 46, at xvii–xix. The heart of his view, though, concerns equal respect for persons. The argument upon which he relies is a modified version of the Original Position. *Id.* at 137 n.5. While I would not go as far as to suggest the Original Position has nothing to do with stability of a society, I will say that arguments that employ it are supposed to show why some arrangement does or does not yield "a fair system of cooperation between free and equal citizens." *Id.* at 22. That seems to suggest that Rawls is deeply enough concerned about properly respecting people when he demands that we respond to reasonable pluralism in the politically liberal way.

49. Nat'l Endowment for the Arts (Jan. 18, 2016, 6:40 AM), <https://www.arts.gov/honors/medals/year/2000>.

50. SUNSTEIN, *supra* note 4, at 14.

trying to settle disagreements, that good must be weighed against the problems that result from failing to answer the punishment question. That good, like the workload reduction good, pales in comparison to the problems generated by shirking the punishment question.

## II. THE COURT DOES NOT DEFINE PUNISHMENT IN THE EIGHTH AMENDMENT CONTEXT

In the previous part, we saw why we need to answer the punishment question. Here, I review how the United States Supreme Court has tried to sidestep the question in the Eighth Amendment context. In many of its Eighth Amendment cases, the Court has tried to construe *cruel punishments* as a single concept. In describing that strategy, I also highlight its shortcomings.

### A. Early Cases

One of the earliest Eighth Amendment cases was *Pervear v. Commonwealth of Massachusetts*,<sup>51</sup> decided in 1866, where the Court held that the Eighth Amendment does not apply to actions undertaken by state governments. The *Pervear* Court noted, however, in dicta, that the treatment of which Pervear complained, a sentence of three months of hard labor and a fifty-dollar fine, was not “excessive, or cruel, or unusual.”<sup>52</sup> Here, we have an early instance of the Court suggesting, in passing, that some treatment is sufficient for punishment but refusing to mention in addition what is necessary for some treatment to count as punishment. Thus, one learns, through this case, that hard labor is punishment, just not cruel punishment. From this case alone, one cannot be entirely sure whether the fine that Pervear received is to be counted as punishment,<sup>53</sup> for the comment that the treatment was not “excessive” no doubt refers to the Eighth Amendment’s prohibition on “excessive fines.”<sup>54</sup>

In *Wilkerson v. State of Utah*, decided in 1878, the Court held that the Eighth Amendment does not prohibit death by firing squad.<sup>55</sup> Later, in 1890, the Court held that the Eighth Amendment does not prohibit death

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51. 72 U.S. 475 (1866).

52. *Id.* at 480.

53. It would later be clarified that, strictly speaking, fines are not punishment. There is completely separate excessive fines jurisprudence. *See, e.g., Alexander v. United States*, 509 U.S. 544, 558 (1993).

54. U.S. CONST. amend. VIII.

55. 99 U.S. 130 (1878).



by the electric chair in *In Re Kemmler*.<sup>56</sup> In neither of these nineteenth century cases does the punishment question arise, but in each, we get partial answers. Death by firing squad and death by electric chair are punishments that are cognizable under the Eighth Amendment, yet, these are not cruel punishments and thus pass constitutional muster.

*Weems v. U.S.* is a notable case in that it is among the first to suggest that disproportionate punishments violate the prohibition against cruel and unusual punishments.<sup>57</sup> *Weems*, decided in 1910, held that “fifteen years of cadena”<sup>58</sup> violates the Eighth Amendment when it is imposed for a simple act of fraud that does not even benefit the defrauder.<sup>59</sup> *Cadena*, Spanish for chain, was a requirement that one remain in iron chains while performing “hard and painful labor.”<sup>60</sup> While *Weems* revolutionized contemporary juridical understandings of what counts as cruel, it did far less on the punishment question front. Obviously, requiring someone to perform hard labor under the weight of iron chains, after convicting her of fraud, is to punish that person. So obvious is this point, the question of what counts as punishment never even arises in the *Weems* case.

At this point in recounting the history of the Court’s Eighth Amendment decisions, one might be tempted to think that all of them really should go the way of *Weems* and its forebears. That is to say, it may come as little surprise that the punishment question is neither raised nor explicitly answered in Eighth Amendment litigation. In many Eighth Amendment cases, the question is not whether the treatment is punishment but whether its severity is of such a degree (proportionally or absolutely) that the Constitution forbids it.

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56. 136 U.S. 436 (1890). This case is interesting in that it is not technically decided under the Eighth Amendment. The Court is still operating under the theory that the Eighth Amendment applies only to the national government and is not incorporated anywhere to apply to the states. However, *Kemmler* is an early example of looking at the Fourteenth Amendment, in both the Due Process Clause and the Privileges or Immunities Clause, as possible constitutional basis for overturning treatment that amounts to cruel and unusual punishment.

57. This case vindicates the view held by Justice Field when he dissented in *O’Neil v. State of Vermont*. O’Neil was sentenced to over 54 years of prison for selling liquor without a license. The Court did not reach the question of whether his outrageously severe sentence was too cruel to be constitutionally permissible, because the Court held that the sentence, bestowed by Vermont law, was beyond the reach of the Eighth Amendment. Field vehemently disagreed with this and further thought that the severe sentence was much more severe than the constitution permits for such offenses. *O’Neil v. State of Vermont*, 144 U.S. 323, 340 (1892) (Field, J., dissenting).

58. *Weems v. United States*, 217 U.S. 349, 358 (1910).

59. *Id.* at 382.

60. *Id.* at 364.

### B. *Turning Points*

Things begin to change in *Trop v. Dulles*.<sup>61</sup> For this 1958 case, the issue was whether divesting an Army private of his American citizenship for desertion comported with the Eighth Amendment. The Court considered first whether the denationalization was punishment and then, after concluding that it was,<sup>62</sup> held that the punishment was cruel and unusual.<sup>63</sup> Because the punishment question was explicitly raised, the Court devoted some time to offering a definition of punishment. Chief Justice Warren, writing for the Court,<sup>64</sup> reasoned, “If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal.”<sup>65</sup> In other words, if the law imposes a disability and does so for specific reasons, namely reprimanding reasons (henceforth *retributive reasons*), deterrent reasons, and some unspecified other reasons that are traditionally associated with punishment, then the law imposes a punishment.

To his credit, Chief Justice Warren offered a definition that appears to offer necessary and sufficient conditions for something to count as punishment. The necessary conditions are the disability and the reasons for imposing the disability, and, insofar as this purports to be a definition, the further claim must be that these are jointly sufficient for punishment. Despite its merits, there are two formal problems with this definition. First, the definition suffers from a circularity problem. The definiendum is in the definiens! We have to know what punishment is to be able to know about this third class of reasons to which Warren alludes. Of course, if we already know what punishment is, we do not need anyone’s definition. The second formal problem is that the definition contains a certain ambiguity. Attention to the specific language bears this out. Warren writes that the disability must be imposed “for the *purposes* of punishment.”<sup>66</sup> Does this mean that the disability has to be imposed for retributive reasons AND deterrent reasons AND the unspecified set of reasons? Surely, it would be more plausible to suggest that any one of the three reasons would suffice. Though it would be *more* plausible, this suggestion creates

61. *Trop v. Dulles*, 356 U.S. 86 (1958).

62. *Id.* at 97.

63. *Id.* at 101.

64. Warren’s opinion is for a plurality of the Court. His judgment, that denationalization is punishment and that this instance of punishment violates the Eighth Amendment, is the judgment of the Court.

65. *Trop*, 356 U.S. at 96.

66. *Id.* at 96 (emphasis added).

substantive problems for the definition. Instead of exploring those now, let us continue examining the history of Eighth Amendment cases, for these make enough trouble for Warren's definition.

Consider two cases from the 1970s, *Ingraham v. Wright*<sup>67</sup> and *Estelle v. Gamble*.<sup>68</sup> In *Ingraham*, schoolchildren sued their school for paddling them with such severity that it sometimes required medical attention.<sup>69</sup> In *Gamble*, a prisoner sued prison officials and his doctors, alleging they did not adequately address injuries that resulted when a 600-pound bale of cotton fell on him.<sup>70</sup> Both plaintiffs claimed that their respective treatments amounted to cruel and unusual punishment. Before explaining what the Court decided in each case, let us see how Warren's definition fares. Recall that according to that definition, punishment obtains when there is a disability, imposed for retributive, deterrent and/or<sup>71</sup> other punishment-related reasons. Seemingly, we have punishment in *Ingraham* but none in *Gamble*. We have punishment in *Ingraham* because the paddling by school officials certainly imposes a disability, and it is plausible to assume that they had the requisite kinds of reasons in mind. In *Gamble*, by contrast, the disabilities, injuries from the cotton accident, were not *imposed* by anyone; thus, *a fortiori*, they were not imposed for any reason, retributive, deterrent, or otherwise. The Court held just the opposite in both cases.

According to the *Ingraham* Court, "the [Eighth] Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government. An examination of the history of the Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes."<sup>72</sup> In other words, it matters *who* imposes the disability. We do not have to agree with the Court about the outcome of *Ingraham* to recognize that Warren's definition missed a necessary condition. It does matter who imposes a disability, and that Warren misses this obvious fact suggests that the Trop Court, despite appearances to the contrary, did not provide a satisfying answer to the punishment question. Furthermore, by merely mentioning that punishment, for Eighth Amendment purposes, necessarily involves those who administer the

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67. 430 U.S. 651 (1977).

68. 429 U.S. 97 (1976).

69. *Ingraham*, 430 U.S. at 657.

70. *Estelle*, 429 U.S. at 98–99.

71. This construction is supposed to retain the ambiguity noted above.

72. *Ingraham*, 430 U.S. at 664.

criminal justice system, the *Ingraham* Court was not offering a full answer to the punishment question either.

Let us turn to *Gamble*. Here, the Court held, “deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain’ proscribed by the Eighth Amendment.”<sup>73</sup> In other words, the state can be ‘on the hook’ for injuries that it does not impose but that it deliberately neglects to remedy. The *Gamble* Court, by developing a new test for cruel and unusual punishment, in essence, states an entirely new sufficient condition for punishment: deliberate indifference to serious medical needs of prisoners. Justice Thurgood Marshall, writing for the majority, makes a normatively persuasive case that the harms prisoners might suffer due to the deliberate inattention of officials is of the sort that we ought to eliminate by constitutional means. Justice Marshall’s likening of the neglect of prisoners’ medical needs to torture<sup>74</sup> brings to mind influential philosophical arguments of the time which called into question the commonplace thought that directly causing a harm is wrong, while merely allowing one to happen is blameless.<sup>75</sup> The underlying thought of both Marshall and these philosophical discussions is that when a person is in one’s care, one incurs a duty to see that she does not suffer grave, preventable harms, and deliberately shirking this duty can be as bad as imposing the harm directly.

Groundbreaking as this decision was, the *Gamble* Court still does not offer a set of necessary and sufficient conditions for something to count as punishment; thus, the punishment question remained unanswered.

### C. Modern Cases

Let us fast-forward to current Eighth Amendment jurisprudence. The general standard is that punishment is cruel when it is disproportionately harsh, given the crime<sup>76</sup> or the type of offender,<sup>77</sup> or when it is an

73. *Estelle*, 429 U.S. at 104 (citations omitted).

74. *Id.* at 103.

75. See James Rachels’s famous article about the doing/allowing distinction, especially his thought experiment about drowning one’s six-year-old cousin versus merely watching “delighted[ly]” as the cousin drowns. James Rachels, *Active and Passive Euthanasia*, 292 NEW ENG. J. MED. 78, 78–86 (1975).

76. See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, as modified (Oct. 1, 2008), opinion modified on denial of reh’g, 554 U.S. 945 (2008) (banning the death penalty for nonviolent rape of a child by adult); *Solem v. Helm*, 463 U.S. 277 (1983) (banning a life sentence for a bad check of \$100, written by a recidivist); *Coker v. Georgia*, 433 U.S. 584 (1977) (banning the death penalty for rape of an adult woman); *Weems v. United States*, 217 U.S. 349 (1910) (banning penalty of fifteen years of the cadena for fraud).

77. See, e.g., *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (banning mandatory life in prison

“unnecessary and wanton infliction of pain.”<sup>78</sup> Courts determine proportionality largely by reference to “the evolving standards of decency that mark the progress of a maturing society.”<sup>79</sup> How courts determine what counts as an unnecessary and wanton infliction of pain depends on the kind of thing at issue.<sup>80</sup> If the claim is that a prison official used excessive force, then one must consider (1) whether the official acted “maliciously and sadistically”<sup>81</sup> and (2) the nature of the injury inflicted. If the claim is that the prisoner’s conditions of confinement instance unnecessary and wanton infliction of pain, then one must consider (1) whether the prison officials were “deliberately indifferent”<sup>82</sup> to the prisoner’s plight and (2) whether the prisoner has been subjected to “substantial risk of serious harm.”<sup>83</sup> If the claim is that a method of execution instances unnecessary and wanton infliction of pain, there is yet another test.<sup>84</sup> All of these tests for an Eighth Amendment violation suffer from the same problem with respect to the punishment question, namely that they do not answer it.

Amid all of this Eighth Amendment jurisprudence, the most the Court has done with respect to the punishment question is to develop a new necessary condition for punishment, as it did in *Wilson v. Seiter*, where the Court explicitly considered the punishment question and held that there is “an intent requirement.”<sup>85</sup> Since it should be, by now, clear why this innovation leaves the punishment question unresolved, I conclude this part of the article by highlighting the practical problem at the heart of sidestepping the punishment question.

According to the *Seiter* Court, punishment has an intent requirement, and for conditions of confinement cases, the culpable state of mind must be deliberate indifference. Suppose that a prison official oversees a prisoner, and further suppose, just as a general rule, that the official is deliberately

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without the possibility of parole for those under age 18); *Roper v. Simmons*, 543 U.S. 551 (2005) (banning the death penalty for offenders under age 18); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (banning the death penalty for offenders under age 16); *Atkins v. Virginia*, 536 U.S. 304 (2002) (banning the death penalty for “mentally retarded persons”).

78. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

79. *Miller*, 132 S. Ct. at 2463.

80. *Hudson v. McMillian*, 503 U.S. 1, 5 (1992) (“What is necessary to establish an ‘unnecessary and wanton infliction of pain,’ we said, varies according to the nature of the alleged constitutional violation.”).

81. *Id.* at 9.

82. *Farmer*, 511 U.S. at 828.

83. *Id.*

84. See *Glossip v. Gross*, 135 S. Ct. 2726, 2737, *reh’g denied*, No. 14-7955, 2015 WL 5052442 (U.S. Aug. 28, 2015).

85. *Wilson v. Seiter*, 501 U.S. 294, 301(1991).

indifferent to whatever suffering should befall the prisoner. In a situation such as this, what should we say about prison conditions that are bad, but not bad enough to suggest that the prisoner has suffered serious harm, or a substantial risk thereof? Is this happening still punishment, according to the Court? This is not answered, for all we know from *Seiter* is that it fails to be *cruel* punishment. For the Eighth Amendment itself, further inquiry is not needed. Of course, there are other provisions of the Constitution for which further inquiry *is* needed. If the prisoner is not a prisoner but a pretrial detainee, whom the state has no right to punish,<sup>86</sup> one needs to know whether those circumstances are punishment.

This hypothetical situation, then, reminds us of our purpose in seeking an answer to the punishment question. As much as the preceding might seem like an exercise in logic, substantive questions of great practical import depend on our answers to the punishment question. This is even true in the Eighth Amendment cases, for we saw that, time and again, the Court did construe punishment, just partially and (largely) covertly. This strategy will not do, for it puts off what must be done anyway on another day or in another constitutional context.

### III. THE COURT DOES NOT DEFINE PUNISHMENT ELSEWHERE

Since there is no full answer to punishment question in the Eighth Amendment context, we now turn to other places where courts have tried to define punishment. The Constitution, in several places, calls on courts to distinguish between criminal law and civil law. The Fifth Amendment, for instance, prohibits the federal government from requiring self-incriminating testimony during a criminal trial<sup>87</sup> or even during a custodial interrogation before a criminal trial.<sup>88</sup> The Sixth Amendment sets up a number of protections for defendants in criminal prosecutions, including public trials, a right to counsel, and trial by jury.<sup>89</sup> The Court has sought to distinguish criminal law from civil law by claiming that the former involves “punitive purposes.” Of course, such purposes need to be defined, and to define them is to answer the punishment question, a task the Court refused to do in the Eighth Amendment context.

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86. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (“[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.”).

87. U.S. CONST. amend. V.

88. *Miranda v. Arizona*, 384 U.S. 436, 460–61 (1966) (“We are satisfied that all the principles embodied in the privilege [against self-incrimination] apply to informal compulsion exerted by law-enforcement officers during in-custody questioning.”).

89. U.S. CONST. amend. VI.

This part begins by looking at a leading case on the criminal-civil distinction, *Kennedy v. Mendoza-Martinez*. I argue that the majority's multi-factor test is completely unworkable. Next, I consider two more answers to the punishment question that, more or less, come from the Court: Justice Stewart's answer, offered in his dissenting opinion in *Mendoza*, and Professor Stinneford's answer, offered as a reconstruction of the Court's post-*Mendoza* jurisprudence. As we will see, both Stewart's and Stinneford's definitions suffer from the same defect, namely an overly-narrow focus on intentional impositions of harm, thereby excluding reckless impositions.

#### A. *The Mendoza Test*

In *Kennedy v. Mendoza-Martinez*, the Supreme Court considered whether legislative divestiture of citizenship in response to draft-dodging counted as punishment.<sup>90</sup> More specifically, the Court considered whether Congress could impose the divestiture "without affording the procedural safeguards guaranteed by the Fifth and Sixth Amendments."<sup>91</sup> Ultimately, the Court held that the divestiture was punishment, but this conclusion does not concern us. What concerns us, here, is the test the Court used to reach its conclusion.

The Court used the following multi-factor test to determine whether something counts as punishment.

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry.<sup>92</sup>

For ease of presentation, it may help to list each of the seven factors separately and to number them.

(1) Whether the sanction involves an affirmative disability or

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90. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

91. *Id.* at 166.

92. *Id.* at 168–69.

restraint

- (2) Whether the sanction has historically been regarded as a punishment
- (3) Whether the sanction comes into play only on a finding of scienter
- (4) Whether the sanction's operation will promote the traditional aims of punishment—retribution and deterrence
- (5) Whether the behavior to which the sanction applies is already a crime
- (6) Whether no alternative purpose to which the sanction may rationally be connected is assignable for it<sup>93</sup>
- (7) Whether the sanction appears excessive in relation to the alternative purpose assigned

Now, obviously, these factors are independent inquiries, independent in the sense that the answer to one does not determine the answer to another.<sup>94</sup> This independence raises the following kind of question. What should a court do when the answer to (1) differs from the answer to (2)? It seems like poor advice to require that all (1)–(7) be answered in the affirmative in order to deem something punishment. This is true for the simple reason that there can be new forms of punishment, so (2) cannot be required in every case. Moreover, the Court admitted that the factors could “point in differing directions,”<sup>95</sup> while it still could be proper to adjudge a particular sanction punishment.

An obvious alternative is to claim that something is punishment so long as it satisfies a majority of the factors. This seems like poor advice because some factors, like (1), probably matter much more than the others. Consider the following example to see why this might be so. Suppose a conservative state passes a law with the following effect. All medical doctors will have “MEDICAL DOCTOR” written on their state-issued identification cards; however, if a medical doctor is known to have performed an abortion within the past five years, this person will have “MEDICAL DOCTOR & BABYKILLER” written on the state-issued identification card.

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93. I modified this factor so that an affirmative response weighs in favor of considering the sanction punishment.

94. They are not all independent. (6) is not independent of (7).

95. *Mendoza-Martinez*, 372 U.S. at 169.



In this example, one could very plausibly argue that, while (1), (2), and (5) are not satisfied, the other four factors are satisfied. Still, this labeling does not seem to count as punishment, however nefarious such labeling might be. Maybe there is a First Amendment violation.<sup>96</sup> But it seems hard to sustain that this is a due process violation of the kind considered in *Mendoza*.

If the foregoing is correct, we should conclude, minimally, that there is no obvious way to employ the *Mendoza* test. Some commentators have urged a stronger conclusion. Professors Rosen-Zvi and Fisher claim,

[T]he *Mendoza-Martinez* test is unable to yield a principled and predictable answer. In every case of its application, the judge ends up with a mixture of yes and no answers to each of the seven factors and must ultimately determine whether the sanction at hand is civil or criminal based upon her own valuation of each factor and its relative weight. Inevitably, the Court resorts to tautological reasoning: it purports to define as criminal, and thus order heightened procedural safeguards for[,] sanctions that serve primarily to punish, when, as a matter of fact, the punitive purpose ascribed to the sanction rests upon some intuition regarding the procedural safeguards that the sanction merits.<sup>97</sup>

In other words, according to Rosen-Zvi and Fisher, the *Mendoza* test determines nothing; instead, one's background intuitions do all the work.

On either view, mine or the one offered by Rosen-Zvi and Fisher, we need to look beyond the majority opinion in *Mendoza* for an answer to the punishment question.

### *B. Post-Mendoza*

In his article, "Punishment Without Culpability," Professor John F. Stinneford offers a new answer to the punishment question, drawing on the jurisprudence following *Mendoza*. Stinneford claims, "it is becoming increasingly clear that neither a purpose to deter, incapacitate, nor to rehabilitate can transform a putatively civil statute into a criminal one. Only a retributive purpose can."<sup>98</sup> In other words, according to Stinneford,

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96. *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that a state may not require citizens to display a message with which they disagree on state-issued license plates.).

97. Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 VA. L. REV. 79, 126 (2008).

98. John F. Stinneford, *Punishment Without Culpability*, 102 J. CRIM. L. & CRIMINOLOGY 653, 679 (2012) (citations omitted).

a punitive purpose is a retributive one. This suggests the following definition of punishment: punishment is that which is done by state actors with a retributive purpose. Stinneford both endorses this as a good definition of punishment and as a good interpretation of post-*Mendoza* decisions. For the purposes of the present effort, we will ignore the interpretative claim and also ignore the reasons that undergird the interpretative claim.<sup>99</sup>

Stinneford does not offer a good definition of punishment because he cannot recognize as punishment harms that the Supreme Court, in its Eighth Amendment jurisprudence, has rightly recognized. Of particular note are harms that befall convicted persons as a result of state officials' deliberate indifference. The Court has held, for instance, that when prison officials ignore a transsexual prisoner's claim that she is in danger of being beaten and raped by a fellow inmate, the consequent rape and battery count as punishment, and cruel punishment to boot.<sup>100</sup>

Perhaps, one might retort, Stinneford's definition can accommodate inmate-on-inmate prison rape, and like cases, by claiming that the officials' indifference was sparked by a retributive purpose. The major problem with this strategy is that it would only work in some cases. Sometimes, an official will be indifferent to the risk of serious harm to a prisoner because the official thinks that the impending harm is deserved. Other times, officials may be indifferent because properly responding to risk is burdensome. If Stinneford would see punishment in the first case but no punishment in the second, we have two problems. First, we get unfair outcomes because *all* prisoner-plaintiffs that suffer serious harm, resulting from officials turning a blind eye, should be able to bring a constitutional tort. Second, under Stinneford's definition, we set up a perverse loophole. Anytime a prisoner-plaintiff brings suit, alleging that serious harm befell her because of an official's deliberate indifference, the official can just say that he was indifferent because he did not feel like working that day or some other excuse that does not entail retributive purpose.

If one is tempted, at this point, to suggest that the two aforementioned problems are not problems with the definition, *just* unfortunate consequences of adopting the definition, it may help to recall the nature of our inquiry. The point was to craft a definition of punishment that is responsive to the practical, that is moral and political, concerns which give

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99. Among the cases Stinneford reviews are the various sex offender cases from the 1990s where federal courts have held that registration and even incapacitation are not punishment.

100. See *Farmer v. Brennan*, 511 U.S. 825 (1994).

rise to several constitutional provisions, such as the Fifth, Sixth, and Eighth Amendments. The Supreme Court has already succeeded in making a persuasive case that all those who suffer serious injuries resulting from prison officials' deliberate indifference should have a remedy in the form of a constitutional tort. If we accept that, we are thereby practically committed to avoiding the type of loophole, enabled by Stinneford's definition of punishment.

### *C. Returning to Mendoza: Stewart's Dissent*

Justice Stewart, dissenting in *Mendoza*, offered another definition of punishment. Stewart wrote, "whether or not a statute is punitive ultimately depends upon whether the disability it imposes is for the purpose of vengeance or deterrence, or whether the disability is but an incident to some broader regulatory objective."<sup>101</sup> Largely, Stewart's definition echoes that of the post-*Mendoza* jurisprudence, or at least Stinneford's reconstruction of it. Stewart departs from Stinneford in mentioning deterrent purposes in addition to retributive ones.<sup>102</sup>

Insofar as Stewart and Stinneford agree, the disagreement with Stewart is the same as the one with Stinneford. One must be able to recognize serious harms flowing from state actors' deliberate indifference as punishment, and these definitions seem ill-suited to that purpose. Where Stewart differs from Stinneford, there is a different problem. On Stewart's account, so long as an event has a deterrent purpose, it counts as punishment. This seems problematic because it does not allow us to differentiate between criminal law and tort law, as many hold that tort law is about deterring future bad action as well as remedying past bad action.<sup>103</sup> The point is not that only criminal law punishes, for that is false; sometimes, courts award punitive damages in tort suits. Rather, the point is that treating something as punishment as soon as it has a deterrent

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101. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 208 (1963) (Stewart, J., dissenting).

102. As a small philosophical aside, it might be thought that Stewart's definition suffers from an additional defect, namely that it appears to invoke the legislature's intentions, and there has been much criticism of the idea that one can attribute intentional attitudes, like beliefs, desires, fears, and intentions, to groups. Frankly, I think such attributions are entirely licit, at least sometimes. For instance, it makes sense to say, "The ACLU plans to file an amicus brief" or that "Miami Heat feared that the San Antonio Spurs would sweep them in the Finals." Philosophers have given different answers about why such statements can turn out to be true, but most agree that the skeptical, Scalia-type view looks pretty unintuitive. I thought it important to defend Stewart on this score, as my view of punishment may require such attributions. See *infra* Part V.A.

103. *Jones v. Reagan*, 696 F.2d 551, 554 (7th Cir. 1983) ("[T]ort law, including the law of constitutional torts, has a deterrent as well as a compensatory function.").

purpose would render most acts taken against tortfeasors punishment, and if that were true, it would be harder to distinguish tort law from criminal law. Right now, we can say criminal law generally involves punishment, while tort law generally does not; whereas, under Stewart's formulation, that would no longer be true. And this problem is not just an academic one; it is a practical problem. Without a way to distinguish tort law from criminal law, we have no way to comply with the Constitution's mandates to give special protection to defendants in criminal cases.

#### IV. LOOKING OUTSIDE THE COURTS

Having rejected various answers to the punishment question offered by the courts or by those purporting to summarize the courts, we now turn to voices wholly outside the courts. In her article "Deliberate Indifference: An 'Unnecessary' Change?" Diana Davis offers a new definition of punishment.<sup>104</sup> Her approach is specifically developed for the Eighth Amendment context, but we will consider it as a general answer to the punishment question. In this part, I first provide the best reading of Davis's view, and then, I raise four criticisms.

##### A. Finding the Davis Definition

To determine whether something is punishment, the Supreme Court has required inquiry into the minds of state actors allegedly responsible for harm. Professor Davis has suggested that we drop the 'subjective' inquiry. Whether something counts as punishment, for Davis, is a purely 'objective' matter, a matter that does not require any evidence of bad thoughts on the part of the state actor (malice, indifference, etc.). Davis crafts her new understanding of punishment to comport with the way *convicts* likely see the fact of suffering harm. According to Davis, convicts "could view everything that happens from the moment of their sentencing as punishment."<sup>105</sup>

Davis refines her definition, leaving the reader with the following. "[P]unishment . . . includes within it all the events transpiring upon imprisonment (excluding events involving third parties not living or working within the prison)."<sup>106</sup> It is unfortunate that Davis shifts from

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104. Diana L. Davis, *Deliberate Indifference: An "Unnecessary" Change?*, 29 HOUS. L. REV. 923, 924 (1992).

105. *Id.* at 957.

106. *Id.* at 957-58.

talking about what happens from the moment of *sentencing* to what happens from the moment of *imprisonment*. The problems with the shift are obvious (1) one can be sentenced to things other than imprisonment and (2) one can suffer rather grave harms at the hands of state officials between the moment of sentencing and the moment of imprisonment. These criticisms are, in a certain way, cheap shots. Davis's definition may not be intended as exhaustive; she says that "punishment . . . *includes* within it" all the events from imprisonment onward, not that punishment is *only* those events from imprisonment onward. All the same, given the criticisms raised above, it seems most reasonable to see Davis's core claim to be about all that goes on post-sentencing, minus her two caveats.

For our purposes, the Davis view is the following. Punishment is, at least, all those events transpiring upon sentencing, excluding events involving third parties not living or working within the prison. This is an initially plausible view, but we must determine if it can withstand scrutiny.

#### *B. Pre-conviction Punishment?*

The first problem with Davis's new approach is that it does not acknowledge pre-conviction punishment. Suppose that a corrections officer beats up a man, suspected of child molestation, while the suspect is awaiting trial, and further suppose that officer beats the man *because* he believes the suspect is guilty. This seems no less like punishment than if the officer behaved the same way one month later after the suspect is convicted and sentenced.

It may help here to clear up a potential logical problem. One might think that because the State has absolutely no right to punish anyone until they are convicted, pre-conviction beatings, horrible as they might be, cannot count as punishment. This is mistaken reasoning because those acts for which it makes sense to say, "The State can't do THAT," have to be things that are logically possible in the first place. If there is no such thing as punishing someone before they are convicted, it is literally meaningless to say, "The State has absolutely no right to punish anyone until they are convicted." If that statement is meaningful and imposes an actual restriction on the State's power, it has to be possible to inflict punishment before conviction.

Courts, too, have recognized that there may be pre-conviction punishment and have said that this would violate Due Process.<sup>107</sup> For

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107. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.").

instance, the Seventh Circuit has held that sexual molestation of a pretrial detainee by a county jail guard can constitute cruel and unusual punishment; *a fortiori*, this behavior constitutes punishment.<sup>108</sup> Lest one think that only the Seventh Circuit recognizes the possibility of pretrial punishment, so have other circuit courts.<sup>109</sup> In one particularly distressing case, the Eleventh Circuit held that denying medical care to a pregnant pretrial detainee, which resulted in infection and miscarriage, constituted punishment and therefore violated Due Process.<sup>110</sup>

Now, a formalistic response to this critique is to note, again, that Davis is not offering an exhaustive definition of punishment. Her definition just describes a set of happenings that is *sufficient* for punishment; she is not telling us what is *necessary* for punishment. All the same, in purposely drawing the line at the moment of sentencing, Davis implicitly suggests that there is something special about that time, as opposed to those times prior. This suggestion, given my counterexample and the plausible holdings of courts, is problematic. Anytime state officials act with retributive purpose, malice, or deliberate indifference, we very well might have a case of punishment, and that is true before or after conviction.

### C. *Going Above and Beyond*

The previous criticism tried to show that Davis's notion of punishment is too narrow; this criticism and the next try to show that Davis's definition is also too broad.

On Davis's approach, the following situation would count as punishment. Despite being housed in a clean, well-heated prison, being given high-quality, heavy clothes along with terrifically warm and comfortable bedding, and being subject to weekly health check-ups, a prisoner contracts pneumonia. The health service in the prison immediately diagnoses the prisoner and begins aggressively treating her. Nevertheless, the prisoner succumbs to the disease and dies. Here we have a harm that occurred after sentencing, yet it seems confused to say that the prisoner's death was part of the punishment.

Davis recognizes this potential danger. Because she is writing about the Eighth Amendment context, Davis can claim that the abovementioned

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108. *Washington v. Hively*, 695 F.3d 641, 643 (7th Cir. 2012).

109. *See, e.g., United States v. Walsh*, 194 F.3d 37, 47 (2d Cir. 1999) (“[T]he right of pretrial detainees to be free from excessive force amounting to punishment is protected by the Due Process Clause of the Fourteenth Amendment.”).

110. *Goebert v. Lee Cnty.*, 510 F.3d 1312, 1331 (11th Cir. 2007).

sorts of situations are not *cruel* punishments. They are not cruel because they do not “offend common standards of decency.”<sup>111</sup> Something problematic still lingers in the way Davis classifies this kind of event, but we can see this most clearly only after my third counterexample to her account.

*D. What if the Harm Would Have Happened Anyway?*

On Davis’s approach, the following situation would count as punishment. A man from a town, call it Pompeii, is arrested for simple assault. The man, who has lived in Pompeii every day of his life and intends to stay there, agrees to a plea bargain. To his delight, he gets to remain in Pompeii, for he is sentenced to sixty days in the local jail. The next day, however, a nearby volcano suddenly erupts, killing everyone in Pompeii, including all occupants of the jail. This situation would count as punishment for Davis because the prisoner’s death is a harm that occurred after he was sentenced and is not attributable to any third party who works or lives outside the prison.

One might be wondering why I posed this counterexample. This situation described is obviously outlandish. Volcanoes *have* destroyed entire towns,<sup>112</sup> but such occurrences are awfully uncommon; thus, it might be thought too demanding to request that Davis modify her definition of punishment to handle these unusual cases. Moreover, one might think that Davis can handle this counterexample, bizarre as it is, by employing the same argumentative strategy we saw in the previous part. She can say that though this is punishment, it is not cruel punishment. Therefore, so the argument might go, she avoids any counterintuitive results.

We can begin exposing the problem with that response by noting something about Davis’s definition of punishment. She explicitly excludes harms inflicted on prisoners by third parties that neither live nor work in the prison. If the only thing driving Davis in developing her definition were the thought that prisoners can see *everything* that happens to them after a conviction as punishment, there would be no reason for this carve-out. One could proceed without it, and the way to deal with the possibility that prisoners receive damages for harms inflicted by such third parties is

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111. Davis, *supra* note 104, at 958.

112. See generally RALEIGH TREVELYAN, *THE SHADOW OF VESUVIUS: POMPEII AD 79* (1976) (discussing the destruction of the Roman city of Pompeii and other cities destroyed in the Vesuvius eruption of 79 CE.).

to develop a test for ‘cruel punishment’ that eliminates this possibility. Davis, however, does not do that in the case of third parties who neither live nor work in the prison. She thinks this should be ruled out *ex ante* as not even rising to the level of punishment at all. This leads one to wonder: if this is the right strategy for the third parties why is this *not* the right strategy for volcanoes and pneumonia.

Behind her caveat for third parties probably lies the thought that state officials have to be, in some important sense, *responsible* for the harm inflicted on the convicted person. If the officials are not responsible for the harm, the question of whether the harm was severe, cruel, or anything else should not arise and should not reach the courts, so the thought goes. Davis errs, however, in thinking that the behavior of third parties is the only way state officials may lack responsibility for harm befalling a convict. State officials are also not responsible when they do everything within their power to prevent harm, as in the pneumonia case. State officials are also not responsible when none of their actions is a but-for cause of the harm, as in the volcano case.<sup>113</sup>

Although the volcano is outlandish, the principle it supports is intuitive and present in many areas of law. In criminal law, tort law, even contract and property law, if one party cannot show that the defendant was a but-for cause of the alleged harm, the case falls apart, with very, very few exceptions.<sup>114</sup>

#### *E. A Final Nail in the Coffin: The Angry Mob*

This last counterexample to Davis indicates another reason why her definition is too narrow. On Davis’s approach, the following situation would *not* count as punishment. An infamous criminal is transported to a new prison. Local vigilantes get word of this and decide to pay a visit. The prisoners are all in the prison’s recreational yard when the vigilantes arrive. The vigilantes, none of whom work for the prison, find the prisoner and beat him to death while prison guards stand around idly, polishing their guns and whistling.

This would not count as punishment for Davis because, though this is

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113. Just to be clear, I am not equating “A is responsible for x” with “A is a but-for cause of x.” I am aware that one can be a but-for cause of x while not being responsible for x. I am claiming that one cannot usually be responsible for x while not being a but-for cause of x. Of course, there is even a well-known reason why one can be responsible for x while not being a but-for cause of x: over-determined events.

114. These exceptions often include over-determined events. See, e.g., RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 27 (2011).



post-sentencing harm, it involves third parties who neither live nor work in the prison. Now, perhaps, Davis can find some way to evade this counterexample, but any method that would look minimally plausible would underscore my key point that what matters most for answering the punishment question is determining whether state officials are responsible for the harm.

#### V. A NEW DEFINITION OF PUNISHMENT

The numerous problems with the previous accounts suggest a new definition of punishment. Punishment is (a) any sufficiently serious harm imposed by someone acting under color of law with a retributive purpose or (b) any sufficiently serious harm that befalls a punished or incarcerated person if that harm is intentionally inflicted by those acting under color of law or if the harm would have been prevented, had state officials exercised an ordinary standard of care. This definition has a number of parts, so before defending it against objections, I would do well to defend it against misinterpretations.

##### *A. Some Clarifications*

The beginning, or (a) part, of the definition is basically Stinneford's definition. It is filled out with "someone acting under the color of law" for obvious reasons. If the actual officials hire other people to do their dirty work, that is still punishment. Certainly, if it would be cruel and unusual punishment for corrections officers to kill prisoners in their sleep, the constitutional violation would not be evaded if the officers hired assassins. I used Stinneford's definition, which requires retributive purpose instead of Justice Stewart's more capacious "retributive or deterrent purpose," because some civil law, particularly tort law, has a deterrent purpose. Products liability law is often justified by its ability to deter those involved in the creation and distribution of goods from taking actions that result in harm to consumers. Making Buick pay for the injuries caused by its defective wheel, for instance, is not to punish the company, even though the court is acting under color of law and, by forcing the payment, imposes harm.<sup>115</sup>

The big departure from Stinneford, at least in the (a) part of definition, concerns the "sufficiently serious" part. To justify this modification, one need only reflect on how far-reaching the definition would be without this

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115. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 395 (1916).

qualification. Under the Stinneford definition of punishment, it looks like school children are subject to punishment anytime school officials level harms with retributive intent. An upshot of this would be that every detention or lost recess time meted out to students looks like an infliction of punishment without due process of law. To avoid this normatively absurd result, Stinneford's definition needs to be qualified in some way. An obvious way is to take a route inspired by the *Ingraham* Court: just as *Ingraham* shielded every sanction a school official might levy upon a student from Eighth Amendment scrutiny, one might shield schools from certain kinds of Fifth Amendment inquiry. This route seems problematic because the government should have no safe haven wherein all manner of harm can be freely visited upon individuals. The practical solution is to require that the harm inflicted with retributive intent be of sufficient seriousness to amount to punishment.<sup>116</sup> This solution can assuage worries that our definition will require a trial before a teacher can make a student stand in the corner; at the same, this solution offers grounds on which to overturn *Ingraham*.

The second or (b) part of the definition is where serious confusion might emerge. The (b) part deals with harms that occur downstream from incarceration or a situation that would count as punishment under the (a) part. The (b) part refers to things like the conditions of confinement and harms inflicted by third parties like inmate-to-inmate prison rape. The set of harms which count as punishment under the (b) part is obviously much larger than the set included under the (a) part. In the (a) set, we only count harms intentionally caused by a state actor's retributive purpose; meanwhile, in the (b) set, we count harms that are unintentionally caused as well as those intentionally caused. Consider the following hypothetical situation for an intuitive argument as to why this should be so. If a corrections officer, on the way to the prison, recklessly rear-ends me, while I am driving to the same prison to visit a friend, she does not punish me. Arguably, however, if I am a convict and the reckless corrections officer totals the car while transporting me to another prison, I am punished. One can say in this latter case, but not in the former, that by dint of a criminal conviction, this harm befell the convict. And that is shorthand for saying: by dint of some state actor seeking retribution against the convict, this harm befell him. Of course, there are objections

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116. It might be wondered what counts as "sufficiently serious." One might wonder whether I intend to exclude certain kinds of court-ordered shaming practices, especially in light of my BABYKILLER example, *infra* Part III.A. The unsatisfying answer has to be "Well, it depends on the case."

one might raise here, and I address those below, but an objector can grant the following. While there may be a *weak* case for calling the totaling situation “punishment,” there is *no* case for calling the rear-ending situation “punishment.” If that is so, we share the practical intuition that a broader range of harms might count as punishment if one is already punished.

There is something else about the second half of my definition that might be unclear. I suggest that the harms could be intentionally inflicted *or* the result of an official not exercising an ordinary standard of care. It might be thought that this is redundant. In this vein, one might think, “If something counts as punishment as soon as the official acts negligently, it surely counts as punishment if the official acts recklessly or intentionally. So the rule should just talk about harms inflicted that violate the ordinary standard of care.” This is mistaken because one can punish by doing things that are not contrary to the ordinary standard of care. In fact, exercising ordinary care may require punishment. If one prisoner is relentlessly beating another prisoner, it may be negligent *not* to strike the attacking prisoner with a billy club.

#### *B. Negligent Infliction of Serious Harm: Is it Really Punishment?*

A bigger point of contention about my account is that it allows harm caused by state officials’ negligence to count as punishment. It might be objected that such harms can hardly constitute punishment.<sup>117</sup>

They should constitute punishment for the kind of reason advanced by Davis. If we think from the perspective of the prisoner or detainee, any harm that accrues to her, for which the state is somehow responsible, seems like punishment. This might take the form of something obvious and intentionally inflicted, like a prison sentence, or something less intentional like forgetting to heat a prison or running a prison in such a way that facilitates prison rape. The reason for taking the perspective of the person potentially subject to punishment is obvious. We developed our constitutional protections with this person in mind. It matters far less whether some other person takes the treatment to be punishment.

If the retort here is that every minor, unintentional, harm would then count as punishment, I would remind the reader that the definition is qualified with “of sufficient seriousness” to handle worries about minor harms.

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117. See, e.g., H. L. A. HART, PUNISHMENT AND RESPONSIBILITY 5 (1968) (asserting that punishment “must be intentionally administered,” not accidental).

C. *What about Incapacitation?*

One might charge that my definition of punishment is under-inclusive because it does not cover significant harms, like lifelong confinement, if the state has an incapacitative, as opposed to retributive, purpose. Focusing on a particular case may serve to sharpen this objection.

In *Kansas v. Hendricks*, the Court upheld a Kansas law, which allowed the state to confine someone “likely to engage in repeat acts of sexual violence”<sup>118</sup> for an “indefinite duration.”<sup>119</sup> Particularly distressing is the fact that the evidentiary burden the state must bear in order to, essentially, incarcerate someone, is the preponderance of the evidence standard, not the higher beyond a reasonable doubt standard required for inflicting punishment. The Court upheld this because it agreed with Kansas that the civil commitment was not punishment. On the objection under consideration, my definition errs by agreeing with the *Hendricks* Court and not seeing this great infliction of harm as punishment.

I do agree with the *Hendricks* majority, abstractly, that incapacitating a person because she is both mentally ill and dangerous to others is not punishment. At least in the abstract, even if the government decided tomorrow that it would indefinitely incapacitate everyone who was likely to commit a crime, relying on either genetic information or actuarial data, this would still not constitute punishment. It might, however, raise equal protection concerns or substantive due process concerns, but not punishment concerns. This stance on a hypothetical situation, though, somewhat depends on the situation remaining hypothetical. It is unlikely that a real mass incapacitation would fail to feature retribution. This same sense of doubt is how one should meet the actual situation of *Hendricks*, too. We should be much more skeptical than the majority was that there was no retributive purpose behind the restrictions placed on Leroy Hendricks and others like him. I would have inferred a retributive purpose from a combination of factors largely unexplored by the majority. These include society’s hatred for pedophiles—the primary target of the Kansas law—the fact that the state acknowledged that there is treatment for pedophilia but declined giving it to Hendricks either during his prison sentence or his civil commitment, and the fact that the state did not consider less restrictive means of protecting the public.<sup>120</sup> Given these

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118. Kan. Stat. Ann. § 59-29a01.

119. *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997).

120. Justice Breyer discusses these latter two factors in his dissent. *Id.* at 373–97 (Breyer, J., dissenting).

factors, it is at least arguable that Kansas was actually seeking retribution against Hendricks and not merely trying to protect the public against a sexual predator. As such, the confinement imposed by Kansas and many other states with sexually violent predator laws was punishment.

*D. What about Rehabilitation?*

The final objection to consider is whether my definition of punishment illicitly smuggles in a justification for punishment. If such were true it would present both theoretical and practical difficulties. Let us develop this objection and see how far it goes.

For something to count as punishment on my account, it typically involves a retributive purpose either directly or as a downstream effect of retribution. Saying this appears to imply that my account not only defines punishment but also justifies punishment on retributivist grounds. This looks problematic in part because it is theoretically illicit to define a phenomenon in such way as to foreclose debate about the justification for having the phenomenon. This is especially so in the case of punishment since there is a lively debate over the justification for punishment, and rehabilitation has long been an important contender.<sup>121</sup> Another, more practical reason to worry about restricting punishment to those harms connected with retribution as opposed to rehabilitation is the following. Suppose a state inflicts a very grave harm on a convict but does so on the theory that this will rehabilitate him. We can imagine some *A Clockwork Orange* type of scenario in which the rehabilitation looks as bad as the disease.<sup>122</sup>

My response to both worries begins by just clarifying *retributive purpose*. I mean something less theoretically ambitious than those who are “retributivists about punishment,” where this means that people who *justify* punishment by citing just deserts or even vengeance. On my view, a person A undertakes action *x* with retributive purpose, when A does *x* with the thought that doing *x* gets back at some other party B for some wrong for which B is responsible. It is a further question to decide what justifies getting back at B. Maybe A wants to get back at B because that is B’s just desert; maybe A wants to get back at B because that will deter B from doing whatever he did again; maybe A wants to get back at B in order to

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121. An early advocate of the rehabilitation justification was Plato. See PLATO, *Gorgias*, in PLATO: COLLECTED DIALOGUES (Edith Hamilton & Huntington Cairns eds., W. D. Woodhead trans.) (c. 400 B.C.E.).

122. See generally ANTHONY BURGESS, *A CLOCKWORK ORANGE* (1962).

make B a better person; maybe A wants to get back at B because that will deter others from acting like B henceforth.

The general structure of my view is that retribution in the pared down sense is the purpose that largely *defines* punishment, but once we have defined the phenomenon, we are free to attempt to justify it with separate reasons. This picture of understanding a voluntary action, like punishing someone, is pretty commonplace. On a standard picture of what it means for an action to be intentional or voluntary,<sup>123</sup> the actor has to be able to provide a minimal purpose that explains why she is moving her body as she is.<sup>124</sup> Only after one discerns this minimal purpose and has thereby seen the behavior as a voluntary action can one turn to wondering what, if anything, justifies committing that particular voluntary action. An example may help to clarify this. Suppose, for instance, that a man, named Carlos, is swinging a heavy blunt object and making contact with another person's leg. If Carlos acts voluntarily, he is answerable to a simple why-question. That is, someone may licitly ask why Carlos is swinging the object. Carlos can, in turn, say things like "I am trying to hit that person," or "I am trying to hit the piñata." If, for instance, Carlos says that he is trying to hit the person, that is not yet a justification for acting this way; it merely makes the action intelligible as a voluntary action at all. A justification would be something like mentioning that this other person hit Carlos first or that this person took Carlos's piñata.

To return to the worry that generated this digression, on my definition of punishment, rehabilitationalists about punishment are committed to harming people with retributive purpose. Of course, this sounds weird not only because rehabilitation is not supposed to be harmful but also because rehabilitation is thought to be opposed to retribution. This weirdness should dissipate once we note two things. First, something can harm a person, even if it yields a net benefit. Amputating Hippolyte's foot harms him, even if he would die without the operation.<sup>125</sup> Locking someone in a jail cell harms them, even if (by some miracle) it makes them a better person. Second, if we understand retributive purpose in the pared down sense of supplying the minimal reason which makes some behavior intelligible as voluntary, we will not see retributive purpose and rehabilitation as diametrically opposed.

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123. I shall use the word *voluntary*, though in philosophical jargon it is more commonplace to say *intentional*. I am hoping to avoid confusion with legal jargon, where *intentional* means something more than merely voluntary.

124. See generally G. E. M. ANSCOMBE, *INTENTION* (1957).

125. GUSTAVE FLAUBERT, *MADAME BOVARY* 251 (2001).

Given my view about retributive purpose, the *A Clockwork Orange* issue is unlikely to arise. I can say that those state actors acted with retributive purpose and did thus punish the protagonist Alex, even if the justification for acting with retributive purpose was rehabilitative.

Finally, to revisit *Hendricks*, the Kansas statute may not be punishing anyone. This is not because the state *claims* it acts with incapacitative purpose. Rather, Kansas may not be punishing anyone because the state may not be trying to get back at anyone for anything. The Kansas statute allows state officials to incapacitate persons indefinitely even before any wrongdoing is deemed to have been done.<sup>126</sup> The *dangerousness* of the person, not a wrong committed by that person, is that to which the treatment is to serve as a response.

#### CONCLUDING REMARKS

In this course of this Article, I have argued that one finds no workable definition of punishment in the courts. There is no definition in Eighth Amendment jurisprudence, even though the word “punishment” actually shows up in the text of the Constitution. There is no workable definition in the Court’s criminal-civil distinction jurisprudence either. I have also argued that this lack is problematic because courts, without an explicit, workable definition, must rely on partial definitions gleaned from here and there. Without being explicitly formulated, these partial definitions cannot even be rationally appraised and may have unjust results. Turning away from the courts, I looked at a definition of punishment offered by a commentator, Diana Davis, who had the insightful idea to think about punishment from the perspective of those suffering adverse treatment from the state. This perspective, I argued, is the correct lens, for our practical intuitions about punishment are, deeply enough, worries about the fate of this person. After interrogating the Davis definition, I found several problems, problems that I attempted to remedy in formulating my new definition of punishment. According to my definition, a happening counts as punishment when and only when (a) someone acting under color of law imposed a sufficiently serious harm upon another with a retributive purpose or (b) any sufficiently serious subsequent harm that befalls a punished or incarcerated person as a consequence that is intentionally inflicted by those acting under color law or would have been prevented, had state officials exercised an ordinary standard of care.

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126. KAN. STAT. ANN. § 59-29a01.

To conclude, I hope tackle a different type of worry about my endeavor, not a worry that wonders whether a better answer to the question might be found but one that wonders whether I have asked a proper question in the first place. In this essay I set out to find a *general* answer to the punishment question; that is, I have sought a single set of conditions that, if met, count as punishment for the Eighth Amendment context as well as other constitutional contexts. It might be wondered whether this is wise. What licenses someone to think that we should take *punishment* to refer to the same phenomenon in these different contexts? In other domains, the Court has held that the same lexical item may mean different things depending on the context, and we observe this simple truth in everyday life. For instance, the Court has held that *interrogation* means one thing in the Fifth Amendment context<sup>127</sup> and another thing in the Sixth Amendment context.<sup>128</sup> To cite from ‘real life,’ we know that the word *bear* refers to several different things, a large creature, the action of carrying or supporting something, and giving birth to offspring. Why think that there is an answer to *the* punishment question?

To respond, I reiterate something said at the outset of this Article. It seems like there is a single practical concern, though expressed variously, to which several constitutional provisions attempt to give voice. This concern is about that thing we demand to be humane and not cruel, the same thing we ought to impose only upon prior notice, which we ought to impose only with strong procedural safeguards in place. This single thing is harm imposed by the state, inflicted to ‘get back at’ someone, or practically any harm that results from the state trying to ‘get back at’ someone—with some caveats. This getting back at people really ought not to be cruel, really ought not to be imposed unless people have the opportunity to learn which acts will occasion such treatment, and really ought not to be imposed without a good deal of proof, etc.

The alternative to thinking this is to suggest that there is punishment for thinking about prison conditions, punishment for thinking about sentences meted out by judges and juries, punishment mentioned in statutes, and so on. If asked what these notions have in common, the answer would be nothing. These would all be rightly called punishment merely by happenstance or some connection that remains ineffable. This alternative to my methodology makes our various claims look disordered and inadequately thought-out. That is not how our practical intuitions

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127. *Rhode Island v. Innis*, 446 U.S. 291 (1980).

128. *Brewer v. Williams*, 430 U.S. 387 (1977).



concerning the proper use of punishment actually work. Or at least, I would hope not.