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Long-Term Incarceration and the Moral Limits of Punishment

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Declaration

I certify that the thesis I have presented for examination for the PhD degree of the London School of Economics and Political Science is solely my own work.

I warrant that this authorisation does not, to the best of my belief, infringe the rights of any third party.

I declare that my thesis consists of 99,929 words.

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Abstract

This thesis, inquiring into the permissibility of long-term incarceration, maintains that two sets of reasons determine the moral limits of punishment.

First, the reasons that justify the infliction of penal harm will only license "proportionate" or "parsimonious" means of realizing our penal aims. Part I, searching for these reasons, conceives of the criminal law as a system of protections, upon which all citizens rely for their assured liberty. An offender weakens this system by contributing to the threat of "criminality." The state is thereby entitled, and only entitled, to harm him as a means of "erasing" his criminality contributions, generally by deterring would-be future offenders. This precludes long-term incarceration in most, but not all cases, given the tenuous relationship between penal severity and deterrence.

The second set of reasons opposes degrading punishments. Is long-term incarceration impermissibly degrading, irrespective of its proportionality or usefulness otherwise? Part II gains traction by considering torture, the exemplar of degrading treatment. I define torture as *the intentional infliction of a suffusive panic*. I argue that it is egregiously "disrespectful" of the human capacity to realize value. It converts a *diachronic* being capable of building a good life through time into a *synchronic* being whose awareness is restricted to a maximally terrible present. Meanwhile, a prison sentence is "long-term," I argue, if it severely risks ruining an inmate's life, just in virtue of the amount of time that he is separated from society and thereby deprived of certain associational goods (e.g. a family and career). Long-term incarceration for reasons of retribution or deterrence *intentionally* inflicts this life-ruining harm. It is thus impermissibly disrespectful of a person's value-generating capacities, I conclude, akin to penal torture. Long-term incarceration for the reason of incapacitation, however, whereby the state is not motivated to harm the offender, can be legitimate.

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Introduction

Is long-term incarceration a legitimate form of punishment? That is, does it inflict an impermissible degree or type of penal harm? This thesis maintains that two sets of reasons determine the moral limits of punishment. First, the reasons that justify the positive infliction of penal harm will contain "internal" punishment limits. They will only license penal harms that are "proportionate" or "parsimonious" means of realizing our penal aims. The second set of reasons are those that resist the infliction of degrading punishments. These reasons are relatively distinct from those that justify the infliction of penal harm; the latter may authorize a punishment that is nonetheless impermissibly degrading. In this Introduction, I will outline the thesis's main arguments, while also considering the relationship between these two sets of reasons.

Part I. Internal Limitations

Chapter 1, seeking to establish the appropriate internal punishment limits, inquires into the justification of state punishment. Why—if at all—is the state entitled to harm people when they commit offenses? Chapter 1 conceives of the criminal law as a system of protections—against murder, rape, theft, etc.—upon which all citizens rely for their assured liberty, and which depends for its effectiveness on the deterrent threat of punishment. But Chapter 1 also accepts a moral principle. It is a variation of the prohibition on using people as a mere means to the greater good[1]: we must not sacrifice individuals as a means of mitigating harms or threats for which they have no responsibility. The challenge is to explain how punishing offenders for the sake of deterrence—for the sake of a reliable system of criminal law protections—is consistent with this "non-sacrifice principle." For deterrent punishments seem to violate the principle rather straightforwardly, with

[1] *See* Immanuel Kant, *Groundwork of the Metaphysics of Morals* [1785], in ed. and trans. Mary J. Gregor, *Practical Philosophy* (Cambridge: Cambridge University Press, 1996), 37-108, at 80 (4:429) ("So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means.").

the state harming an offender as a prudential warning to would-be future offenders, for whom the offender has no responsibility.

In responding to this challenge, I argue that the criminal law, as a system of protections, operates somewhat counterintuitively. It rests ultimately not on police intervention, but rather on people *self-applying* criminal legal norms. That is, when I walk down a street, I am not relying upon the police to protect me like personal guards, but rather upon other people within the jurisdiction to self-apply the rules that prohibit assaulting me, stealing my wallet, and so forth. This analysis clarifies the nature of criminal wrongdoing. When an individual offender fails to self-apply the criminal law, then, *in combination with other offenders*, he contributes to a wider social threat. This is "criminality"—not merely the perceived, but the objective threat of crime. Criminality hinders the institutional aims of the criminal law. It chills the exercise of our rights, forces us to take expensive precautions, and subjects us to unreasonable risks of harm. The more criminality there is in society, the less worth the criminal law has as a guide to the possible incursions of other people in society, and the less assured is our liberty. Deterrent punishment, as a means of holding an offender responsible for his criminality contributions, is thereby permissible. When the state harms an offender to deter would-be future offenders, it is forcing him to "erase" his past and possibly ongoing contributions. The state is not merely sacrificing him to limit the problem of future crime, for which he has no personal responsibility. It is rather forcing him to fulfill his own duty, owed to society as a whole, to repair his criminality contributions and restore the reliability of the criminal law system. Over time, ideally—with would-be future offenders appropriately deterred—it would be as if he had never contributed to criminality at all, in terms of the average threat of crime faced by society.

While they are closely connected, this framework in fact generates two theories of deterrent punishment. The "corrective justice theory of punishment" concerns the offender's duty to *rectify* his past criminality contributions. The "social

defense theory of punishment," meanwhile, concerns the offender's duty to *mitigate* his ongoing contributions. The social defense theory only applies to those offenders who remain unreasonably unreliable with regard to upholding the criminal law; in addition to justifying deterring punishment, this theory can in special circumstances also justify forms of incapacitation. While the past offense is dispositive proof that the offender contributed to criminality in the past and therefore owes a duty of rectification, what evidence suffices to prove that he is *also* contributing to criminality in the present, and therefore that he *also* owes a duty of mitigation, is a much more challenging issue.

The corrective justice and social defense theories contain a number of internal punishment limitations. First, the infliction of penal harm is justified only so long as it deters crime, given that these theories deny that the suffering of offenders is an intrinsic good. Second, penal harm is justified only so long as it is the most efficient use of crime prevention resources. Third, if inflicting penal harm is indeed an effective and maximally efficient means of generating deterrence, once the offender's personal duty of repair is fulfilled, then the state cannot harm him further permissibly. Consider Alex, whose intention to steal a car increased criminality in the past by, say, 10 units. According to this third internal limitation, the state would be entitled to harm him so as to decrease future criminality by 10 units, *but no more*. Fourth, it is impermissible to harm an offender to a degree that is *entirely out of proportion* to the stringency of the offender's duty of repair, even if that meant that his duty went to some degree unfulfilled. A 20-year prison sentence for Alex, even if it were the singular means by which he could decrease criminality by 10 units, would be entirely out of proportion to the reparative benefit gained by society.

This collection of internal limits rules out long-term incarceration in most cases, I argue, given the tenuous relationship between penal severity and crime deterrence. To sentence an offender to a 20-year term is generally a wasteful and inefficient use of crime prevention resources, let alone entirely out of proportion

to the stringency of his duty of repair. Nonetheless, the corrective justice and social justice theories could license such a punishment, and any other potentially degrading punishment, such as penal torture, were the offender's criminality contribution sufficiently grave and, as an empirical matter, were such a punishment an effective means of deterrence. For crime deterrence does correlate to some degree with penal severity, even if it correlates more robustly with the likelihood of receiving some amount of punishment.[2] And if it were indeed the case, as some have suggested,[3] that extreme or degrading punishments were effective means of deterrence, then the two theories would lack the internal resources to categorically rule out such punishments *ex ante*, as a matter of principle.

Part II. Degradation Limitations

Part I thus examines the set of reasons that justify the maintenance of a state institution dedicated to the infliction of penal harm, and then the punishment limitations that are "internal" to these reasons, that is, those limits associated with the demand to inflict penal harm only to the extent that it furthers the realization of its justificatory goods. Part II has two central aims.

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[2] For evidence that the certainty of punishment is more important for deterrence than the severity of punishment, see Daniel S. Nagin, "Deterrence in the Twenty-First Century: A Review of the Evidence," in ed. Michael Tonry, *Crime and Justice in America: 1975–2025* (Chicago: Chicago University Press, 2013); Andrew von Hirsch, et. al., *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (Portland: Hart, 1999), 27, 36, 45; Steven N. Dulauf and Daniel S. Nagin, "Imprisonment and crime: Can both be reduced?" *Criminology & Public Policy* 10 (2011): 13-54.

[3] *See* Lawrence Katz, Steven D. Levitt, and Ellen Shustorovich, "Prisons Conditions, Capital Punishment, and Deterrence," *American Law and Economics Review* 5 (2003): 318-43 (arguing that penal severity, as revealed through prisoner death rates, correlates robustly with decreasing crime rates); Hashem Dezhbakhsh, Paul H. Rubin, and Joanna M. Shepherd, "Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data," *American Law and Economics Review* 5 (2003): 344-76 (suggesting that each execution prevents eighteen murders on average); H. Naci Mocan and R. Kaj Gittings, "Getting off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment," *The Journal of Law and Economics* 46 (2003): 453-78 (finding that each execution decreases homicides by about five, while each commutation increases homicides by about five); *but see* John J. Donohue and Justin Wolfers, "Uses and Abuses of Empirical Evidence in the Death Penalty Debate," *Stanford Law Review* 58 (2005): 791-846.

A. Independent Reasons

The first aim is to examine the set of reasons that opposes the infliction of degrading punishments. Beyond "degrading," other relevant adjectives include, at least, "cruel," "inhuman," "inhumane,"[4] "barbaric," and "brutal." There is considerable overlap between the terms, however, and we ought to conceive of the reasons that oppose such punishments as a unified or general category.[5] It seems unlikely that the reasons that oppose, say, cruel punishments are very different from the reasons that oppose, say, inhumane punishments. And, indeed, a number of treaties and constitutions group these considerations together. The Universal Declaration of Human Rights provides, for instance: "No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment."[6] Let us refer to this category of sentencing considerations as "degradation-limiting penal reasons" ("degradation-limiting reasons" or "degradation limitations" for short).

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[4] *See* Jeremy Waldron, "Inhuman and Degrading Treatment: The Words Themselves," *Canadian Journal of Law & Jurisprudence* 23 (2010): 269-286, at 278-79 (arguing that "inhumane" treatment is distinct from and milder than "inhuman" treatment).

[5] For attempts to parse the meanings of the various terms, see Waldron, *id.* and John Vorhaus, "On Degradation - Part One: Article 3 of the European Convention on Human Rights," *Common Law World Review* 31 (2002): 374-99; *but see Tomasi v France* (App no 12850/87) [1992] ECHR 53 (making a finding of "inhuman and degrading" treatment without distinguishing between the two terms); *Ribitsch v. Austria* (App no 18896/91) [1995] ECHR 55 (same).

[6] Universal Declaration of Human Rights, art. 5. The International Covenant on Civil and Political Rights, the European Convention on Human Rights, the American Convention on Human Rights, and the Brazilian Constitution all contain a clause with this exact language (though, the Brazilian clause is in Portuguese). *See also* United States Constitution, am. 8 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); New York State Constitution, art. 1(5) ("Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained."); Texas State Constitution, art. 1(13) (emphasis added) ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel *or* unusual punishment inflicted."); Canadian Charter of Rights and Freedoms, art. 12 ("Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."); Federal Constitution of the Swiss Confederation, art. 10(3) (translation): ("Torture and any other form of cruel, inhuman or degrading treatment or punishment is prohibited."); New Zealand Bill of Rights Act 1990, sect. 9 ("Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment."); South African Constitution, art. 12(1) ("Everyone has the right to freedom and security of the person, which includes the right not to be tortured in any way; and not to be treated or punished in a cruel, inhuman or degrading way."); UN Convention Against Torture, art. 16(1): ("Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined.").

Robert Nozick conceives of rights as categorical "side constraints" upon the pursuit of consequentialist reasons.[7] Part II focuses on degradation-limiting penal reasons that operate in a morphologically similar manner. That is, it will focus on *dispositive* versions of such reasons. They are dispositive in that they represent true "limits" that positively bar certain punishments—say, penal torture—regardless of the reasons pushing in the other direction to punish in such a manner or degree. "*You cannot do that to a human being"* captures the ideal in broad brush, though, given our focus on penal reasons, we are concerned ultimately with a more precise variant: *"You cannot do that a human being (as a form of state punishment)."* We should recognize, though, that not every degradation-limiting reason is dispositive. That is, they need not all or always represent categorical "side constraints" upon the pursuit of our penal objectives. For instance, that a punishment will humiliate an offender is a degradation-limiting reason against its infliction, let us assume. I doubt that such a reason will always be dispositive, though, given that all punishments will likely humiliate to some degree.[8] Thus, between two mildly humiliating punishments—both of which achieve our penal aims equally without implicating any other sentencing concerns—our degradation-limiting reason would cause us to select the punishment that humiliated less, rather than simply ruling out both options. Though, for the sake of completeness, such a reason might be non-dispositive at one level of saliency, but then dispositive at another. There may be a degree of humiliation that no punishment should ever inflict, for instance, regardless of the offender's retributive desert, of deterrence considerations, and so forth.

Degradation limitations operate with relative independence from other penal considerations, as stated above. This is a key point. To make sense of it, let us

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[7] Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 28-33.

[8] *See Tyrer v UK* [1978] 2 EHRR 1, par. 3 (finding that, for Article 3 to apply, the punishment must humiliate beyond the "usual element of humiliation" inherent to all punishments); Graham Zellick, "Corporal Punishment in the Isle of Man," *International and Comparative Law Quarterly* 28 (1978): 665-71, at 669 (defining punishment as degrading when it "is inescapably humiliating and debasing beyond the normal limits of punishment…").

consider Antony Duff's treatment of the "rape the rapist" sentencing proposal.[9] As I discuss in Chapter 1, Duff conceives of punishment as a form of rational discourse between a community and an offender.[10] The offender commits a "public" wrong and thus deserves the community's censure, on Duff's view. The community should not simply lash out at him, Duff continues, but rather ought to express its disapproval *rationally*, providing him with reasons to regret his actions and to desist from wrong in the future. While Duff maintains that hard treatment is the means by which the community censures offenders, he argues that such treatment must remain within the bounds of rational communication. As such, he concludes that his theory forecloses penal rape, because such a punishment "does not address [the rapist] as a rational moral agent—it simply seeks to traumatize and humiliate him."[11]

We should be careful to recognize which reasons are doing the heavy lifting for Duff. Duff opposes penal rape here not because it is impermissibly degrading, not *because* it traumatizes and humiliates, but because, by traumatizing and humiliating, it would fail as a form of rational communication. The only legitimate reason for the state to inflict penal harm, Duff believes, is to censure a moral agent for committing a public wrong; and given that penal rape would not qualify as censure or would not qualify as the appropriate form of censure, the state cannot inflict that form of penal harm legitimately. The offender deserves a particular form of communication, and penal rape does not qualify. The fact that penal rape is extremely degrading would thus stand as an independent reason against its infliction. Perhaps one could foreclose all impermissibly degrading punishments as a matter internal to the pursuit of her penal aims. Duff seems to believe that he can achieve this via the constraint that hard treatment must remain a form of rational communication. If that were the case, however, it would not mean that degradation-limiting reasons were somehow irrelevant or non-existent. It would mean that the impermissibility

[9] R.A. Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001), 143-45.
[10] *See* Chapter 1 at 32.
[11] Duff, *Punishment, Communication, and Community, supra* note 9 at 143.

of such punishments was over-determined, ruled out by the demand to pursue our positive penal aims with proportionality or parsimony, in addition to the *separate* fact that such punishments are impermissibly degrading.[12]

In general, criminal law theorists seem overeager to tie every intuitive sentencing consideration to the base of their positive theory of punishment, that is, to argue that every intuitive sentencing consideration is a matter of "internal" principle, flowing directly from the set of reasons that justifies the positive infliction of penal harm. However, we can appeal to sentencing reasons, such as degradation-limiting reasons, that do not have a very tight relationship with our justificatory penal reasons—even if, as I discuss in Chapter 2, they share a deeper foundation of principle in the commitment to human inviolability.[13] For instance, if Duff is wrong that his justificatory penal reason—the imperative to censure a wrongdoer via the infliction of genuinely communicative hard treatment—rules out penal rape, then he is not thereby committed to the legitimacy of such punishment. He could appeal to the relatively independent degradation-limiting reasons to foreclose its infliction. And, indeed, it seems to me that Duff *is* wrong that his theory definitely rules out penal rape. Duff writes of the communicative nature of hard treatment: "It is a way of trying to focus [the offender's] attention on his crime. It provides a structure within which, we hope, he will be able to think about the nature and implication of his crime, face up to it more adequately than he might otherwise (being human) do, and so arrive at a more authentic repentance."[14] But what better way

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[12] *See* Waldron, "Inhuman and Degrading Treatment," *supra* note 4 at 277 ("The provisions we are considering prohibit treatment or punishment which is cruel, inhuman, or degrading, *whatever else it is*. So, for example, if someone thinks that water-boarding is *necessary* in certain circumstances to prevent terrorist attacks, that does not affect the question of whether it is inhuman, nor does it affect the consequences of its being judged inhuman. If it is inhuman, then it is prohibited by the provisions we are considering whether it is necessary for defense against terrorism or not."); *id.* at 278 ("It is quite consistent to say of a punishment that it is cruel *and* that God ordains it: God may be cruel. The question of whether something is cruel or inhuman is one aspect of its overall evaluation; the question of whether God ordains it is another.")

[13] *See* Chapter 2 at 168-70.

[14] Duff, *Punishment, Communication, and Community*, *supra* note 9 at 108.

to focus an offender's attention on his crime than to make him suffer the same offense? Why *not* rape the rapist? The act of penal rape *in and of itself* might not constitute the form of communication that Duff has in mind, but penal rape followed by the offender's inevitable reflection on what the state has done to him (and therefore what he has done to his victim) might indeed qualify. So long as the offender's capacity for rational reflection remained intact, it would seem that Duff's theory, without appealing to degradation-limiting reasons, might entail highly degrading forms of punishment. Duff's theory, to be sure, is not the only one that would have to appeal to degradation-limiting reasons to foreclose such punishments. Consider "traditional" retributivists, who are concerned to deliver to wrongdoers a deserved allotment of suffering.[15] If an offender has done something absolutely heinous to multiple people, would he not deserve, following traditional retributivist proportionality, to have something absolutely heinous done to him? Jeffrie Murphy, committed to the "fair play" variant of traditional retributivism,[16] accepts this point, as well as the role played by dispositive degradation limitations in preventing such punishments: "Even when proportionality is satisfied, however, we shall not use a certain punishment if it is intrinsically degrading to the humanity of the criminal—e.g. we shall not torture the torturer."[17] And, as discussed above, even what I take to be the two legitimate theories of punishment—the corrective

[15] On "traditional" retributivism, see Chapter 1 at 27-32.

[16] *See* Chapter 1 at 28.

[17] Jeffrie G. Murphy, "Cruel and Unusual Punishments," in *Retribution, Justice, and Therapy: Essays in the Philosophy of Law,* ed. Wilfrid Sellars (Dodrecht: D. Reidel Publishing, 1979), 223-249, at 236. *See also* Alec Walen, "Retributive Justice," *The Stanford Encyclopedia of Philosophy* (Winter 2016 Edition), https://plato.stanford.edu/archives/win2016/entries/justice-retributive/ ("[P]roportionality should rule out certain punishments on the ground that they are disproportionately large. But there is no reason for retributivists not to look to other criteria, such as respect for human dignity, to prohibit those forms of punishment that seem cruel or degrading."); Youngjae Lee, "Desert and the Eight Amendment," *Journal of Constitutional Law* 11 (2008): 101-112, at 102 (distinguishing between the "desert model" of Eight Amendment jurisprudence, which is concerned to prevent retributively disproportionate sentences, and the "dignity model," which is concerned to guarantee to offenders "a minimum standard of decency and humanity.").

justice and social defense theories—cannot foreclose degrading punishments as an internal matter of principle.

B. Torture and Long-Term Incarceration

The second aim of Part II is to examine the meaning of long-term incarceration, and the permissibility of that form of punishment by reference to degradation limitations. I argue in Chapter 3 that long-term incarceration—say, a 20-year term—severely risks ruining an inmate's life. And the central question I am concerned with is when and whether it is impermissibly degrading to do this to someone—to ruin his life or to severely risk ruining his life—as the official response to his crime. In this way, long-term incarceration serves as the test case for our broader inquiry into degradation-limiting penal reasons.

Part II tries to gain traction in this realm of reasons via moral analogy. That is, it does not consider these reasons completely *a priori* or *de novo* and then apply the abstract findings to the question of long-term incarceration. Rather, it tries to push off, as it were, from a state practice—torture—that is commonly viewed as impermissibly degrading, as implicating a hard stop on the reasons, penal or otherwise, in favor of its infliction. Even more to the point, if we look just to penal torture—torture as a form of punishment—this practice is considered the exemplar of an impermissibly degrading punishment. In *Furman v. Georgia*, for instance, Justice Brennan writes that the "primary principle" by which the US Supreme Court assesses whether a punishment is "cruel and unusual" and thus in violation of the 8th Amendment is whether it is "degrading to human dignity"[18]; and he deems "torturous punishment" to be the "*paradigm* violation of this principle" (his emphasis).[19] Furthermore, prohibitions on degrading punishments are often grouped together with prohibitions on torture in legal texts: "No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment."[20] Drafters and

[18] *Furman v. Georgia*, 408 U.S. 238, 281 (1972).
[19] *Id.*
[20] Universal Declaration of Human Rights, art. 5. *See supra* note 6.

signatories seem to have understood that both prohibitions—(a) no torture and (b) no cruel, inhuman or degrading treatment or punishment—implicate the same set of considerations. In this way, if degradation-limiting reasons exist, then a close examination of the practice of torture should illuminate their nature and content. Murphy writes:

> "Are there certain punishments which one would want to oppose in principle, as unjust violations of the rights of the person being punished, regardless of the social utility (e.g. deterrence) which might flow from such punishments? Since I believe the answer to this question obviously is *yes* (will anyone stand up for torture and mutilation?), another and much more difficult question must next be confronted—namely, what is it about such punishments which make them cruel and unusual in the sense of being wrong in principle?"[21]

The hypothesis that I pursue in Part II, in response to Murphy's second question, is that the general reasons that oppose the infliction of torture simply are our degradation-limiting reasons, or the most fundamental of such reasons. The moral analogy, then, works like this: what are the "wrong-making" features of torture, and does long-term incarceration share any such features?

C. Disrespect and Degradation

In Chapter 2, I argue that *disrespect* is the metric of degradation, such that the central wrong-making feature of torture is the egregious disrespect it demonstrates toward a victim. I follow Joseph Raz in arguing that "respect" involves having the appropriate response to the presence of value.[22] To respect something involves aiding or at least not interfering with the possibility of that thing's exhibition of value, as well as potentially expressing or honoring its value in a symbolic manner. For instance, to pour water on a beautiful sandcastle is to disrespect the sandcastle's value, while pouring water on a plant, generally, is to respect the plant's value—with the understanding that such objects have value only insofar as people might

[21] Murphy, "Cruel and Unusual Punishments," *supra* note 17 at 223-24.
[22] *See* Joseph Raz, *Value, Respect, Attachment* (Cambridge: Cambridge University Press, 2001).

engage with them meaningfully. The demands of respect thus depend on what the object actually does to exhibit value, on the "mechanism" of its value exhibition, as it were, and the ways in which our actions help or hinder the working of that mechanism. To apply this logic to human beings directly—and thus to understand what respecting or disrespecting a person means—we need an understanding of what humans do, exactly, to exhibit value.

I argue that human beings exhibit value due to their meta-capacity for practical reason—the combination of their capacities for, at least, autonomy, value-recognition, memory, and imagination—which enables them to stitch moments together through time and construct a good life. They are *diachronic* creatures with pasts and futures of their own construction to a significant degree, capable not only of experiencing "momentary" goods, like enjoying an ice-cream cone, but also of achieving "temporal" goods, like maintaining a marriage. While suffering may play a role in the production of temporal goods, as with the suffering involved with certain forms of professional training, I argue that humans retain the capacity to generate *disvalue*, which constitutes merely *wanton* suffering.

With this conception of human value in mind, I conclude that torture is the *archetype* of disrespect for a person and her special capacities for generating value and disvalue. After examining a number of first-hand accounts of torture victims, I define torture as *the intentional infliction of a suffusive panic*. I then argue that torture, by inflicting a *make it stop right now* panic, (a) completely halts the victim's value generating capacities, as she loses the thread of her diachronic identity and (b) maximizes her capacity for disvalue, with her consciousness saturated with suffering. Torture is thus perverse from the perspective of respecting human value. It takes a being capable of living broadly and purposefully through time and, via the infliction

of a suffusive panic, converts her into a "shrilly, squealing piglet," in Jean Améry's words, restricting her ken to a maximally terrible present.[23]

Certain forms of torture, however, are yet more disrespectful than others, depending on the degree to which they risk long-term psychological or physical damage. Disrespect, in this way, is on a spectrum, with torture for an eternity—*suffusive panic forever*—at the very top. Treatment can be less disrespectful than this, however, and still be impermissibly degrading. But where, exactly, on the spectrum of disrespect shall the "dispositive" line be drawn, beyond which we would say that such treatment is absolutely impermissible? Given that respect involves the process of responding to something's value, disrespect for a person always embodies a rejection, to some degree, of her value. But, as I explain in Chapter 2, there are different modes of disrespect; one might just disrespect another's value as, say, a playwright (e.g. the symbolic disrespect of saying "your play is not very good."). When delivered in a certain manner and degree, however, disrespect can embody a rejection of someone's *essentially human* value, which is grounded on her essentially human capacity to build a good life through time. Such treatment expresses the conviction that this creature does not matter, at least not like a person does, such that we can do whatever we want with it, as if it were a mere thing or animal. Above the "dispositive" line, we can say, more particularly, that a punishment rejects the offender's standing as a human, by *ruining* his essentially human capacity to realize value in a diachronic, life-building manner, or by embodying the legitimacy of doing so. While this will usually take the form of a *non-symbolic*, physical interference with someone's value-generating capacities, certain essentially *symbolic* forms of disrespect can be so extreme as to qualify. Consider "Derby's Dose," by which a slave overseer forced runaways to eat human excrement as a form of punishment.[24]

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[23] Jean Améry, *At the Mind's Limit: Contemplations by a Survivor on Auschwitz and its Realities*, trans. Sidney Rosenfeld and Stella P. Rosenfeld (Bloomington: Indiana University Press, 1980), 35.
[24] *See* Malcolm Gladwell, *Outliers: The Story of Success* (London: Penguin Books, 2009), 282. For discussion, see Chapter 2 at 167-68.

Where on the ladder of disrespect does long-term incarceration reside? Is it so disrespectful that, like penal torture, it embodies a rejection of the offender's standing as a human? In Chapter 3, I begin the investigation by examining the deprivations of incarceration *simpliciter*. What valuable activities or states of being does incarceration limit one's access to, regardless of sentence length? There is a great diversity in prison quality, as I explain, from a foul dungeon where inmates are packed in tightly and encouraged to commit suicide to a calm island with beaches and farm animals. This diversity means that incarceration for even a short period of time can entail a wide array of deprivations. There is, however, one deprivation inherent to all prisons: inmates will be unable to freely associate with other citizens in society. I refer to it as the denial of "the freedom of general association."

I then add the variable of sentence length to the analysis, moving from the meaning of incarceration *simpliciter* to that of long-term incarceration, and considering what it means to remove someone from free society for, say, 20 years. I ultimately define a prison term as *long-term* if it represents *a severe risk of ruining an offender's life, just in virtue of the amount of time that he is denied the freedom of general association*. It is a slow-forming, essentially non-phenomenological injury to one's life project. Long-term confinement away from society inhibits the realization of certain *temporal* and *associational* goods, that is, those goods which require cultivation over time in association with other people, like maintaining a family and having a meaningful career. Such goods are foundational to almost all conceptions of the good life.

Impermissible degradation, I argue in Chapter 3, must be *intentional*. Only then could it embody an affirmative rejection of the offender's humanity. Thus, if torture represents the *intentional* infliction of a suffusive panic, can we say that the state *intends* to ruin an offender's life when it long-term incarcerates him, or intends to severely risk that outcome? This depends on the underlying theory of punishment. If the only reason to long-term incarcerate is incapacitation, the state is not

necessarily motivated to harm the offender. The resulting cost to his life project can represent an unintended byproduct of the state's aim to prevent him from committing very serious offenses in the future. It would pose no problem on a genuine incapacitation theory, for instance, if prison were somehow an inmate's private Xanadu, where he could lead a flourishing (and crime-free) life. Long-term incarceration for reasons of retribution or deterrence, however, is different. On those rationales, the state is motivated to harm the offender. It sees harming him, and indeed harming him in a way that severely risks ruining his life, as *a reason for action*. Long-term incarceration for reasons of retribution or deterrence involves *using* the resulting harm to generate moral desert or crime prevention, respectively. Retributivists would argue, for instance, that the offender does not deserve Xanadu; and deterrence theorists would argue that allowing him to live there would incentivize crime. Chapter 3 thus concludes that long-term incarceration could only be justified for reasons of incapacitation. Long-term incarceration for reasons of retribution or deterrence affirmatively rejects the offender's humanity by *intentionally* inflicting a life-ruining harm. This is egregiously disrespectful of his essentially human value-generating capacities and is therefore impermissibly degrading, just like penal torture.

Part I

Internal Limitations

Chapter 1. Two Theories of Deterrent Punishment*

As discussed in the Introduction, "internal" punishment limitations are motivated by the reason or reasons that we have to punish offenders. That is, these reasons will justify the infliction of harm upon an offender, but likely not an *unlimited* amount of harm. If the only reason to punish an offender was, say, that wrongdoers deserve to suffer in proportion to their wrongdoing, then that penal reason would not justify the punishment of torture for, say, a bicycle thief. For that degree of suffering would be out of proportion to the bicycle thief's wrongdoing. And thus to oppose penal torture in that case we would not need to appeal to "degradation limitations," which, as discussed in the Introduction, forestall extremely degrading punishments that a punishment theory might otherwise license, were the offense particularly heinous or such punishments somehow beneficial for the wider society. This chapter is concerned, ultimately, with determining the appropriate internal punishment limits and it therefore inquires into the justification of state punishment. What reason or reasons explain why the state is entitled to harm people when they commit offenses? Only by answering this question could we understand when those reasons "switch off," as it were, and fail to justify the infliction of further penal harm.

In developing this question this chapter relies upon two premises. The first premise is that, to justify its extreme institutional costs, state punishment must deter crime to some sufficient degree.[1] The second premise is a moral principle. It

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* Parts of this chapter appear in Jacob Bronsther, "Two Theories of Deterrent Punishment," *Tulsa Law Review* 53 (2018): 461-95.

[1] *See* Douglas Husak, "Holistic Retributivism," *California Law Review* 88 (2000): 991-1000, at 996 ("Retributivists must show not only that giving culpable wrongdoers what they deserve is intrinsically valuable, but also that it is sufficiently valuable to offset what I will refer to as the drawbacks of punishment…The first such drawback is the astronomical expense of our system of criminal justice."); Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), 88–110 (arguing that while it is permissible for the state to harm offenders in order to encourage them to recognize that what they have done is wrong, only the project of general deterrence could justify the creation of costly state institutions); Michael T. Cahill, "Punishment Pluralism," in ed. Mark D. White, *Retributivism: Essays on Theory and Policy* (Oxford: Oxford University Press, 2011), 25-

is a variation of the prohibition on using people as a mere means to the greater good[2]: we must not sacrifice individuals as a means of mitigating harms or threats for which they have no responsibility. This "non-sacrifice principle," in one version or another, founds the liberal legal order and its conception of the individual as an inviolable bearer of rights.[3] The challenge—I think the central challenge of criminal law theory—is to explain how we can accept both premises and justify state punishment. For deterrent punishment seems to violate the non-sacrifice principle rather straightforwardly, as the state inflicts suffering upon an offender as a prudential warning to would-be future offenders, for whom the offender has

48, at 39 ("Punishment is not free; it costs money. Whether to punish, and how, and how much, are all questions that might be influenced by the financial cost of punishing. The adjudicative system that determines punishment, and the correctional system that imposes it, create direct costs and also opportunity costs, as time and money are dedicated to criminal justice rather than other things."); Andrew von Hirsch, *Fairness, Verbrechen und Strafe: Strafrechtstheoretische Abhandlungen* (Berlin: Berliner Wissenschafts-Verlag, 2005), 42 (denying the need to punish if acts of violence and theft are rare); Claus Roxin, "Prevention, Censure, and Responsibility: The Recent Debate on the Purposes of Punishment," in eds. A.P. Simester, Antje du Bois-Pedain and Ulfrid Neumann, trans. Antje du Bois-Pedain, *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Oxford: Hart Publishing, 2014), 23-42, at 26 (arguing that "the protective function of the state" is "a basic precondition for the justified imposition of any penal sanction"). Even Michael Moore, who denies that crime prevention is necessary to justify the costs of state punishment, accepts that it is nevertheless an important reason in its favor: "[I]n any accounting about setting up institutions to achieve justice, against enforcement and other costs we must balance any benefits. One obvious benefit punishment gives is crime prevention, through deterrence, education, and incapacitation." Michael S. Moore, *Placing Blame: A Theory of Criminal Law* (Oxford: Clarendon Press, 1997), 151.

[2] *See* Immanuel Kant, *Groundwork of the Metaphysics of Morals* [1785], in ed. and trans. Mary J. Gregor, *Practical Philosophy* (Cambridge: Cambridge University Press, 1996), 37-108, at 80 (4:429) ("So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means.").

[3] *See* John Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press, 1971), 3–4 ("Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others."); Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 32-33 ("Why not…hold that some persons have to bear some costs that benefit other persons more, for the sake of overall social good? But there is no *social entity* with a good that undergoes some sacrifice for its own good. There are only individual people, different individual people, with their own individual lives. Using one of these people for the benefit of others, uses him and benefits the others. Nothing more. What happens is that something is done to him for the sake of others. Talk of an overall social good covers this up."); Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), at xi ("Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them.").

no responsibility. I call this the "Means Problem." Why, if at all, is the state entitled to use offenders as a means of bringing about general deterrence?

In responding to the Means Problem, this chapter conceives of the criminal law as a system of protections—against murder, rape, assault, theft, drunk driving, etc.—upon which all citizens rely for their assured liberty. This, I argue, is the *function* of the criminal law. The maintenance of a relatively cooperative, non-violent civil society, and the confident planning and execution of an individual life within such a society, depends upon reliable criminal law protections. How these protections work, however, is perhaps counterintuitive. They rest, ultimately, not on police intervention, but on people *self-applying* criminal legal norms. This, I argue, is the *method* of the criminal law. To what degree can we rely upon the legal protection against, say, car theft? It depends on how much intent there is within the jurisdiction to steal cars. That is, when I park my car, I am not relying upon the police to protect it like personal guards, but rather upon other people within the jurisdiction to self-apply the rule against stealing cars.

Given this conception of the criminal law's function and method, we can more precisely understand the nature of criminal wrongdoing. When an individual offender fails to self-apply the criminal law, then, *in combination with other offenders*, he contributes to a wider social threat. This is "criminality." It is the objective, rather than the perceived, threat of crime. The more criminality there is within a jurisdiction, whether in a given moment or when considered over time, the less worth the criminal law has as a system of protections and as a guide to the possible incursions of others, and the less assured is our liberty. Criminality chills the exercise of our rights, forces us to take expensive precautions, and subjects us to unreasonable risks of harm. Deterrent punishment, which aims to decrease the amount of criminality in society moving forward and to reinforce the reliability of the criminal law's protections, is thereby permissible—that is, consistent with the non-sacrifice principle—in two possible ways.

First, in accordance with what I call *the corrective justice theory of punishment*, we can use an offender via general deterrence as a means of repairing the damage to our assured liberty caused by his past criminality contributions. He increased the level of criminality in the past to some degree, and the way to repair that, as a matter of corrective justice, is to use him to decrease the level of criminality in the future. Over time, ideally—with would-be future offenders appropriately deterred—it would be as if he had never contributed to criminality at all, in terms of the average threat of crime faced by society. In this way, the state would not "sacrifice" him to mitigate a problem for which he lacks responsibility, but rather force him to repair his own wrongdoing.

The corrective justice theory of punishment is at least partly backward looking, given its concern with an offender's past criminality contributions. It is the primary theory of punishment presented here, since it aims to justify the punishment of all offenders. By comparison, the second theory this chapter introduces—*the social defense theory of punishment*—is entirely forward looking, and would provide an *additional* reason of punishment for some but not all offenders. It applies to those offenders whose intention or willingness to offend is *ongoing*, that is, those offenders whom we still cannot reasonably rely upon to uphold the law. Such an offender would have partial responsibility for the ongoing, present threat of criminality, and his deterrent punishment could be justified on grounds of collective self-defense. Here again the state would not be "sacrificing" him to mitigate a problem for which he lacks responsibility.

Section I (pages 27-34) discusses the inability of the two dominant schools of criminal law theory—utilitarianism and retributivism—to resolve the Means Problem. Section II (pages 34-41) examines Alan Brudner's Hegelian argument that state punishment does not use offenders impermissibly, since offenders have effectively consented to their punishment. Section III (pages 41-8) introduces and defends the conception of the criminal law as a system of protections, contrasting

it with retributivist views and Joshua Kleinfeld's "reconstructivist" theory. Section IV (pages 48-54) explains how this system depends on people self-applying criminal legal norms and how offenders create the threat of criminality as a byproduct of their unreliability with regard to upholding the criminal law. The analogy is to factories contributing to smog and global warming as a byproduct of their pollution. Section V (pages 54-9) introduces two moral principles to derive the corrective justice and social defense theories of punishment from this framework. Section VI (pages 59-71) considers two objections, discussing the place of the act requirement and the role of the victim within the two theories. The offender is not punished on either view for the criminal act, in and of itself. The completed act—just like an attempt or a conspiracy—is rather *evidence* of the offender's prior and possibly ongoing criminal commitments, and thus of his prior and possibly ongoing criminality contributions. As to victims, I argue that while they do not play a direct or necessary role in justifying state punishment—given that the criminal wrong is to contribute to a threat that impacts everybody in the jurisdiction negatively—the state may have liability as a co-defendant to compensate victims for their civil damages. Section VII (pages 71-80) contrasts these views with Victor Tadros's "duty" theory of punishment, which introduced the idea that deterrent punishments can remedy an offender's wrong. Section VIII (pages 81-3) considers the empirical assumption upon which this justification of state punishment rests: social peace and cooperation in modern society depend on effective threats of criminal punishment. Finally, Section IX (pages 83-96) returns us to our initial question and discusses the "internal" sentencing limits of the two theories. I argue that they would license a mild system of punishment by comparison to the current federal and state sentencing schemes in the US, given the tenuous relationship between punishment severity and crime deterrence.

I. Utilitarian and Retributivist Responses

Utilitarian and retributivist theories of punishment cannot provide satisfactory answers to the Means Problem. With regard to utilitarian theories, this conclusion is easy to establish. On the utilitarian view, punishment is an "evil," as Jeremy Bentham writes, insofar as it causes suffering, and its justification depends on, and only on, whether it prevents "greater evils."[4] One's responsibility for those "greater evils" is not, in and of itself, a relevant moral consideration, and utilitarians—unlike retributivists—have a famously hard time explaining what is wrong exactly with "punishing" an innocent person if doing so would happen to prevent crime and maximize happiness (or whatever the utilitarian in question wants to maximize).[5] If we accept the non-sacrifice principle—whereby we refuse to use people to mitigate harms or threats for which they have no responsibility—then our theory of the criminal law and state punishment cannot be utilitarian.

"Traditional" retributivists, meanwhile, who see the good of punishment as analytically connected to an offender's suffering, would argue that they are exempt from the Means Problem.[6] They would argue that to cause an offender to suffer

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[4] Jeremy Bentham, *Theory of Legislation* [1871], ed. C.K. Ogden (New York: Harcourt Brace Co., 1931), 360.

[5] *See* Saul Smilansky, "Utilitarianism and the 'Punishment' of the Innocent: The General Problem," *Analysis* 50 (1990): 256-61, at 257 (arguing that the question of punishing the innocent is not merely philosophical, because "in the creation and daily application of the criminal law we are constantly facing a general situation in which utilitarians would be obliged to promote the 'punishment' of the innocent"); John Rawls, "Two Concepts of Rules," *Philosophical Review* 64 (1955): 3-32 (arguing that a form of "rule utilitarianism" could save utilitarianism from punishing the innocent). *But see* J. Angelo Corlett, "Making Sense of Retributivism," *Philosophy* 76 (2001): 77-110 (criticizing Rawls). I place the word "punishing" in quotes here because, according to some theorists, only the *non-innocent* can be punished, as an analytical matter internal to the concept of punishment. On this view, the concept of punishment refers only to a particular response to *wrongdoing*, such that one who has committed no wrong cannot be punished. Rawls, for instance, refers to the infliction of penal harm on the innocent not as punishment, but as "telishment." Rawls, "Two Concepts of Rules," *supra* at 11. *See also* Patrick Tomlin, "Innocence Lost: A Problem for Punishment as Duty," *Law & Philosophy* 37 (2017): 225-254, at 229.

[6] While I distinguish between "traditional" and "censuring" retributivists, in considering them as part of the same tradition (and in defining retributivism *simpliciter*), I follow Mark Michael, who writes, "For a utilitarian, the event that justifies punishment occurs subsequent to the punishment, whereas for the retributivist the punishment and its justifying event/state of affairs begin simultaneously." Mark A. Michael, "Utilitarianism and Retributivism: What's the Difference?" *American Philosophical Quarterly* 29

in proportion to his wrongdoing is not to use him as a means toward any end; it is to generate the intrinsic good of moral desert. Traditional retributivists understand this desert claim in one of two ways. First, according to "strict" retributivists like Michael Moore (and maybe Kant) it is grounded in the unadorned conviction that wrongdoers deserve to suffer.[7] Second, "fair play" retributivists like Herbert Morris, Jeffrie Murphy, and Richard Dagger understand this desert claim to derive from a commitment to fairness.[8] If we assume that an offender has benefitted from everyone else's restraint in following the law—not always a safe assumption, Murphy argues[9]—then he has gained an unfair advantage by breaking the law and failing to restrain himself in turn; and the harm or suffering of punishment is thus deserved as a means of stripping away the offender's unfair gain. Retributivists of either stripe would argue that if crime deterrence happens to result from retributivist punishment, the state has not thereby used an offender impermissibly for the purpose of achieving that outcome. Any social benefit that results from giving—and intending to give—an offender what he deserves is a "happy surplus," as Michael Moore writes.[10] In this way, they would conclude, the state can kill two birds

(1992): 173-82, at 175. Retributivists, according to Michael, see the justifying good of punishment (say, the intrinsic good of deserved suffering) as being connected analytically to punishment itself. For utilitarians, by comparison, the relevant good (say, crime deterrence) is "epiphenomenal" to punishment. *Id.* at 178. Michael's theory thus entails that "negative" retributivists, like Anthony Quinton, are not genuine retributivists. Negative retributivists believe that wrongdoing makes offenders *liable* to punishment, but that other positive reasons or goods, like crime deterrence, justify the actual infliction of punishment; the justifying good that punishment creates on this view is thereby epiphenomenal to punishment itself. *See* Anthony Quinton, "On Punishment," *Analysis* 14 (1954): 133-42.

[7] *See* Moore, *Placing Blame*, *supra* note 1; Michael S. Moore, "The Moral Worth of Retribution," in ed. Ferdinand Shoeman, *Responsibility, Character, and the Emotions: New Essays in Moral Psychology* (New York: Cambridge University Press, 1987), 179-219, at 179 (arguing that criminal punishment, like a person's right to equal treatment, is justified "because, and only because" it is morally deserved).

[8] *See* Herbert Morris, "Persons and Punishment," *The Monist* 52 (1968): 475-501; Jeffrie G. Murphy, "Marxism and Retribution," *Philosophy & Public Affairs* 2 (1973): 217-43; Richard Dagger, "Playing Fair with Punishment," *Ethics* 103 (1993): 473-88. *See also* George Sher, *Desert* (Princeton: Princeton University Press, 1987), 69–90.

[9] Murphy, "Marxism and Retribution," *supra* note 8 at 232–43.

[10] Moore, "The Moral Worth of Retribution," *supra* note 7 at 179–80.

with one stone, generating sufficient deterrence to justify maintaining the institution of punishment as a mere byproduct of giving offenders their just deserts.[11]

But even if offenders deserve to suffer in accordance with traditional retributivism, do they deserve to suffer to a degree and in a manner that would generate a sufficient amount of general deterrence as a byproduct? Do traditional retributivists hit the second bird (of sufficient crime deterrence)? There are two basic lines to this objection. First, consider one influential ideal of traditional retributivist sentencing: the state ought to injure an offender to the same degree that the offender injured his victim.[12] In the case of minor offenses, this sentencing logic would seem to entail sentences that are too lenient for the purpose of deterrence. Tadros writes:

> "Consider theft of a compact disc. In this case, it is surely permissible to impose on the thief a greater magnitude of harm than he has culpably caused. The idea that taking one of the thief's compact discs away would be sufficient punishment in this case is unappealing. There is an obvious instrumentalist rationale for this conclusion—given the low rate of detection of theft, such a modest punishment would result in a great deal of theft."[13]

The principle of an eye-for-an-eye does not entail an eye-for-a-compact disc, but a compact disc-for-a-compact disc, and, as such, we have good reason to doubt the principle's effectiveness as a form of regulation for minor offenses.[14]

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[11] Moore uses the "two birds, one stone" metaphor in this general way to refer to the process of bringing about deterrence as a byproduct of securing retribution (though he would deny that deterrence is necessary to justify state punishment). Moore, *Placing Blame*, *supra* note 1 at 28.

[12] For sophisticated defenses of this sentencing ideal (*lex talionis*), see Jeremy Waldron, "Lex Talionis," *Arizona Law Review* 34 (1992): 25-52; Jeffrey Reiman, "Justice, Civilization, and the Death Penalty: Answering Van den Haag," *Philosophy & Public Affairs* 14 (1985): 115-48; Morris Fish, "An Eye for an Eye: Proportionality as a Moral Principle of Punishment," *Oxford Journal of Legal Studies* 28 (2008): 57-71.

[13] Tadros, *The Ends of Harm*, *supra* note 1 at 345.

[14] There are problems with the *lex talionis* ideal beyond its inability to generate sufficient deterrence for minor offenses. With serious offenses, for instance, it can demand sentences that are unduly harsh or degrading, such as the rape of a rapist. And, with regulatory offenses, such as driving violations, it seems to offer no sentencing guidance at all. As Blackstone writes: "[T]here are very many crimes, that will in no shape admit of these [matching] penalties, without manifest absurdity and wickedness. Theft cannot be punished with theft, defamation by defamation, forgery by forgery, adultery by adultery, and

The second line of the objection is, I think, more fundamental. If we assume that effective general deterrence requires that individual cases of punishment be a matter of public knowledge, it is not clear that traditional retributivists can justify that practice, given offenders' right to privacy. The traditional retributivist concern is to deliver a deserved amount of suffering to a wrongdoer, with no direct concern for the interests of the wider society. It is not as if a traditional retributivist state could generate an offender's allotment of retributive harm in any way it pleases, with no concern at all for his pre-existing rights. What if forcing offenders to work as slaves in fields, or to serve as medical test subjects, was the most efficient way to "spend" the suffering the state was entitled to inflict upon them? It would not suffice to say, as a "limiting retributivist" might want to, that the state could "pay" for the extra humiliation and degradation by punishing for a shorter period of time, so that the offender ultimately experiences the same amount of harm.[15] To violate an offender's most basic privacy rights, which protect his interest in controlling how he presents himself to others, by publicizing his wrongdoing and punishment would seem to be similarly unjustified, *unless the rationale for punishment itself demanded public punishment*.[16] Unless, that is, what he "owes" is to the community and inherently requires a violation of his privacy. Thus, a traditional

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the like." William Blackstone, *Commentaries on the Laws of England,* Vol. 4 [1769] (Chicago & London: University of Chicago Press, 1979), 13.

[15] "Limiting" retributivists, like Norval Morris and Richard Frase, believe (a) that while retributive desert may be a sufficient reason to punish, our conclusions about how much harm a particular offense warrants are imprecise, with vague upper and lower limits, such that any punishment within that range would be retributively legitimate and (b) that consequentialist considerations should determine the choice of punishment within that range. *See* Norval Morris, *Madness and the Criminal Law* (Chicago: University of Chicago Press, 1982), 182–87, 196–200; Richard S. Frase, "Punishment Purposes," *Stanford Law Review* 58 (2005): 67-84. Limiting retributivists appeal to what I call the "while we're here" argument: "while we're here exacting retribution," they argue implicitly, "we might as well maximize other social goods." The "two birds" argument is still doing the heavy lifting, but limiting retributivists aim to move beyond it by foregrounding deterrence as an important sentencing consideration, so long as its pursuit remains within the bounds of desert.

[16] On the right to privacy as protecting one's interest in controlling his presentation to others, see Andrei Marmor, "What Is the Right to Privacy?" *Philosophy & Public Affairs* 43 (2015): 3-26; James Rachels, "Why Privacy Is Important," *Philosophy & Public Affairs* 4 (1975): 323-33; Adam Moore, "Privacy: Its Meaning and Value," *American Philosophical Quarterly* 40 (2003): 215-27.

retributivist state may not be able to justify the practice of publicizing an offender's punishment, which we are assuming is necessary to bringing about a sufficient level of general deterrence.

There are at least two replies to consider. First, one might reply that, even in a traditional retributivist state, a concern with having publicly accountable trials would override offenders' privacy interests.[17] Nonetheless, it seems that a genuine traditional retributivist should view public trials and punishments as sub-optimal, given the privacy interests of offenders and innocent defendants. And she should seek out creative institutional solutions that would enable trials and punishments to stay private, at least when so desired by defendants and offenders, while ensuring a legitimate criminal process. Second, one might reply that people could be sufficiently deterred, even without public trials and punishments, due to a more abstract or general awareness of the system of punishment.[18] Perhaps. That would seem to be a legitimate—and uncertain—empirical question. Consider, for instance, the drumbeat of securities fraud prosecutions in recent years in the Southern District of New York.[19] Of those in a position to commit securities fraud, would their general awareness of federal securities laws and federal prosecutors sufficiently replace the deterrent impact of these very public prosecutions?

I will not pursue that question or this broader argument any further, for the central weakness of the traditional retributivists' "two birds" argument for our purposes is much more straightforward. It requires accepting the premise that the suffering of offenders, *regardless of the severity of their offense*, is an intrinsic good, to be realized even if their punishment occurred in total secrecy, and thus had no impact

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[17] Thanks to Nicola Lacey for raising this objection.

[18] Thanks to Kimberly Kessler Ferzan and Patrick Tomlin for raising this objection.

[19] *See* Jeffrey Toobin, "The Showman: How U.S. Attorney Preet Bharara Struck Fear into Wall Street and Albany," *The New Yorker,* May 9, 2016, https://www.newyorker.com/magazine/2016/05/09/the-man-who-terrifies-wall-street; N.Y. Times: Dealbook, "Preet Bharara's Key Insider Trading Cases, Oct. 6, 2015, https://www.nytimes.com/interactive/2014/07/09/business/dealbook/09insider-timeline.html.

on the level of crime, or even if it were somehow criminogenic. It is an analytic truth that when an intrinsic good is realized, all else equal, the world is a better place. To say nothing of regulatory offenses like speeding, would the world be a better place if, say, car thieves were made to suffer to some degree in total secrecy, with no impact on the crime level? At an absolute minimum, people's convictions differ on this question, and we should be very hesitant to hang the legitimacy of the law against car theft upon answering it in the affirmative—or the legitimacy of every other criminal law upon affirmatively answering a parallel question.

The "censuring" retributivism of Antony Duff and Andrew von Hirsch, for different reasons than the traditional retributivists, also fails to provide a safe harbor from the Means Problem.[20] By violating "public," communal values, on this view, offenders deserve the community's censure. This censure aims at the wrongdoer's repentance, reformation, and reintegration into the community—a project internal to all censuring, Duff argues.[21] Duff, though, believes that deterrence is an inappropriate penal aim at any level. To address citizens "in the coercive language of deterrence," he writes, "is to cease to address them as members of the normative community."[22] Penal hard treatment is "the means by which the offender can make apologetic reparation to the victim," and nothing else.[23] It is a necessary part of the communication between the public and the offender, Duff argues, and not a method of scaring or threatening would-be future offenders. As a response to the Means Problem, Duff would thus be resorting to a version of the "two birds" argument. By aiming at the first bird of censure, *which inherently requires penal hard treatment*, we hit the second bird of crime prevention.

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[20] *See* R. A. Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001); Andrew von Hirsch, *Censure and Sanctions* (Oxford: Oxford University Press, 1993). *See also* John Tasioulas, "Punishment and Repentance," *Philosophy* 81 (2006): 279-322.
[21] Duff, *Punishment, Communication, and Community, supra* note 20 at 80–82, 106–12.
[22] *Id.* at 83.
[23] *Id.* at 98.

Von Hirsch, however, is more straightforward than Duff about the need to prevent crime and about the limits of delivering deserved censure as a means of achieving that aim. He argues, I think rightly, that censure need not take the form of hard treatment, and could be communicated, for instance, by the mere fact of public conviction.[24] Von Hirsch views hard treatment not as an essential component of censure, but as a supplemental, *prudential* reason a legal system offers to citizens to desist from crime, offered in addition to the underlying *moral* reasons.[25] Von Hirsch attempts to mask the prudential reason in various ways, in particular via the argument that (a) penal hard treatment is a means of communicating censure (even if not an inherently necessary means), (b) the censure deserved for a given offense, in accordance with "ordinal" proportionality, depends on the amount delivered for other offenses, such that (c) we can incorporate hard treatment into our system, while still giving offenders the censure they deserve, by giving more hard treatment—that is, more censure—to those who commit worse offenses.[26] He side-steps the "cardinal" proportionality issue, though, and fails to explain why, even if what offenders deserve is relative to one another, the state is entitled to raise the entire scale of sentences upwards for the purpose of deterrence. That is, he fails to explain why the state is entitled to use offenders and their suffering as a tool for mitigating future crime.[27]

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[24] Von Hirsch, *Censure and Sanctions*, *supra* note 20 at 9–14.
[25] *Id.*
[26] *Id.* at 15–19, 29–70.
[27] Andrew von Hirsch and Andrew Ashworth, in outlining their joint version of censuring retributivism, argue that society should set the punishment scale as low as possible, consistent with its crime prevention needs, but never so high that punishment loses its status as moral communication. Within these bounds, they argue, ordinal proportionality ought to rule. Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford: Oxford University Press, 2005), 141–43. They fail to address the primary worry here about why the state is entitled to scale up sentences to any degree, and thereby use offenders for the purpose of crime prevention. But there is the separate question of whether scaling up is consistent with their aim of delivering to offenders a deserved amount of censure. Intuitively, a punishment's cardinal severity is highly determinative of the level of censure communicated. It cannot only be a matter of ordinal severity. And it seems, then, that consistent with their concern with delivering a proportionate amount of censure, they cannot ignore cardinal proportionality, and cannot be so strategic in anchoring the punishment scale. On the complexities and

The framework presented below aims to secure the benefits of both utilitarianism and retributivism, but without their respective costs, and in so doing exhibit what Patrick Tomlin calls "constrained instrumentalism."[28] Like a utilitarian theory, it conceives of punishment as an instrumental "evil," rather than an intrinsic good, to be used for the direct purpose of crime reduction but, like a retributivist theory, it licenses punishment only as a proportionate response to someone's culpable choices, consistent with the liberal conception of people as non-sacrificeable ends in themselves and a principled refusal to punish the innocent.

II. The Offender's Consent

Before developing that positive theory further, let us consider Alan Brudner's Hegelian solution to the Means Problem.[29] It relies on the basic principle that it is permissible to use someone as a means if he has so consented.[30] If I volunteer for military service, for instance, it is permissible to send me into battle as a tool of the wider community. For the consent principle to solve the Means Problem offenders would have to consent to being used for the purpose of general deterrence. But how could this work, given that offenders rarely volunteer for punishment? It is not the consent of an offender's "empirical self," Brudner explains, but rather of his *fiduciary*, "someone the empirical individual could accept as a representative consenting on its behalf."[31] This is the offender's "thinking Agent" according to Brudner, a "notional person" who has neither subjective ends of its

limitations of the retributivist ideal of the proportional penal sentence, see Nicola Lacey and Hanna Pickard, "The Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems," *Modern Law Review* 78 (2015): 216-40 (arguing that the proportionality ideal is a "chimera" and incapable, as a purely ideational or philosophical matter, of determining sentence length).

[28] Tomlin, "Innocence Lost," *supra* note 5 at 226.

[29] I am grateful to Peter Ramsay for illuminating discussions on the Hegelian theory of punishment.

[30] There are likely limits to this principle. As Brudner himself argues, consent could not legitimate slavery. Alan Brudner, *Punishment and Freedom: A Liberal Theory of Penal Justice* (Oxford: Oxford University Press, 2009), 299.

[31] *Id.* at 3.

own (i.e. no particular desires or purposes) nor knowledge of its "principal's" subjective ends, and who is exclusively concerned with its principal's formal "independence," that is, its principal's formal freedom to choose and pursue subjective ends.[32] The concept of the "thinking Agent" seems to be a stand-in for our unencumbered, unadulterated capacity for formal agency. As this capacity forms part of our metaphysical essence and identity, Brudner seems to imply, it can make commitments on our behalf. The relationship between the thinking Agent and its principal—and the ontological status of the thinking Agent—is, in the end, opaque.

The "right" for Brudner, broadly following Hegel, consists of the "framework of mutual respect" that follows from the principle of "securing the greatest extent of equal liberty" for agents.[33] Legal rights, by guaranteeing each agent's independence, constitute the framework of mutual respect. When an offender *chooses* to violate one of these rights, say, by assaulting someone, he rejects this framework of mutual respect, Brudner argues. His action denies, implicitly, that there are "inviolable spheres of liberty" around agents, and thereby upholds the principle that *rights do not exist*.[34] Let us call this principle the Criminal Principle. Actions for Brudner (and Hegel) are something like laws for Ronald Dworkin; what they are, all the way down, is in part the principles that justify them.[35] To assault someone, then, is not just to assault someone; it is also to espouse or lay down the Criminal Principle, the "claim to an unlimited liberty" that would justify the assault.[36] The Criminal Principle is "self-contradictory," Brudner continues, because its denial of the existence of rights means, for instance, that the assaulter could not complain if

[32] *Id.* at 4.
[33] *Id.* at 78.
[34] *Id.* at 77.
[35] Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986).
[36] Brudner, *Punishment and Freedom*, *supra* note 30 at 40.

someone assaulted him in turn.[37] Almost as a matter of logical necessity in response to the Criminal Principle's self-contradiction, the system of mutual recognition—the law—will act to deny its validity.[38] This denial will take the form of punishment. The reason for punishing, in sum for Brudner, is to establish the normative authority of the law; it "is to deny a practical denial of rights that would appear valid were its self-contradictoriness not practically demonstrated," thereby "vindicating the normative authority of mutual recognition."[39]

The offender has no complaint to being used as a means to vindicate the authority of the law, Brudner argues, because via his offense he has affirmed the general validity of the Criminal Principle, and thus has consented to its application against himself in the form of punishment. As a response to the Means Problem, then, Brudner would resort to the "two birds" argument, as well. As a byproduct of "realizing right" and vindicating the authority of the law—consistent with the offender's own consent—the state acts to deter crime. Indeed, Brudner explicitly endorses a form of "limiting retributivism," arguing that (a) the state will, ideally, limit the offender's liberty to same degree that he limited the liberty of his victim, but given that (b) this determination is extremely vague, then (c) "within the bounds of ordinal proportionality, crime prevention concerns can militate against punishments that are too light…"[40]

While I find the general thrust of the Hegelian theory of punishment attractive, insofar as it conceives of punishment as reinforcing a system of legal norms, I do not see how Brudner's theory of consent could ground a resolution to the Means Problem. Let us outline his conception of consent in a little more detail.

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[37] Alice Ristroph questions whether the Criminal Principle is necessarily self-contradictory, given that one could at least coherently endorse an "every-man-for-himself view." Alice Ristroph, "When Freedom Isn't Free," *New Criminal Law Review* 14 (2011): 468-485, at 476.

[38] *See* Alan Brudner, "The Contraction of Crime in Hegel's *Rechtsphilosophie*," in ed. Markus D. Dubber, *Foundational Texts in Modern Criminal Law* (Oxford: Oxford University Press, 2014), 141-62, at 153-59.

[39] Brudner, *Punishment and Freedom*, *supra* note 30 at 51.

[40] *Id.* at 55. *See* discussion *supra* note 15.

It is the consent of the offender's thinking Agent rather than his empirical person that counts for Brudner, and this consent is forthcoming via the thinking Agent generalizing the Criminal Principle as a principle applicable for all agents.[41] The thought—not spelled out by Brudner—is that thinking Agents, by representing pure formal agency in the German idealist mold, act only for reasons (rather than animalistic instinct) and it is the nature of such reasons that they are generalizable, applying with equal force to all similarly situated agents. Thus, when the offender assaults his victim, "the thinking Agent standing in [his] shoes," to use Brudner's phrase, will have acted on a reason, that reason being the Criminal Principle, which the thinking Agent therefore affirms as a general principle to be applied by others against itself, ultimately in the form of punishment of the empirical person.[42] The central problem with this argument is that the thinking Agent, as constituted by Brudner, would never have broken the law in the first place, so maintaining that the Agent nonetheless affirms the principle that justifies breaking the law seems unavailable. As Brudner writes of the thinking Agent: "having no subjective ends, it forbears from wrong (wills the right) for the sake of its dignity alone."[43] It is only by flouting the principles of one's thinking Agent that one could ever lay down the Criminal Principle. The thinking Agent, concerned only with formal freedom, and armed with the Hegelian and Kantian understanding that law and only law can guarantee this freedom, will demand that its principal follow the law. Indeed, given the thinking Agent's ignorance of subjective ends, following the law amounts to its singular purpose and principle. It demands *and only demands* that its principal follow the law. As such, we could never impute affirmation of the Criminal Principle to the thinking Agent and could not thereby hang this affirmation on the empirical person that is the offender. The notion of a thinking Agent binding a

[41] *Id.* at 40.
[42] *Id.*
[43] *Id.* at 45.

principal makes more sense in the frame of social contract theory, arguably, which is not the one chosen by Brudner. It seems misguided to argue, as Brudner does, that a thinking Agent can bind its principal in the real world—as opposed to a hypothetical contract writing setting—via the principal's own decisions, which the thinking Agent would never have endorsed were it in charge.[44] Thus, I believe, we cannot resolve the Means Problem through the complex Hegelian theory of consent.

But what of traditional social contract theories as a method of resolving the Means Problem? Could we not point to a hypothetical social contract to demonstrate the offender's consent to his punishment? I am skeptical. I follow those who argue that as a method of establishing bonafide moral consent, in parallel to a legal contract, a hypothetical contract is "not worth the paper it isn't written on."[45] As Ronald Dworkin writes, "A hypothetical contract is not simply a pale form of contract; it is no contract at all."[46] If a social contract is, rather, "*only an idea* of reason," as Kant writes, then contract theorists are back to square one with regard to the Means Problem, though with a particular intellectual toolkit based on a conception of the polity as a system of mutual restraint that benefits each member.[47] Neither should we accept John Rawls' conception of "pure procedural justice," where the

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[44] This echoes Alan Norrie's criticism of Kant's punishment theory. "In designing a justification of punishment in terms of an abstract ideal being," Norrie writes, "Kant unavoidably only justifies punishment *of* abstract ideal beings—who never commit crimes anyway." Alan Norrie, *Law, Ideology, and Punishment* (Norwell, MA: Kluwer, 1991), 62; *see also* Jeffrie G. Murphy, "Kant's Theory of Criminal Punishment," in *Retribution, Justice, and Therapy: Essays in the Philosophy of Law*, ed. Wilfrid Sellars (Dordrecht: D. Reidel Publishing, 1979), 82-92. For further criticism of Brudner's idea that a thinking Agent can bind its principal, see Ristroph, "When Freedom Isn't Free," *supra* note 37 at 473-74.

[45] G.A. Cohen uses this phrase to describe the "anti-contractarian" argument. G.A. Cohen, *Rescuing Justice and Equality* (Cambridge, Mass: Harvard University Press, 2008), at 341. Cohen rejects the "constructivist" approach to social justice more generally. *See* Cohen, *id.* at 274-343.

[46] Ronald Dworkin, "The Original Position," in ed. Norman Daniels, *Reading Rawls*: *Critical Studies on Rawls' 'A Theory of Justice'* (Oxford: Basil Blackwell, 1975), 16-52, at 18. *See also* Dworkin, *Taking Rights Seriously*, *supra* note 3 at 150-183; Nozick, *Anarchy, State, and Utopia*, *supra* note 3 at 183-231.

[47] Immanuel Kant, "On the common saying: That may be correct in theory, but it is of no use in practice" [1793], in ed. and trans. Mary Gregor, *Practical Philosophy* (Cambridge: Cambridge University Press, 1996), 296 (8:297).

hypothetical contract procedure, even if only an "idea of reason," generates necessarily valid principles that are unimpeachable by reference to non-contractual reasons.[48] Any political principle will generate winners and losers, and we need to provide a genuine explanation to someone who is worse off as a result of that principle as to why she has no complaint or at least no dispositive complaint.[49] Asserting, without further explanation, that the principle derives from the logic of the Original Position will not suffice. As Hume explains in relation to Locke's social contract theory, if a social agreement, hypothetical or otherwise, is a source of authoritative reasons, it will be so as a result of the very reasons that the parties themselves had to contract with one another, not the bare fact of the contract itself.[50] Though, as Samuel Freeman explains, Hume's critique does not rule out the possibility that the concept of a social contract is necessary for organizing and inferring our political reasons.[51]

What explanation, then, using the toolkit of this "moderate" contractualism, could the state offer to offenders to explain why it can use them for the purpose of mitigating crime, given that, in accordance with the moderate view, it can assert neither (a) that they have genuinely consented to such punishment nor (b) that the results of the hypothetical contract are inherently just and immune from external criticism? Murphy's fair play retributivism—the explanation that offenders took advantage of others' restraint and deserve to have their unfair advantage stripped away via punishment—is the primary punishment theory stemming from this form of contractualism.[52] But aside from viewing the suffering of

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[48] Rawls, *A Theory of Justice,* supra note 3, at 85-86, 201.
[49] *See* Thomas Scanlon, *What We Owe to Each Other* (Cambridge, Mass: Belknap Press, 1998).
[50] David Hume, "Of the Original Contract" [1748] in his *Essays: Moral, Political, and Literary* [1777] (reprinted Indianapolis: Liberty Classics, 1985), 465–87.
[51] Samuel Freeman, "Original Position," in ed. Edward N. Zalta*, The Stanford Encyclopedia of Philosophy* (Winter 2016 Edition), https://plato.stanford.edu/archives/win2016/entries/original-position/.
[52] For other contractualist theories, *see, e.g.,* Christopher W. Morris, "Punishment and Loss of Moral Standing," *Canadian Journal of Philosophy* 21 (1991): 53-79; Emmanuel Melissaris, "Toward a Political Theory of Criminal Law: A Critical Rawlsian Account," *New Criminal Law Review* 15 (2012): 122-55; Claire Finkelstein, "A Contractarian Approach to Punishment," in eds. Martin P. Golding and William

offenders' as an intrinsic good, as discussed above, this view depends upon the conclusion that offenders have in fact "gained" from their offenses, at least in the sense that they have been able to live in an unrestrained manner. M. Margaret Falls outlines some of the challenges of maintaining that an offender has profited from his wrongdoing:

> "One must acknowledge, for example, that the unpunished rapist is really better off than men and women who resist the temptation or feel no temptation to rape. Also one has to reject seemingly healthy and reasonable emotions generally felt towards criminals as inappropriate or at least as misleading and based on illusions. Amidst our anger at a Charles Manson or a Lizzie Borden, we feel a mixture of disgust, pity, and horror—disgust at what they allowed themselves to become, pity over what they have done to themselves in becoming that, and horror that becoming such is a possibility for each of us. These are not the emotions we have towards someone who has gained an advantage over us; and while to some these emotions may seem the residue of a fairytale-picture of humanity, their strength and intuitive appropriateness should make us slow to accept the reciprocity theory's view."[53]

Beyond concluding that a murderer or rapist has profited from his offense, the fair play theory requires the further conclusion that the central reason we punish him is to strip away such gain. Would the criminal trial thus be centered on the question of how much advantage the offender acquired, in terms of the extent to which he allowed himself to be unrestrained, such that offenses that we are more tempted to commit deserve more punishment? But what then of the fact that we seem less tempted by *mala in se* offenses than by *mala prohibita* offenses, as Antony Duff argues?[54] Would fair play theory entail that the former deserve less

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A. Edmundson, *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Malden, MA: Blackwell Publishing, 2005), 207-20; Corey Brettschneider, "The Rights of the Guilty: Punishment and Political Legitimacy," *Political Theory* 35 (2007): 175-99.

[53] M. Margaret Falls, "Retribution, Reciprocity, and Respect for Persons," *Law and Philosophy* 6 (1987): 25-51, at 31-2; *see also* Don E. Sheid, "Davis and the Unfair-Advantage Theory of Punishment: A Critique," *Philosophical Topics* 18 (1990): 143–70.

[54] *See* R.A. Duff, *Trials and Punishments* (Cambridge: Cambridge University Press, 1986), 213 ("[T]alk of the criminal's unfair advantage implies that obedience to the law is a burden for us all: but is this true

punishment than the latter? Should we take into account the offender's ill-gotten material advantage, as well, such that the successful fraudster perhaps deserves more punishment than the murderer? Fair play theory, as Duff explains, makes more sense in the realm of *mala prohibita* offenses (e.g. it seems that we all are tempted to speed while driving, and that the speeder has indeed profited from everyone else's restraint). Though, even there, once more, it requires the conclusion that harming the offender—the speeder—is justified as the creation of an intrinsic good, to be realized even if it happened entirely in secret, with no deterrent impact at all. And, regardless, it is surely fatal to a theory of punishment if it fails to justify, or to easily justify, *mala in se* offenses like murder and rape.

III. A System of Protections

A. The Function of the Criminal Law

In responding to the Means Problem, as indicated above, this chapter conceives of the criminal law as a system of protections. The criminal law aims to protect us from, say, the "specific crimes" listed in Part II of the Model Penal Code: homicide, assault, reckless endangering, terroristic threats, kidnapping, false imprisonment, rape, arson, burglary, theft, forgery, deceptive business practices, bribery, corruption, perjury, riot, public drunkenness, and so forth.[55] We rely upon these protections in our interactions with other people and, crucially, in planning such interactions. Beyond our safety, we also rely upon them to secure our privacy away from others in, say, our homes and cars. In this way, our *assured* liberty, understood broadly in accordance with neo-republican theorists, depends on the reliability of the criminal law.[56] People with assured liberty, as Philip Pettit writes,

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of such *mala in se*? Surely many of us do not find it a *burden* to obey the laws against murder and rape, or need to *restrain* ourselves from such crimes: how then does the murderer or rapist gain an unfair advantage over the rest of us, by evading a burden of self-restraint which we accept?").

[55] Model Penal Code (American Law Institute 1962), §§ 210–251 [hereinafter MPC].

[56] *See* Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997); Quentin Skinner, *Liberty Before Liberalism* (Cambridge: Cambridge University Press, 1998); Philip Pettit, "Freedom as Antipower," *Ethics* 106 (1996): 576-604; John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford: Oxford University Press, 1990). This chapter

are "possessed, not just of non-interference by arbitrary powers, but of a secure or resilient variety of such non-interference."[57] To be sure, regulatory "violations" like speeding form part of this narrative.[58] By promulgating such offenses, the state aims to protect people from dangerous drivers, so that they can drive on public roads with a relative degree of safety and reasonably rely upon that safety in planning their days and lives.

An effective criminal law, on this view, is nothing less than the fundament of the modern social world. It is central to the "King's Peace" and the existence of society itself, insofar as the reasonable reliability of at least its major provisions renders Hobbesian, preemptive violence irrational.[59] We are bathed in these most basic criminal law protections when we, say, walk in a busy public park with relative confidence, or when we sleep soundly in our beds. The criminal law is central to a

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travels only so far with republican theorists. While it accepts—and aims to clarify—the republican ideal of an assured and reliable *civic* liberty, it questions the republican conception of liberty itself, of what, exactly, is meant to be assured in society. Republicans understand liberty to be the state of "non-domination," whereby other people lack the capacity to interfere with your life in a discretionary or arbitrary manner. *See* Pettit, *Republicanism*, *supra* at 51–79. "[F]ree persons," Pettit writes, "do not depend on anyone's grace or favour for being able to choose their mode of life." Philip Pettit, "Criminalization in Republican Theory," in eds. R.A. Duff, et. al., *Criminalization: The Political Morality of the Criminal Law* (Oxford: Oxford University Press, 2014), 132-50, at 138. But, as I will discuss below, an effective criminal law depends on the *self-application* of criminal legal norms by people within the jurisdiction. As such, there is no escaping dependence on others' "grace or favour," at least to some degree, given that they could choose not to self-apply the criminal law. The assured liberty ideal, in sum, is not of the perfect absence of discretionary power in society, but of the confident reliance on people to exercise such power reasonably and in accordance with promulgated rules. *See* Thomas W. Simpson, "The Impossibility of Republican Freedom," *Philosophy & Public Affairs* 45 (2017): 27-53 (arguing that "freedom as non-domination" is unachievable, because either the state dominates the citizens or the citizens retain the power to dominate each other).

[57] Pettit, *Republicanism*, *supra* note 56 at 69.

[58] *See* MPC, *supra* note 55 at § 1.05 (providing that an offense is a noncriminal "violation" if no sentence other than a fine or other civil penalty is authorized upon conviction). The view presented here would not make such a hard distinction between "noncriminal" violations and truly "criminal" offenses, understanding them both to be part of the same regulatory project.

[59] *See* Thomas Hobbes, *Leviathan* [1651], ed. Richard Tuck (Cambridge: Cambridge University Press, 1996), 86–90 (arguing that the state of nature is marked by preemptive violence, a "warre of every man against every man"); Alice Ristroph, "Hobbes on "Diffidence" and the Criminal Law," in ed. Markus D. Dubber, *Foundational Texts in Modern Criminal Law* (Oxford: Oxford University Press, 2014), 23-38 (Markus D. Dubber ed., 2014) (explaining that Hobbes understood the formation of the criminal law to be a response to "diffidence," the anxiety that people have about their security and standing in relation to each other).

well-functioning society, too, by enabling the possibility of relatively assured mutually beneficial cooperation.[60] I cooperate with people in the creation of a marketable product, for instance, only if I am relatively secure in the knowledge that neither they nor others could steal it with impunity. As Lindsay Farmer writes, "The criminal law's role in the management of social life is to curb passions and impulsive behavior, stabilizing expectations about the conduct of others and helping to establish relationships of trust."[61] Of course, other forms of law, like contract law, and non-legal social norms,[62] like the practice of being "neighborly" with those who live nearby, enable cooperation as well. I would venture, though, following Hobbes, that these more refined means of civilization depend for their possibility on a background of relatively effective criminal law. I consider the empirical foundations of this view in Section VIII.

This conception of the criminal law is connected to Nicola Lacey's communitarian theory, where we punish not for crude moralistic or utilitarian reasons, but for a particular function, to preserve, as Lacey writes, "a framework of common values within which human beings can develop and flourish."[63] It also

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[60] *See* Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (Oxford: Oxford University Press, 2016), 37–60.

[61] *Id.* at 193.

[62] *See generally* Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Cambridge, Mass and London: Harvard University Press, 1991); Eric A. Posner, "The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action," *University of Chicago Law Review* 63 (1996): 133-97.

[63] Nicola Lacey, *State Punishment: Political Principles and Community Values* (London and New York: Routledge, 1988), 169–201. *See also* John Finnis, *Natural Law and Natural Rights*, 2nd ed. (Oxford: Oxford University Press, 2011) ("The 'goal' of the familiar modern systems of criminal law can only be described as a certain form or quality of communal life, in which the demands of the common good indeed are unambiguously and insistently preferred to selfish indifference or individualistic demands for licence but also are recognized as including the good of individual autonomy, so that in this mode of association no one is made to live his life for the benefit or convenience of others, and each is enabled to conduct his own life (to constitute himself over his span of time) with a clear knowledge and foreknowledge of the appropriate common way and of the cost of deviation from it."); Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford: Oxford University Press, 2007), at 293 ("An effective and properly functioning system of criminal law and criminal justice is essential for that relative security of mutual expectations which is a condition of the civility of civil society.); Hyman Gross, *A Theory of Criminal Justice* (New York: Oxford University Press, 1979), 10 ("The criminal law…establishes rules of conduct whose observance allows us to enjoy life in society, and in addition

dovetails with Farmer's argument that "securing *civil order* is a general and continuing aim of the criminal law,"[64] where "civil order" is understood as a distinctly *legal* form of social order, which "is not primarily about moral community, but about the co-ordination of complex modern societies…"[65] In sum, on the view presented here we punish not to give wrongdoers a deserved allotment of suffering or condemnation, nor merely to reduce the aggregate level of harm or pain, but to enable and protect a community—a community of strangers living together in society—and the system of rules that offers these strangers the possibility of assured liberty and thereby of human flourishing.

An effective criminal law, in this way, is partly constitutive of the Rule of Law ideal. Respect for the Rule of Law is a virtue of *societies*, not merely of *governments*, as Rule of Law theorists tend to suggest. The Rule of Law demands fidelity to law by the government, of course, but also by the citizenry. More substantive conceptions of the Rule of Law, which dovetail with the neo-republican conception of assured liberty, maintain that the Rule of Law has value because it provides individuals with a secure place to stand within society, and secure pathways in which to move. We can appreciate how, on such a view, knowing when and where *other citizens* may be waiting to strike, in addition to knowing when and where the state itself may be waiting, is of paramount importance.[66]

B. A Distinctive View

This interpretation of the criminal law's function—as a system of protections upon which a cooperative civil society and the assured liberty of each citizen depends—is relatively provocative and distinctive within contemporary criminal

provides punishment for violation of these rules, for the rules would not be taken seriously enough by enough people to be generally effective if they could be broken with impunity.").

[64] Farmer, *Making the Modern Criminal Law,* supra *note* 60 at 27 (emphasis added).

[65] *Id.* at 193; *see also id.* at 299.

[66] On the distinction between "formal" and "substantive" conceptions of the Rule of Law, see Paul P. Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework," *Public Law* 21 (1997): 467-87; Jeremy Waldron, *The Rule of Law and the Measure of Property* (Cambridge: Cambridge University Press, 2012).

law theory (I think surprisingly). Let us compare it with the retributivist and "reconstructivist" conceptions of the criminal law's function. The aim is to demonstrate the distinctiveness of this view, but also to critique these theories indirectly, by establishing their inability to account for what is, I hope, an intuitive and attractive understanding of the criminal law's function.

My discussion of retributivism here will be brief. What is the function of the criminal law on the retributivist view? Rather than a system of protections, retributivists would understand the criminal law to be *a public schedule of interpersonal wrongs*, the commission of which demands the imposition of suffering or censure, as discussed above. The retributivist narrative is of the state punishing a wrongdoer for creating a victim. The reliance interest of non-victims on the criminal law plays no role in the story, or at least no direct role. A retributivist criminal law is, in these ways, an essentially moral rather than political project, and it lacks the resources to articulate the idea that an effective criminal law is constitutive of the Rule of Law and a source of assured liberty for all people within the jurisdiction.[67]

Let us now consider Joshua Kleinfeld's "reconstructivist" theory of the criminal law, which he believes captures the perspectives of a disparate group of historical and contemporary authors, in particular Hegel and Durkheim.[68] Whereas Brudner focuses on Hegel's conception of freedom, Kleinfeld argues that the function of the criminal law is to maintain society's "embodied ethical life"—what Hegel termed *Sittlichkeit*—upon which its solidarity depends[69]:

> "Ethical life is broad: it is not just a set of moral imperatives (thou-shalts and thou-shalt-nots) but also rights, values, teleologically structured social institutions and practices, conceptions of good and bad character and good and bad lives, normatively laden social roles

[67] On the distinction between "moral" and "political" theories of punishment, see Peter Ramsay, "Imprisonment and Political Equality" (LSE Legal Studies, Working Paper No. 8/2015); Corey Brettschneider, *Democratic Rights: The Substance of Self-Government* (Princeton: Princeton University Press, 2007), 96–113.

[68] Joshua Kleinfeld, "Reconstructivism: The Place of Criminal Law in Ethical Life," *Harvard Law Review* 129 (2016): 1485-1565.

[69] *Id.* at 1487 (defining *Sittlichkeit*); *id.* at 1489 n. 2 (distinguishing his approach from Brudner's).

> and social structures, evaluative understandings and outlooks, and more."[70]

It is a conception of society as a dense network of norms. Like Brudner, Kleinfeld understands social practices and institutions—as well as individual actions—to be constituted in part by the principles and values that justify them. And a crime, in this way, represents a rejection of society's norms. A murder is not just a killing, but also an expressive denial of the norm, say, that people have a certain priceless worth. Unlike Brudner, however, Kleinfeld does not argue that, as a result of his actions, the offender has consented to his punishment. Kleinfeld emphasizes the communitarian rather than the liberal aspects of his guiding theorists. And the function of punishment, Kleinfeld argues, is to expressively reaffirm the values that a crime has rejected. Punishment thus ensures that the value in question is "real" and "embodied," rather than merely abstract and notional. "The state in the criminal context," Kleinfeld concludes, "should be the embodiment and protector of society's lived moral culture—its way of life."[71]

Kleinfeld views his project as, in part, a sociological inquiry. And if he is right about the criminal law's function as a sociological matter, then a jurisdiction's criminal law should be nothing less than the negative image of its entire normative universe. An alien anthropologist should be able to understand the American (or French or Spanish) "embodied ethical life" or "way of life" by reverse engineering its criminal law. But of all the norms that guide social interactions in modern society, it seems that the criminal law guarantees the "reality" of only a small fraction. When reporting back to its esteemed colleagues on the culture of "the Americans," the alien anthropologist, with only the Model Penal Code to show for its journey, would state that they are a people that believe it is wrong to kill, to steal, to rape, to move about in public spaces recklessly, and so forth, recounting all the crimes

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[70] *Id.* at 1490.
[71] Kleinfeld, "Reconstructivism," *supra* note 68 at 1555.

listed in Part II. Its colleagues might then reply: "Yes, yes, we understand that they live in relative peace—that they are relatively civilized. But tell us about their *culture*, about their lived normative universe. You are an anthropologist, after all. All you have to show us is their criminal code?"

As Vincent Chiao notes, Durkheim claimed in *The Division of Labor in Society* that punishment was a privileged means of maintaining societies with "mechanical" solidarity, which are characterized by the similarities and undifferentiated social roles of their members.[72] But it did not play such a fundamental role, Durkheim continued, in societies with "organic" solidarity, which exhibit complex forms of cooperation enabled by the differences of their members. In the latter forms of society, like contemporary America, Durkheim understood that citizens generate solidarity and a shared normative order not only, or even primarily, through the criminal law, but as a result of an interdependent civil society. For instance, the (defeasible) norm against insubordination to one's boss, while surely part of the American "embodied ethical life," is not enforced through the criminal law, but rather through the mechanisms of a capitalist civil society; if you are insubordinate you may get fired and lose your income. Kleinfeld the sociologist would have difficulty explaining this outcome. And Kleinfeld the philosopher would have difficulty explaining why the criminal law ought not to expand to enforce this norm, and all other norms in our "collective consciousness."[73]

The point of this section, once more, has not been to engage with the merits of retributivism or reconstructivism directly.[74] Beyond demonstrating the relative distinctiveness of the conception of the criminal law as a system of protections upon which a cooperative civil society and the assured liberty of each citizen

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[72] Vincent Chiao, "A Response to Professor Kleinfeld's Reconstructivism: The Place of Criminal Law in Ethical Life," *Harvard Law Review Forum* 129 (2016): 258-67, at 264-65; Emile Durkheim, *The Division of Labor in Society* (1893), trans. W.D. Halls (London: Macmillan, 1984), 31–87.
[73] Kleinfeld, "Reconstructivism," *supra* note 65 at 1493 (explaining that his conception of "embodied ethical life" parallels Durkheim's notion of a society's "collective consciousness").
[74] I consider reconstructivism further below. *See infra* note 97.

depends, the aim has been to critique these two views indirectly, by demonstrating their inability to articulate and justify this understanding of the criminal law's function. Retributivists, viewing the criminal law as a public schedule of interpersonal moral wrongs, prove far too little, while reconstructivists, viewing the criminal law as the enforcer of a society's entire normative universe, prove far too much.

IV. Criminality and Legal Reliance

A. The Method of the Criminal Law

Moving forward, what we want from the criminal law is a system of protections that we can reasonably rely upon in the planning and execution of our lives, but we want to secure this system consistent with a commitment to human inviolability, that is, consistent with a refusal to sacrifice people as a means of mitigating harms or threats for which they lack responsibility. The linchpin of this project is an understanding of how, exactly, the criminal law works—how it operates to provide protection and secure our reasonable reliance. The criminal law, as a distinctly legal form of protection, depends upon the normative capacities of people within the jurisdiction. This is the *method* of the criminal law, as indicated above. As opposed to the brutish and unpredictable coercion of non-legal modes of governance, legal systems ask citizens to grasp prospective rules and standards and regulate their own conduct accordingly. As Jeremy Waldron writes:

> "Self-application is an extraordinarily important feature of the way legal systems operate. They work by using, rather than short-circuiting, the agency of ordinary human individuals. They count on people's capacities for practical understanding, for self-control, for self-monitoring and modulation of their own behaviour in relation to norms that they can grasp and understand."[75]

[75] Jeremy Waldron, "How Law Protects Dignity," *Cambridge Law Journal* 71 (2012): 200-222, at 206. *See also* HLA Hart, *Punishment and Responsibility* (Oxford: Clarendon, 1968), at 227-30; Farmer*, supra* note 60 at 166.

Legal systems, in this manner, are more efficient and powerful means of governance than non-legal systems.[76] When it comes to the latter, the state must be more involved; when you get citizens to do things at the barrel of a gun, you need to actually be there, with a gun. When it comes to law, the state can simply promulgate a rule, which citizens are then expected to perceive and self-apply. Thus, when someone relies upon a legal protection, she is relying, in large part, upon the self-application of the relevant norm by other people in the jurisdiction. More than an assurance that the state will be there, positively intervening to prevent people from doing X or Y, the criminal law assures, or rather aims to assure, that people will uphold the legal rules that prohibit X or Y. When I rely upon the criminal laws against car theft or murder, as indicated above, I am not relying upon the police to wait by my car or my person, like personal guards, but rather upon people self-applying the legal norms against stealing cars and murdering people. If the threat of punishment generates much of our reliance upon the law's protections—that is, if people self-apply legal norms for prudential rather than moral reasons, out of fear of the criminal sanction—it does not ruin this story; indeed, that is the very purpose of punishment on this view, as I will explain.

B. Criminality

With this framework in mind—of the criminal law as a system of protections that depends for its effectiveness on people self-applying legal norms—we can begin to understand the antagonistic relationship between the objective threat of crime and the function of the criminal law to provide people with a map of when and where they can be safe from the incursions of others. Crime, considered as a general phenomenon within a jurisdiction, diminishes the reliability of this map. Can I rely upon the protection against car theft? In considering this question, I need to know the prevalence of car theft within the jurisdiction. Or, more

[76] *See* Joseph Raz, "The Rule of Law and Its Virtue," in *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979), 210-229.

specifically—and here is the point—I need to know how much ongoing intent there is within the jurisdiction to steal cars. The greater the aggregate intent, the less reasonably I can rely upon the protection. If Alice intends to steal a car, then, in combination with others intending to steal cars, she weakens the reliability of the legal protection against car theft upon which citizens are meant to rely. She contributes to a social threat that makes buying, leasing, and using cars more expensive and perilous.

We want to know, then, how many people are failing to self-apply each criminal law, and to what degree. What this means will depend on the *mens rea* of the offense. A failure to self-apply a criminal law with intent *mens rea*, like the law against car theft, involves having an *intention* to commit the prohibited act. A failure to self-apply such a law can come in degrees when considered over time, as between someone who has an intention to steal a car only one time and a professional car thief who has such an intention repeatedly; they have both failed to self-apply the law, but the latter to a greater degree. A failure to self-apply a criminal law with recklessness or negligence *mens rea*, meanwhile, involves having a *willingness* to act in a manner that the law deems overly risky or careless.[77] Consider, for instance, a person who has few qualms about driving recklessly, and who occasionally drives at very high speeds through school zones, among other reckless driving acts. He does not intend to hurt anybody with his car, but he is willing to bring into the world an unreasonably high risk of that outcome. In this way, he would be failing to self-apply the legal norm against reckless driving—though to a lesser degree

[77] This assumes that the norm was non-coercive and genuinely legal, following Lon Fuller's theory of law, such that self-application was possible. This would require at least a due diligence defense for negligence offenses, but I will not engage with those issues here. *See* Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven and London: Yale University Press, 1969) (arguing that purported legal rules count as genuine law only if they cohere with the "principles of legality": generality, publicity, prospectivity, intelligibility, consistency, feasibility, constancy through time, and congruence between the rules as announced and as enforced).

than someone who has absolutely no qualms about driving recklessly, and who routinely drives at very high speeds through school zones.[78]

If an offender exhibits any such form of *mens rea*, the broader point is that he is *normatively committed* to performing the prohibited act in the normal course of future events.[79] He could change his view as to the authority of the relevant legal reasons and "unsettle" his commitment, to be sure, but that does not alter the fact that until this happens he is, to some degree, *coming for us* (and thereby contributing to the objective threat of crime). How does the impulsive offender fit into this story?[80] First, he does so as soon as he has an intention or willingness to perform a prohibited act, even if, due to his impulsivity, the intention or willingness is established only thirty seconds before he commits the act. The threat of crime will vary over time, of course, and his surprising act could mean, perhaps, that we have underestimated the threat level for that time and place; in such cases, less than chilling the exercise of our rights or forcing us to take expensive precautions, the threat of crime exposes us to unreasonable risks of harm. In short, an intention or willingness to break the law need not be the enduring and regular commitment of the professional criminal. An intention or willingness to break a law only one time, whether formed impulsively or otherwise, would suffice. Second, we might understand someone's unchecked and aggressive impulsivity to constitute a willingness to act recklessly in a diffuse criminal fashion, such that we can depend on him to perform a range of criminal acts in the normal course of future events. But how could we know that someone was impulsive in this manner? How could we know, indeed, that anybody was "normatively committed" to offending? As I discuss further below, the central piece of evidence just is someone's past offense, which

[78] Thanks to Peter Ramsay for helpful discussion on this point.
[79] By normal course of future events, I mean assuming that nothing entirely unexpected occurs, like an asteroid strike or the offender's untimely death.
[80] Thanks to Nicola Lacey and Patrick Tomlin for pressing me to clarify this point.

represents *dispositive* evidence of his *past* intention or willingness to offend, but merely *some* evidence of his ongoing intention or willingness to offend.[81]

Let us say that someone with an intention or willingness to perform a criminal act is *unreasonably unreliable* with regard to the self-application of the associated criminal law (with the understanding that there are varying degrees of unreliability). Let us say, furthermore, that to be unreliable in this way is to contribute to society's level of *criminality*. At least two distinctions are key to understanding this concept of criminality. First, we can distinguish between the *synchronic* criminality level (in a specific moment) and the *diachronic* criminality level (over time). The former relates particularly to the question: What is the threat of crime that we are facing right now? The latter, meanwhile, relates particularly to the question: What is the average threat of crime that we face, moving forward, as we plan our lives? Second, we can distinguish between "general" and "specific" criminality. We tend to focus on the level of "general criminality," since we tend to rely on the criminal law as a whole as a general provider of effective protections. When we walk down the street, for example, we are relying on homicide offenses, non-fatal offenses against the person, driving offenses, and so forth. It is in this sense that we refer to the criminal law as a *system* of protections. A 1998 study was concerned with general criminality levels when it reported that, in the prior 12 months, 25% of the residents of America's largest cities had avoided leaving their homes at night to prevent becoming a victim of crime, and 25% had avoided going out alone.[82] Sometimes, however, we are concerned with the "specific criminality" level of a particular offense, say, of car theft when purchasing car theft insurance or parking our car. Regardless, the "general criminality" level is just composed of the "specific criminality" levels for each offense.

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[81] *See* discussion *infra* at 65-6.

[82] Steven K. Smith, et. al., *Criminal Victimization and Perceptions of Community Safety in 12 Cities, 1998* (Bureau of Justice Statistics: Office of Community Oriented Policing Services, May 1999), 20-21. On the relationship between the objective threat of crime and the perception of crime, see *infra* at 59-63.

One's criminality contribution will vary with the *mens rea* level of the offense. One may be reasonably reliable, for instance, with regard to self-applying the norm against intentional killing, but not the norm against reckless killing, or the norm against grossly negligent killing. If we seek assurance against other people killing us, each homicide offense addresses a separate component of that aim. We want assurance against people who would kill us purposefully, as well as those who would kill us as a result of their conscious risk-taking or their extreme carelessness. And to be unreliable with regard to the law against intentional killing is to make a different and generally more severe criminality contribution than to be unreliable with regard to the laws against reckless killing or grossly negligent killing. It would be possible, though, for someone to be so wildly reckless with regard to the possibility of causing others' deaths that his criminality contributions would be even greater than those of an intentional killer. All of these issues will be relevant for sentencing, as I discuss in Section IX.

On this view, in sum, criminality is the joint product of people in society who are failing to self-apply criminal legal norms, in the specific sense of having an intention or willingness to offend. The greater the amount of criminality in society, whether in a given moment or when considered over time, the less worth the criminal law has as a system of protections and as a guide to the possible incursions of other people, and thus the less assured is our liberty (and the more difficult it is to flourish). But how, one might object, could we understand criminality to be the joint product of offenders, such that we could hold them responsible for its impact? It is not as if a car thief wishes to diminish the reliability of the law against car theft; all he wants to do, let us assume, is to make money. To say that criminality is the joint product of offenders, however, is not to argue that criminality is a purposeful joint product akin to organized crime. The better analogy is to pollution. Polluters are not working together purposefully to create a societal threat, but each of them, as a *byproduct* of their actions, contributes to the social harm of smog or

global warming, and we can hold them responsible for their proportional contributions, morally if not legally.[83] Likewise, offenders contribute to the wider social threat of criminality as a foreseeable, necessary, and causally "close" byproduct of their unreliability with regard to upholding the criminal law, and we can hold them responsible for their proportional contributions to this social threat (both morally and legally). We can take the metaphor one step further, indeed, and understand criminality to represent a form of *socio-legal pollution*.

V. Two Principles of Permissible Using

This conception of the criminal law and of criminality allows us to resolve the Means Problem, if we appeal to either of two moral principles. These are principles that provide exceptions to the general prohibition on using people as a means to the greater good. In other words, to use someone as a means consistent with either principle is not to use him to mitigate a harm or threat for which he lacks responsibility.

A. Corrective Justice Means Principle

The principle of "corrective justice" provides that an individual has a duty to rectify the losses or damage caused by his wrongful conduct, and that he can permissibly be forced to fulfill this duty.[84] The classic statement is found in Aristotle's discussion of justice in Book V of the *Nicomachean Ethics*.[85] An individual

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[83] A. P. Simester and Andrew von Hirsch refer to pollution as a "conjunctive" harm, the prevention of which involves proscribing an act that is "a token of the type of conduct that cumulatively does the harm." A. P. Simester and Andrew von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Oxford: Hart, 2011), 85. Criminality is such a "conjunctive" harm, with the intention or willingness to offend being the relevant "token." On the parallel notion of "cumulative" harms, see Andrew von Hirsch, "Extending the Harm Principle: 'Remote' Harms and Fair Imputation," in eds. A. P. Simester and A. T. H. Smith, *Harm and Culpability* (Oxford: Clarendon, 1996), 259-77, at 263.

[84] *See* Jules L. Coleman, "The Practice of Corrective Justice," *Arizona Law Review* 37 (1995): 15-31; Ernest J. Weinrib, "Corrective Justice in a Nutshell," *Toronto Law Journal* 52 (2002): 349-52. *See also* Tadros, *The Ends of Harm*, *supra* note 1 at 131-32 (introducing the concept of an "enforceable duty," a duty that one can permissibly be forced to uphold). For further discussion of "enforceable duties," see *infra* at notes 122 and 128.

[85] Aristotle, *Nicomachean Ethics*, trans. and ed. Roger Crisp (Cambridge: Cambridge University Press, 2000), 87-89.

can be used as a means permissibly, according to the Corrective Justice Means Principle, to restore the ex-ante status quo that he disturbed. To use him in this manner would be consistent with a commitment to human inviolability, since he would not be sacrificed to mitigate a problem for which he lacks responsibility. He would be used, rather, to repair his own wrongdoing. This principle, of course, grounds one of the central theories of tort law.[86]

B. Defensive Means Principle

The second principle, the Defensive Means Principle, is derived from the right to self-defense. In the paradigmatic form of self-defense, where an aggressor attacks a victim physically and the victim responds in kind, the victim is not using the aggressor as a means of mitigating or preventing a threat, since the aggressor himself is the threat.[87] We could imagine self-defense situations that were otherwise. If two people are attacking me, for instance, I could grab one of them and use him as a shield, as a means of blocking the other's blow. It is permissible, in this way, for victims or would-be victims of an ongoing threat to use an aggressor as a proportional means of mitigating or preventing that threat. It reflects Tadros's view that "there is a permission manipulatively to harm a person who is culpable and responsible for creating a threat of serious harm to avert that threat."[88]

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[86] *See, e.g.,* Ernest J. Weinrib, *Corrective Justice* (Oxford: Oxford University Press, 2012); Jules L. Coleman, "Corrective Justice and Wrongful Gain," *Journal of Legal Studies* 11 (1982): 421-440; Jules L. Coleman, *Risks and Wrongs* (Cambridge: Cambridge University Press, 1992); Stephen R. Perry, "The Moral Foundations of Tort Law," *Iowa Law Review* 77 (1992): 449-514; Scott Hershovitz, "Corrective Justice for Civil Recourse Theorists," *Florida State University Law Review* 39 (2011): 107-28.

[87] *See* Tadros, *The Ends of Harm*, *supra* note 1 at 245.

[88] *Id.* at 189. On the distinction between harming someone as a means versus harming someone to eliminate a threat, see Warren S. Quinn, "Actions, Intentions, and Consequences: The Doctrine of Double Effect," *Philosophy & Public Affairs* 18 (1989): 334-51; Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2011, reprinted edition), 155-202; Helen Frowe, "Equating Innocent Threats and Bystanders," *Journal of Applied Philosophy* 25 (2008): 277-90; Jonathan Quong, "Killing in Self-Defense," *Ethics* 119 (2009): 507-37.

The Corrective Justice and Defensive Means Principles are not radically distinct.[89] They both involve forcing people to fulfill *a duty to repair their wrongdoing*, broadly conceived. Forcing someone to rectify his past wrongdoing, consistent with the former principle, undoubtedly involves forcing him to fulfill such a duty of repair. Forcing someone to mitigate an ongoing wrong, consistent with the latter principle, seems to as well, given that mitigating an ongoing wrong is a form of repairing that wrong. With this, we can bring the various threads of the argument together to resolve the Means Problem. By appealing to either of these two principles, in the context of the conceptions of the criminal law and criminality detailed above, we can generate two theories of permissible deterrent punishment. While the theories have somewhat distinct grounding reasons, and require distinct forms of evidence to secure convictions, they are united in that, broadly, they both involve forcing people to repair their criminality contributions. In this way, we might conceive of the theories as two sub-theories of the same unified theory of deterrent punishment.

C. Corrective Justice Theory of Punishment

There are four basic steps to the corrective justice theory of punishment. First, an offender contributed in the past to society's level of criminality via his intention or willingness to flout the criminal law. He contributed, that is, to a social threat in the past that limited the assured liberty of people within the jurisdiction. Second, the purpose of deterrent punishment is to reduce the level of criminality

[89] *See* Victor Tadros, "Causation, Culpability, and Liability," in eds. Christian Coons and Michael Weber, *The Ethics of Self Defense* (New York: Oxford University Press, 2016), 110-30, at 118 ("Why should the permission to harm a person to prevent a threat being realized be grounded in very different considerations to the permission to harm a person to ensure that the person harmed is compensated? Given the close relationship between negating harm and compensating a person for harm, it would be surprising if very different considerations determined these two realms of the ethics of harm."). *But see* Jonathan Quong, "Liability to Defensive Harm," *Philosophy & Public Affairs* 40 (2012): 45-77, at 45 ("Liability to defensive harm is only one type of liability, however, and we must not assume that things true of liability to defensive harm are necessarily true for other types of liability. Other kinds of liability—for example, the liability to pay taxes, pay damages, or suffer punishment—may have very different normative bases.").

in society. Deterrence is not targeted toward specific offenders, but rather toward the general threat of crime faced by citizens. The third step is an appeal to the Corrective Justice Means Principle. And, thus, fourth: Deterrent punishment is permissible in proportion to an offender's past criminality contributions. We are using him as a means of repairing—by way of general deterrence—the damage to our assured liberty caused by his own criminality contributions. He is not, as in the standard conception of deterrent punishment, merely sacrificed to scare off would-be future offenders, for whom he has no responsibility. He has increased the level of criminality in the past, and so the way to repair that, as a matter of corrective justice, is to use him to decrease the level of criminality in the future. Over time, ideally—with would-be future offenders appropriately deterred—it would be as if he had never contributed to criminality at all. This builds off of Tadros's idea that deterrent punishment can represent a form of equitable remedy; though, as I explain in Section V, very different conceptions of the criminal wrong and of the state's role in remedying that wrong ground Tadros's "duty theory."

D. Social Defense Theory of Punishment

The corrective justice theory is at least partly backward looking, as stated above, given its concern with offenders' past criminality contributions. It is the primary theory of punishment presented here, since it aims to justify the punishment of all offenders. The social defense theory of punishment, by comparison, is entirely forward looking, and would provide an *additional* punishment reason for some but not all offenders. It applies to those offenders whose normative commitment to offending is ongoing—that is, those offenders whom we still cannot reasonably rely upon to uphold the law. For those offenders, we can appeal to the Defensive Means Principle to justify additional deterrent punishment. We would be using an offender as a means, yes, but for the purpose of mitigating the *ongoing threat* of criminality for which he has partial responsibility. He would not merely be sacrificed for the greater good, to mitigate a problem for which he lacks

responsibility. Instead, we would be using him as a means of defending ourselves against a current social threat that impacts us all and for which he shares partial responsibility. Below I discuss the evidential challenges of this view—of establishing with sufficient confidence that we cannot reasonably rely on someone to uphold the criminal law moving forward.

We can appeal to the social defense theory of punishment to explain the intuition (and sentencing policy) that a recidivist offender may in some cases deserve more punishment than a first-time offender or someone who is demonstrably apologetic and reformed.[90] His recidivism could be evidence that he maintains his criminal normative commitments as an ongoing matter. If this evidence were sufficiently strong—a big if, as I discuss below—then we could conclude that he has a duty to mitigate the current threat of criminality, consistent with the social defense theory. Meanwhile, first-time and reformed offenders, while lacking this duty of mitigation, would still have a duty of rectification consistent with the corrective justice principle.

Let us consider an immediate issue: Why use an offender for the purpose of general deterrence on the social defense view? If all we want is, essentially, for him to erase his contributions to the ongoing threat of criminality, why not simply incapacitate him in prison? We should be wary, though, of assuming that carceral incapacitation represents a perfectly neat application of the social defense theory for two reasons. First, it may simply shunt the costs of an offender's unreliability with regard to the criminal law from the wider public onto other imprisoned offenders; this is especially true with violent offenders.[91] There is no reason to believe that offenders lose their right to the criminal law's protections inside prison. And

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[90] *See* U. S. Sentencing Guidelines Manual (US Sentencing Commission, 2016), § 4A1.1, at 392; Julian V. Roberts, "The Role of Criminal Record in the Sentencing Process," *Crime & Justice* 22 (1997): 303-62 (surveying the history and purposes of recidivist enhancements).

[91] *See* Catherine Appleton and Bent Grøver, "The Pros and Cons of Life Without Parole," *The British Journal of Criminology* 47 (2007): 597-615, at 604.

we would not think, in parallel, that confining someone to a particular zip code outside of prison would somehow perfectly erase his ongoing criminality contributions. As such, the offender's duty to mitigate the threat of criminality would often remain unfulfilled unless his imprisonment acted to deter other offenders. And if it did not deter others, as an empirical matter, then his imprisonment would represent a wanton and illegitimate injury on the social defense view. Perhaps, though, we could structure prison in such a way that an offender did not represent any risk to other prisoners, akin to a quarantine situation. Except for the most dangerous and violent offenders, however, this would likely be a disproportionate and inefficient means of forcing an offender to fulfill his duty of mitigation; I discuss this issue further in Chapter 3.[92] Second, and related to this last point, we should be hesitant to assume that prison is always the preferred method of punishment. Imposing a fine, a term of community service, or perhaps a form of monitoring may be a more efficient and humane method of reducing the level of criminality in society, *even if that means that an offender remains free and potentially unreformed in society*.[93] Given that this is not a retributivist view, we must—on general consequentialist grounds—prefer those methods of punishment that enable an offender to fulfill his duty with the smallest degree of injury in the process.

VI. Two Objections

To flesh out the corrective justice and social defense views I will consider two objections.

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[92] *See* Chapter 3 at 247-50.

[93] *See, e.g.*, Alexander C. Wagenaar, et. al., "General Deterrence Effects of U.S. Statutory DUI Fine and Jail Penalties: Long-Term Follow-Up in 32 States," *Accident Analysis & Prevention* 30 (2007): 982-994 (comparing from 1976–2002 the DUI rates in twenty-six states that implemented a mandatory minimum fine for first time DUI offenders with eighteen states that implemented a mandatory minimum jail penalty for such offenders and concluding that the pattern suggested a greater deterrent effect from the mandatory fines than the mandatory jail sentences); Oliver Roeder, et. al., *What Caused the Crime Decline*? (New York: Brennan Center for Justice, 2015) (concluding that the effectiveness of increasing rates of incarceration as a crime control tactic in America has been limited since 1990 and non-existent since 2000).

A. What About the Act Requirement?

The first objection asks: If we punish (a) to rectify prior contributions to criminality and (b) to diminish the ongoing threat of criminality, why wait for an offender to commit a criminal act, consistent with the "act requirement"? Why not punish people for merely seeming "dangerous," an outcome that Peter Ramsay worries our system is increasingly headed toward?[94] If someone seems dangerous is he not contributing to criminality? Or, put differently, why not lock up everybody who actuarial statistics indicates is "likely" or "very likely" to offend, and thereby dramatically decrease criminality and increase legal assurance?

Self-defense principles undergird the conception of the criminal law as a system of protections, and of criminality as an attack on the people who rely on those protections. There are internal limits to these principles that can prevent such abuses. Within the realm of interpersonal self-defense, for instance, there is no right to attack any person that *may* pose a threat to you (for example, any person that *may* punch you). To activate traditional self-defensive logic, there must be an ongoing attack against you. Within the socio-legal realm, in the context of the two theories, the ongoing attack against people within the jurisdiction just is criminality, which is composed of offenders' intentions or willingness to flout criminal legal norms, as discussed above. To hang out in the "wrong crowd," say, to be friendly with drug dealers, is not in and of itself to have any such commitment. One could be friendly with drug dealers and then be entirely reliable with regard to the self-application of the criminal law, such that he was not in any way liable to punishment.

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[94] *See* Peter Ramsay, "Preparation Offences, Security Interests, Political Freedom," in eds. R.A. Duff, et. al, *The Structures of Criminal Law* (Oxford: Oxford University Press, 2012), 203-28; Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (Oxford: Oxford University Press, 2012). *See also* Lucia Zedner, *Security* (London: Routledge, 2009); Mark Neocleous, *Critique of Security* (Edinburgh: Edinburgh University Press, 2008); Ian Loader and Neil Walker, *Civilizing Security* (Cambridge: Cambridge University Press, 2007); Paul Robinson, "Punishing Dangerousness," *Harvard Law Review* 114 (2001): 1429-56.

But what about preemptive defense? If there is a right to preemptive *self*-defense, it applies only where the aggressor exhibits an intention to attack (for example, a person has angrily raised his fist to punch me). Given (a) that the "attack" in the context of criminality is the intention to violate a law with intent *mens rea* or a willingness to violate a law with recklessness or negligence *mens rea*, then (b) preemptive *social* defense could only apply where someone had an intention to have an intention to offend, or an intention to have a willingness to offend. Both are essentially meaningless formulations that collapse into having the intention to offend, bringing us back to square one. Preemptive social defense for the purpose of diminishing criminality is thus incoherent. One either has a normative commitment to flout a criminal law, or not.

The legal assurance promised by the two theories is thus primarily objective rather than subjective.[95] It is a matter of reducing the actual risk of crime in the future, not simply reducing people's perceptions of the risk of crime. The reason to punish is to create reliable legal protections—that is, to have criminal legal norms that people in society are in fact upholding and self-applying, so that citizens can confidently plan and successfully execute their lives. Objective legal assurance increases along with the objective reliability of legal protections. Subjective legal assurance, one's personal feeling of the law's reliability, is an important, but ultimately derivative concern; subjective assurance should, of course, increase along with objective assurance, but this is not always the case.[96] If we knew, then, that someone was flirting with the possibility of, say, grievously assaulting someone,

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[95] On the related distinction between objective and subjective "security," see Ramsay, "Preparation Offences," *supra* note 94; Zedner, *Security*, *supra* note 94 at 14–19; Loader and Walker, *Civilizing Security*, *supra* note 94 at 155–61.

[96] *See* John Gramlich, "Voters' Perceptions of Crime Continue to Conflict with Reality," *Pew Research Center*, November 16, 2016, http://www.pewresearch.org/fact-tank/2016/11/16/voters-perceptions-of-crime-continue-to-conflict-with-reality (reporting that 57% of those who had voted or who planned to vote in the 2016 presidential election believed that crime had gotten worse since 2008, 27% believed it had stayed the same, and 15% believed it had gotten better, even though violent crime and property crime had fallen by 26% and 22%, respectively, between 2008 and 2015).

then while this may worry us and diminish our subjective sense of security, it is not until he actually holds an intention to commit the act that he is, as indicated above, *coming for us*. And it is only then that he has contributed to criminality and diminished our objective assurance, making himself liable to our collective rights to corrective justice and self-defense.

In the other direction, there could be a situation in which we have an unjustified level of subjective assurance. We might blithely assume, say, that the specific criminality level for car theft was vanishingly low, while in fact the jurisdiction was filled with people intending to steal cars. If we then left our car doors unlocked or failed to purchase car theft insurance, our subjective assurance would be *unreasonable*. We would be relying on the criminal law's protections unreasonably, and thereby taking unreasonable risks. We can see here how criminality does not merely chill the exercise of our rights or force us to take expensive precautions; especially when we underestimate its current or future level, criminality also exposes us to unreasonable risks of harm. Along these lines, if one conceals his criminal intentions from public knowledge by being a very professional and secretive criminal—or by being an impulsive and surprising one-time criminal—he has still contributed to criminality.[97] We want people to exercise their liberties

[97] Thanks to Antony Duff for pressing me to address the example of the professional and secretive offender. Kleinfeld's reconstructivist theory, by comparison, cannot easily escape this challenge. Kleinfeld understands a crime to expressively reject a social norm, as discussed above, and a punishment to expressively deny that rejection. If the crime goes unpunished, he argues, then the social norm that it rejects will ultimately wither away. He writes that "crime not only offends the norms on which social solidarity is based but, *by showing that those norms can be violated*, saps them of authority." Kleinfeld, "Reconstructivism," *supra* note 68 at 1506 (emphasis added). He appeals to Durkheim's example of the classroom. "If students start cheating on their exams and see that teachers, who could do something about it, turn a blind eye, the norm against cheating will dissolve and dissolve quickly—and likewise if citizens are known to frequently cheat on their taxes or spouses on one another." *Id.* In this way, he writes that crimes "endanger—genuinely endanger—ethical life." *Id.* But it is not the crime itself that would endanger the norm, but (a) the *public* flouting of the norm followed by (b) the non-punishment of that public flouting. If the flouting were to happen entirely in secret then the reconstructivist penal logic would fail to apply, it seems, or at least would apply with far less stringency than if the offender happened to get caught in public. For the secret flouting of a norm, even if unpunished, would not impact the norm's public standing. For related discussion, see *infra* note 129.

confidently, but not unreasonably or foolishly. Subjective assurance, in and of itself, is thus not our ultimate aim. The criminal law, in sum, aims for objective assurance over time, and then for the subjective assurance level to be appropriate given the degree to which it achieves that primary goal.

There are now some bullets to bite. First, is the act of offending on this view *merely evidence* that one had or has an intention or willingness to commit a prohibited act? As it relates to the justification of deterrent punishment: Yes. Were liability dependent only upon the criminal act itself, as on traditional theories, our understanding of criminality and our response to the Means Problem would dissolve. This is a central point. An act that occurred in the past could not, *in and of itself*, contribute to an ongoing social threat. Erin Kelly argues, for instance, that beyond the harm borne by the victim, we could hold an offender partially responsible for people's "fear" of offenses of the type he committed.[98] John Braithwaite and Philip Pettit make a similar point.[99] They argue that an offender's primary wrong is to diminish or destroy his victim's "dominion," the state of being free from others' arbitrary interference. The offender also commits a wrong against society as a whole, they argue, by diminishing the "reassurance" of non-victims regarding the security of their own dominion.[100] But the "fear" or lack of "reassurance" would be in relation to the risk of *future* offenses—of, say, future robberies—and the offender's *past* robbery, which is what Kelly, Braithwaite, and Pettit want to hold him responsible for, could not, in and of itself, contribute to that future risk. It may, in combination with other such robberies, indicate to the population an ongoing risk of future robberies. But merely to indicate the existence of an ongoing risk—as a reporter might—is surely not to be responsible for that risk.

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[98] Erin I. Kelly, "Criminal Justice Without Retribution," *Journal of Philosophy* 106 (2009): 440-62, at 457.
[99] Philip Pettit and John Braithwaite, "Not Just Deserts, Even in Sentencing," *Current Issues in Criminal Justice* 4 (1993): 225-39, at 230.
[100] *Id.* ("If I see that crimes are committed against others—especially when the victims of crime do not have their complaints taken seriously or redressed—then the basis for believing that I enjoy resilient non-interference is undermined. My dominion is endangered.").

Only if we see the act as *evidence* of an offender's past and perhaps ongoing normative commitments, and understand the objective risk of crime (criminality) to be composed of such commitments, could we aim to hold him proportionally responsible for the impact of that risk on people's legal assurance.

But does this mean that if we knew that a citizen had an intention or willingness to offend, but he had not yet taken any steps in the real world to achieve this aim, that we could punish him as a means of mitigating criminality? Yes—but with the understanding that we would never, even if it decreased criminality to zero, grant the state authority to look into our minds like this; to do so would increase our objective assurance against other citizens, but profoundly decrease it vis-à-vis the state itself. Whether to protect ourselves against the state, in particular against broad, discretionary, and intrusive powers of investigation, or against offenders, is the question at the center of controversial police practices like "stop-and-frisk." As Farmer writes: "A…dimension of civil order concerns the civility of the criminal law itself. The criminal law not only has to secure trust between individuals, but also the trust of individuals in the order of law."[101] There is, in this way, a seemingly irresolvable conflict within the Rule of Law ideal introduced above, wherein we seek assurance against both crime and an intrusive state. Regardless, through its concern with assurance against the state, the two theories have the internal resources to forestall an overbearing, illiberal system. The conclusion, then, is that we absolutely need an act requirement, given our need for proof of offenders' normative commitments, when coupled with our concern for assurance against the state. The act requirement would, however, involve some costs in terms of principle, by granting immunity to those with unrevealed criminal normative commitments. Is this not, though, accepting thought crime or perhaps character

[101] Farmer, *Making the Modern Criminal Law, supra* note 60 at 301.

liability, at least in principle?[102] Yes, but with the understanding that the criminalized thought or character "flaw" is a very particular one connected essentially to action, namely, the intention or willingness to commit a prohibited criminal act.[103]

To be clear, the commission of a prohibited criminal act would serve different evidential purposes within the two theories. Within the corrective justice theory, the criminal act would serve as dispositive proof that one contributed to criminality in the past; the act is dispositive evidence that he was normatively committed to offending—that he had an intention or willingness to offend.[104] Within the social defense theory, the act would represent evidence, but not necessarily dispositive evidence, that one maintains his criminal commitments as an ongoing matter. Perhaps the offender has changed his normative commitments with regard to the authority of the law in the interim. As stated above, that an offender has a history of offending would indeed represent evidence of his ongoing commitments.[105] What would qualify as *sufficient* evidence for that conclusion I will not engage with here; though, it must be emphasized that the legitimacy of social defensive punishment hangs on finding a satisfactory answer to that difficult question. I consider this issue further in Chapter 3.[106] We must be vigilant, generally, against the dangers of licensing punishment upon merely armchair predictions of dangerousness, as A.E. Bottoms and Roger Brownsword seem to flirt with in justifying a system of "civil" preventive detention beyond an offender's "criminal"

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[102] For a critical history of "character" liability, see Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests, and Institutions* (Oxford: Oxford University Press, 2016).

[103] For related commentary on the act requirement, see Douglas Husak, "Does Criminal Liability Require an Act?" in ed. Antony Duff, *Philosophy and the Criminal Law: Principle and Critique* (Cambridge: Cambridge University Press, 1998), 60-100 (arguing against the view that criminal liability is and ought to be imposed only for an act).

[104] To be sure, if the evidence was of multiple criminal acts—say, multiple car thefts—none of which had been addressed before by the legal system, then that would be dispositive proof of a greater criminality contribution than evidence of a single theft. *See supra* at 45-6 (discussing *diachronic* criminality).

[105] For thoughtful discussion of the value of propensity evidence, see Mike Redmayne, *Character in the Criminal Trial* (Oxford: Oxford University Press, 2015), 111–43.

[106] *See* Chapter 3 at 245-47.

sentence.[107] For to punish someone who is not in fact contributing to criminality would violate our most basic liberal commitments—and his most basic rights—by sacrificing an innocent person for the greater good. Nonetheless, that the evidential question is difficult does not vitiate the underlying analysis regarding the liabilities and duties of those people whom we cannot reasonably rely upon to uphold the criminal law as an ongoing matter.

Finally, the corrective justice and social defense views can easily explain the practice of interpreting the act requirement flexibly enough to account for inchoate liability doctrines like attempt and conspiracy. This is an important point in their favor. With attempt liability, they would understand the offender taking "substantial" steps or "more than merely preparatory" steps toward the commission of an offense to be proof of his intention to offend, and thus of his criminality contribution.[108] The idea is that some lesser form of preparation would not qualify as sufficient evidence of an intention. Likewise, with conspiracy liability, they would understand the agreement to offend, when combined with the overt act in furtherance of that agreement, to be proof of the parties' intentions to offend.[109] The attempt and the conspiracy serve the exact same role as the completed act itself—as evidence of an offender's normative commitments. Inchoate liability doctrines pose difficult interpretative challenges, by comparison, for retributivist theories, and also for Tadros's "duty" theory, which I discuss in the following section.[110]

B. Where's the Victim?

Unlike incomplete attempts or standalone conspiracies, when offenders have actually created victims, one might object to the negligible role such victims

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[107] A.E. Bottoms and Roger Brownsword, "The Dangerousness Debate After the Floud Report," *British Journal of Criminology* 22 (1982): 229-54.

[108] *See* MPC, *supra* note 55 at § 5.01(1)(c) (outlining the "substantial step" standard for attempt liability in the U.S.); Criminal Attempts Act 1981, c. 47 (codifying the "more than merely preparatory" standard for attempt liability in England and Wales).

[109] *See* MPC, *supra* note 55 at § 5.03 (outlining the requirements for conspiracy liability).

[110] *See* Larry Alexander, "Can Self-Defense Justify Punishment?" *Law & Philosophy* 32 (2013): 159-75 (arguing that Tadros's theory cannot justify punishment for inchoate offenses).

play on this view. Surely, the second objection goes, the reason to punish has to do with the offender's responsibility for the harm borne by the victim. He has wronged the victim, it continues, and deserves to suffer or to be censured, accordingly, for that wrong.[111] In reply to this objection, I am skeptical that retributivist and expressivist reasons do in fact address victims sufficiently. If I have been assaulted, it may be important to me that the state recognizes that I have been wronged by punishing the offender. But I am still left with the damage of the assault, which may well be more detrimental to my interests and also to my self-respect than the offender's non-punishment. To say that the civil system can address this component of the wrong seems inadequate, especially if the offender lacks the resources to provide sufficient compensation.

Here is a tentative solution: the state should bear some responsibility for any civil damages that may result from a crime, as a co-defendant of sorts. A crime occurs when someone violates a legal protection. By promulgating such a protection, as argued above, the state invites its citizens to rely upon its validity. When someone flouts the law, then, the victim has a civil claim against that person, yes, but maybe also against the state.[112] The claim might sound in (social) contract, with the victim's own restraint and respect for the law given in consideration for the institution of reliable legal protections, and with the gravamen of the victim's claim being the unreliability of the protection flouted by the offender. Or maybe it could be a form of promissory estoppel, whereby society has invited the victim to detrimentally rely upon the promise of protections. Or, following Alan Norrie, we might argue that the state bears responsibility for the social conditions that were

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[111] Duff, *Punishment, Communication, and Community, supra* note 20 at 28 ("[C]ensure of conduct declared to be wrong is owed to its victims, as manifesting that concern for them and for their wronged condition that the declaration itself expressed.").

[112] Pettit and Braithwaite mention the possibility of a public "restitution fund," though not one motivated by the state's own duty to the victim as a co-defendant. Pettit and Braithwaite, "Not Just Deserts," *supra* note 68 at 236–37 ("If restitution is possible, but not within the means of the offender, then it may be that extra help should be provided from a restitution fund, with the offender contributing only a part.").

in part determinative of the offender's intention to offend.[113] If such an argument works, the state would have some responsibility to rectify a victim's losses, possibly to fill in the gaps left by an offender's lack of resources and, following Nicola Lacey and Hanna Pickard, possibly to provide non-pecuniary forms of compensation as well.[114] The state, aware of its duty of repair, might even initiate the civil process on the victim's behalf, aiming to reach a negotiated settlement out of court. The general framework, then, is of the criminal system protecting the interest of society as a whole in diminishing criminality and maintaining a reliable system of criminal protections, and then of the civil system protecting the interests of individual crime victims, but with the government now involved in that project to some degree. Of course, the civil system on this view would cover non-criminal tortious actions, as well, but the state would not bear any liability in those cases.[115]

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[113] *See* Alan Norrie, "Freewill, Determinism and Criminal Justice," *Legal Studies* 3 (1983): 60-73, at 72 (quoting Karl Marx, "The Eighteenth Brumaire of Louis Bonaparte," in ed. David McLellan, *Karl Marx: Selected Writings* (Oxford: Oxford University Press, 1977), 329-55, at 329) ("Men make their own history, but they do not make it just as they please; they do not make it under circumstances chosen by themselves, but under circumstances directly encountered, given and transmitted from the past.").

[114] Nicola Lacey and Hanna Pickard insightfully call for two distinct institutional tracks for criminal justice, "with one track of the system designed to serve the interests and needs of victims, and one track of the system designed to determine criminal responsibility and convict and sentence offenders…" Nicola Lacey and Hanna Pickard, "A Dual-Process Approach to Criminal Law: Victims and the Clinical Model of Responsibility Without Blame," *Journal of Political Philosophy* 26 (forthcoming 2018) (manuscript at 26) (on file with author). They envision an entirely new institution dedicated to crime victims, one separate from the existing tort system. But incorporating state liability into the tort system would seem to be a more efficient institutional solution, providing a single forum for making victims whole. Accepting Lacey and Pickard's argument, furthermore, that making victims whole is often a symbolic and emotional process, *id.* at 12–16, 21–24, an augmented civil system could allow for non-pecuniary forms of compensation, such as an apology from the offender or access to state-sponsored therapy. Moreover, involvement of a court might aid in this expressive process, given its capacity for making public, authoritative pronouncements regarding the losses borne by victims and the responsibilities of the various parties. Regardless, even if Lacey and Pickard would reject the tort system as an appropriate forum for considering victims' non-pecuniary needs with due care, given its adversarial and potentially combative nature, they do envision some role for state liability for victims' pecuniary damages. And that process, at least, would have to be unified with the existing tort system, lest a victim receive double damages potentially from the offender and the state.

[115] The corrective justice and social defense theories are meant to justify the practice of deterrent punishment, which as argued above, must represent the centerpiece of any legitimate institution of punishment. But the two theories need not, as a matter of logic, fill the entire field of punishment reasons and—for the sake of completeness—it should be noted that one could incorporate victim-centered penal reasons into the system of criminal justice demanded by the two theories. That is, the

Let us consider two objections to this proposal.[116] First, one might object, would not state liability for criminal damages be extraordinarily, prohibitively expensive? We can respond, simply, that if the state is indeed liable as a moral matter, the ultimate cost will depend not only on the amount of unfulfilled criminal damages, but also on competing demands for state resources. How high a priority state liability for criminal damages would be I will not discuss here. But to clarify the point of principle: If the state had an enormous set of resources that for some reason it could only spend on crime victims, the idea is that when the state paid the victims' unfulfilled damages, it would not do so merely out of a general duty of beneficence—a general duty to help people regardless of one's relationship to them—but at least partly out of a duty of repair.[117] And that conclusion, grounded on the idea that the state has to some degree failed a crime victim, strikes me as broadly intuitive and appropriate. However, one might object, secondly, that any level of state liability would create perverse incentives for the state, either to let offenders go unpunished or, conversely, to hyper-aggressively prevent the

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victim need not, as a matter of logic, exist only in the civil system on this view. One could consistently uphold corrective justice and social defensive reasons of punishment in addition to a "moderate" retributivism that considers delivering retributive harm or expressive censure a legitimate, though non-decisive penal rationale. Given that such retributive or expressive reasons are connected more closely to the wrong against the victim and the harm borne by the victim, one could perhaps add them to the two theories to partially address the "Where's the victim?" worry—possibly as a sentencing enhancement for especially heinous offenses. On "moderate" retributivism, see Mark S. Martins and Jacob Bronsther, "Stay the Hand of Justice? Evaluating Claims That War Crimes Trials Do More Harm Than Good," *Daedalus* 146 (2017): 83-99; Jeffrie G. Murphy, "Retributivism and the State's Interest in Punishment," in eds. J. Roland Pennock and John W. Chapman, *Criminal Justice: Nomos XXVII* (New York: New York University Press, 1985), 156-64; Ramon M. Lemos, "A Defense of Retributivism," *Southern Journal of Philosophy* 15 (1977): 53-65, at 62-63; Michael Philips, "The Justification of Punishment and the Justification of Political Authority," *Law and Philosophy* 5 (1986): 393-416, at 401–10; Larry Alexander, Kimberly Kessler Ferzan and Stephen Morse, *Crime and Culpability: A Theory of Criminal Law* (Cambridge: Cambridge University Press, 2009), 7-10; Alec Whalen, "Retributive Justice," in ed. Edward N. Zalta, *The Stanford Encyclopedia of Philosophy* (Winter 2016 Edition), https://plato.stanford.edu/archives/win2016/entries/justice-retributive.

[116] Thanks to Kimberly Kessler Ferzan for raising these objections.

[117] On the meaning and practical implications of "beneficence," see Peter Singer, "Famine, Affluence, and Morality," *Philosophy & Public Affairs* 3 (1972): 229-243; Liam B. Murphy, "The Demands of Beneficence," *Philosophy & Public Affairs* 22 (1993): 267-92; Richard W. Miller, "Beneficence, Duty and Distance," *Philosophy & Public Affairs* 32 (2004): 357-83; Garret Cullity, *The Moral Demands of Affluence* (Oxford: Oxford University Press, 2004).

commission of offenses. To what degree, though, would the police, prosecutors, and judges ignore offenses, or prosecute offenders less vigorously, out of a concern that the state would have to pay damages to the offenders' victims? And to what degree would a democratic populace accept further police intrusion, looking only to that same fiscal concern (and assuming that the money spent on police prevention was indeed a good investment in terms of money saved on damages)? I am doubtful that either degree would be significant—to say nothing of the fact that they may to some degree cancel each other out, given that they work at cross-purposes—but they are legitimate empirical questions. Whether they prove fatal would depend on the actual cost of state liability for criminal damages, taking into account competing demands for resources, as well as complex questions of institutional design, culture, and accountability.[118]

Jean Hampton, in her later work, wrote that crime represents "*an affront to the victim's value or dignity*,"[119] and that it warrants a response intended "to vindicate the value of the victim denied by the wrongdoer's action through the construction of an event that not only repudiates the action's message of superiority over the victim but does so in a way that confirms them as equal by virtue of their humanity."[120] Though I am not endorsing this penal logic, it is an influential theory and it is worthwhile to point out that compensation from the state to crime victims might represent the expressive "event" in question. Hampton believed that her theory demanded—and only demanded—retributive punishment for the criminal wrongdoer. But it would seem that compensation from the state would act to

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[118] *See* Barry Friedman and Maria Ponomarenko, "Democratic Policing," *NYU Law Review* 90 (2015): 1827-1907 (arguing that U.S. police forces have historically been democratically unaccountable, "aloof from the ordinary processes of democratic governance," and suggesting legislative and judicial means of reform).

[119] Jean Hampton, "Correcting Harms Versus Righting Wrongs: The Goal of Retribution," *UCLA Law Review* 39 (1992): 1659-1702, at 1666.

[120] *Id.* at 1686.

vindicate the victim's value and restore her dignity, and in a less damaging and costly manner than penal hard treatment inflicted upon the offender.

VII. The Duty to Rectify and the Criminal Law

These two theories of deterrent punishment, in particular the corrective justice view, share a number of features with Victor Tadros's "duty theory," as stated above. It will sharpen their presentation to clarify how they differ from his theory, and to explain why I believe they present a more secure moral foundation for state punishment. The duty theory is motivationally similar to the two theories, given that it foregrounds the Means Problem and, in searching for a response, attempts to move beyond traditional retributivist and utilitarian theories.[121] Through a complex array of interlocking arguments, Tadros aims to bring us in *The Ends of Harm* from the moral to the political, from the duties that criminal wrongdoers owe to the individual people they have wronged to the exclusive right of the state to punish those wrongdoers for the sake of general deterrence. By comparison, the corrective justice and social defense views start with the legal and the political, with a conception of the criminal law as a system of protections foundational to social cooperation, and then understand society's rights against offenders to flow from people's reliance upon that system. I will outline Tadros's theory as a whole, before questioning whether he can make the jump from the moral to the political, and arguing for the advantages of starting with the political.

A. Explication

Beginning with the moral, Tadros introduces the (I think sound) notion of an "enforceable duty," a duty that one can be forced to uphold because (a) upholding it "is necessary to avert a great harm" and (b) if it is breached, "compensation will be inadequate, or will be unlikely to be forthcoming."[122] Tadros continues by

[121] Tadros describes the Means Problem (or a close version thereof) in at least three places in *The Ends of Harm*. *See* Tadros, *The Ends of Harm, supra* note 1 at 113–14, 181–82, 266–67.
[122] *Id.* at 275. *See also id.* at 131-32, 279.

arguing that there are enforceable duties to avert the wrongful threats that one has created; this is the Defensive Means Principle. If one has hired a hit man, for instance, he has a duty to stop him, and he could be forced to uphold this duty, by being used as a means if necessary—say, by being forced to stand in front of the bullet—as death is very serious and not compensable.[123] Tadros thus identifies a way in which someone can be used as a means permissibly: when doing so forces him to uphold an enforceable duty.

But what if the threat has already come to fruition and there is no ongoing or forthcoming attack to mitigate or prevent? Tadros argues that if one has already breached his duty, "he retains a duty to do the next best thing."[124] If I fail to turn up to paint your fence, as promised, then I ought to find someone to take my place, Tadros argues, or failing that, I ought to paint it as soon as possible.[125] Or failing both, I could pay damages. But what if the wrong cannot be easily rectified by damages, as Tadros believes is the nature of criminal as opposed to civil wrongs?[126] What if Greg has assaulted Henry? What is "the next best thing" that Greg can do, given that he cannot take his assault back? Due to the inadequacy of damages as a remedy for assault, Tadros argues that Greg can best fulfill his duty to rectify his wrong by preventing *another* person, say, Xavier, from assaulting Henry.[127] In this way, Greg could erase his assault, as it were, leaving Henry with the net result of having been assaulted once—just where he would have been had Greg refrained from assaulting him in the first place, with the difference that Xavier rather than Greg would have inflicted the assault. An offender's duty of rectification toward his victim is "enforceable," Tadros continues, such that victims can force offenders

[123] *Id.* at 192–94.
[124] *Id.* at 276.
[125] *Id.*
[126] *Id.* at 275-79.
[127] *Id.*

to uphold their duties by coercively using them as a means of preventing a future offense.[128]

The Corrective Justice Means Principle, rather than the Defensive Means Principle, is thus doing the relevant work for Tadros. On Tadros's theory, offenders rectify their past wrongdoing by preventing or mitigating ongoing or future wrongs. Defending the victim is simply the means of compensation.[129] It is an

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[128] At various points, Tadros emphasizes the "urgency" of enforceable duties, where if someone does not act to uphold his duty *right now*, then very serious, uncompensated harm will result. "[A]s it is urgent that I do my duty and that I do it now," Tadros writes, "you may force me to do it." *Id.* at 268. *See also id.* at 189. Tadros ought to shed this "urgency" requirement, because it creates an unreasonable escape hatch for many wrongdoers: so long as they could fulfill their duty in the future—even if there is no reason to think that they will in fact do so—then the duty would not be enforceable. More to the point, if he insists on the "urgency" requirement, then the duty to rectify one's wrongs would not be enforceable in most cases, and his theory (and the corrective justice theory of punishment, as well) would dissolve. For if we imagine a timeline of future offenses against Henry, whether Greg stops the very first one or not will not substantially impact Greg's ability to fulfill his duty of rectification. If he fails to stop the first offender, this is in fact highly compensable, by stopping a later one; and so, consistent with the urgency requirement, we could not force him to fulfill his duty. But I cannot see why a duty of rectification in such cases would be unenforceable, assuming we had reason to believe that he would not fulfill the duty at any point in the future. Thanks to Patrick Tomlin for helpful discussion on this point.

[129] Daniel Farrell, by comparison, has developed a theory of deterrent punishment connected more directly to self-defense principles. His theory was the first, to my knowledge, to attempt to secure a non-consequentialist grounding for the pursuit of general deterrence—or at least the first contemporary theory, if one wanted to include Hegel in that category. Farrell's theory, while based upon self-defense principles, relies not on the Defensive Means Principle, but on an interpretation of self-defense as a right founded in distributive justice. "When someone knowingly brings it about, through his own wrongful conduct, that someone else must choose either to harm him or to be harmed herself," Farrell writes, "justice allows the latter to choose that the former shall be harmed, rather than that she shall be harmed…" Daniel M. Farrell, "The Justification of Deterrent Violence," *Ethics* 100 (1990): 301-17, at 302. Farrell follows Warren Quinn in conceiving of the criminal law as a system of threats of punishment. *See* Warren Quinn, "The Right to Threaten and the Right to Punish," *Philosophy & Public Affairs* 14 (1985): 327-73. But Farrell questions why, if someone has violated a criminal law, we are entitled to follow through on our threat and actually inflict penal harm. He makes the following argument in response: Given that the criminal law is a system of threats, when someone breaks the law he forces us to choose either to (a) harm him consistent with our threats or (b) allow ourselves to be harmed by future offenders, who have learned that we do not follow through on our threats. Thus, Farrell concludes, we are entitled to punish the offender, letting him rather than us suffer the relevant harm, given that he has forced the choice upon us through his wrongdoing. *See also* Daniel M. Farrell, "Deterrence and the Just Distribution of Harm," *Social Philosophy and Policy* 12 (1995): 220-40; "The Justification of General Deterrence," *Philosophical Review* 94 (1985): 367-94.

Tadros replies, I think correctly, that Farrell's argument is "implausibly modest" as a theory of punishment, since it entails that the degree of punishment will be determined not by the offense itself, but by the extent to which the offender's non-punishment would impact the public's respect for the law. Tadros, *The Ends of Harm, supra* note 1 at 272–73. Tadros presents the counterexample of

offender's duty to rectify his past wrong, rather than any standalone duty to prevent or mitigate an ongoing or future wrong, that justifies punishment on his theory. The corrective justice view, to outline its basic mechanics once more, employs the same logic vis-à-vis an offender and society: the offender, by contributing to criminality in the past, has a duty to those reliant on the criminal law to rectify this contribution, which he can fulfill by preventing another's criminality contribution, such that those reliant on the criminal law face the same level of criminality over time.

Tadros enters the political realm by arguing that if a victim has a right to inflict harm upon his offender in order to protect himself from future offenses, then victims collectively have enforceable duties to donate their harming rights to the state.[130] It costs victims very little—indeed, a reasonably just state pursuing general deterrence should prove far more capable of using offenders efficiently and proportionally to prevent future offenses than individual victims acting alone—and such public state punishment will, via general deterrence, protect those non-victims who have no independent right to protection. This duty of donation is, in effect, an enforceable duty of easy rescue, Tadros argues ingeniously.[131] Crime victims can easily "rescue" non-victims by donating their punishment rights to the state, akin to saving a drowning person at the cost of wetting one's clothes. Crime

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someone who offends away from the public eye. "Suppose that you destroy my car in circumstances where no one else will find out about it." *Id.* at 273. It would seem, on Farrell's theory, that the state would have no reason to punish such an offender, given that his non-punishment would not undermine the credibility of the system of threats, or at least that it would have a much less demanding reason than if the criminal damage occurred in a very public place. This parallels the discussion above regarding whether Kleinfeld's reconstructivist theory can account for the professional and secretive offender. *See supra* note 97.

More generally, Farrell's theory requires a rather circuitous dialogue between the state and the offender with regard to the justification of his punishment, one which would be difficult to understand as a normative interpretation of any real system of criminal punishment: "We punish you not because you broke the law *per se*, nor because your actions were *in and of themselves* harmful, but because if we did not punish you, then others would get the wrong idea about how serious we are about upholding the criminal law."

[130] *Id.* at 293-311.

[131] *Id.* at 297-99.

victims, that is, can provide a great advantage to non-victims—protection from crime—at the cost of little if anything to themselves.

Offenders, Tadros continues, have no complaint to being used to protect people who are not their victims. This is because when doing so is expedient or necessary, offenders have enforceable *secondary* duties to work together toward the fulfillment of their *primary* duties toward their victims. If only I can prevent a future assault against your victim, and only you can prevent a future assault against my victim, then we each have an enforceable secondary duty to agree to protect the other's victim.[132] Given that, in the real world, the best available method of protecting their victims is to threaten future offenders via a system of state punishment, offenders have enforceable duties to work together, as it were, to receive punishment and thereby maintain such a system. So, while offenders are being used to protect people who are not their victims, it is morally permissible because it is in the service of their own personal duties.[133] Thus, for Tadros, with the state bound essentially to both the victim's right to rectification and the offender's duty to rectify, the moral transforms into the political, and the state holds an exclusive right to punish (for the purpose of general deterrence). The Means Problem, meanwhile, is purportedly resolved because when the state uses offenders as a means of preventing crime it is not using them merely to mitigate harms or threats for which they have no responsibility, but rather forcing them to fulfill their own (enforceable) duties of rectification.

B. Critique and Comparison

Given its complexity (and ingenuity), criticism of *The Ends of Harm* has been something of a group project.[134] No single paper or chapter can engage with the work as a whole, and analyses tend to focus on one or maybe two links in its long

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[132] *Id.* at 184, 192–94, 266–68, 274–76.
[133] *Id.* at 279–81.
[134] *See* symposia on the book in *Jerusalem Review of Legal Studies* 5 (2012); *Law and Philosophy* 32 (2013); and *Criminal Law and Philosophy* 9 (2015).

chain of arguments. While this may seem like a sign of strength, it is actually a weakness. By having so many interlocking components, all of which are necessary for the argument as a whole to work, the theory is wide open to potentially fatal attack, even if many of its individual components are sound (and inspiring). A chain is only as strong as its weakest link. I will focus here on only two aspects of the theory, accordingly: first, whether victims would have a duty to donate their right of protection to the state and, second, the implications of Tadros's theory for tort law.

As to the first issue, whether victims would have a duty to donate their right of protection to the state, it is not clear that preventing future offenses will always—or even usually—be the best means of rectification. In many situations, the payment of damages would be superior, I believe, given that (a) damages are not *entirely* inadequate as a means of rectification[135] and (b) whether there will be future offenses of the same type to deter is uncertain. If my house was burgled and the chance of a second burglary is low, payment of damages might be better as a means of rectification, however inadequate, than the deterrence of a possible, but unlikely, future burglary. Tadros might reply that punishment could protect victims from other types of offenses. In that case, though, where my house is burgled and I use the offender ultimately to prevent, say, a car theft or an assault, that seems no better than damages at "matching up" with and erasing the initial wrong. As a means of rectifying the particular offense he suffered—the moral concern that drives Tadros's theory—a victim might strongly prefer the certainty of damages in his pocket to protection from hypothetical future crimes. If the offender lacked

[135] *See* Kimberly Kessler Ferzan, "Rethinking *The Ends of Harm*," *Law and Philosophy* 32 (2013): 177-98, at 189–92 (arguing that some crimes, especially but not only property crimes, would be fully compensable with damages, such that the rich who could afford to pay such damages may be able to avoid punishment on Tadros's view); Randy E. Barnett, "Restitution: A New Paradigm for Criminal Justice," *Ethics* 87 (1977): 279-301 (arguing for a penal system centered on offenders providing financial restitution for victims). *But see* Daniel McDermott, "The Permissibility of Punishment," *Law and Philosophy* 20 (2001): 403-32 (arguing that damages could never fully rectify denying someone the treatment she was owed as a rights-holder).

the resources to pay immediately, maybe the victim could receive a percentage of his wages for a period of time.[136]

Aside from damages, perhaps the victim would prefer a form of equitable remedy other than punishing the offender to prevent future offenses, as Kimberly Kessler Ferzan argues.[137] A victim of car theft, she writes, might prefer that the car thief wash his car regularly, rather than be punished to deter future car thefts.[138] Tadros misreads Ferzan, I think, when he replies that it would be disproportional to harm an offender significantly for the sake of providing a minor benefit to the victim like a car washing. He imagines a scenario in which a boulder rolls over an offender, breaking his legs, but somehow triggering a free car wash.[139] But Ferzan's vision is of the offender himself doing the car washing, and receiving no further punishment, so Tadros's worry about the disproportionality of car washing as a means of rectification seems inapposite.

If this holds, then donating to the state your right to rectification, and thereby giving up your right to damages or non-penal equitable remedies, would not be without cost; and Tadros's "easy rescue" argument as an explanation for why the state can coercively take this right away from victims would be placed into doubt. Tadros (very interestingly) conceives of victims' personal rights to rectification as "protective resources," almost akin to a natural resource that ought to be distributed fairly within society.[140] But consistent with a liberal conception of individual rights, it seems that victims ought to have a choice over how they wish to proceed with their own rights to rectification: to sue for damages or an equitable remedy unrelated to preventing future attacks, to force the offender to serve as a

[136] *See* Barnett, "Restitution," *supra* note 135 at 288–90.
[137] Ferzan, "Rethinking *The Ends of Harm*," *supra* note 135 at 192–94.
[138] *Id.*
[139] Victor Tadros, "Responses," *Law and Philosophy* 32 (2013): 241-325, at 304.
[140] *Id.* at 307.

personal bodyguard for some period, to donate their punishment right to the state, or to choose not to pursue any action at all.

Tadros might reply that for a duty of rescue to be operative it need not be the case that fulfilling the duty be without cost or even without significant cost. But what is his principle, exactly, for determining when someone is obligated to exercise an otherwise personal right for the benefit of others? Does he endorse a version of Peter Singer's famous principle of rescue: "[I]f it is in our power to prevent something bad from happening, without thereby sacrificing anything of comparable moral importance, we ought, morally, to do it"?[141] Such a principle is extraordinarily demanding, as Singer understands.[142] And were it enforced as a matter of law it would potentially conflict with a foundational liberal principle that Tadros himself elucidates in a different context: "people are entitled to determine for themselves which ends to pursue, even if their ends are not the most valuable ends considered impartially."[143] If the money spent on a dinner out or a fashionable piece of clothing could be used by Oxfam to save a life—as it could—and if a dinner out or fashionable piece of clothing is not of comparable moral significance to a life saved—as it is not—would such purchases be illegal?[144] What about the choice of one's career? Is that of comparable significance to a life saved? If it is *not*, would the government have the right to force one into the career path that enabled her to save the most lives by producing the most economic value? This is somewhat hyperbolic, but Tadros imagines that the state can coercively enforce a victim's duty to rescue non-victims, even as it relates to a victim of a very minor offense protecting others from such an offense. At a minimum, then, Tadros owes

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[141] Singer, "Famine, Affluence, and Morality," *supra* note 117 at 231.
[142] *Id.* at 235.
[143] Victor Tadros, "Wrongful Intentions Without Closeness," *Philosophy & Public Affairs* 43 (2015): 52-74, at 65.
[144] For interesting discussion on the morality of a comparatively well-off person choosing to, say, go out to dinner, in the context of her duties to the global poor, see Miller, "Beneficence," *supra* note 117.

us an explanation as to how far his own legally enforceable duty of rescue goes, and what its implications are when extended beyond the criminal law context.

The corrective justice and social defense views, by comparison, can sidestep these complications. They do not require the victim's personal right to rectification to justify state punishment, given that the relevant wrong—a criminality contribution—is against the community as a whole. This coheres with the legal principle that it is the state, rather than the victim, that prosecutes individuals for criminal offenses: it is not *Victim v. Offender*, but *The People v. Offender*. The entire institution of the criminal law, from the police to courts to prisons to the parole system, is engineered for the state and the wider community to assert their own interests against offenders. The notion, then, that this institution is founded on the process of victims donating their moral rights to the state is at best an awkward fit as a matter of interpretation.[145]

Secondly, if Tadros were able to reply effectively to these worries, and establish that victims in fact have a legally enforceable duty to donate their right of rectification to the state for the purpose of general deterrence—and in a principled manner that would have acceptable implications for liberal rights more broadly—then his theory would have an extraordinary implication for tort law. Once more, Tadros believes that the nature of criminal as opposed to civil wrongs is that the former cannot easily be rectified by damages. The purpose of the criminal law, on his view, is to rectify criminal wrongs, while the purpose of tort law is to rectify civil wrongs. Here is the extraordinary implication: there is no place in this story for the victim of a criminal wrong to sue for tort damages. The rectification he

[145] There is a movement to increase the participation of victims in the criminal process; its very existence, though, is evidence that victims' rights are not central to the institution as currently structured. *See generally* Douglas E. Beloof, Paul G. Cassell, and Steven J. Twist, *Victims in Criminal Procedure,* 3rd ed. (Durham: Carolina Academic Press, 2014); Markus Dirk Dubber, *Victims in the War on Crime: The Use and Abuse of Victims' Rights* (New York: NYU Press, 2002); Lynn N. Henderson, "The Wrongs of Victim's Rights," *Stanford Law Review* 37 (1985): 933-1021; Erin Ann O'Hara, "Victim Participation in the Criminal Process," *Journal of Law and Policy* 13 (2005): 229-47.

seeks would be secured by the prevention of future offenses against him, rather than damages. As a judge might explain in rejecting a victim's suit, the victim has already forced his wrongdoer to suffer so as to prevent future wrongs against him—he has already, say, sent him to jail for his own personal benefit—and so he has already been made whole and can ask no more of his wrongdoer. Such an outcome—no tort damages for crime victims—is a dramatic consequence of Tadros's theory, and we should very much prefer a theory that allows for such damages. The corrective justice and social defense theories, by comparison, are able to motivate the criminal law while maintaining a tort system for crime victims. Again, the distinctly criminal wrong on these views, that which makes one liable to state punishment, is not a wrong against an individual victim, but rather a wrong against the wider society in the form of a contribution to criminality.

The corrective justice and social defense theories thus follow Farmer's guidance that theories of punishment must not merely identify discrete criminalizable wrongs, but must also account for the criminal law as a whole, as an institution central to the maintenance of social cooperation.[146] The two theories do this very directly, as the criminal wrong on either view *just is* the hinderance of the criminal law's institutional aims. Indeed, we can view the criminal wrong as a tort against society or, more precisely, against the individuals within society, all of whom rely upon the institution of the criminal law, and with the corrective justice and social defense principles working to repair that social damage. The offender's tort against his individual victim—as well as the state's potential liability for its failure to protect the victim, as discussed above—are distinct issues to be considered in the separate civil system.

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[146] *See* Farmer, *Making the Modern Criminal Law, supra* note 60 at 299 ("What links disparate rules on, say, forgery of documents, the sale of poisons, the regulation of jurisdiction overseas and so on, is a common sense that they belong to something which can be described as the 'criminal law'. What makes this intelligible as an idea is not only that the rules may share certain common properties (which is not always the case), or that the rules carry penal sanctions, but also that they are directed at securing civil order in some way.").

VIII. Empirical Foundations

The theory of the criminal law and of state punishment which I have set out and defended rests upon an empirical assumption: an effective, reliable criminal law is foundational to the maintenance of a cooperative civil society and to people's assured liberty. If this assumption (or set of assumptions) were false, then consistent with this chapter's first premise—that to justify its extreme institutional costs, state punishment must deter crime to some sufficient degree—there could be no legitimate system of state punishment.[147] This is not just an issue for the corrective justice and social defense theories, then, but for all purported justifications of state punishment. If we could secure social peace and cooperation without the threat of punishment—if, say, the operation of non-legal social norms would suffice to diminish the threat of crime—then the enormous expense of the criminal justice system, with its police, prosecutors, defense attorneys, judges, prisons, parole officers, and so forth, would be unjustifiable, given the great mass of suffering that even a relatively mild system of criminal punishment inflicts on offenders and their dependents, and given all that we might otherwise do with those resources. To be clear, it would be unjustifiable even if retributivists were right that, regardless of its deterrent impact, all offenders deserved to suffer or be censured. For the imperative of retributivist penal desert, even if legitimate, could not be an absolute trump.[148] And if its infliction played a negligible role in deterring crime, then that imperative would be overridden by the wants and needs that we could otherwise fulfill with penal resources.

What, then, should we make of the empirical claim regarding the impact of the criminal law—of the threat of criminal punishment—on society and social

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[147] *See supra* note 1.

[148] Kant famously disagrees. Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right* [1796], trans. William Hastie (Edinburgh: T. & T. Clark, 1887), at 198 (arguing that, even in a disbanding island society, "the last Murderer lying in the prison ought to be executed . . . in order that every one may realize the desert of his deeds, and that bloodguiltiness may not remain upon the people.").

cooperation? It is difficult to know with certainty. It would require assessing a polity with, and then without, a functioning criminal law over a sufficiently long period of time. The historical examples we have—say, when German soldiers arrested the entire Danish police force in 1944,[149] when US and coalition forces overthrew the Baathist regime in Iraq in 2003,[150] and when the police force of the Brazilian state of Espirito Santo went on strike in 2017[151]—loudly support the thesis that the threat of criminal punishment plays a crucial role in decreasing the crime level. But these "experiments" were not run for long enough, one might argue, and perhaps over a longer period of time sufficient non-penal and possibly non-legal modes of regulation would emerge to guarantee people's assured liberty.[152] Perhaps. Claus Roxin writes perceptively on how we ought to interpret the lack of definitive social science evidence on the deterrent impact of state punishment, given the complex causal relationships at play in someone's decision to offend. At the same time he articulates the reliance interest of non-victims on the criminal law:

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[149] Johannes Andenaes, "The General Preventive Effects of Punishment," *Pennsylvania Law Review* 114 (1966): 949-83, at 962 (reporting that, during the German occupation of Denmark, when an unarmed watch corps served as a makeshift police force, the frequency of street crimes like robbery rose very sharply, though the incidence of crimes such as embezzlement and fraud was less affected.)

[150] *See, e.g.*, Naomi Klein, "Baghdad Year Zero," *Harper's Magazine,* September 2004, 43–53 (reporting widespread lawlessness after the fall of the Baathist regime); John F. Burns, "Pillagers Strip Iraqi Museum of Its Treasure," *N.Y. Times*, April 12, 2003, http://www.nytimes.com/2003/04/12/international/worldspecial/pillagers-strip-iraqi-museum-of-its-treasure.html (reporting looting).

[151] *See, e.g.*, Paulo Whitaker and Pablo Garcia, "Over 100 Dead in Brazil as Police Strike Spurs Anarchy," *Reuters*, February 9, 2017, http://www.reuters.com/article/us-brazil-violence-espirito-santo-idUSKBN15O1ZT (reporting widespread violence in the wake of the police strike); Lola Mosanya, "'Crazy Violence' in Brazilian State During Police Strike," *BBC News*, February 11, 2017, http://www.bbc.co.uk/newsbeat/article/38942911/crazy-violence-in-brazilian-state-during-police-strike (same); *BBC News,* "Brazilian City of Vitoria Hit by Police Strike," February 6, 2017, http://www.bbc.co.uk/news/world-latin-america-38879775 (same); Paulo Whitaker, "Some Brazil Police Break Strike Following Wave of Homicides," *Reuters*, February 12, 2017, http://www.reuters.com/article/us-brazil-violence-idUSKBN15R0SU (same).

[152] Even if that were the case, we might have reason, nonetheless, to prefer a legal to a non-legal system of protections. As Jeremy Waldron writes in discussing the treatment of Romeo and Juliet by the Montagues and Capulets: legal protections have the advantage of not depending upon the potentially fickle affections of a closely-knit social group. Jeremy Waldron, "When Justice Replaces Affection: The Need for Rights," in *Liberal Rights: Collected Papers 1981–1991* (Cambridge: Cambridge University Press, 1993), 370-91, at 377-79.

> "This indeterminacy [in the social science evidence]…does not change the fact that a functioning system of social control and criminal justice is—taken in the totality of its social effects—certainly capable of helping to maintain…civil peace for citizens. Some crimes will, of course, still be committed. But whereas in Germany one can walk the streets safely at night, there are other countries in which this is impossibly dangerous and where people hide away in their houses surrounded by high walls. One cannot seriously doubt that such a deplorable state of affairs is due to failures of preventive social management, ranging from police work to the operations of the criminal courts and the correctional system. (That these failures are, in turn, a consequence of poverty and other social problems, is a different point.)"[153]

Let us continue, then, with the commonsense empirical view that a functioning criminal law decreases the threat of crime significantly, but with the understanding that should this claim prove false, or should there be less costly non-penal and possibly non-legal modes of securing sufficient crime reduction, that it would gravely damage any justification of the criminal law. To be sure, this is not to assume that the criminal law's deterrent impact depends upon any particular level of punishment severity, but merely upon the effective threat of at least some level of punishment, the infliction of which would be a matter of public knowledge.[154]

IX. Sentencing Implications

We have now filled in the basic contours of two novel (but closely related) theories of deterrent punishment. The offender, by contributing to criminality, has diminished the assured liberty of everybody in the jurisdiction, by contributing to a social threat that (a) chills the exercise of their rights, (b) forces them to take

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[153] Roxin, "Prevention, Censure, and Responsibility," *supra* note 1 at 29-30. *See also* MacCormick, *Institutions of Law, supra* note 63 at 207-08.

[154] There is considerable evidence that the certainty of receiving *some* level of punishment is more important for the purpose of deterring would-be offenders than the *severity* of the punishment that they receive. *See* Daniel S. Nagin, "Deterrence in the Twenty-First Century: A Review of the Evidence," in ed. Michael Tonry, *Crime and Justice in America: 1975–2025* (Chicago: Chicago University Press, 2013); Andrew von Hirsch, et. al., *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (Portland: Hart, 1999), 27, 36, 45; Steven N. Dulauf and Daniel S. Nagin, "Imprisonment and crime: Can both be reduced?" *Criminology & Public Policy* 10 (2011): 13-54.

expensive precautions, and (c) subjects them to unreasonable risks of harm. At the far extreme, indeed, criminality can threaten the maintenance of a cooperative, non-violent civil society. Deterrent punishment, which acts to reduce the amount of criminality in society going forward, is the means by which the offender rectifies or mitigates his past and possibly ongoing contributions to criminality. In this way, he is not punished so as to limit the problem of future crime, for which he has no responsibility, but rather to force him to fulfill his own duties of repair. And thus, in sum, we have a non-consequentialist justification for deterrent punishment, one that coheres with the principle of human inviolability, with a steadfast refusal to sacrifice offenders as mere means to the greater good.

If this indeed works to answer the *why* question of criminal law theory—Why is the state entitled to harm someone when he commits an offense?—the *how much* question remains nonetheless—How much harm should the state inflict?[155] More particularly, to return to the "internal" punishment limitations question described at the outset: How much harm is the state entitled to inflict upon an offender, looking only to the reasons that positively justify the infliction of penal harm? That is, as we inflict more and more harm upon an offender, at what point do these reasons themselves stop providing a moral justification for doing so? The most basic sentencing implication of the two theories is as follows: The greater one's criminality contribution, the greater the amount of criminality he has a duty to erase, and thus the more severe the punishment he is liable to receive. There

[155] Andrew von Hirsch writes that the latter question is often overlooked in criminal law theory: "Philosophical writing has chiefly confined itself to the general justification of punishment, why the criminal sanction should exist at all. Seldom addressed, however, has been what bearing the justification for punishment's existence has on the question of how much offenders should be penalized." Von Hirsch, *Censure and Sanctions*, *supra* note 20 at 6; *see also* Duff, *Punishment, Communication, and Community*, *supra* note 20 at 131 ("A normative theory of punishment must either include, or be able to generate, a theory of sentencing—an account of how particular modes and levels of punishment are to be assigned to particular kinds of offense and offender. Only then can it guide or even connect with the actual practice of punishment.").

are, however, a number of subsidiary issues to consider in order to make sense of this claim.

First, how do we know when one criminality contribution is greater than another? Given that the ultimate aim is assured liberty, we can ask the following question: How important is it to people, in the planning and execution of their lives, to be able to rely upon others not performing those acts?[156] We can see, in this way, how Inez's intention to kill represents a greater criminality contribution than Ryan's willingness to speed while driving or to drive recklessly.

Second, we need to understand the *fungibility* of criminality when considering an offender's duties. Given that the criminal law is a *system* of protections, such that people rely upon clusters of protections at any given time, as discussed above, one's duties would not be limited to preventing his or her offense type. That is, what Inez did, by making her criminality contribution, was—in concert with other offenders—to chill the exercise of our rights, to force us to take expensive precautions, and to subject us to unreasonable risks of harm. She could rectify this by deterring offenses of a different type, given that the negative impact of those other offenses will register in the same manner. She need not deter only murderers, that is; and she would not be acquitted if she happened to be the only murderer in society.

Given the fungibility of criminality, we can restate the basic sentencing principle in the following manner: By increasing past and possibly present criminality by X units, the offender has a duty to decrease future criminality by X units. To be sure, the notion that we can measure criminality in precise, cardinal "units," like we can measure inches or kilograms, is metaphorical. But, in the first instance, the

[156] For historical and theoretical analyses of why societies criminalize certain actions but not others, and how this deliberative process depends on a society's particular conception of "civil order," see Farmer, *Making Modern Criminal Law*, *supra* note 60.

metaphor provides some useful—and not especially distortive—structure to the sentencing inquiry.

A. Proportionate Deterrent Punishment

Assuming that this basic sentencing principle holds, when do the reasons that justify the infliction of penal harm switch off, as it were, failing to provide justification for the infliction of further harm? I will outline a number of guiding principles.

1. Parsimonious Punishment

Most fundamentally, according to the two theories, the infliction of penal harm at any level is justified only so long as it acts to deter crime, given that the theories are not retributivist and thereby deny that the suffering of offenders is intrinsically good. It may be more efficient, indeed, for offenders to fulfill their duties of rectification and mitigation in ways other than (or in addition to) hard treatment, such as fines and community service.[157] Any marginal increase in penal harm that was not met with a marginal increase in crime deterrence would represent a wanton and illegitimate injury. We must endorse those methods of punishment that enable an offender to fulfil his duty with the smallest degree of injury in the process, as discussed above. Related, given that the suffering of offenders is not an intrinsic good on this view, and given that the budget for crime prevention is limited, the state should ask, for each dollar spent, whether non-penal community investments would represent a more efficient means of reducing criminality—with the understanding that, consistent with the discussion in Section VIII, not all resources could be diverted from the project of general deterrence via the threat of punishment.[158] We can unite these two concerns—penal harm must

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[157] *See supra* note 93.

[158] There is considerable evidence that early childhood development programs are effective in reducing crime. *See* James Heckman, Rodrigo Pinto, and Peter Savelyev, "Understanding the Mechanisms Through Which an Influential Early Childhood Program Boosted Adult Outcomes," *American Economic Review* 103 (2013): 2052-86; Alex R. Piquero, et. al., "Effects of early family/parent training programs on antisocial behavior and delinquency," *Journal of Experimental Criminology* 5 (2009): 83–120.

generate deterrence and must be the most efficient means of generating deterrence—to conclude that the infliction of such harm must be *parsimonious*.

2. Reparative Punishment

But if inflicting harm upon an offender is indeed "parsimonious"—an effective and maximally efficient means of generating deterrence—what are the internal limits to inflicting more and more harm? Let's consider Alex, whose intention to steal a car increased criminality in the past by, say, 10 units. What are the internal limits with regard to his punishment? First, the state would be entitled to harm him so as to decrease future criminality by 10 units, *but no more*. Traditional Benthamite deterrence theories, by comparison, would license the infliction of progressively more harm upon offenders, so long as doing so was a "frugal" means of reducing pain and increasing pleasure overall in society—taking into account the offender's own experience of pain as a result of his punishment.[159] But the Benthamite sentencer would be unconcerned ultimately with the severity of his offense, and she would be happy to make a vicious example of a minor offender—or, indeed, of an entirely innocent person—if that happened to be an efficient means of securing deterrence and increasing the average incidence of pleasure in society. It is because the two theories can foreclose such an outcome, as discussed above, that they are "constrained" instrumentalist theories.[160] Once his duty of repair has been fulfilled, even if the state could decrease future criminality very efficiently by inflicting even minor additional harms upon Alex, the two theories would not license the infliction of any further harm. He is only responsible for his own criminality contributions. He "owes" no more to society once he has been used, via general deterrence, to decrease future criminality by 10 units. He has at

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[159] Bentham offered thirteen rules for determining a proportional utilitarian sentence, including a prohibition on "unfrugal" punishments—punishments that, taking into account the offender's pain as a result of the punishment, would fail to maximize utility overall. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* [1789], ed. W. Harrison (Oxford: Basil Blackwell, 1948), chs. XIV and XV.

[160] *See supra* note 28.

that point made society whole, and to inflict any additional harm upon him is the moral equivalent of hurting an innocent person. In this way, we can say that punishments must be *reparative*, repairing the offender's own wrongdoing, rather than merely being "useful."

3. Equitable Punishment

What if the infliction of deterrent harm is parsimonious and reparative, but inefficient? That is, when inflicting penal harm is the most efficient means of generating deterrence *and* the offender has not yet fulfilled his duty of repair, are there any internal limits to inflicting more and more harm? What if, in the case of Alex and other car thieves, the only way to generate their respective 10 units of deterrence was to inflict enormous amounts of harm on them, say, by incarcerating them for 30 years each? What are the limits, if any, to how much harm one may undergo in order to repair his wrongdoing? This question would seem to be at home in tort law, except for the fact that the payment of damages is the standard means of repair in that realm. In that case, where the financial "harm" borne by the defendant tortfeasor and the rectificatory financial "benefit" gained by the plaintiff are in precise equipoise, the question of whether the cost to the defendant is disproportionate to the benefit to the plaintiff will never emerge.[161] We can, however, find some coarse insights within the law of equity, examining when courts will grant an injunction in response to a tort, most notably in response to a nuisance or trespass, or specific performance in response to a breach of contract, most notably with real property contracts.[162] In those cases, it would indeed be

[161] That is not to say that proportionality has no place is the realm of tort damages. As Jeremy Waldron argues, the financial harm borne by the defendant could be disproportionate to her own moral liability. *See* Jeremy Waldron, "Moments of Carelessness and Massive Loss," in ed. David G. Owen, *Philosophical Foundations of Tort Law* (Oxford: Oxford University Press, 1997), 387-409.

[162] "Specific performance," according to the Uniform Code of Contracts, "may be decreed where the goods are unique or in other proper circumstances," especially with (but not limited to) real property contracts. U.C.C. § 2-716(1) (1999). The premise is that, given the uniqueness of what the claimant has contracted for, it will be difficult if not impossible for her to purchase a suitable substitute, and thus damages would be an inadequate as a means of making her whole. Real property is not the only type of "unique" good; *see Triple-A Baseball Club Assocs. v. Ne. Baseball, Inc.*, 832 F.2d 214, 224 (1st Cir.

possible that the cost to the defendant in making the plaintiff whole could outweigh the plaintiff's benefit. And while there is a diversity of authorities on the matter, to be sure, there is an established tradition within the common law of equity that strikes an intuitive balance.

In *Boomer v. Atlantic Cement Co.,* 257 N.E.2d 870 (N.Y. 1970), for instance, the New York Court of Appeals held famously that a cement factory could continue polluting surrounding properties because the cost of abatement—closing down a $45 million plant that employed hundreds of workers—far outstripped the plaintiff's damages.[163] The court awarded continuing damages as a remedy. Similarly, in *Blackfield v. Thomas Allec Corp.* 128 Cal.App. 348 (1932), the California Court of Appeal affirmed the denial of an injunction where a wall overhanging plaintiff's property by 3 5/8 inches and causing $200 in damages would have cost $6,875 to be removed. In *Christensen v. Tucker*, the California Court of Appeal followed *Blackfield* among other cases in determining that *denial* of injunction in encroachment cases requires the presence of three factors, including that "the hardship to the defendant by the granting of the injunction must be *greatly disproportionate* to the hardship caused plaintiff by the continuance of the encroachment…"[164] English

1987) (holding that a minor league baseball franchise, for which the plaintiff had contracted, was "unique in character and cannot be duplicated," and thus that specific performance of the contract was warranted); *Leasco Corp. v. Taussig,* 473 F.2d 777, 786 (2d Cir. 1972) (specifically enforcing contract for sale of business, as each business is "unique").

[163] Jeff MacMahan distinguishes between "narrow" proportionality, which considers whether a harmful action is proportional with regard to the harm it causes those who are *liable* to be harmed (e.g. opposing soldiers), and "wide" proportionality, which *additionally* considers the harm it causes those who are *not liable* to be harmed (e.g. civilians). Jeff MacMahan, "Proportionality and Time," *Ethics* 125 (2015): 1–24, at 2-4. In considering the impact of the plant's closure not only on the defendant corporation, but also on its employees and the surrounding community, the court in *Boomer* was engaging in "wide" proportionality analysis. *See also* Jeff McMahan, "What Rights May Be Defended by Means of War?" in eds. Cecile Fabre and Seth Lazar, *The Morality of Defensive War*, (Oxford: Oxford University Press, 2014), 115-58, at 124-25; *Killing in War* (Oxford: Oxford University Press, 2009), 21.

[164] *Christensen v. Tucker*, 144 Cal.App.2d 554, 563 (1952) (emphasis added). *See also Wright v. Best*, 19 Cal. 2d 368, 386 (1942) (recognizing the "balancing of conveniences doctrine," by which a "court of equity may deny injunctive relief and relegate the plaintiff to his remedy at law, if the benefit resulting to him from the granting of the injunction will be slight as compared to the injury caused the defendant thereby."); Restatement (Second) of Torts § 941 (1965) ("The relative hardship likely to result to the

cases provide similar guidance. In *Jordan v Norfolk County Council* [1994] 1 WLR 1353, for instance, an order for defendant council to replace trees on plaintiff's land was varied when it emerged that the cost of compliance would be over £250,000. The plaintiff's damage was valued at £200 and the value of the entire property was £25,000.

Meanwhile, within contract law, the Second Restatement of Contracts provides that specific performance would be inappropriate when it "would work an *unconscionable advantage* to the plaintiff or would result in injustice."[165] In *Kilarjian v. Vastola*, the New Jersey Superior Court declined to specifically enforce a contract for the buyers' "dream home," since the seller's health had deteriorated in the interim, such that moving out of the house might "precipitate respiratory failure and hasten [her] demise."[166] English law provides, along the same lines, that specific performance may be refused where it would bring a "severe hardship to the defendant," [167] such as effectively requiring him to bring legal proceedings against a third party, which might disrupt family relations, or "hardship amounting to an injustice."[168] In *Patel v Ali* [1985] Ch 283—a case very similar to *Kilarjian*—the Chancery Division denied plaintiff home buyers specific performance, because the seller's condition had worsened in the intervening period—losing her leg to amputation and her husband to prison, while gaining two children—and she would have lost crucial assistance from neighbors and nearby family had she been forced to move. The Court held that this qualified as an "extraordinary and persuasive

defendant if injunction is granted and to the plaintiff if it is denied, is one of the factors to be considered in determining the appropriateness of an injunction against tort.").

[165] Restatement (Second) Of Contracts § 359(3) (1981) (emphasis added).

[166] *Kilarjian v. Vastola,* 877 A.2d 372, 375 (2004). *See also Van Wagner Adver. Co. v. S & M Enter.*, 492 N.E.2d 756 (N.Y. 1986) (denying specific performance due to disproportionate hardship).

[167] *See Thomas v Dering* (1837) 1 Keen 729 at 747-48; *Hartlepool Gas and Water Co v West Hartlepool Harbour and Rly Co* (1865) 12 LT 366; *Bulger v McManaway* [1963] NZLR 427.

[168] *Tamplin v. James* (1880) 15 Ch.D. 215 at 221.

circumstance" whereby "hardship" could vitiate one's duty to perform on a real property contract.[169]

We can apply these principles of equity to our conception of penal proportionality. First, we should avoid the (tempting) Benthamite conclusion that the harm borne by the offender must never be greater than the harm prevented in the process. For instance, we do not think that the sellers in *Kilarjian* or *Patel* ought to be able to avoid specific performance based on a showing that moving out would harm them *slightly* more than failing to move out would harm the buyers. Second, and more to the point, we should conclude that it is impermissible to harm an offender to a degree that is *entirely out of proportion* to the harm prevented by doing so, even if that meant that his duty of repair toward society went to some degree unfulfilled. As courts in equity have discerned, duties of repair have an internal limit in this manner—one which is vague both in terms of its practical application and indeed its precise conceptual foundation, but one which is, just the same, intuitively compelling if not undeniable. A 30-year sentence for Alex, even if it were the singular means by which he could decrease criminality by 10 units, would be entirely out of proportion to the reparative benefit gained by society as a result—just as removing the overhang in *Blackfield*, at a cost of $6,875, would be entirely out of proportion to the $200 in damages suffered by the plaintiff. And it would thereby be impermissible for reasons internal to the corrective justice theory and Alex's duty of repair. It is not that such a punishment might degrade Alex or waste social resources—separate and legitimate considerations, to be sure—but that such a degree of harm bears the entirely wrong relationship or proportion to the stringency of his own duty. And as we are taking our cue from the law of equity, we can say that such punishment would be *inequitable*.[170]

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[169] *Patel v Ali* [1985] Ch 283 at 288.

[170] This dovetails—to a degree—with the internal limits to Tadros's theory. Tadros argues that (a) the harmfulness of an offender's punishment, inflicted as a means of protecting his victim from future harms, can be no greater than (b) the amount that the offender could have been harmed to prevent

B. Punishment as Policy

Let us now step outside of the metaphor that criminality is like height and weight—that we can measure criminality, as well as the amount of criminality that punishment acts to deter, with cardinal precision. Measuring the deterrent impact of punishment is based on a counter-factual: How much crime would there be if we punished to X, Y, or Z degree? The state, of course, can only consider this question *prospectively*, in inherently broad brush, as a matter of general policy, delivering a set amount of penal harm for different classes of offenders. It is not as if the state could measure precisely how much criminality Alex's individual punishment prevents, releasing him once the mercury in his personal "criminality prevention thermometer" passes 10 units mark. To answer the prospective policy question requires us to leave the moral and enter the empirical, inquiring into how

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the attack in the first place. *See* Tadros, *The Ends of Harm*, *supra* note 1 at 331-60. He writes that an offender's "liability to be punished is derived from his principal obligation not to harm others, and hence the costs that he must bear may not exceed the costs that he would have had to bear to avert his own threat." *Id.* at 347. Tadros argues that the limits of preventive, defensive force are as follows: "One may not use the force necessary to avert a threat if that force is out of all proportion to the magnitude of the threat that one faces." *Id.* at 331; *see also id.* at ch. 8. Imagine, for instance, that someone threatens to slap you and your only means of prevention is to shoot her dead; to do so would be "out of all proportion" to the threat and thus impermissible. Applying this logic to the duty theory of punishment entails that the state must not harm an offender, as a means of rectifying his prior wrong to his victim, to a degree that is "out of all proportion" to the harm risked by that prior wrong. While Tadros's theory and the two theories thus share a broadly similar top-end limit, we should notice that they do not generate the same sentences up and down the offense spectrum. They seem to differ, most importantly, with regard to minor offenses and property offenses. More particularly, with regard to such offenses it appears that Tadros's limiting principle might lead to sentences that are overly lenient for the purpose of deterrence. Consider again the case of the compact disc thief—the case which Tadros raises to establish the inadequacy of talionic, eye-for-an-eye punishments when it comes to deterring minor offenses. *See supra* at 29. To what degree could a record store owner permissibly harm someone as a means of preventing him from stealing a single compact disc? Or a record player? Or even his car? We might doubt whether inflicting only such a degree of harm on such offenders, as a means of punishment, would be adequate for the purpose of deterrence. The corrective justice and social defense theories, with their socio-political conception of criminal wrongdoing, and with their direct purpose to repair a criminality contribution, would not be so constrained. Tadros might reply that we ought to imagine how much defensive harm the victim would be entitled to inflict in a state of nature context, not within an established legal environment featuring professional police who might be able to, say, catch the thief and return your compact disc. But with at least property and regulatory offenses, such analysis would be impossible, since such offenses could only occur within a legal context. That is, such offenses involve the violation of rights, like property rights, that only take shape within a relatively effective system of law.

much deterrence a particular sentencing regime or schedule generates as an empirical matter.

It is, to be sure, an inexact science. The challenge of making society whole, in this way, is interestingly different from the challenge of making an individual plaintiff whole in the context of tort damages. Such damages may rectify her losses only approximately, especially in non-commercial contexts, but that the plaintiff will receive these damages is not in doubt, assuming the defendant has sufficient resources. In the penal context, as understood here, the complication is reversed. Unlike damages in the civil context—but like an injunction or specific performance—decreasing future criminality would, if delivered in full, represent a perfectly neat means of repair. However, the degree to which the offenders will in fact "perform," in the form of decreased future criminality, is uncertain, and even if we assume that the state has vast penal resources at its disposal.

Though, it is not as if those charged with determining deterrent sentences are completely in the dark. As discussed above, for instance, there is considerable evidence that the *certainty* of receiving some level of punishment is more important for the purpose of deterring offenders than the *severity* of the punishment received.[171] Steven Dulauf and Daniel Nagin carefully survey empirical studies on crime deterrence in America to conclude that the "marginal deterrent effect of increasing already lengthy prison sentences is modest at best."[172] While they do not define "already lengthy," they are not making any statement as to the deterrent impact of increasing "short" sentences; they include the "already lengthy" modifier only because almost all of the studies that they look at examine the effect of increasing multi-year sentences.[173] Consider, for instance, California's "Three Strikes and You're Out" law. That law mandates a minimum sentence of 25 years after

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[171] *See supra* note 154.
[172] Steven N. Dulauf and Daniel S. Nagin, "Overview of 'Imprisonment and crime: Can both be reduced?'" *Criminology & Public Policy* 10 (2011): 9-11, at 9.
[173] Dulauf and Nagin, "Imprisonment and crime," *supra* note 154 at 31.

conviction for a third strike-eligible offense. Franklin Zimring, Gordon Hawkings, and Sam Kamin concluded that only those individuals with two strike-eligible offenses showed any indication of reduced offending, and that the law reduced the felony crime rate overall by at most 2%.[174] Other studies have found similarly modest evidence of the crime-preventative effects of the law.[175] Dulauf and Nagin argue that the data strongly favors investments in the police. "Increasing the visibility of the police by hiring more officers or allocating existing officers in ways that heighten the perceived risk of apprehension seems to have substantial marginal deterrent effects."[176] One policy, toward this end, is stationing officers in crime "hot spots."[177] Assuming a limited amount of crime prevention resources—and assuming that the only policy options are police or incarceration—Dulauf and Nagin conclude that resources would be far more efficiently spent on increasing police presence than on lengthy sentences. Mark Kleiman and David Kennedy have reached similar conclusions.[178]

While there are many variables at play, a number of European states have for decades now coupled low crime rates with mild sentencing regimes.[179] This is surely the ideal outcome from the perspective of the corrective justice and social defense theories, given their concern to decrease criminality with as little injury to

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[174] Franklin E. Zimring, Gordon Hawkins, and Sam Kamin, *Punishment and Democracy: Three Strikes and You're Out in California* (New York: Oxford University Press, 2001). Cited in Dulauf and Nagin, "Imprisonment and crime," *supra* note 154 at 28.

[175] *See* Lisa Stolzenberg and Stewart J. D'Alessio, "'Three strikes and you're out': The impact of California's new mandatory sentencing law on serious crime rates," *Crime & Delinquency*, 43 (1997): 457–469; Peter Greenwood and Angela Hawken, *An Assessment of the Effect of California's Three-Strikes Law* (Santa Monica: Greenwood Associates, 2002). Cited in Dulauf and Nagin, "Imprisonment and crime," *supra* note 155 at 28.

[176] Dulauf and Nagin, "Overview," *supra* note 174 at 9.

[177] Dulauf and Nagin, "Imprisonment and crime," *supra* note 154 at 34-36.

[178] Mark Kleiman, *When Brute Force Fails: How to Have Less Crime and Less Punishment* (Princeton: Princeton University Press, 2009); David Kennedy, *Deterrence and Crime Prevention: Reconsidering the Prospect of Sanction* (Abingdon: Routledge, 2009).

[179] *See* Nick Cowen and Nigel Williams, "Comparisons of Crime in OECD Countries," CITIVAS: Institute for the Study of Civil Society, April 2012, http://www.civitas.org.uk/content/files/crime_stats_oecdjan2012.pdf (comparing rates of homicide, rape, robbery, assault, burglary, and vehicle theft within OECD states, as well as rates of punitiveness).

offenders as possible. Thus we ought to expect the two theories to bring about a system of punishment far less severe—and featuring far less long-term incarceration—than the one practiced in the United States as well as the United Kingdom in recent decades. Nonetheless, the effectiveness of penal harm in bringing about deterrence will vary from context to context, and we should not think that the corrective justice and social defense theories standing alone could ground, say, a Scandinavian system of criminal justice, given all the factors that enable such systems.[180]

Furthermore, and importantly for what follows, we should not think that the corrective justice and social defense theories in any context could completely foreclose extreme or degrading punishments as a purely "internal" matter of principle. For, as stated in the Introduction, crime deterrence does correlate to some degree with penal severity, even if it correlates to a higher degree with the likelihood of receiving some amount of punishment. And if it were indeed the case, as some have suggested,[181] that extreme or degrading punishments were effective

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[180] *See generally* Nicola Lacey, David Soskice, and David Hope, "Understanding the Determinants of Penal Policy: Crime, Culture, and Comparative Political Economy," *Annual Review of Criminology* 1 (2018): 195-217 (analyzing four paradigmatic determinants of penal policy—crime rates, cultural dynamics, economic structures and interests, and institutional differences—and considering the impact of race as an independent determinant of US penal policies); Nicola Lacey, *The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies* (Cambridge: Cambridge University Press, 2008) (examining political economic, institutional, and cultural determinants of penal severity); John Pratt, "Scandinavian Exceptionalism in an Era of Penal Excess, Part I: The Nature and Roots of Scandinavian Exceptionalism" *British Journal of Criminology* 48 (2008): 119-37 (arguing that high levels of social trust and solidarity have grounded Scandinavian criminal justice systems and considering demographic and economic factors conducive to those high levels); John Pratt, "Scandinavian Exceptionalism in an Era of Penal Excess, Part II: Does Scandinavian Exceptionalism Have a Future?" *British Journal of Criminology* 48 (2008): 275-292 (same); James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* (Oxford: Oxford University Press, 2003) (arguing that cultural and ideological differences explain the difference between the American penal regime, on the one hand, and French and German regimes, on the other); Nicola Lacey and David Soskice, "Crime, Punishment and Segregation in the United States: The paradox of local democracy," *Punishment & Society* 4 (2015): 454-81 (arguing that local government autonomy in the United States, and the resulting fact that criminal justice policies are filtered through local electoral politics, presents unique challenges for garnering political support for integrative criminal justice policies).

[181] *See, e.g.,* Lawrence Katz, Steven D. Levitt, and Ellen Shustorovich, "Prisons Conditions, Capital Punishment, and Deterrence," *American Law and Economics Review* 5 (2003): 318-43 (arguing that penal severity, as revealed through prisoner death rates, correlates robustly with decreasing crime rates);

means of bringing about deterrence, then the two theories would lack the internal resources to rule out such punishments if the offender's criminality contribution was sufficiently grave. Cruelty may very well be parsimonious, reparative, and equitable. This is a crucial point. And to oppose extreme or degrading punishments in such a case, we would need to appeal to a relatively distinct set of reasons, as I discuss in Part II.

Hashem Dezhbakhsh, Paul H. Rubin, and Joanna M. Shepherd, "Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data," *American Law and Economics Review* 5 (2003): 344-76 (suggesting that each execution on average prevents eighteen murders); H. Naci Mocan and R. Kaj Gittings, "Getting off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment," *The Journal of Law and Economics* 46 (2003): 453-78 (finding that each execution decreases homicides by about five, while each commutation increases homicides by about five); *but see* John J. Donohue and Justin Wolfers, "Uses and Abuses of Empirical Evidence in the Death Penalty Debate," *Stanford Law Review* 58 (2005): 791-846.

Part II

Degradation Limitations

Chapter 2. Torture and Respect

Part II has two aims. The first is to discern the nature and content of our "dispositive degradation-limiting penal reasons." These reasons foreclose the infliction of certain degrading punishments, regardless of the fact that our positive theory of punishment might otherwise license such treatment as the proportional response to an offense. For instance, as argued in the Introduction, even if Antony Duff's communicative theory of punishment licensed penal rape for rapists—as it indeed might—Duff could foreclose such a punishment by appealing to the relatively independent degradation-limiting reasons. The second aim of Part II is to examine the legitimacy of long-term incarceration by reference to these reasons. What is long-term incarceration, and when does its infliction surpass a dispositive degradation limitation?

Torture, which is the primary subject of this chapter, is our guide into this realm of degradation-limiting penal reasons, and therefore into the permissibility of long-term incarceration. In the Introduction, I noted Justice Brennan's conclusion that "tortuous punishment" is the "*paradigm*" example of "cruel and unusual" punishment, as well as the fact that many legal documents group together prohibitions on torture and prohibitions on penal degradation.[1] It is with such jurisprudence in mind that Jeremy Waldron writes:

> "[T]he prohibition on torture is a point of reference to which we return over and over again in articulating legally what is wrong with cruel punishment or distinguishing a punishment that is cruel from one that is not: We do not equate cruelty with torture, but we use torture to illuminate our rejection of cruelty."[2]

Waldron argues that the legal prohibition on torture, beyond encapsulating the moral wrongness of torture, represents a "legal archetype": "a particular provision

[1] *Furman v. Georgia*, 408 U.S. 238, 281 (1972).
[2] Jeremy Waldron, "Torture and Positive Law: Jurisprudence for the White House," *Columbia Law Review* 105 (2005): 1681–1750, at 1738.

in a system of norms which has a significance going beyond its immediate normative content, a significance stemming from the fact that it sums up or makes vivid to us the point, purpose, principle, or policy of a whole area of law."[3] David Luban extends Waldron's idea, arguing that the prohibition on torture is a *moral* as well as a legal archetype, since "the prohibition closely connects with other values that the world has come to regard as fundamental—fundamental concepts of human dignity, human equality, and the rejection of total domination of some people by others."[4] He concludes that torture represents an "archetype of evil."[5] The point here is that Brennan, Luban, and Waldron all conceive of torture as the *exemplar* of legal and moral wrongness and impermissible state action. An inquiry into torture's normative features should thus teach us something about degradation limitations. At least that is the assumption of this chapter.

Elaine Scarry dismisses the "deep sense of tact" from which people deem torture beyond analogy. She writes eloquently:

> "Torture is such an extreme event that it seems inappropriate to generalize from it to anything else or from anything else to it. Its immorality is so absolute and the pain it brings about so real that there is a reluctance to place it in conversation by the side of other subjects. But this reluctance, and the deep sense of tact in which it originates, increase our vulnerability to power by ensuring that our moral intuitions and impulses, which come forward so readily on behalf of human sentience, do not come forward far enough to be of any help: we are most backward on behalf of the things we believe in most in part because, like ancients hesitant to permit analogies to God, our instincts salute the incommensurability of pain by preventing its entry into worldly discourse."[6]

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[3] *Id.* at 1701.
[4] David Luban, *Torture, Power, and Law* (Cambridge: Cambridge University Press, 2014), 125.
[5] *Id.* at 112.
[6] Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* (New York and Oxford: Oxford University Press, 1983), 60.

Scarry explains that we should not understand our special revulsion for torture to mean that it exists in an incomparable realm of wrongness all of its own.[7] Indeed, it can be a guide to wrongness *simpliciter*—or, more precisely, degradation *simpliciter*—and we should be willing "to place it in conversation by the side of other subjects," such as long-term incarceration (which I consider directly in Chapter 3).

This chapter proceeds as follows. Section I (pages 101-10) examines the legal conception of torture, concluding that it is far too broad. Section II (pages 110-24) considers the work of Henry Shue, David Sussman, and Matthew Kramer, concluding that they, too, fail to capture what, if anything, is special about torture's wrongness. With the ground thus cleared, Sections III-VI (pages 125-73) present an original theory of torture. I argue that torture is *the intentional infliction of a suffusive panic*, and that its central wrong-making feature is the egregious *disrespect* it demonstrates toward the victim. Torture converts a *diachronic* being capable of building a good life through time into a *synchronic* being, whose awareness is almost completely restricted to a maximally terrible present. Section VI considers what this means for our understanding of degradation more generally, arguing that to surpass a dispositive degradation limitation involves denying someone's status as a human, by "ruining" her essentially human capacity to construct a good life through time, or treating her in a way that embodies the legitimacy of ruining this capacity. To so thoroughly reject someone's worth, even someone who has committed a heinous offense, violates the liberal commitment to human inviolability.

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[7] The philosophy of comparisons suggests that no two options (e.g. torture and incarceration) could be genuinely "incomparable" with regard to a particular predicate (e.g. degradingness), with reason having nothing to say whatsoever on the options' relative exhibition of the predicate. If they were genuinely incomparable, then we could not make *any* judgment as to their relative exhibition; we could not even determine, say, that the worst torture imaginable is *more* degrading than one hour of incarceration. *See* Ruth Chang, "Introduction," in ed. Ruth Chang, *Incommensurability, Incomparability, and Practical Reason* (Cambridge, MA: Harvard University Press, 1998) and "The Possibility of Parity," *Ethics* 112 (2002): 659-88; Laurence Tribe, "Policy Science: Analysis or Ideology?," *Philosophy & Public Affairs* 2 (1972): 66-110; James Griffin, "Are There Incommensurable Values?," *Philosophy & Public Affairs* 39 (1977): 39-59.

I. The Legal Conception

What is torture, and what are its wrong-making features? The two questions—the definitional and the normative—are connected: however one defines torture will inevitably impact her understanding and interpretation of its wrongness, and vice versa, and so it is artificial to consider them entirely separately. Even if intertwined, the two issues nonetheless involve distinct methodologies; one is linguistic, sociological, and empirical, and the other—our true target—is normative, a moral interpretation of whatever slice of reality the definition selects. Let us consider first the law's conception of torture and its wrong-making features. Perhaps the law can illuminate or inform our moral inquiry.[8] To reveal my conclusion, I believe that the law does provide such illumination in this instance, but only through its failure. The most prominent legal definition of torture—conceiving of torture as *the intentional infliction of severe suffering*—is over-inclusive, failing to pass a broad-brush test of conceptual analysis. This *definitional* failure muddies the related *moral* analysis, unsurprisingly, given the connection between the two. Apart from warping the law's relationship to morality, the definitional failure weakens the law's ability to realize its true goal of constraining and preventing state torture, as I discuss in Section III. It's not only bad moral philosophy, then; it's bad legal drafting and interpretation.

As to the broad-brush test of conceptual analysis, we can agree about the central cases of "torture": running electricity through someone's body for the purpose of interrogation, pulling someone's body apart with "the rack" for the purpose of punishment, and so forth. Just the same, we can agree on what is definitely *not* torture. This includes most of the practices in the world (e.g. someone singing a song because she wants to is not torture), including many harmful

[8] In his work on human dignity Jeremy Waldron employs the method of looking to the law for moral insight. *See* Jeremy Waldron, *Dignity, Rank, and Rights,* ed. by Meir Dan-Cohen (Oxford: Oxford University Press, 2012).

practices (e.g. mocking or shoving somebody moderately is not torture). In this way, torture represents a significantly distinct set of practices. It deserves a word of its own. And even if there are practices that fall into a vague middle between torture and not-torture, any definition that encompass practices that are definitely not torture, or many such practices, fails as a matter of conceptual analysis.

A. Explication

The first legal instrument to define torture, which has undoubtedly influenced later legal instruments and interpretations,[9] was the United Nation's 1975 "Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment."[10] Article 1 presents two definitions:

> "1. For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.
>
> 2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment."

How the two clauses interrelate is not entirely clear. If the first clause defines torture, essentially, as the deliberate infliction of *severe* pain or suffering, and the second clause defines it as an *aggravated* and deliberate form of cruel, inhuman, or degrading treatment, does that mean that cruel, inhuman, and degrading treatment constitutes non-aggravated or non-severe pain and suffering*?* Is the first clause

[9] Nigel S. Rodley, "The Definition(s) of Torture in International Law," *Current Legal Problems* 55 (2002)*:* 467-493, at 468.

[10] GA res. 3452 (XXX), Annex, 9 December 1975.

clarifying any qualities that are unique to torture, and not shared by cruel, inhuman, or degrading treatment? Could there be an aggravated and deliberate form of cruel, inhuman, or degrading treatment that was *not* torture? The terms cruel, inhuman, and degrading are not defined elsewhere the Declaration.

In defining torture the 1984 Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment and Punishment (CAT), an international treaty with 161 parties including the United States and all of the EU states, follows the first clause of the Declaration's definition, but adds coercion and discrimination to the list of "purposes," and weakens the state action requirement to include official *acquiescence* to torture. It drops the second clause, though, and fails to define cruel, inhuman, or degrading treatment elsewhere. Here is the definition in full:

> "For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."[11]

There are five central components: (1) severe mental or physical pain or suffering, (2) intentionally inflicted, (3) for such purposes as interrogation, punishment, intimidation, coercion, and discrimination, (4) by a state, meaning at least with the acquiescence of a public official, presumably while working in her official capacity, but (5) not including pain or suffering caused by lawful sanctions.

[11] UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1(1) (hereafter "CAT").

I will consider the final two components first, since they are less important for our purposes. The meaning of the fifth component, a vestige from the Declaration, is unclear and I think irrelevant to our search for torture's wrong-making features. It would seem to erase the clause prohibiting penal torture, as Louis Seidman explains.[12] The fourth component—state action or acquiescence—is complex, and not relevant at this ground floor of the inquiry. Private parties acting without the knowledge of state officials can surely inflict torture. State torture, though, may feature unique wrong-making features; it may, for instance, violate substantive Rule of Law values, as Jeremy Waldron argues, in addition to violating basic moral principles that apply to private actors.[13] Nonetheless, we need a theory of torture's wrongness as a straightforward moral matter before considering what additional wrong-making features state torture may exhibit. The presence of the state action or acquiescence component is unsurprising and perhaps unimpeachable, given that the CAT is meant to regulate the policies of states.[14] That said, in interpreting Article 7 of the 1966 International Covenant on Civil and Political Rights—which bans torture, and cruel, inhuman or degrading treatment, but without defining the relevant terms—the UN Human Rights Committee held that private parties could torture for the purposes of the treaty's definition. "It is the duty of the State Party," the Committee wrote, "to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by Article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity."[15]

The first three components of the CAT's definition have more to offer as a normative guide to torture *simpliciter*: (1) severe mental or physical pain or suffering, (2) intentionally inflicted, (3) for such purposes as interrogation, punishment,

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[12] Louis Seidman, "Torture's Truth," *University of Chicago Law Review* 75 (2005): 881–918, at 895.
[13] Jeremy Waldron, "Torture and Positive Law," *supra* note 2.
[14] Jeremy Wisnewski, *Understanding Torture* (Edinburgh: Edinburgh University Press, 2010), 5.
[15] Human Rights Committee, General Comment No. 20, 1992, §2.

intimidation, coercion, and discrimination. The phrase "such purposes as" in the third component implies that the enumerated list of purposes is not exhaustive. David Luban argues that the drafters should have been clearer with this, by ending the relevant sentence with the phrase "or any purpose whatsoever," since "[t]hat would drive home the correct conclusion: torture is torture, regardless of its purpose."[16] Nonetheless, given the open-ended nature of "such purposes as," the first two components describe the gravamen of the wrong of torture according to the CAT, and also the Declaration: the intentional infliction of severe mental or physical pain or suffering. This is the core of the definition. The US statute codifying the CAT does not stray far, defining torture as "an act committed by a person acting under the color of law *specifically intended to inflict severe physical or mental pain or suffering* (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control."[17] One difference from the CAT is the inclusion of the "specifically" modifier: "specifically intended." This implies that the *oblique* intent to cause severe suffering will not qualify as torture (e.g. situations where a bomb will cause severe suffering to innocent bystanders as an unintended, but very likely byproduct of blowing up a munitions factory). Additionally, the US statute adds a "custody or physical control" requirement, consistent with its reservations upon ratifying the treaty.[18]

While not bound by the CAT, the International Criminal Court (ICC) has followed its definition closely. As defined by the *Elements of Crime* of the ICC, the first requirement of both "the crime against humanity of torture" and the distinct

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[16] Luban, *Torture, Power, and Law*, *supra* note 4 at 119; *see also* Matthew Kramer, *Torture and Moral Integrity: A Philosophical Enquiry* (Oxford: Oxford University Press, 2014), 31.

[17] 18 USC § 2340 (emphasis added). At the time of ratification, the US determined that existing state and federal law was sufficient to implement the CAT as it related to torture on US soil, but insufficient to cover torture abroad. 18 USC § 2340 is meant to fill this gap. As to meaning of "specific intent" in US law, see, e.g., *U.S. v. Blair*, 54 F.3d 639 (10th Cir. 1995); *Thornton v. State*, 397 Md. 704 (2007).

[18] U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990).

"war crime of torture" is as follows: "The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons."[19] The "General Introduction" provides that such a material element must be committed with "intent and knowledge."[20] So, again, we have the intentional infliction of severe mental or physical pain. The differences between the two offenses concern against whom the severe pain or suffering is intentionally inflicted, and why. The crime against humanity of torture can be committed for any purpose, so long as the conduct was part of a "widespread or systematic attack directed against a civilian population."[21] The war crime, meanwhile, requires that the conduct take place in the context of an international armed conflict, against persons protected under the Geneva Conventions of 1949, and "for such purposes as" those purposes listed in the CAT.[22]

Finally, Article 3 of the European Convention on Human Rights ("Prohibition of torture") provides: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." In considering the meaning of Article 3's terms, none of which the Convention itself defines, the European Court of Human Rights has followed the Declaration and the CAT closely. In *Ireland v. United Kingdom,* the Court considered whether the "interrogation in depth" used by the British government against suspected members or collaborators of the Irish Republican Army (IRA), in pursuance of emergency powers, violated Article 3.[23] "Interrogation in depth" involved the "five techniques" of sleep deprivation, stress positions, deprivation of food and drink, subjection to noise, and hooding. After holding that the treatment constituted inhuman and degrading treatment, in violation of Article 3, the court considered whether it also amounted to torture:

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[19] *The Elements of Crimes* (The Hague: The International Criminal Court, 2011), arts. 7(1)(f) and 8(2)(a)(ii)-1.
[20] *Id.* at General Introduction(2).
[21] *Id.* at art. 7(1)(f)(4)-(5), note 14. The article also requires that the victim was in the perpetrator's custody or control, and that the pain or suffering did not arise from lawful sanctions. *Id.* at art. 7(1)(f)(2)-(3).
[22] *Id.* at art. 8(2)(a)(ii)-1.
[23] *Ireland v. United Kingdom* (App No 5310/71) [1978] ECHR 1.

> "[W]hilst there exists on the one hand violence which is to be condemned both on moral grounds and also in most cases under the domestic law of the Contracting States but which does not fall within Article 3 (art. 3) of the Convention, it appears on the other hand that it was the intention that the Convention, with its distinction between 'torture' and 'inhuman or degrading treatment', should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering."[24]

The Court distinguishes here between (a) violence that is immoral and illegal but which is neither inhuman nor degrading, nor torture and (b) violence that is inhuman or degrading but which is not torture. As to the latter distinction, it understands the gravamen of torture to be "deliberate inhuman treatment causing very serious and cruel suffering." The word "inhuman" performs less work than might be expected, given the conception of the term offered in *Ireland*:

> "The five techniques were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, *at least intense physical and mental suffering* to the persons subjected thereto and also led *to acute psychiatric disturbances* during interrogation. They accordingly fell into the category of inhuman treatment within the meaning of Article 3 (art. 3)."[25]

While this may not have been intended as a complete legal definition of "inhuman," we can see that the Court understands the term broadly.[26] And if we use this excerpt to define "inhuman" in the key phrase from that case—"deliberate inhuman treatment causing very serious and cruel suffering"—then torture becomes "the deliberate infliction of *intense physical and mental suffering* or *acute psychiatric disturbances* that causes very serious and cruel suffering." We are left, in the end, just where the Declaration, the CAT, the US Code, and the ICC left us, with a

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[24] *Id.* at para [167].

[25] *Id.* (emphasis added); *see also The Greek Case* (App Nos 3321-3/67, 3344/67) [1969] 12 ECHR Yearbook 1, p. 186 ("The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which in the particular situation is unjustifiable.")

[26] For philosophical discussion of meaning of "inhuman," see Jeremy Waldron, "Inhuman and Degrading Treatment: The Words Themselves," *Canadian Journal of Law & Jurisprudence* 23 (2010): 269-286, at 278-81.

conception of torture as a practice on the far end of a continuum of the intentional infliction of suffering.[27]

In applying this understanding of torture, the Court concluded that even though the five techniques, as applied in combination, "undoubtedly amount to inhuman and degrading treatment…they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood."[28] Their infliction did not warrant, that is, the "special stigma" associated with the word torture.[29] The "special stigma" phrase is not further defined or grounded in the case law and does not seem to provide traction beyond emphasizing the extraordinary nature of torture. The Court in *Aydin*, by comparison, applied this sliding-scale analysis to conclude that the physical and mental injuries inflicted by Turkish forces upon a 17-year old detainee, most importantly the fact that she was raped, deserved that "special stigma" and qualified as torture.[30]

B. Critique

At first glance, the legal definition of torture seems unimpeachable. Whatever torture is, surely it must involve the intentional or deliberate infliction of severe mental of physical suffering. And indeed it must, but there are a number of worries with this definition. The most important involves the test of conceptual analysis mentioned above. Given the vagueness of "severe suffering," the legal definition seems to encompass practices that are definitely not torture. Consider a state dropping a bomb on enemy soldiers, or requiring candidates for elite military

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[27] Indeed, the Court in *Ireland* notes the connection between its definition and that in Article 1(2) of the Declaration. *Ireland* v. *UK*, *supra* note 23 at para [167]. Meanwhile, the Court in *Aydin v. Turkey* (App No 23178/94) [1997] ECHR 75, at para [195] notes the connection between the *Ireland* definition of the torture and that in the CAT.

[28] *Ireland* v. *UK*, *supra* note 23 at para [167].

[29] *Id.* To be clear, by holding that "interrogation in depth" amounted to inhuman and degrading treatment in violation of Article 3, the Court categorically outlawed the practice, in accordance with Article 15's provision that no derogation from Article 3 shall be made, even in times of war or public emergency. In terms of its legal impact, Article 15 makes no distinction between torture and inhuman or degrading treatment. *See* Waldron, "Torture and Positive Law," *supra* note 2 at 1706.

[30] *Aydin, supra* note 27.

units to undergo extreme forms of testing, looking not to train them but to weed out the weak links. Or consider a landlord evicting a tenant out of spite, knowing and indeed desiring that the tenant would have to sleep on the streets for months before he could find other housing. Or consider someone beating up another person in a bar fight. All seem to represent the intentional infliction of severe suffering, and yet none seems to qualify as torture as normally understood. Perhaps in the case of killing enemy soldiers, severe suffering is neither the intended aim nor means, assuming the state just wants to kill, and assuming that death in and of itself does not involve suffering. The question would then depend on whether the *oblique* intent to cause severe suffering qualified as torture—something the US statue specifically forecloses—given that dropping the bomb would very probably cause severe physical and mental suffering in some survivors and those who ultimately die alike.[31]

That a definition is over-inclusive is a problem or weakness only if a more precise definition is available. It is not as if the law defines torture as "a harmful practice," such that it encompasses a huge array of actions. The "intentional infliction of severe suffering" does narrow our gaze meaningfully. There may be no more precise way to define the term; language has descriptive limits. However, below I will pursue the hypothesis that we can in fact do much better, and secure a definition that covers all practices that are definitely torture, and none that are definitely not torture. Of course, it would make this project easier project if the hypothesis failed. If the wrong of torture was indeed the intentional infliction of severe suffering, then Part II could proceed rather straightforwardly: (1) long-term incarceration involves severe suffering, (2) long-term incarceration for the purposes of retribution or deterrence involves the intentional infliction of severe suffering, and thus (3) long-term incarceration for the purposes of retribution or deterrence is torture, and therefore is impermissible morally and legally, surpassing

[31] I consider the meaning of oblique intent in Chapter 3 at 242-245.

a dispositive degradation-limiting reason. As a more refined conception of torture emerges below, it will become evident that such an argument is unavailable, and that torture and long-term incarceration are distinct in important ways, while nonetheless sharing some fundamental wrong-making features.[32]

In pursuing a more precise understanding of torture's wrongness, I will leave the law now and consider several prominent academic theories, critiquing Henry Shue, David Sussman, and Matthew Kramer in Section II, and then aligning myself with Jean Améry and Elaine Scarry, among others, who understand torture's wrong-making features to be connected to its "overwhelmingness."

II. Shue, Sussman, and Kramer

A. Henry Shue: Torture as an assault on the defenceless

In his seminal 1978 article, Henry Shue unravels the following argument: since (a) killing is more harmful than torture and (b) killing is sometimes permissible, as in a just war, then (c) torture must sometimes be permissible.[33] Shue explains that the argument is fallacious because killing is permissible when the victim is a threat—as in combat—while a torture victim is always defenseless. The central

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[32] Waldron, very aware of the slipperiness of "severe suffering," nonetheless takes umbrage at the desire to find a more precise definition of torture. He argues that any such effort, like the work of George W. Bush's lawyers in the Office of Legal Counsel (OLC), could only be motivated by the aim to legalize conduct that would otherwise be swept up in the broad prohibition (e.g. to refine the legal meaning of "severe suffering" so that waterboarding does not qualify as such). *See* David Cole (ed.), *The Torture Memos: Rationalizing the Unthinkable* (New York: The New Press, 2009). Waldron argues that we should not be anywhere on the spectrum of the infliction of pain or suffering. Waldron, "Torture and Positive Law," *supra* note 2 at 1698-1703. While Waldron's argument is powerful, and represents trenchant criticism of the OLC's torture memos, for at least three reasons we ought to reject his philosophical conservatism with regard to a more precise torture definition. First, it is unclear how we can square his position with *any* intentionally inflicted suffering on the part of the state. Does his position rule out non-mild deterrent or retributive punishments? Does it entail pacifism? Second, only with a more precise definition of torture can we articulate the conviction, which Waldron must share, that torture is indeed qualitatively worse than lesser forms of aversive treatment. *See* discussion *infra* at 113, 117-19. Related, without a more precise definition, torture is not worth very much as an "archetype" and source of comparison, with the concepts of intentionally inflicted "pain" and "suffering" doing all of the work. Our moral understanding of injuries, at least, would then be impoverished. Third, as I argue below, the vagueness of "severe suffering" represents a regulatory deficiency. A more precise definition would prove more capable at preventing torture, by providing a much higher interpretative hurdle for the torture-defending lawyers of the future. *See* discussion *infra* at 138-39.

[33] Henry Shue, "Torture," *Philosophy & Public Affairs* 7 (1978): 124-43.

wrong-making feature of torture, he concludes, is that it is an "assault upon the defenseless."[34] Shue writes:

> "[T]orture begins only after the fight is—for the victim—finished. Only losers are tortured. A 'fair fight' may even in fact already have occurred and led to the capture of the person who is to be tortured. But now that the torture victim has exhausted all means of defense and is powerless before the victors, a fresh assault begins. The surrender is followed by new attacks upon the defeated by the now unrestrained conquerors. In this respect torture is indeed not analogous to the killing in battle of a healthy and well-armed foe; it is a cruel assault upon the defenseless."[35]

Shue considers the reply that the victim is not in fact defenseless, since he retains the ability to end the torture by providing the information desired by the torturer. Shue offers two responses. First, such an act of compliance is unavailable for victims of "terroristic torture," whose torture is meant to intimidate a wider group.[36] Nothing is asked of them other than to suffer; they cannot do or say anything to end the ordeal. Second, as to a victim of "interrogational torture," to say that he can escape by informing is artificial, Shue argues, because it would demand of him a profound betrayal and violation of his integrity—at least for committed members of the opposition. Shue writes: "An alternative which is legitimately to count as an escape must not only be preferable but also itself satisfy some minimum standard of moral acceptability. A denial of one's self does not count."[37]

There are several critiques of Shue's argument. First, as a number of theorists have explained, Shue conflates being defenseless against torture with being completely non-threatening.[38] Shue writes: "The torturer inflicts pain and damage

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[34] *Id.* at 127-30.
[35] *Id.* at 130; *see also* Michael Ignatieff, *The Lesser Evil* (Edinburgh: Edinburgh University Press, 2004), 137.
[36] Shue, "Torture," *supra* note 33 at 132-33.
[37] *Id.* at 136.
[38] *See* Frances Kamm, *Ethics for Enemies: Terror, Torture and War* (Oxford: Oxford University Press, 2011), 7; David Sussman, "What's Wrong with Torture?" *Philosophy & Public Affairs* 33 (2005): 1-33, at 16; Seamus Miller, "Is Torture Ever Morally Justifiable?," *International Journal of Applied Philosophy* 19 (2005): 179–92; Kramer, *Torture and Moral Integrity, supra* note 16 at 37-39.

upon another person who, by virtue of now being within his or her power, *is no longer a threat* and is entirely at the torturer's mercy."[39] Someone entirely at another's mercy, however, could still be threatening, say, by having engineered an ongoing or future attack and by retaining the ability to mitigate or prevent that attack. If Shue wants his theory to explain the wrongness of torturing in that case—as he does—he needs to say more. To torture that type of individual would be an attack on someone who was defenceless against torture, but unlike assaulting the traditional prisoner of war that Shue has in mind, it would not be an attack on someone who is completely non-threatening and powerless; it would not be an attack on someone entirely off of the battlefield. As it stands, then, Shue's conception of torture's wrongness seems to be overly narrow, covering only those who are defenseless against torture *and* non-threatening.

Second, victims of torture need not be defenseless and thus attacking a defenseless person cannot be torture's essential wrong-making feature. Uwe Steinhoff, in a somewhat involved hypothetical, shows how someone could inflict tortuous agony with a laser from some distance, even though the victim was not defenseless, given that she had a gun and could shoot at the perpetrator wildly.[40] We would maintain that such an individual was tortured, even though she was not defenseless. Third, as Kamm and Steinhoff argue, attacking the defenseless is not always impermissible. Kamm writes: "Individuals who have set off a missile against us *could be defenseless* against our counterattack because their new missiles are slow to arrive. Yet just war theory does not imply that these individuals are not combatants. Nor does it imply that it is impermissible for us to counterattack to stop their further threat on the grounds that there is no 'fair fight' until their missiles arrive."[41]

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[39] Shue, "Torture," *supra* note 33 at 130 (emphasis added).
[40] Uwe Steinhoff, *On the Ethics of Torture* (Albany: SUNY Press, 2013), 40-1; *see also* Kamm, *Ethics for Enemies*, *supra* note 38 at 5-9; William Twining, "Torture and Philosophy—I," *Proceedings of the Aristotelian Society, Supplementary Volumes* 52 (1978): 143–68, at 160.
[41] Kamm, *Ethics for Enemies*, *supra* note 38 at 6; *see also* Steinhoff, *On the Ethics of Torture*, *supra* note 40 at 94-5.

"Attacking the defenseless" thus seems to be a poor candidate for a wrong-making feature that is purportedly beyond the pale, and the essence of degradation. Fourth, as to Shue's point that victims of interrogational torture do not have a "legitimate alternative" to torture, it does not seem, as David Sussman argues, that we should care, or care very much, about the personal integrity of, say, people who are forced to betray their commitments to extremely illiberal causes.[42]

Let us assume, though, that Shue could adequately respond to all these critiques. There would nonetheless remain something deeply unsatisfying about his theory. He would be unable to distinguish qualitatively between different types of assaults on the defenseless. There would be nothing extraordinary about the infliction of torture. It would represent a severe type of assault on a defenseless person, among the many possible types. Shue could not account for any qualitative moral difference between shouting at, slapping, or even moderately beating a prisoner, on the one hand, and positively torturing him with electricity or a waterboard, on the other. The gravamen of the slap and of running electricity through his body would be the same: an assault on a defenseless person.[43] I share David Sussman's conviction that "there is something morally special about torture that distinguishes it from most other kinds of violence, cruelty, or degrading treatment."[44] While it seems that Shue agrees with this, his conception of torture's wrongness as an assault on the defenseless cannot provide the underlying explanation.

B. David Sussman: Torture as a Moral Perversion

In pursuit of such an explanation, Sussman distinguishes torture from coercion. "Coercion," he argues, "requires only that its victim have the capacities needed for practical reasoning and intentional action, and that he be able to

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[42] Sussman, "What's Wrong with Torture?" *supra* note 38 at 18.
[43] Waldron seems unable to make such a distinction either, given his emphasis on the impermissibility of being *anywhere* on the spectrum of intentional pain or suffering. *See* discussion *supra* note 32.
[44] Sussman, "What's Wrong with Torture?" *supra* note 38 at 3.

recognize the expression of these powers in those who are trying to pressure him."[45] It would be possible to coerce an agent with no emotional life, like a corporation, so long as it were capable of pursuing its interests rationally and of anticipating the actions of other agents.[46] Torture is different, Sussman argues: "[T]he torturer is not merely constructing a harsh set of options for the victim to navigate rationally as best he can. The felt experience of pain, fear, and uncertainty are essential elements of torture."[47] It is not the mere fact, though, that torture hurts or is frightening. What is special about torture for Sussman is that the victim's own body, affects, and emotions are used to generate pressure upon him, such that he is "actively complicit in his own violation."[48] This is what makes torture a "moral perversion" and uniquely wrong on his view.[49]

> "What the torturer does is to take the victim's pain, and through it the victim's body, and make it begin to express the torturer's will…My suffering is experienced as not just as something the torturer inflicts on me, but as something I do to myself, as a kind of self-betrayal worked through my body and its feelings."[50]

Waterboarding victims, for example, are forced to struggle against their own desire to breathe, Sussman explains.[51]

Orthodox Kantians, Sussman continues, fail to appreciate the role of pain—specifically, of one's identification with her pain and with her affective responses to her pain—in explaining the wrongness of torture. They understand the victim's lack of reasonable consent to be the gravamen of torture's wrongness. That it is bodily pain that the torture victim could not reasonably consent to, rather some other "intensely unwanted imposition," such as a blackmailer's publication

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[45] *Id.* at 8.
[46] *Id.* at 9.
[47] *Id.* at 10.
[48] *Id.* at 4.
[49] *Id.* at 4-5.
[50] *Id.* at 21.
[51] *Id.* at 23.

of compromising photographs, is for the Kantians of no moment.[52] "[M]y blackmailer is not doing anything of a piece with torturing me," Sussman replies to the Kantians, "even though she is thwarting my will through a means to which she has no right."[53] The blackmailer's autonomy violation is purportedly not "perverse" like the torturer's autonomy violation, on Sussman's view, because the blackmail victim is not complicit in his own violation; I discuss this further below. Sussman considers the Kantians' response that they can in fact appreciate the importance of pain, insofar as it "is almost impossible to reflect, deliberate, or even think straight when one is in agony," such that pain "compromises or undermines the very capacities constitutive of autonomous agency itself."[54] Sussman contends that this response, which I will also discuss further below, fails for two reasons. First, it cannot distinguish, in any way, between undermining one's agency through pain or through pleasure. And, second, it cannot distinguish between undermining one's agency through torture or through killing, and thus cannot capture his conviction that torture has a burden of justification even greater than that of killing.[55] Sussman thus concludes that the standard resources of the Kantian tradition cannot account for torture's wrongness, and he rests his conception of its wrongness on his theory of forced self-betrayal.

There is a controversial conception of personal identity at the heart of Sussman's theory. For his argument to get off the ground, we must to some degree identify with the capacities that torture exploits, such that when one faces her pain she is (or feels that she is) facing herself. It is not clear, though, that every person has such a reaction to her pain. It would seem possible for someone who was, say, repeatedly shocked with electricity, to feel in no way complicit in her own violation, to feel no shame at all by the fact that she responded instinctively to her agony,

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[52] *Id.* at 14.
[53] *Id.*
[54] *Id.* at 14-15.
[55] *Id.* at 15-6.

and to put all the blame on her perpetrator. Would Sussman conclude that such a person was not tortured, or experienced something qualitatively less wrongful? Or would he insist that she was mistaken and that, perhaps as a metaphysical matter, she was indeed facing and betraying herself when she responded to her pain? Furthermore, even if we all do identify with our pain receptors, fight-or-flight responses, and other such capacities in the relevant manner, there is the additional point that these capacities are not obviously failing or *betraying* torture victims. They are perceiving reality correctly. The message they communicate to a victim is accurate: your body and possibly your life is in danger. To put the point differently: The torture victim desires not that her traitorous pain receptors would switch off, so that her tormentor can destroy her body painlessly, but rather for her body not to be destroyed. It is not clear, then, how the fact that she responds to her pain makes her complicit in her own violation. Perhaps it is the more basic fact that she wants and needs a functioning body; the torturer exploits that fact about her, and so she is or feels complicit in her torture. But, here as well, it seems that a torture victim might not—and indeed should not—feel like she has betrayed herself when the torturer exploits her need for a functioning body, as if it represented some failing on her behalf. And we would not think that someone who had the appropriate reaction, placing all of the blame on her perpetrator and feeling no shame at all, would have experienced something qualitatively less wrongful than someone who did feel a sense of complicity.

Regardless, and yet more fundamentally, even if Sussman is right that (a) torture is "a kind of forced self-betrayal" and (b) that this is the central wrong-making feature of torture, it is doubtful that he has achieved his primary mission of explaining what is special or unique about torture's wrongness. In parallel to the legal conceptions of torture and to Shue's theory, Sussman's theory is over-inclusive. Coercion involves introducing an unreasonable obstacle into someone's

decision-making process.[56] Sussman distinguishes coercion from torture, but given that torture must be in essential part an instance of coercion, we can understand his distinction to be between (a) coercion that introduces obstacles unrelated to bodily pain, like in his example of blackmail and (b) coercion that introduces the obstacle of bodily pain, like in torture. The first problem for Sussman is that he cannot distinguish between instances of the latter, similarly to Shue's inability to distinguish between assaults on the defenceless. Any instance of painful coercion, no matter how minor or middling the pain, would qualify as torture on his view, as a "perverse" autonomy violation whereby one's own pain receptivity is used against herself. If someone twists my arm very moderately until I agree to tell her a secret I have not thereby been tortured, even if we accept that the reason I speak is to stop the pain and that my coercer has thereby forced me to betray myself. But Sussman's theory requires concluding otherwise.[57] In short, while Sussman surely has severe, all-consuming pain in mind, the wrong-making features he identifies would apply to qualitatively lower degrees of pain.

The second problem for Sussman is that if the gravamen of painful coercion is forced self-betrayal, many instances of *non-painful* coercion share this feature. Sussman is somewhat aware of this possibility. He argues that, in addition to sexual desire, "[a]ny suitably intense and relentless craving, whether for food,

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[56] *See* Robert Nozick, "Coercion," in *Philosophy, Science, and Method: Essays in Honor of Ernest Nagel*, eds. Sidney Morgenbesser, Patrick Suppes, and Morton White (New York: St. Martin's Press, 1969); Roland J. Pennock and John W. Chapman (eds.), *Nomos XIV: Coercion* (Chicago: Aldine-Atherton, Inc., 1972).

[57] Interestingly, Bentham would be happy to understand arm-twisting as torture: "Torture…is where a person is made to suffer any violent pain of body in order to compel him to do something…which done…the penal application is immediately made to cease." W.L. Twining and P.E. Twining, "Bentham on Torture," *Northern Ireland Legal Quarterly* 24 (1973): 305–56, 308 (quoting Bentham Manuscripts, University College London, box 46, 63-70). Bentham includes a mother pinching a child to get her to stop playing with something as an instance torture. Unlike Sussman, Bentham defined torture broadly to enable debate over which forms of pain were legitimately inflicted, consistent with his utilitarianism, rather than ruling out all such instances ex ante. He wrote: "There is no approving [torture] in the lump, without militating against reason and humanity: nor condemning it without falling into absurdities and contradictions." *Id.* at 337. (Bentham quotes from Waldron, "Torture and Positive Law," *supra* note 2 at 11697, 1698 note 77.)

drugs, sleep, or just quiet, could be the medium [of torture]."[58] The idea is that the victim, by identifying with the desire or craving used against her, would be or feel partly complicit in her own violation. While this extends the logic of self-betrayal beyond the infliction of bodily pain, Sussman nonetheless limits the extension to the realm of unthinking impulses and instincts—basic, first order desires and cravings that one has limited power to amend via rational deliberation, desires and cravings that in Sussman's imagining would be something like overwhelming.[59] But we can extend the logic further yet, to non-first order and non-overwhelming desires.[60] In the blackmail case, for instance, where someone threatens to release a compromising photograph of the victim—say, one that reveals him to be a homosexual—the victim's desire for that information to remain private is what generates the pressure. If we can say that someone identifies with his desire to breathe, which the waterboarder exploits, then we can also say—indeed, much more confidently say—that someone identifies with the desire for his homosexuality to remain private. While the victim is ultimately worried about what *others* will think of him, this worry is uniquely his own, such that he could feel complicit in his own violation, perhaps wishing desperately he was not so worried about such things, or had more courage. The blackmailer, then, seems to commits the torturer's special wrong on Sussman's view, as he uses the victim's own affects, emotions, and desires as tools for exploiting the victim.[61] But blackmail is not torture. And with this, we can

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[58] Sussman, "What's Wrong with Torture?" *supra* note 38 at 27.

[59] *See* Harry Frankfurt, "Identification and Wholeheartedness," in ed. Ferdinand Schoeman, *Responsibility, Character, and the Emotions: New Essays in Moral Psychology* (New York: Cambridge University Press, 1987) (distinguishing first and second order desires).

[60] Kramer seems aware of this point, noting, for instance, that a salesman could exploit the feelings of a potential customer; but he nonetheless agrees with Sussman that, when coercive, exploiting someone's feelings in this way represents a central wrong-making feature of torture. *Torture and Moral Integrity, supra* note 16 at 175.

[61] In *R v. Valderrama-Vega* [1985] Crim LR 220, the defendant, charged with importing drugs, pleaded duress. He claimed that the offense was the result of three pressures: (1) he was threatened with the disclosure to his wife of his homosexual tendencies, (2) there were threats of serious violence against him and his family, and (3) he was under severe financial strain. The Court of Appeal upheld the principle that only threats of death or serious injury could form the basis of a duress defence (though they need not be the only reason for the defendant's action). The threat to reveal his homosexual

conclude our analysis of the over-inclusiveness of Sussman's conception of torture. The wrong-making features he identifies cover acts that are clearly not torture, in particular (a) "minor," non-overwhelming instances of painful coercion, like very moderate arm-twisting and (b) non-overwhelming, non-painful instances of coercion, like blackmail. Sussman, in sum, has not identified what, if anything, is unique about torture's wrongness.

C. Matthew Kramer: Torture as Perpetrator Corruption

Matthew Kramer's book on torture contains many interesting analyses, most of which I lack the space to discuss.[62] I will consider, though, his most original, and most central, argument against torture. It is "perpetrator focused," meaning that the wrong-making features he identifies focus on what torture means for or does to its perpetrators, rather than its victims. Kramer believes that, for at least three reasons, a "victim focused" perspective cannot explain the absolute wrongness of certain forms of torture. First, Kramer believes that with a sufficiently heinous offender, as with his example of Khalid Sheik Mohammed, neither the offender's interests nor his inviolability could justify an absolute ban on his interrogational torture, were he threatening future acts of terrorism.[63] Kramer argues on retributivist grounds of "just deserts" that "the interests of a mass-murdering terrorist in being free from excruciating pain are of no positive ethical weight."[64] He writes:

> "Were such a person to experience agonizing pain as a result of purely natural causes while in isolation from any society whose medical resources might alleviate his suffering, the world would *not be*

tendencies was, as such, irrelevant to the defence. For our purposes, however, we can understand that Valderrama-Vega, when bringing the drugs across the border, could have felt shamefully complicit in the way Sussman describes not only due to his fear of physical violence, but also due to his fear about the revelations to his wife. Any hard distinction between the two, just in terms of the victim's own feelings of complicity, seems unwarranted.

[62] Kramer, *Torture and Moral Integrity, supra* note 16.

[63] *Id.* at 187-88.

[64] *Id.* at 187.

> *ethically inferior* to an otherwise identical alternative world in which he never undergoes any agony."[65]

Kramer is willing to argue, even more forcefully, that such a world would be *ethically superior* (rather than merely "not ethically inferior").[66] In such contexts, Kramer explains that focusing on the torture victim (rather than the perpetrator) would lead to licensing his torture. Second, Kramer believes that killing in some situations, say, a hostage situation, has a lower burden of justification than torturing—as Sussman contends—and given that death is worse than at least most instances of torture for victims, only a perpetrator-focused perspective could explain this conviction.[67]

Third, and most importantly for his overall view, Kramer argues that only by focusing on perpetrators can we distinguish—as he believes we must—between "ephemerally incapacitative" torture, by which we force people to *omit* from doing something (say, electrically shocking someone so she fails to depress a detonator) and "act-impelling" torture, by which we force people to *act* (say, electrically shocking someone until she reveals the location of her co-conspirators).[68] Given that both forms of torture implicate the same *victim focused* wrong-making features (e.g. the pain experienced by the victim), Kramer argues, only a *perpetrator focused* perspective could justify the conviction that act-impelling torture like interrogational torture, unlike ephemerally incapacitative torture, is "always and everywhere wrong."[69] Kramer introduces an unorthodox moral terminology, consistent with what could only be a most radical moral pluralism.[70] He believes that act-impelling torture is "always and everywhere wrong," but nonetheless "morally optimal" in

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[65] *Id.* at 187-88 (emphasis added).
[66] *Id.* at 188.
[67] *Id.* at 188-89.
[68] *Id.* at 187-212.
[69] *Id.* at 115, 188-89, 194, 197, 201.
[70] *Id.* at 1-28. For critical discussion of his full terminology, the details of which I only glance upon here, see Uwe Steinhoff, "Review of Matthew Kramer, *Torture and Moral Integrity: A Philosophical Inquiry*," *Kennedy Institute of Ethics Journal* 25 (2015): E-1—E-6.

rare cases, such that its infliction would be permissible.[71] In such cases, he concludes, we can morally and legally censure the perpetrator of torture for committing a (permissible) wrong. Meanwhile, he believes that "omission-impelling" torture may in rare cases be *both* permissible and not wrong, such that it would be inappropriate to censure the perpetrator.

But why should we care about this distinction between act- and omission-impelling torture? What is the special wrong-making feature that Kramer identifies for perpetrators of act-impelling interrogational torture that makes it "always and everywhere wrong" (even if sometimes morally permissible)? "Those people morally degrade themselves," he writes, "because they aim with their torturous measures to achieve fine-grained control over the conduct of others through the subjection of the others to agony."[72] When forcing someone to perform an omission rather than action, Kramer argues that the level of control sought is not so "fine-grained," given that the victim has the opportunity to perform any number of actions other than, say, depressing the detonator.[73] When forcing someone to act, though, she has but one thing to do, and this, Kramer argues, makes an enormous moral difference.

> "Striving for such control through the infliction of harrowing pain, the torturers sully their moral integrity by endeavouring to elevate themselves to a position of minutely directive dominance—godlike dominance—that exceeds what can legitimately be sought by human beings in their interaction with one another and with sentient beings more generally."[74]

It is the perpetrators' self-aggrandizing pursuit of a "godlike dominance" over their victims, Kramer concludes, by forcing their victims to perform a singular action

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[71] Kramer, *Torture and Moral Integrity, supra* note 16 at 115.
[72] *Id.* at 201.
[73] Kramer relies upon Jonathan Bennett's understanding of acts versus omissions. Jonathan Bennett, *The Act Itself* (Oxford: Oxford University Press, 1995). While Kramer places great moral weight on the distinction, Bennett himself did not believe it had moral significance—as Kramer acknowledges. *Id.* at 195. For critical discussion on this point, see Steinhoff, "Review of Matthew Kramer," *supra* note 70.
[74] Kramer, *Torture and Moral Integrity, supra* note 16 at 201.

via the infliction of agony, that explains the special moral wrongness of act-impelling torture.

In reply to Kramer's conclusion, that special wrong-making features supervene on act-impelling but not omission-impelling torture, consider the following hypothetical: A is a government agent and B and C are co-conspirators aiming to blow up a building, with B working logistics from afar and C working onsite to set up and detonate the bomb. Imagine that A tortures B to reveal C's location, arriving just in time to torture C to prevent her from detonating the bomb (somehow torturing C is the only method of preventing the detonation). Kramer's argument implies that A's actions toward B are qualitatively more wrongful than her actions toward C, given that A forced B to do one thing (inform as to C's location), while leaving C the opportunity to do anything she wanted to other than detonate the bomb. But both acts of torture would involve the infliction of agony as a means of preventing someone from realizing a singular, desperately desired aim. Yes, C has the opportunity to do a great multitude of things other than detonate the bomb, but she does not want to do those other things. And the realization of her aim requires her to do that one single thing that her torture forecloses. If Kramer's concern is with a perpetrator's "godlike dominance" over her victim, it is doubtful that B would feel significantly more dominated than C. They both had one goal—indeed, the very same goal—and A tortured them both to prevent them from realizing that goal. And, more to the point, it is doubtful that A herself would feel significantly less dominant of C than B; if she dominates one, she dominates the other. If this works, Kramer might argue that it does not invalidate his argument, but merely extends it, such that both act- *and* omission-impelling torture are now "always and everywhere wrong" (even if sometimes "morally optimal"), given what they entail for the integrity of the perpetrators.

Is there anything, though, to the perpetrator-focus? Frances Kamm is skeptical:

> "[I]t at least *seems* that torturing someone could be corrupting, only if torturing is wrong on other grounds. That is, the prospect of corruption *seems to presuppose* that what will be done is wrong, rather than providing a reason to believe it is wrong. If so, we would need another explanation for why torturing is wrong, on the whole or in part, besides its leading to corruption of the torturer. Suppose we had an account of why torture is wrong. Then it seems misguided to think that the strongest objection to the wrong act is not what makes it wrong but that it makes an agent who does it into a wrongdoer. It is especially misguided to think that agents themselves should avoid wrong acts because of the effect on themselves. Rather they should avoid wrong acts because of the properties that make the act wrong."[75]

Why is torturer impermissible? If Kramer's response is that it would "sully [the] moral integrity" of perpetrators to so thoroughly dominate another person, then Kamm's reply is that so dominating another person could only impact one's integrity if it were independently wrong. If *arguendo* we agreed with Kramer that someone like Khaled Sheik Mohammed has forfeited his rights, such that he has no self-regarding complaint to his torture, then how could forcing him to talk via torture corrupt one's integrity? If it's not wrong with regard to the victim, then why is it wrong with regard to the perpetrator?

Perhaps this is too quick. Let us imagine an instance of "victimless" torture: an impeccable virtual reality simulation wherein people could immerse themselves in the experience of torturing another person; or maybe the simulation could occur in the real-world and involve totally life-like robots. Since the "victims" would be imaginary or fake, the "torturers" would violate no one's rights, in parallel to Kramer's starkly retributivist conception of torturing Khaled Sheik Mohammad. There would seem, nonetheless, something grotesque about the simulation, and regardless of whether it increased participants' likelihood of hurting people in the real world. The simulation would be bad for you. And perhaps we can say the same

[75] Kamm, *Ethics for Enemies*, *supra* note 38 at 51-52.

thing about real-world torture, such that, independently of what it does to its victims, torture is partly destructive of its perpetrators, of their integrity or their personas, as they fill their consciousnesses with perfectly cruel images and intentions.[76] Maybe delegating the actual torture to some horrible machine could lessen this impact. Regardless, completely ignoring the fact that the perpetrator is the culpable party, it would seem hyperbolic to equate the perpetrator's own injury with that of the victim, as should become clearer below when we consider some first-hand accounts of torture victims. And I follow Kamm in thinking that such perpetrator-focused considerations, even if genuine reasons against torture, are low on the list of such reasons, far beneath the victim-centered reasons. All that said, there is a more basic sense in which the wrongness of torture does indeed require the perpetrator focus. It is not the idea that torture is bad or corrupting for perpetrators, but the separate notion that torture is an intentional wrong, whereby the perpetrator must intentionally inflict a certain experience on the victim for it to qualify as torture. I will return to this issue of intentionality below.

There is a final point to make about Kramer's proposal. The relationship between the infliction of agony and the "godlike dominance" associated with forcing someone to act is unclear. For it seems that any instance of coercing someone to perform a single action, even if it did not involve pain, would implicate Kramer's central concerns. That would lead us again to an over-inclusive definition of torture, as blackmailing someone so they perform a specific action would seem to be torture, or to implicate the exact same wrong-making feature as torture.

[76] *See* Lydia DePillis, "This is how it feels to torture: It's followed by 'toxic levels of guilt and shame,'" *The Washington Post* (December 11, 2014), https://www.washingtonpost.com/news/storyline/wp/2014/12/11/this-is-how-it-feels-to-torture/?utm_term=.24e3a4c35952.

III. Suffusive Panic

In this and the following sections I develop a novel account of torture's wrong-making features, as indicated at the outset. In this section (pages 125-41) I primarily follow Jean Améry and Elaine Scarry's work on the "overwhelming" nature of torture in developing a definition of the practice.[77] Torture, I argue, is the intentional saturation of a victim's consciousness with panic. Above a certain level of acute suffering, almost all of us lose the ability to reflect upon our experience, as instincts associated with the fight-or-flight response kick in, and we have but one thought, or at least one extremely dominant thought, which is to *make it stop right now*. Torture aims, in this way, to cabin a victim's ken and sense of self into perfectly awful *present*. Sections IV – VI consider the moral reasons that oppose doing this to someone, looking to develop our understanding of degradation-limiting reasons more generally. Section IV (pages 141-50) examines the concept of "respect," explaining how it concerns having a certain attitudinal and practical response to something's value. At its most straightforward, to *disrespect* something involves interfering with its capacity to realize or exhibit value. To pour water on a sandcastle, in this way, demonstrates disrespect for the sandcastle's value. To understand what it means to respect or disrespect a *person*, then, we need a basic theory of the human good, a basic theory of what humans do exactly to realize or exhibit value, and how an action might assist or hinder this process. Section V (pages 150-60) takes a broadly Aristotelean line, arguing that humans realize value *diachronically,* employing their practical reasoning capacities to stitch moments together through time to construct good lives as a whole. Section VI (pages 160-73)

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[77] Jean Améry, *At the Mind's Limit: Contemplations by a Survivor on Auschwitz and its Realities*, trans. Sidney Rosenfeld and Stella P. Rosenfeld (Bloomington: Indiana University Press, 1980); Scarry, *The Body in Pain, supra* note 6. For discussion of torture's overwhelming nature, see also Seth Kreimer, "Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror," *University of Pennsylvania Journal of Constitutional* Law 6 (2003): 278-325, at 296-99; David Luban, "Liberalism, Torture, and the Ticking Bomb," *Virginia Law Review* 91 (2005): 1425–61, at 1430-31; Kramer, *Torture and Moral Integrity, supra* note 16 at 161-173.

brings the threads of the argument together, explaining how intentionally inflicting a suffusive panic is profoundly disrespectful of a victim's *essentially human* value. To torture a person is to force the *diachronic* into the *synchronic*, to take a being that realizes value through time and to force her into *this awful moment only*. Section VI then considers what this means for our understanding of degradation more generally. It concludes that to surpass a dispositive degradation-limiting reason involves demonstrating a degree of disrespect toward someone that embodies a rejection of her standing as a human. This is achieved by intentionally "ruining" her essentially human capacity to build a good life through time, or intentionally treating her in a way that establishes the legitimacy of ruining this capacity. To so thoroughly reject someone's worth, I conclude, violates the liberal commitment to human inviolability. Even if the reasons that justify the infliction of penal harm—such as the corrective justice and social defense theories—endorse such treatment as a proportional means of realizing our penal aims, it is still impermissible.

A. Blinding Pain

Nazi interrogators tortured Améry though the method referred to as *strappado* or *corda*. His hands were shackled behind his back. A chain was hooked to the shackles. The chain lead to the top of a vaulted ceiling, where it ran into a roll. The chain was pulled upwards until Améry's arms and then body were raised off the ground, with his shoulders bearing all his weight. "[T]here was a crackling and splintering in my shoulders that my body has not forgotten until this hour," Améry writes over two decades after the ordeal. "The balls sprang from their sockets. My own body weight caused luxation; I fell into a void and now hung by my dislocated arms, which had been torn high from behind and were now twisted over my head."[78] Améry describes the consuming nature of the pain:

> "Whoever is overcome by pain through torture experiences his body as never before. In self-negation, his flesh becomes a total reality…[O]nly in torture does the transformation of the person into

[78] Améry, *At the Mind's Limit*, *supra* note 77 at 32.

> flesh become complete. Frail in the face of violence, yelling out in pain, awaiting no help, capable of no resistance, the tortured person is only a body, and nothing else beside that."[79]

During his thirty months of confinement in the late 1970s, agents of the Argentinian military junta repeatedly tortured Jacobo Timerman, who had edited a newspaper critical of the regime. In describing the experience of being electrically shocked, Timerman echoes Améry's point that for the torture victim "his flesh becomes a total reality."

> "What does a man feel? The only thing that comes to mind is: They're ripping apart my flesh…It is impossible to shout—you howl…When electric shocks are applied, all that a man feels is that they're ripping apart his flesh. And he howls. Afterwards, he doesn't feel the blows. Nor does he feel them the next day, when there's no electricity but only blows."[80]

Timerman's distinction between "shouting" and "howling" seems to refer to the aural responses characteristic of people versus animals. The tortured person does not "shout" out like a person, with words, but rather "howls" like an animal.[81] Améry reaches a similar conclusion, replacing "howl" with "squeal":

> "A slight pressure by the tool-wielding hand is enough to turn the other—along with his head, in which are perhaps stored Kant and Hegel, and all nine symphonies, and the World as Will and Representation—into a shrilly squealing piglet at slaughter."[82]

Améry's agony vitiated, or concealed, his personal principles, manners, memories, aesthetic and social theories, political identities, and so forth, all represented ironically in the excerpt by his knowledge of Kant, Hegel, Beethoven, and

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[79] *Id.* at 33.

[80] Jacobo Timerman, *Prisoner Without a Name, Cell Without a Number* (Weidenfeld and Nicolson: London 1981), 32-33.

[81] *See* Jeffrie G. Murphy, "Cruel and Unusual Punishments," in *Retribution, Justice, and Therapy: Essays in the Philosophy of Law,* ed. Wilfrid Sellars (Dodrecht: D. Reidel Publishing, 1979), 223-249, at 233 (arguing that a punishment is "in itself" degrading when it "treats the prisoner as an animal instead of a human being" or "perhaps even is an attempt to *reduce* him to an animal or a mere thing."). On the connection between degradation and animalization, see *infra* at 167-68.

[82] Améry, *At the Mind's Limit*, *supra* note 77 at 35.

Schopenhauer. Améry presents his book as a meditation on what it meant to be an intellectual under torture and in a concentration camp. The excerpts here encapsulate his conclusions on torture, which do not differ much from those of his time in a concentration camp. If an intellectual human being differs dramatically in his capacities and intrinsic value from a piglet, an intellectual in agony and a piglet in agony are the same "shrilly squealing" creature, Améry argues. Améry was a body in pain, "and nothing else beside that."[83]

Agony erased his refinement and cultivation, and his personal commitments, too, as the Nazis restricted his ken to his excruciation, with the result—the intended result—that he was ready to betray himself and the Belgian resistance to realize his one undeniable desire and motive, which was for the pain to stop. Améry explains, though, how the concept of "betrayal" mischaracterizes the process of confessing or informing under the duress of torture.[84]

> "One cannot betray or be false to something that has ceased to exist and, in the most literal way possible, the created world of thought and feeling, all the psychological and mental content that constitutes both one's self and one's world, and that gives rise to and is in turn made possible by language, ceases to exist."[85]

Betrayal is not a strict liability offence, Améry explains. And the torture victim lacks awareness of—and thus cannot in fact betray—the values or people his impulsive utterances may impact. Of course, he has some awareness of them, or else he would not be able to say anything related to them, but he lacks awareness of their meaning and importance.

Elaine Scarry, in parallel to Améry and Timerman, emphasizes the attention-fixing capacity of severe pain:

"As in dying and death, so in serious pain the claims of the body

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[83] *Id.* at 33.

[84] In so doing, he presents further reasons to doubt Sussman's conclusion that torture's essential wrong-making feature is that it brings about "a kind of forced self-betrayal." *See* discussion *supra* at 113-19.

[85] Améry, *At the Mind's Limit*, *supra* note 77 at 30.

> utterly nullify the claims of the world. The annihilating power of pain is visible in the simple fact of experience observed by Karl Marx, 'There is only one antidote to mental suffering, and that is physical pain,' a pronouncement whose premises are only slightly distorted in Oscar Wilde's 'God spare me physical pain and I'll take care of the moral pain myself.'"[86]

She also writes:

> "Pain annihilates not only the objects of complex thought and emotion but also the objects of the most elemental acts of perception. It may begin by destroying some intricate and demanding allegiance, but it may end (as is implied in the expression 'blinding pain') by destroying one's ability simply to see."[87]

Of course, Scarry uses "blinding pain" and the notion that pain destroys "one's ability simply to see" as metaphors. Torture does not ruin one's capacity for sight literally. What a victim loses, to reinforce the point, is the ability to "see" the motivational relevance of anything other than her agony and the imperative of making it stop. Nothing else crosses her mind (to use another metaphor).

Scarry continues:

> "It is the intense pain that destroys a person's self and world, a destruction experienced spatially as either the contraction of the universe down to the immediate vicinity of the body or as the body swelling to fill the entire universe. Intense pain is also language-destroying: as the content of one's world disintegrates, so the content of one's language disintegrates; as the self disintegrates, so that which would express and project the self is robbed of its source and its subject."[88]

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[86] Scarry, *The Body in Pain, supra* note 6 at 33.

[87] *Id.* at 54.

[88] *Id.* at 35. David Luban articulates a similar view: "[T]orture is a microcosm, raised to the highest level of intensity, of the tyrannical political relationships that liberalism hates the most. I have said that torture isolates and privatizes. Pain forcibly severs our concentration on anything outside of us; it collapses our horizon to our own body and the damage we feel in it…The world of the man or woman in great pain is a world without relationships or engagements, a world without an exterior. It is a world reduced to a point, a world that makes no sense and in which the human soul finds no home and no repose." Luban, "Liberalism, Torture, and the Ticking Bomb," *supra* note 77 at 1430-31.

Why might torture be "language-destroying"? The central idea is that verbal expression depends upon an awareness of, and desire to engage with, the concepts and things to which words refer, but torture restricts one's awareness and desire to her pain. And pain, Scarry explains, is itself largely inexpressible, given its lack of external referents.[89] Scarry makes the further, somewhat obscure point that language depends upon the presence of subjectivity—of an "I" who expresses herself—and torture robs a victim of this, as the self in extreme pain "disintegrates." Accepting that point, though, would require the conclusion that when a torture victim feels pain, she does not conceive of it as *her* pain. And that seems very unlikely to be the case. We can say that a torture victim's sense of self is "severely restricted" or even "ruined" without concluding that it is positively obliterated. Regardless, Timerman provides support for Scarry's "language-destroying" argument, explaining that words were somehow inapposite tools for communicating his experience:

> In the long months on confinement, I often thought of how to transmit the pain that a tortured person undergoes. And always I concluded that it was impossible. It is a pain without points of reference, revelatory symbols, or clues to serve as indicators.[90]

As does Améry:

> "[T]he created world of thought and feeling, all the psychological and mental content that constitutes both one's self and one's world, and that gives rise to and is in turn made possible by language, ceases to exist."[91]

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[89] Scarry, *The Body in Pain, supra* note 6 at 3-11. I will return to this point in Chapter 3 at 220-24, arguing that Scarry conflates (a) being unable to express one's pain with precision and detail with (b) being unable to express the very presence of one's pain. While I accept (a), I disagree with (b), at least when it comes to extreme pain. When it comes to extreme pain, its very presence is easy to communicate, as one wails involuntarily and everyone within earshot understands what is happening.

[90] Timerman, *Prisoner Without a Name, supra* note 80 at 32-33.

[91] Améry, *At the Mind's Limit*, *supra* note 77 at 30.

If words are inherently external and social, and pain is inherently internal and personal, then the all-consuming pain of torture would indeed be an experience largely resistant to words, with only the beastly "howl" or "squeal" available as means of expression.

B. Pan's Shout

Cesare Beccaria, writing in 1764, attempts to clarify the psychological processes or mechanisms by which the severe pain attendant to torture consumes one's attention:

> "Every act of our will is always proportional to the force of the sensory impression which gives rise to it; and the sensibility of every man is limited. Therefore, the impression made by pain may grow to such an extent that, *having filled the whole of the sensory field*, it leaves the torture victim no freedom to do anything but choose the quickest route to relieving himself of the immediate pain."[92]

Beccaria explains that torture, by saturating someone's senses with pain, will determine her actions. I doubt, though, that Beccaria's "presentist" empiricism—if we can call it that—can explain this process. To make any sense of the view that our sense impressions determine our acts would require accepting what Beccaria seems to overlook: that many such acts are impelled by our *prior* sensory impressions, as Locke argues.[93] Otherwise, there would be no way to understand my desire for, say, orange juice, if I was not at that moment looking at orange juice. As such, without saying more, it is not clear why filling one's *present* sensory field would consume her attention and determine her will. Perhaps a prior sense impression could win that moment nonetheless. I take no position on empiricist psychology or any such issues. The general point is that we normally retain some discretion

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[92] Cesare Beccaria, *On Crimes and Punishments*, in *On Crimes and Punishments and Other Writings*, ed. Richard Bellamy, trans. Richard Davies, Virginia Cox, and Richard Bellamy (Cambridge: Cambridge University Press, 1995), 41 (emphasis added) (quoted in Kramer, *Torture and Moral Integrity, supra* note 16 at 165).
[93] *See* John Locke, *An Essay Concerning Human Understanding* [1689], ed. Roger Woolhouse (London: Penguin, 1997), Book II, Chapter X ("Of Retention"), 147-52.

over whether the data currently streaming in through our five senses determines our actions or not. This applies, indeed, to many instances of pain (e.g. a dull pain in my shoulder will not prevent me from going about my day). Another way to state the point is that in every waking moment our sensory field is saturated by whatever we see, hear, taste, touch, and smell. But these experiences do not always consume our attention and determine our will. We need to tell another story, then, about why extreme pain forces us into the moment, as it were, in the ways articulated so effectively by Améry, Timerman, and Scarry. To say that it fills one's sensory field is not enough, given that there usually is a lot of thinking going on "behind the scenes" of our sensory experience, and that this thinking often determines our decisions. To understand what extreme pain does to us, how it floods that behind the scenes action, shrinking us down in the ways described above, requires an additional concept: panic.

The word comes to English from the French *panique*, which in turn derives from the Greek *panikos*, meaning "of Pan," the ancient Greek god—half-man, half-goat—of fertility, pastures, flocks, and shepherds, among other things.[94] Normally conceived of as a peaceful, playful god, he was believed to retain a dark side affiliated with a shout that would cause flocks to stampede, fleeing in terror. Pan's shout was believed to impact people, too, supposedly causing the Persians to flee in the battle of Marathon. The English word is associated with this aspect of the god. From the Oxford English Dictionary: "A sudden feeling of alarm or fear of sufficient intensity or uncontrollableness as to lead to extravagant or wildly unthinking behaviour, such as that which may spread through a crowd of people; the state of experiencing such a feeling."[95] I lack the expertise to engage with the neurology of

[94] "Panic." Merriam-Webster.com, https://www.merriam-webster.com/dictionary/panic.
[95] *OED Online*. December 2016. Oxford University Press, http://www.oed.com/view/Entry/136852?rskey=EVMqyn&result=2 (accessed March 09, 2017).

panic.[96] My central point, though, requires only a basic awareness of the self-preservation instincts associated with the fight-or-flight response. When pain or suffering reaches a certain point, it can trigger these instincts, causing the "wildly unthinking behaviour" constitutive of panic. The concept of the stampede elucidates. The victim's pain or suffering, when coupled with her self-preservation instincts, will *stampede* over the other aspects of her consciousness and identity, dominating not only her sensory experience, but also the behind the scenes deliberation, too, in an immersive rush of *make it stop right now* panic.

In 1958 Henri Alleg, a newspaper editor like Timerman, was tortured in a variety of ways by French Algerian authorities. They wanted the names and locations of the people who were protecting him while he was in hiding. Alleg, describing the first time he was waterboarded, expresses torture's powers of determination:

> "When everything was ready, he said to me: 'When you want to talk, all you have to do is move your fingers.' And he turned on the tap. The rag was soaked rapidly. Water flowed everywhere: in my mouth, in my nose, all over my face. But for a while I could still breath in some small gulps of air. I tried, by contracting my throat, to take in as little water as possible as to resist suffocation by keeping air in my lungs for as long as I could. But I couldn't hold on for more than a few moments. I had the impression of drowning, and a terribly agony, that of death itself, took possession of me. In spite of myself, all the muscles of my body struggled uselessly to save myself from suffocation. In spite of myself, the fingers of my two hands shook uncontrollably. 'That's it! He's going to talk,' said a voice."[97]

Extreme pain or suffering, in this way, does not just hurt more than lesser forms of pain or suffering, but also contains within it the possibility of a stampeding panic.

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[96] *See, e.g.,* John A. Wemmie, "Neurobiology of panic and pH chemosensation in the brain," *Dialogues in Clinical Neuroscience* 13 (2011): 475-83.

[97] Henri Alleg, *The Question*, trans. John Calder (London: John Calder, 1958), 49.

Christopher Hitchens, interested in the question of whether waterboarding constituted torture, volunteered to be waterboarded by US Special Forces. His recounting echoes that of Alleg:

> "In this pregnant darkness, head downward, I waited for a while until I abruptly felt a slow cascade of water going up my nose. Determined to resist if only for the honor of my navy ancestors who had so often been in peril on the sea, I held my breath for a while and then had to exhale and—as you might expect—inhale in turn. The inhalation brought the damp cloths tight against my nostrils, as if a huge, wet paw had been suddenly and annihilatingly clamped over my face. Unable to determine whether I was breathing in or out, and flooded more with sheer panic than with mere water, I triggered the pre-arranged signal and felt the unbelievable relief of being pulled upright and having the soaking and stifling layers pulled off me. I find I don't want to tell you how little time I lasted."[98]

As to whether waterboarding constituted torture, Hitchens concluded: "I apply the Abraham Lincoln test for moral casuistry: 'If slavery is not wrong, nothing is wrong.' Well, then, if waterboarding does not constitute torture, then there is no such thing as torture."[99] Malcolm Nance was the Master Instructor and Chief of Training at the US Navy's Survival, Evasion, Resistance and Escape School (SERE), which, among other activities, trains elite soldiers in surviving and ideally resisting torture. In addition to leading, witnessing, and supervising the waterboarding of hundreds of people, he underwent the procedure himself "at its fullest."[100] He writes of the waterboard: "Unless you have been strapped down to the board, have endured the agonizing feeling of the water overpowering your gag reflex, and then feel your throat open and allow pint after pint of water to

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[98] Christopher Hitchens, "Believe Me, It's Torture," *Vanity Fair*, July 2, 2008 (emphasis added).
[99] *Id.*
[100] Malcolm Nance, "Waterboarding is torture…Period (Links Updated…#9)," *Small Wars Journal*, October 31, 2007, http://smallwarsjournal.com/blog/waterboarding-is-torture-period-links-updated-9

involuntarily fill your lungs, you will not know the meaning of the word."[101] He continues:

> "It does not simulate drowning, as the lungs are actually filling with water. There is no way to simulate that. The victim is drowning."[102]
>
> "Waterboarding is slow motion suffocation with enough time to contemplate the inevitability of black out and expiration—usually the person goes into hysterics on the board."[103]
>
> "They all talk! Anyone strapped down will say anything, absolutely anything to get the torture to stop."[104]

In these excerpts, both Hitchens and Lance confirm that torture induces a *make it stop right now* panic, as well as the centrality of this feeling in explaining the aversiveness of torture. Hitchens expresses this point succinctly when he writes that he was "flooded more with sheer panic than with mere water…"[105]

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[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] Probably the most famous fictional account of this process is the climax to George Orwell's *1984*, when Winston is interrogated by O'Brien, the agent of the totalitarian regime. Winston—who has a phobia of rats—is strapped to a chair and threatened with a cage containing starving rats. The cage was configured so that it could be placed on his head like a mask. It had a wire door toward the face that could be lifted once the mask was secured, after which the rats would eat his face. For context, the character of Julia is Winston's desperate lover and co-conspirator. This extract is a good demonstration, as well, of how mental torture, by resulting in a suffusive panic, belongs in the same category of injury as physical torture.

> "The cage was nearer; it was closing in. Winston heard a succession of shrill cries which appeared to be occurring in the air above his head. But he fought furiously against his panic. To think, to think, even with a split second left—to think was the only hope. Suddenly the foul musty odour of the brutes struck his nostrils. There was a violent convulsion of nausea inside him, and he almost lost consciousness. Everything had gone black. For an instant he was insane, a screaming animal. Yet he came out of the blackness clutching an idea. There was one and only one way to save himself. He must interpose another human being, the body of another human being, between himself and the rats.
>
> The circle of the mask was large enough now to shut out the vision of anything else. The wire door was a couple of hand-spans from his face. The rats knew what was coming now. One of them was leaping up and down, the other, an old scaly grandfather of the sewers, stood up, with his pink hands against the bars, and fiercely

To my knowledge, there have been no serious scientific studies of the psychological, psychiatric, or neurological experience of torture in the moment of agony. But *ex post* studies of survivors provide further evidence about the connection between torture and panic, given the prevalence of post-traumatic stress disorder and panic attacks after the fact.[106] Consider Trung, a 61 years old Vietnamese refugee living in Boston.[107] He had served as a high-level officer in the South Vietnamese army before he was imprisoned for 12 years by the North Vietnamese army and subjected to beatings and torture. He reported "orthostatic panic attacks," panic attacks induced by standing upright. Researchers who were studying

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> sniffed the air. Winston could see the whiskers and the yellow teeth. Again the black panic took hold of him. He was blind, helpless, mindless.
>
> 'It was a common punishment in Imperial China,' said O'Brien as didactically as ever.
>
> The mask was closing on his face. The wire brushed his cheek. And then—no, it was not relief, only hope, a tiny fragment of hope. Too late, perhaps too late. But he had suddenly understood that in the whole world there was just one person to whom he could transfer his punishment—one body that he could thrust between himself and the rats. And he was shouting frantically, over and over.
>
> 'Do it to Julia! Do it to Julia! Not me! Julia! I don't care what you do to her. Tear her face off, strip her to the bones. Not me! Julia! Not me!'"

George Orwell, *1984* (New York: Harcourt, 1949), 273-74.

[106] *See e.g.,* Brian Engdahl, et. al., "Posttraumatic Stress Disorder in a Community Group of Former Prisoners of War: A Normative Response to Severe Trauma," *American Journal of Psychiatry* 154 (1997): 1576-81; Metin Başoğlu, "Severity of trauma as predictor of long-term psychological status in survivors of torture," *Journal of Anxiety Disorders* 9 (1995): 339-50; Raija-Leena Punamäki, et. al., "Nature of torture, PTSD, and somatic symptoms among political ex-prisoners," *Journal of Traumatic Stress* 23 (2010): 532-36; C. Bower and D. Stein, "Panic disorder following torture by suffocation is associated with predominantly respiratory symptoms," *Psychological Medicine* 29 (1999): 233-6; Alejandro Moreno and Michael Peel, "Posttraumatic Seizures in Survivors of Torture: Manifestations, Diagnosis, and Treatment," *Journal of Immigrant Health* 6 (2004): 179-186; Devon Hinton, et. al., "Panic disorder among Cambodian refugees attending a psychiatric clinic: Prevalence and subtypes," *General Hospital Psychiatry* 22 (2000): 437-44; Devon E. Hinton, et. al., "Orthostatic Panic Attacks Among Vietnamese Refugees," *Transcultural Psychiatry* 44 (2007): 515-44; Marcello Ferrada-Noli, et. al., "Suicidal Behavior After Severe Trauma. Part 1: PTSD Diagnoses, Psychiatric Comorbidity, and Assessments of Suicidal Behavior," *Journal of Traumatic Stress* 11 (1998): 103-112; Athanase Hagengimana, et. al., "Somatic panic-attack equivalents in a community sample of Rwandan widows who survived the 1994 genocide," *Psychiatry Research* 117 (2003): 1-9.

[107] Devon E. Hinton, et. al., "Orthostatic Panic Attacks Among Vietnamese Refugees," *supra* note 106 at 523-24.

the pervasiveness of that phenomenon amongst Vietnamese refugees provided the following case study:

> "Trung had not received psychiatric care before presenting at our clinic. He complained of poor energy, flashbacks, hopelessness, insomnia (just over an hour's sleep at night), and nightmares. Upon standing, he had dizziness, blurry vision, tinnitus, shortness of breath, chest tightness, sweating, palpitations, diaphoresis, and fear of death. Trung worried about a heart attack (*đau tim*) and dangerously high blood pressure. After sitting back down, these symptoms persisted for about 20 minutes. In these panic episodes, he had four different types of flashbacks. For one, as tinnitus (*ù tai*) began, he recalled his friend's screams upon being taken out of his prison cell and escorted a short distance away, then shot and killed by five guards; the sound of bullets, the screams of his friend, the anxiety-produced ear ringing, all seemed to combine in a dizzying mix. Second, he recalled being tortured by having logs placed on his chest until he lost consciousness. (He was tortured this way several times.) Third, he recalled when the interrogators kicked and stomped upon his chest until he lost consciousness—and that when he awoke, his chest ached. And fourth, he recalled one day, when feeling ill and off balance, tripping and falling down a rocky, steep slope; he hit his head half way down the slope, losing consciousness. Each of the flashbacks came into his mind like a movie, one after another, each lasting about 1 minute. The flashbacks only stopped when he was able to pull himself from the vortex of memory, most usually by turning on the television."[108]

Given that even a memory of torture can induce feelings of panic in this way—and given that such an experience is relatively common amongst torture survivors—that is at least some further evidence, working backwards, that the experience of torture itself involves extreme panic.[109] We can add this *ex post* evidence to the compelling first-hand accounts provided by Améry, Timerman, Alleg, Hitchens, and Lance—as well as the intuitive evidence about what it might feel like to be tortured.

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[108] *Id.* at 524.

[109] Below I consider the moral implications of the long-term damage of torture. *See* discussion *infra* at 164-65.

With this, we can restate the definition of torture proposed above: *Torture is the intentional infliction of a suffusive panic*. Unlike the legal definition of torture (the intentional infliction of severe mental or physical pain or suffering), as well as those proposed by Shue, Sussman, and Kramer, this definition passes the broad-brush test of conceptual analysis discussed above, encompassing practices that are definitely torture but leaving out practices that are definitely not torture. The definition easily encompasses mental torture—torture which operates directly through psychological mechanisms, rather than through bodily pain, as in the presence of constant light or darkness or loud noise—so long as the experience overwhelms in the way indicated above, culminating in the same phenomenology of panic.[110] But it leaves out lesser forms of painful coercion. Very moderately twisting my arm, for instance, will not induce suffusive panic. It also leaves out blackmail. A victim of blackmail will be able to reflect to some degree on how she might respond to the threat. She will not flail about hysterically and impulsively upon receipt of the blackmailer's letter, howling like an animal. It also leaves out incarceration, thus precluding the "easy" comparison between torture and long-term incarceration enabled by the legal definition of torture.[111] Whatever long-term incarceration does to someone, only very rarely does it induce feelings of utter terror and panic; I discuss this issue further in the following chapter.

C. Interpretative Constraint

This definition avoids much of the vagueness inherent to the legal definition of torture. President George W. Bush's Office of Legal Counsel (OLC) lawyers, in considering whether waterboarding qualified as torture, interpreted the US statute codifying the CAT—excerpted above—which defines torture, in most

[110] For George Orwell's fictional account of mental torture, see *supra* note 105. *See* David Luban and Henry Shue, "Mental Torture: A Critique of Erasures in U.S. Law," *Georgetown Law Journal* 100 (2011): 624-41 (analyzing the concept of mental suffering and arguing that US legal interpretation of anti-torture laws entails the legalization of mental torture).

[111] *See* discussion *supra* at 109-10.

relevant part, as an act "specifically intended to inflict severe physical or mental pain or suffering."[112] In attempting to define "severe pain or suffering," the OLC lawyers looked to medical administration statutes, where Congress defines what an "emergency medical condition" is for the purposes of receiving health benefits.[113] These definitions only obliquely reference "severe pain." Nonetheless, the OLC lawyers argued that "severe pain" for the purposes of the CAT amounts to what Congress defined as a "emergency medical condition." They thus concluded, first, that to amount to torture under the CAT, the pain must be as intense as that associated with serious physical injury, such as organ failure, impairment of bodily function, or death; and, second, they concluded that waterboarding did not inflict physical pain of such intensity, and therefore did not qualify as torture. Even if the arguments of John Yoo, Jay Bybee and their colleagues were circuitous and disingenuous,[114] there is at least a patina of legality to them. And the contention here is that there would have been much less interpretative wiggle room for them to argue that waterboarding did not qualify as torture if the legal definition of torture was "the intentional infliction of *overwhelming* suffering," "the intentional infliction of panic," or, most precisely, "the intentional infliction of a suffusive panic." In this way, as indicated above, the legal definition of torture represents a failure of legal drafting, insofar as a more precise definition, capable of more effective regulation, was available.

D. Counter-Example

Before considering the wrong-making features of intentionally inducing a suffusive panic, let us consider a potential counter-example for this proposed

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[112] 18 USC § 2340.

[113] Memorandum from Office of the Assistant Att'y Gen. to Alberto R. Gonz Counsel to the President (Aug. 1, 2002) (citing 8 USC § 1369 (2000); 42 USC § 1395w-22; id. § 1395x (2000); id. §1395dd (2000); id. § 1396b (2000); id. § 1396u-2 (2000)).

[114] For critical discussion of their legal reasoning, see Karen J. Greenberg and Joshua L. Dratel (eds.), *The Torture Papers: The Road to Abu Ghraib* (Cambridge: Cambridge University Press, 2005); Luban, "A Communicative Conception of Torture," in *Torture, Power, and Law*, *supra* note 4 at 111-36; Waldron, "Torture and Positive Law," *supra* note 2 at 1703-09.

definition. What about the unusual person who resists torture? Alleg may have moved his fingers when he was waterboarded the first time—"In spite of myself, the fingers of my two hands shook uncontrollably. 'That's it! He's going to talk,' said a voice"[115]—but he did not in fact talk. Not then, nor during any of his increasingly vicious tortures, not even when they electrically shocked his mouth and genitals. He was regarded as something of a marvel by his tormentors. For, as Nance, the expert waterboarder, writes, "They all talk!"[116] But does Alleg's almost superhuman composure mean that he did not experience a "suffusive panic," and thus entail that he was not tortured, according to my definition? That would surely be damaging to my proposal, given that there is absolutely no denying that Alleg was tortured. Let us consider, though, an alternative situation. Imagine that someone was provided with a strange drug cocktail, such that she was conscious that her tormentors were tearing apart her body, but without any pain or alarm, as if she was sleepily watching a program on a distant television. That my definition rules out such an experience as torture is, I think, a point in its favor. Perhaps when she regains full consciousness, she will experience the panic of genuine torture. During the ordeal itself, however, she was grievously assaulted, but she was not tortured. The point is that this imagined scenario bears little relationship to Alleg's experience. He describes here what happened after he moved his fingers, but then refused to talk:

> "'Well, then?' I remained silent. 'He's playing games with us! Put his head under again!'
>
> This time I clenched my fists, forcing the nails into my palm. I had decided I was not going to move my fingers again. It was better to die of asphyxiation right away. I feared to undergo again that terrible moment where I felt myself losing consciousness, while at the same time fighting with all my power not to die. I did not move my hands, but three times I knew again this insupportable agony. In

[115] Alleg, *The Question, supra* note 97 at 49.
[116] Nance, "Waterboarding," *supra* note 100.

> extremis, they let me get my breathe back while I threw up the water. The last time, I lost consciousness."[117]

It is not as if Alleg experienced his violations with equanimity, as if from a distance. His torturers pushed the buttons that every human has hidden away, buttons that, when pressed in the right way, will induce "insupportable agony" and terror. The right way to describe his experience is that he experienced a suffusive, instinctual panic, and so was tortured, even if he somehow *resisted* this panic, denying the authority of the body and resolving to die.

IV. Disrespect

As stated above, the definitional and the normative are closely intertwined, but ultimately distinct. And if this works as a definitional matter, the normative question nonetheless remains. Why, exactly, is forcing someone into a perfectly awful moment, via the infliction of a suffusive panic, wrong? Or, more specifically, what are its wrong-making features? If its wrongness is obvious, that is not helpful for the present inquiry, which is not about torture in the end.[118] We are looking to torture as a source of comparison, to see if it can provide any guidance on degradation-limiting reasons more broadly. To realize that aim, we need to explain torture's wrongness in terms of general concepts. My central conviction is that the concept of *disrespect* is central to this inquiry—that the fundamental wrong-making feature of torture is that it is egregiously disrespectful to victims. While not every instance of disrespect, such as gently mocking somebody, is degrading, the hypothesis is that disrespect is the metric of degradation, and that every instance of degrading treatment will be degrading because it is disrespectful.

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[117] Alleg, *The Question, supra* note 97 at 49-50.

[118] In *Because it is Wrong*, Charles and Gregory Fried do not offer any sort of *argument* as to why torture is wrong, with conclusions following from premises. Rather, they present images of torture, such as Leon Golub's painting, "Interrogation 1," and the wrongness of treating people in those ways is seemingly meant to be obvious to any reasonable individual. This is not to say that their book is unpersuasive, but it is not of great value for our present purposes. Charles Fried and Gregory Fried, *Because it is Wrong. Torture, Privacy and Presidential Power in the Age of Terror* (New York: W.W. Norton, 2010).

Rather than disrespect, the concept of "human dignity" is often invoked in this context: torture is wrong because it violates the victim's human dignity.[119] Without an explanation of the underlying premises and reasons, however, there is not much force to the assertion that some treatment violates someone's dignity. Respect is more basic than dignity, and more capable of elucidating the machinery of moral reasons at work in our revulsion to certain forms of treatment, as I hope to demonstrate. Indeed, the duty to uphold human dignity is commonly understood to derive from or to be synonymous with having "respect for persons," and so what follows should be understood as an attempt to understand certain aspects of human dignity.[120]

A. Respect and Value

What does it mean to "respect" something? Let us consider Joseph Raz's theory of respect, and of respect for persons.[121] For Raz, respect is a species of responding to value and thus to reason.[122] On his view, respect has two basic components. First, he writes, to respect things means "recognizing" them as things of value—"regarding [them] in ways consistent with their value, in one's thoughts, understood broadly to include imaginings, emotions, wishes, intentions, etc." and,

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[119] *See, e.g.,* John Vorhaus, "On Degradation - Part One: Article 3 of the European Convention on Human Rights," *Common Law World Review* 31 (2002): 374-99, at 388 ("The essence of degrading punishment is the violation of humanity dignity…"); Waldron, "Inhuman and Degrading Treatment," *supra* note 26 at 281-84 (considering "four kinds of outrage to human dignity," which he understands as equivalent to "four species of degradation": "bestialization," treatment fit for an animal, "instrumentalization," treating people as a mere means to the greater good, "infantilization," treating an adult as if she were an infant, and "demonization," treating someone "as though he were simply a vile embodiment of evil."); Kevin J. Murtagh, "Is Corporally Punishing Criminals Degrading?" *Journal of Political Philosophy* 20 (2012): 481-89, at 485 ("[W]ith respect to legal punishment, a degrading punishment is one that is inconsistent with the recognition of the basic dignity of the punished person."); Murphy, "Cruel and Unusual Punishments," *supra* note 81 at 233 ("A punishment will be unjust (and thus banned on principle) if it is of such a nature as to be degrading or dehumanizing (inconsistent with human dignity);" John Kleinig, "The Hardness of Hard Treatment," in *Fundamentals of Sentencing Theory*, ed. A. J. Ashworth and M. Wasik (Oxford: Clarendon, 1998), 273-98 at 287 ("To degrade another is to detract from the other's dignity as a human being.").

[120] I discuss dignity further *infra* at 146-48.

[121] Joseph Raz, *Value, Respect, Attachment* (Cambridge: Cambridge University Press, 2001).

[122] *Id.* at 160.

insofar as language is tied to thought, perhaps expressing this value recognition with words.[123] To despise someone when he is generous and kind is to have an emotion inconsistent with his value, Raz explains, and thus is violative of this first reason of respect.[124] Second, in light of the meta conviction that things of value are of value, respect requires that one preserve and not destroy something that she recognizes to have value.[125] If one sees a masterpiece of painting, respect does not require her to spend time contemplating it—she might not be disposed to like it—but it does require that she not spray-paint over it. That would be disrespectful. It would dishonor her belief that it was a good painting, a painting, that is, from which those who are disposed differently might derive pleasure or insight. Raz, by emphasizing both the psychological and the practical aspects of respect, is in accord with Robin Dillon, who writes, "In respecting an object, we often consider it to be making legitimate claims on our conduct as well as our thoughts and feelings…"[126]

On Raz's view, the point of respecting a valuable object, like the painting masterpiece, is to protect the possibility of communion between valuer (person) and value or good:

> "[I]f engaging with value is the way to realise value, respecting value is the way to protect the possibility of that realization. The basic reasons that something being of value imposes are that it should be allowed to play its proper role, that is, that it should be allowed to be realised."[127]

One does not owe respect, on this view, to the painting *qua* inanimate object. Respect is not owed to the dry paint in and of itself, but rather to the value that such paint can generate when appreciated by people. If wet paint is an *instrumental* good,

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[123] *Id.* at 161.
[124] *Id.* at 161-62.
[125] *Id.* at 161-63.
[126] Robin Dillon, "Respect", *The Stanford Encyclopedia of Philosophy* (Winter 2016 Edition), Edward N. Zalta (ed.), <https://plato.stanford.edu/archives/win2016/entries/respect/>.
[127] Raz, *Value, Respect, Attachment*, *supra* note 121 at 167.

something to be used as a tool to create value; the completed painting is an *intrinsic* good, something constitutive of the good when appreciated by a person. Either form of value, Raz explains, depends on the presence of something *of value in itself*: "a certain category of value whose existence is established by the very nature of value, that is, if anything is of value at all then something is valuable in itself."[128] Instrumental goods only have value insofar as they benefit, in the end, something that is good in itself: the water has value insofar as it nourishes the plant, which has value insofar as it grows the fruit, which has value insofar as it nourishes and provides pleasure to people, who have value in themselves.[129] Intrinsic goods also depend for their value upon the possibility of being engaged with by beings of value in themselves. The painting—a potential source of intrinsic value in this world—would have no such value in a world without people (and without any possibility of generating people).

Razian respect is not limited to valuable objects. It will apply with the same logic to people themselves, given their role in the process of value creation as beings of value in themselves.[130] The conclusion is that respect entails, as Raz writes, "stringent" general duties toward people,[131] and while he does not finish the thought entirely, these would involve a duty to "recognize" each person's capacity to engage with value, both in one's thoughts and possibly as a form of verbal or symbolic expression, as well as a duty to "preserve" each person's capacity to engage with value. It is unclear whether Raz imagines these duties to be positive or negative in nature. A positive duty to preserve someone's capacity to engage with value would be very demanding, probably impossibly so given the realities of aging. But since we are concerned with injurious actions, we can sidestep this issue, as

[128] *Id.* at 144-45
[129] *Id.* at 147
[130] *Id.* at 170.
[131] *Id.*

such actions implicate even a negative duty of practical respect—a duty not to purposefully harm or damage someone's capacity to engage with value.

Stephen Darwall, using different terminology than Raz, distinguishes between "recognition" and "appraisal" respect.[132] To "recognition" respect something on his view means "giving appropriate consideration or recognition to some feature of its object in deliberating about what to do" (e.g. to "respect" a speed limit by lowering your driving speed).[133] To "recognition" respect something, according to Darwall, is to believe that some fact about it ought to impact your practical deliberation. A form of recognition respect is owed to each person, Darwall argues, just in virtue of the fact that they are persons; it determines our general duties to people. "Appraisal" respect, meanwhile, is the respect we have for things in virtue of their excellence (e.g. "respecting" someone's good character, or her tennis skills).[134] So, while Darwallian recognition respect concerns practical deliberation, Darwallian appraisal respect concerns relative estimation. These two forms of respect, however, are related in ways that Darwall seems to overlook. And we should resist Darwall's attempt to draw a sharp distinction between the two, in favor of Raz's view whereby practical forms of respect follow rationally from an appreciation of something's value. Darwallian appraisal respect, for instance, rationally entails forms of Darwallian recognition respect (e.g. I appraisal respect an actor's skills and so I recognition respect her skills by seeing her play; or I appraisal respect human beings as a very special type of creature and so I recognition respect all human beings in certain basic ways). Furthermore, Darwallian recognition respect *expresses* one's Darwallian appraisal respect. This could be explicit, as when someone says something out loud (e.g. "She's a great actor!"), or

[132] Stephen Darwall, "Two Kinds of Respect," *Ethics* 88 (1977): 36-49.
[133] *Id.* at 38.
[134] *Id.* at 41.

it could be implicit in one's actions (e.g. seeing all of her plays impliedly expresses that you think highly of her acting skills).

B. Symbolic and Non-Symbolic Respect

If, in this way, practical responses to something's existence express one's view of that thing's value (or lack thereof), we ought to clarify the difference between symbolic and non-symbolic forms of practical respect. Symbolic respect or disrespect for a person does not, *as a matter of the laws of physics*, impact one's ability to be or to do anything. It is symbolic and therefore culturally determined. The most obvious means of symbolic respect or disrespect is, of course, language, as just indicated: "You're beautiful!" or "You do not matter!" But there are non-verbal means, as well. For instance, unlike running electricity through someone's body, spitting on someone does not, as a matter of the laws of physics, have much of an impact. It is a non-verbal, but nonetheless symbolic means of communicating one's belief about someone's lack of worth. Non-symbolic disrespect, meanwhile, involves a physical interference with the means or mechanism by which the thing exhibits or realizes value (e.g. burning a painting makes it physically impossible for the painting to exhibit value and therefore disrespects the painting). We should follow Raz, though, in thinking that while symbolic forms of respect are often an essential part of practical value recognition, they are generally of lesser importance than actions that physically help or hinder that thing's capacity to exhibit or realize value.

To clarify this point, let us consider Michael Rosen's critique of Jeremy Waldron's theory of human dignity.[135] Waldron unites (a) the egalitarianism within religious definitions of dignity, wherein everyone equally exhibits the dignity of standing above the unreflective, impulsive animal kingdom, with (b) the traditional

[135] Michael Rosen, *Dignity: Its History and Meaning* (Cambridge, MA: Harvard University Press, 2012) and "Dignity Past and Present" in Waldron, *Dignity, Rank, and Rights*, *supra* note 8 at 79-98.

notion that dignity refers to high social status (as in the "dignity" of a king).[136] The resulting construction, which he believes is immanent within the law, creates a general human dignity, mirroring the French revolutionaries' *dignite de l'homme*, such that each person deserves a quasi-aristocratic status in society.[137] Everyone on this view, paupers included, merit the deferential, courteous, and caring treatment accorded to nobility in previous centuries. Rosen believes that while Waldron's interpretation of dignity is the right one, it means that either (a) every fundamental rights violation is essentially symbolic or (b) dignity cannot fulfill the foundational role assigned to it in basic rights documents, as it can only ensure the more symbolic forms of decent treatment. Rosen takes the second view:

> "It seems to me evident that not all violations of rights are symbolic harms…[T]he worst of what the Nazi state did to the Jews was not the humiliation of herding them into cattle trucks and forcing them to live in conditions of unimaginable squalor; it was to murder them."[138]

While murder is surely worse than humiliation, we should be careful to see the connection between the more symbolic and the more physical, between a willingness to profoundly humiliate and a willingness to murder. And whether or not both are forms of indignity, both are surely forms of disrespect. Of course, in some cases, like herding people into cattle trucks, symbolic and non-symbolic forms of disrespect are united. To herd people into any truck against their will is a non-symbolic form of disrespect, insofar as it represents a physical interference with her ability to realize value; but to use a cattle truck adds an additional symbolic component, implying with cultural cues that they are equivalent to animals.[139]

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[136] Waldron, *Dignity, Rank, and Rights*, *supra* note 8.
[137] *Id.*
[138] Rosen, "Dignity Past and Present," *supra* note 135 at 95.
[139] *See* John Vorhaus, "On Degradation Part Two: Degrading Treatment and Punishment," *Common Law World Review* 32 (2003): 65-92, at 79 ("Doubtless treatment that represents a threat to dignity often does so partly by virtue of what it causes to happen, but, however we choose to describe the nature of the threat, it is important not to lose sight of the many ways in which dignity is impinged upon by

Regardless, both forms of disrespect, the more symbolic humiliation and the entirely non-symbolic murder, derive from the same denial of the victims' value. Both are ultimately forms of expression, even if murder is undoubtedly the more emphatic statement.

Avishai Margalit attempts to unite symbolic and non-symbolic forms of disrespect under a broader conception of "humiliation," which he defines as "any sort of behaviour or conditions that constitutes a sound reason for a person to consider his or her self-respect injured."[140] While his book contains great insight into the meaning of humiliation, there are at least two reasons to think that even his broader conception of the term is an insufficient guide to degradation. First, as Anthony Quinton explains, one might endure terrible treatment while nonetheless maintaining her self-respect and composure; and we should not think in such a case that she was not victimized.[141] Second, as Vorhaus argues, humiliation itself is not always indicative of degradation or impermissible treatment:

> "Consider a national football team, widely expected to prove victorious in the World Cup Finals, only to return home after the first round, falling with little resistance to inferior and barely known opposition. After such a tame and disappointing performance, we are apt to say that the team was humiliated, and even more so once they go before a contemptuous public and unrestrained press. But no one is likely to entertain the thought that what the footballers have suffered is degradation on the pitch, and degrading treatment afterwards."[142]

Thus, while we must worry about symbolic forms of disrespect, and humiliating treatment more broadly, we should not use those concepts as our singular guides to degradation.

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the symbolic nature of much ill-treatment."). On the connection between degradation and animalization, see *infra* at 167-68.

[140] Avishai Margalit, *The Decent Society* (Cambridge, MA: Harvard University Press, 1996), 9. *See also The Greek Case*, *supra* note 25 at 186 ("Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others...").

[141] Anthony Quinton, "Humiliation," *Social Research* 64 (1997): 77-89, at 79-80.

[142] *See* Vorhaus, "On Degradation Part Two," *supra* note 139 at 68.

C. Respect as an Epistemic Virtue

Respect, in sum, involves apprehending something's value and then responding appropriately—both attitudinally and practically—given (a) the analytic connection between value and reason and (b) the principle that, to the extent it is in our power, we ought to think, say, and do that which is justified by reason. The reasons that ground respect on this view, to be clear, are object- rather than subject-generated: it is a thing's objective value, whether instrumental or intrinsic, rather than our subjective desires, that determines the demands of respect.[143] John Rawls argues along these lines that respect involves the recognition of something "as directly determining our will without reference to what is wanted by our inclinations."[144] This process of *seeing* the objective value in something and then responding appropriately in one's thoughts and actions is suggested by the Latin source of respect: *respicere,* meaning "to look back at" or "to look again."[145] *Willful blindness* is perhaps the essence of disrespect, then, as one refuses to truly look at or see the value in front of him. If something were incapable of recognizing value, of looking back, as it were, then it would not be capable of disrespect. Consider a falling rock, an attacking shark, or someone who, in the moment of action, was legally insane[146] or a legal automaton[147]—all are capable of causing harm to people, but none have the capacity to disrespect those they harm, given that they lack the capacity to perceive and then to reject the presence of their value. Along these lines, respect may be, as Dillon suggests, at least partly an *epistemic virtue* associated

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[143] *See* Thomas H. Birch, "Moral Considerability and Universal Consideration," *Environmental Ethics* 15 (1993): 313–332 (arguing that respect involves a "deontic experience," whereby one *must* pay attention and respond appropriately); *see also* Carl Cranor, "Toward a Theory of Respect for Persons," *American Philosophical Quarterly* 12 (1975): 309–320; Allan Wood, *Kant's Ethical Thought* (Cambridge: Cambridge University Press, 1999); *but see* Sarah Buss, "Respect for Persons," *Canadian Journal of Philosophy* 29 (2013): 517-550.

[144] John Rawls, *Lectures on the History of Moral Philosophy*, ed. Barbara Herman (Cambridge, Mass: Harvard University Press, 2000), 153.

[145] Latin source provided in Robin Dillon, "Respect," *supra* note 126.

[146] *See M'Naghten* [1843] UKHL J16.

[147] *See R v Quick* [1973] 3 WLR 26.

with the responsible pursuit of and commitment to the truth, namely, the truth of something's value.[148]

V. Human Value

Let us take stock of the overall argument. We have been inquiring into the nature of degradation-limiting reasons, which operate with relative independence from other penal considerations. We have been assuming that the general reasons that oppose the infliction of torture simply are our degradation-limiting reasons (or the most fundamental ones). We defined torture as the intentional infliction of a suffusive panic. We hypothesized that the concept of disrespect is the metric of degradation, such that it can clarify torture's wrong-making features. And we have outlined the abstract framework of disrespect. Disrespect involves a failure to respond appropriately to something's capacity to realize value, most importantly by failing to "protect the possibility of that realization," as Raz explains, as well as by failing to provide more symbolic forms of recognition or expression.[149]

Given that respect is not purely symbolic, to apply this framework to a person—to, say, assess how disrespectful torture is to a person—we need at least a basic theory of the human good, of what humans do to realize value, and of how they do this. Put differently, what is the mechanism or capacity by which humans realize value? Only with this information could we understand the degree to which an action expresses disrespect for a person by interfering with this mechanism (and thereby failing to protect the possibility of her realizing value). To pour water on a plant, for instance, is generally to respect the plant, insofar it enables or assists the mechanism by which it exhibits value. But to pour water on a sandcastle is generally to disrespect the sandcastle, insofar it hinders its respective value mechanism. We

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[148] Robin Dillon, "Respect," *supra* note 126. For the sake of completeness, if moral and ethical questions were non-objective, such that the "truth" of something's value was determined by a context-dependent system of meaning—one to which a society has committed itself—the demands of respect as outlined here would very likely still operate within such a system, given their rather straightforward logic (e.g. "do not destroy that which we deem valuable").

[149] Raz, *Value, Respect, Attachment*, *supra* note 121 at 167.

can make these judgments only because we have an understanding of what plants and sandcastles do to exhibit value, and of the underlying capacities that enable this process. When, then, do people do to exhibit or realize value, and which capacities enable them to do this?[150] Raz's abstract notion that people are of value "in themselves" does not provide an answer to this question.

A. Diachronic Human Value

I take a broadly Aristotelian line on human value. The conviction is that people's value—or their essentially *human* value—derives from their capacity to stitch moments together through time and construct good lives. Aristotle, in Book 1 of *Nichomachean Ethics*, inquires into the "human good."[151] He argues that the "characteristic activity" of humans is leading a "certain kind of life…in accordance with reason."[152] A characteristic activity is "accomplished well when it is accomplished in accordance with the appropriate virtue," he continues, such that the "human good" is a life lived in accordance with the generally human virtues, which enable one to live in accordance with reason (or are constitutive of living in accordance with reason).[153] Most importantly for our purposes, Aristotle emphasizes that the human good can only be realized "over a complete life."[154] He alludes to the migratory return of the swallows, which marks the beginning of summer: "For one swallow does not make a summer, nor one day. Neither does one day or a short time make someone blessed and happy."[155] The idea is that the human good—the realization of value by a person—is a *diachronic* achievement.

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[150] Of course, the idea that plants and sandcastles have value that we might respect or disrespect presupposes a partial answer to this question, one in which people can have valuable engagements with plants and sandcastles.

[151] Aristotle, *Nicomachean Ethics*, trans. and ed. Roger Crisp (Cambridge: Cambridge University Press, 2000).

[152] *Id.* at 12 (1098a).

[153] *Id.* at 16 (1000a).

[154] *Id.* at 12 (1098a) and 18 (1101a).

[155] *Id.* at 12 (1098a).

Aristotle argues, for instance, that we cannot say that a child has led a "blessed" life:

> "If he is called blessed, he is being described as such on account of the potential he has, since, as we have said, happiness requires complete virtue and a complete life. For there are many vicissitudes in life, all sorts of chance things happen, and even the most successful can meet with great misfortunes in old age, as the story of Priam in Trojan times. No one calls someone happy who meets with misfortunes like these and comes to a wretched end."[156]

Aristotle maintains that, since the human good is realized in the context of a life as a whole, we cannot say that a child has realized the human good. Such a judgment is premature. Aristotle implies, indeed, that we cannot judge whether someone has realized the human good until his life is complete. Priam, for instance, was King of Troy at the time of its destruction by Agamemnon, with the implication being that an otherwise virtuous or glorious life can end so terribly that it warps or ruins one's life as a whole. Ronald Dworkin makes a related point in the context of the debate over euthanasia: "We worry about the effect of life's last stage on the character of life as a whole, as we might worry about the effect of a play's last scene or a poem's last stanza on the entire creative work."[157]

Aristotle goes even further yet to suggest that the quality of one's life, viewed in this holistic manner, may be altered by *posthumous* events, such as the success or failure of one's descendants, though he admits the "oddness" of this position.[158] We need neither accept nor deny these more dramatic conclusions to

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[156] *Id.* at 16 (1000a).

[157] Ronald Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (New York: Knopf, 1993), 199.

[158] Aristotle, *Nichomachean Ethics*, *supra* note 151 at 16-17 (1000b) ("For both good and evil are thought to happen to a dead person, since they can happen to a person who is alive but not aware of them. Take, for example, honours and dishonours, and the good and bad fortunes of his children or his descendants generally. But this view also gives rise to a problem. Though a person may have lived a blessed life into old age and died accordingly, some reverses may happen in connection with his descendants. Some of them may be good and meet with the life they deserve, others the contrary; and clearly the relation to their ancestors can vary to any degree. It would indeed be odd if the dead person

appreciate Aristotle's more general point, which is that if humans enliven and exhibit value, they do so in the context of a diachronic project: the pursuit of a flourishing life *as a whole*. We can take this general point from Book 1 of *Nichomachean Ethics*, furthermore, without engaging with the remaining Books 2-10, which discuss the virtues that are conducive to realizing a flourishing life as a whole. That is, we can accept the notion of a diachronic, life-based human good without accepting or denying a foundation of virtue ethics.

To clarify the diachronic nature of the human good, let us consider Dworkin's distinction between "experiential" and "critical" interests.[159] "Experiential interests" are, generally, interests in having pleasurable sensory experiences, including refined instances like playing an instrument, and in having positive emotional states, and in avoiding displeasing sensory experiences and negative emotional states. "Critical interests," meanwhile, are not essentially phenomenological; they are interests in realizing one's personal values and commitments—completing a project, seeing loved ones succeed, ending one's life with dignity, and so forth. The value of realizing a critical interest is, of course, connected to the value of realizing a good life as a diachronic achievement. But so is the value of realizing experiential interests, it seems. The value of pleasure, for instance, seems to depend on its connection to the broader good life, a connection that is usually, but not always secure. Consider the heroin addict who has destroyed her life due to her drug use, rejecting her personal obligations and descending into depravity and indignity. It is only with an appreciation of her as a being that constructs value through time, in the context of a life as a whole, that we can appreciate the immense disvalue of her shooting up, her temporary ecstasy notwithstanding. Connie

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also were to share in these vicissitudes, and be happy, sometimes wretched. But it would also be odd if the fortunes of descendants had no effect on their ancestors for any time at all.")

[159] Dworkin, *Life's Dominion*, *supra* note 157 at 199-208.

Rosati represents a diverse and distinguished group of contemporary theorists who have endorsed the diachronic conception of the human good when she writes:

> "[A] good life seemingly involves more than a person's having many good moments or having many particular things that may be good for her; and it involves more precisely because of the peculiar capacities of persons. Persons have capacities for reason, memory, and imagination, that (most) nonhuman animals evidently lack. Persons have the capacity to reflect on themselves and their lives. Moreover, they have the capacity to be moved not only by what they may desire but by their determinations about what is worth desiring; and so they have the capacity to decide, in light of these determinations, what sort of person to be and what sort of life to lead. The ordinary exercise of these sundry capacities has the result that persons not only attend to their lives from moment to moment; they also take up a view of their lives as a whole, reflecting on themselves and their existence over time. In so doing, they also take, so to speak, a 'larger view' of themselves and their lives."[160]

It is with such a conception of the essentially human capacities—at least reason, memory, and imagination—and of how they collectively enable the construction of a good life through time that we can understand the addict's ecstasy to be without value, since it makes her life as a whole worse.[161] If viewed as a moment

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[160] Connie S. Rosati, "The Story of a Life," *Social Philosophy and Policy,* 30 (2013): 21-50, at 26-27. *See also* Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge, MA: Harvard University Press, 1989), 50-51 ("We want our lives to have meaning, or weight, or substance, or to grow toward some fulness, or however the concern is formulated…But this means our *whole* lives. If necessary, we want the future to 'redeem' the past, to make it part of a life story which has sense or purpose, to take it up in a meaningful unity."); Alasdair MacIntyre, *After Virtue: A Study in Moral Theory*, 2d ed. (Notre Dame, IN: University of Notre Dame Press, 1984), 216-19 (arguing that man is "essentially a story-telling animal," such that the good life is one that unfolds through time with "narrative unity"); John Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press, 1971), 63-4 (maintaining that a good life consists in the approximate realization of a "rational life plan"—the pursuit of one's foundational aims, which are grounded in one's reflective desires, and with the plan's details filled in over time, in the context of one's evolving circumstances); Jeff MacMahan, *The Ethics of Killing* (Oxford: Oxford University Press, 2002), 179-80 ("[W]e must also recognize that well-being is multidimensional and that some of its dimensions are relational—in particular those concerned with the meaning that a state or event has within a person's life); Michael Stocker, *Plural and Conflicting Values* (Oxford: Clarendon Press, 1990), 300–302, 323 (arguing that the value of a life is a Moorean "organic whole").

[161] But are these essentially *human* capacities? What about intelligent animals? Can they not also "build lives"? David Velleman writes that we should not maintain that, say, a cow's life considered as a holistic achievement matters, given that the cow itself (unlike a person) is incapable of understanding itself as a diachronic, life-building being:

standing alone, her ecstasy would be of great value, of course, since pleasure abstractly conceived has value. But that is not how humans conceive of, or ought to conceive of, their existence, as if they had no memories, and were like goldish, born in each moment anew, untethered to the past or future.[162] As C.I. Lewis writes: "The characteristic good of willing and achieving is not one found in this or that passing instant merely, nor in an aggregation of the goods thus momentarily and separately disclosed, but in the temporal and relational patterns of a whole of experience whose progression is cumulative and consummatory."[163] As I will discuss further in the following chapter, the most valuable goods that people can realize, things like maintaining families, careers, and friendships, are essentially "temporal" goods, which can only be realized through time in the context of a broader life project.[164]

If a moment of pleasure might be devoid of value on this diachronic conception of the human good, in the other direction, pain, stress, and suffering can

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> "I assume that a cow cannot conceive of itself as a persisting individual and consequently cannot conceive of itself as enjoying different benefits at different moments during its life. What the cow cannot conceive, it cannot care about; and so a cow cannot care about which sequences of momentary goods it enjoys…I am not sympathetic to stronger versions of internalism, which make a thing's intrinsic value for someone contingent on his being disposed to care about it under specified or specifiable conditions; but I am inclined to think that unless a subject has the bare capacity, the equipment, to care about something under some conditions or other, it cannot be intrinsically good for him."

David Velleman, "Well-being and Time," *Pacific Philosophical Quarterly* 72 (1991): 48-77, at 67. If this works, it begins to explain the moral difference between killing a person and a cow. When you kill a person, you not only deprive her of access to future pleasurable or otherwise valuable standalone moments, as you would with the cow; you may have also ruined her ability to realize a good life as a whole.

[162] Memory has been grossly undervalued as an essential human capacity. Locke is an exception: "Memory, in an intellectual creature, is necessary in the next degree to perception. It is of so great a moment, that where it is wanting, all the rest of our faculties are in a great measure useless; and we, in our thoughts, reasonings, and knowledge, could not proceed beyond present objects, were it not for the assistance of our memories…" Locke, *An Essay Concerning Human Understanding*, *supra* note 93 at 150 (Book II, Ch. X, Sect. 8).

[163] C.I. Lewis, *Analysis of Knowledge and Valuation* (New York: Open Court, 1946), 498.

[164] *See* Chapter 3 at 208-12.

sometimes have great value, insofar as they constitute *investments* toward a good life as a whole, or are analytically connected to such investments, as with the years of rigorous training required to become, say, a qualified surgeon.[165] This generates a conception of human "disvalue," which will come into play when we return to the discussion of torture. Disvalue is something distinct from, and worse than, the absence of value. If human flourishing in the context of a whole life is constitutive of human value, then *wanton* human suffering—suffering that does not represent an investment into one's good life—is constitutive of human disvalue.

There are stronger and weaker versions of this theory. The stronger version—which I accept—is that something is good for a person only if it is good for her life considered as a whole. The question of whether a certain activity or experience is good for me, on this stronger version, is identical to the question of whether it is good for my life considered as a whole. This need not be obsessively forward-looking, though, as I discuss further in the following chapter. That is, it has a central place for "momentary" goods, which do not require cultivation over time to be realized, and which are realized entirely in the moment, as it were, like the consumption of a random ice cream cone.[166] For as a matter of general tendency or personal principle, such goods are surely constitutive of a good life. That is, a life without such goods—without ice-cream cones—would be worse when considered *as a whole*. We might retreat to a more moderate version, however, without impacting our overall argument. The more moderate position is that while people's diachronic capacities are the fundamental basis of their value, constitutive of their ability to realize "temporal" goods like families, careers, friendships, and

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[165] *See* Lewis, *Analysis of Knowledge and Valuation*, *supra* note 163 at 498 ("The goodness of pursuing and attaining is not the goodness found in striving, regardless of the end pursued, plus the goodness found in having something desired, regardless of how it is attained. It lies peculiarly in the relationship between the active intent, the conation, and the realization. The goodness of the end to be realized infuses the activity; and the goodness belonging to purposive action, and not to be found in mere good fortune, colors the realization of the end attained.").

[166] *See* Chapter 3 at 208-10.

so forth, people can nonetheless generate "momentary" value that has nothing to do with their life project. That is, something could be good for me without being good for my life considered as a whole. Perhaps the heroin addict's pleasure has value in this way, as a momentary experience of pleasure, valuable even though it detracts from the pursuit of her good life as a whole. David Velleman takes this position, writing that "a person has two distinct sets of interests, lying along two distinct dimensions—his synchronic interests in being well off at particular moments, and his diachronic interests in having good periods of time and, in particular, a good life."[167] However, given that "momentary goods" are constitutive of a good life as a whole, as with the ice-cream cone, Velleman's distinction, even if sound, is not of great analytical import. It would provide traction only for those purportedly momentary goods, like the addict's ecstasy, that are valuable in the moment but bad for one's life overall.

In this section, we were concerned to discover the mechanism by which human beings exhibit or realize value, in order to understand how an action—like torture—might interfere with that mechanism and therefore express disrespect for

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[167] Velleman, "Well-being and Time," *supra* note 161. As evidence of the independence of synchronic and diachronic well-being, Velleman introduces an interesting hypothetical. Consider two possible lives with the same total amount of synchronic, moment-to-moment well-being. One begins desperately and ends wonderfully, while the other begins wonderfully and ends desperately. Velleman argues that we believe that the former is the better life overall, and that we can make this judgment only if the narrative sequence of events matters. And, he continues, the narrative sequence of events can matter only if diachronic well-being is distinct from synchronic well-being (given that both lives have the same amount of synchronic well-being). Velleman's argument has generated considerable attention. For our purposes, however, we can maintain that human value is centered on the pursuit of temporal goods and a good life as a whole without accepting or rejecting the proposal that the "narrative" or "story" of a life is an independent variable in making a good life. For arguments in favor of the view that a life's narrative structure matters as an independent variable, see Taylor, *Sources of the Self, supra* note 160 at 50-51; MacIntyre, *After Virtue, supra* note 160 at 216-19; Daniel Dennett, "The Self as the Center of Narrative Gravity," in Frank S. Kessel, Pamela M. Cole, and Dale L. Johnson (eds.), *Self and Consciousness: Multiple Perspectives* (Hillsdale, NJ: Lawrence Erlbaum Associates, Publishers, 1992); McMahan, *The Ethics of Killing, supra* note 160 at 178 ("[T]he order of events makes a life better by making it more meaningful."). For criticism of the view, see Stephen Campbell, "When the Shape of a Life Matters," *Ethical Theory and Moral Practice* 18 (2015): 565-575, 571; Connie Rosati, "Story of a Life," *supra* note 160; Galen Strawson, "Against Narrativity," *Ratio* 17 (2004): 428–52; Fred Feldman, *Pleasure and the Good Life* (Oxford: Oxford University Press, 2006), ch. 6; Johan Brännmark, "Leading Lives: On Happiness and Narrative Meaning," *Philosophical Papers* 32 (2003): 321–43.

a person. What, then, is the relevant mechanism? It is the collection of capacities which enables one to stitch moments together and construct a meaningful life over time. Rosati mentions reason, memory, and imagination. We might break "reason" down into at least *autonomy* and *value-recognition.* Autonomy involves the ability to consciously see multiple practical options and then to select one, while value-recognition involves the ability to see the relative objective value in such choices. I follow Donald Regan and David Enoch in thinking that the bare fact that someone has exercised her autonomy and freely chosen an option does not render that option valuable and constitutive of a good life; that is, people can freely exercise their agency—even passing a Kantian test of universalizability—but nonetheless make mistakes, by choosing an option that contains or entails less objective value than another.[168] An agent could have the capacity for autonomy, in this way, but then be incapable of building a good life if she lacked the independent capacity of value-recognition; that might explain the future of artificially intelligent agents and possibly the current reality of psychopaths. We need not reach a firm conclusion on these issues, however, to understand that some such collection of relatively distinct capacities enables humans to realize and exhibit value in a diachronic, life-building manner. Let us define this collection of capacities as a person's meta-capacity for *practical reason*.[169] In sum, then, the mechanism by which human beings

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[168] *See* David Enoch, "Agency, Schmagency: Why Normativity Won't Come from What Is Constitutive of Action," *The Philosophical Review*, 115 (2006): 169-198; Donald Regan, "How to be a Moorean," *Ethics* 113 (2003): 651-77 and "The Value of Rational Nature," *Ethics* 112 (2002): 267-291.

[169] This would qualify a "range property" theory of human value, as it bases human value in a natural property that people exhibit unequally (i.e. people's practical reasoning capacities, understood as their ability to construct good lives, will doubtfully be precisely equal). The "range property" idea is that, regardless of such inequalities, a sufficiency of the property renders one completely within the relevant category. Jeremy Waldron explains that "being in Scotland" in a range property. While Stirling is in the center of the country and Gretna is just over the border from England, both are *equally* "in Scotland." *See* Jeremy Waldron, *One Another's Equals: The Basis of Human Equality* (Cambridge, MA: Belknap Press, 2017), 84-127, 222-23; Ian Carter, "Respect and the Basis of Equality," *Ethics* 121 (2011): 538-71. Thus, the question here is not, "How easy is it for you to build a good life?" but rather, "Do you have the capacity to build a good life?" That bare capacity renders one deserving of full and equal respect on this view. Rawls introduced the idea of a range property. Rawls, *A Theory of Justice*, *supra* note 160 at 506 (grounding people's worth in their moral personality and concluding that "while

exhibit or realize value is their capacity for practical reason, which enables them to build meaningful lives through time.[170]

B. Metaphysical Objection

Before moving forward and re-connecting this discussion to torture, let us consider a metaphysical objection to this temporal, life-based conception of the human good. Does it presuppose controversially, *contra* Derek Parfit, that I am identical with the "younger" and "older" people who have looked and who will look out to the world through "my" consciousness?[171] How else could I be said to be working of the project of "my" good life? Charles Taylor writes perceptively on this objection:

> "It seems clear…that there is something like an a priori unity of a human life through its whole extent. Not quite, because one can imagine cultures in which it might be split. Perhaps at some age, say forty, people go through a horrendous ritual passage, in which they go into ecstasy and the emerge as, say, their reincarnated ancestor. That is how they describe things and live them. In that culture there is a sense to treating this whole life cycle as containing two persons. But in the absence of such a cultural understanding, e.g., in our world, the supposition that I could be two temporally succeeding selves is either an overdramatized image, or quite false. It runs against the structural features of a self as a being who exists in a space of concerns."[172]

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individuals presumably have varying capacities for a sense of justice…[o]nce a certain minimum is met, a person is entitled to equal liberty on a par with everyone else.").

[170] Margalit outlines three strategies for defending the ideal that each person deserves respect: a "positive" one that appeals to a particular human trait; a "skeptical" based on the empirical and cultural fact that in our way of life we respect each other; and a "negative" one that fails to justify the ideal, but forecloses disrespect (which Margalit understand as "humiliation") because it is an instance of mental cruelty. Margalit, *The Decent Society, supra* note 140. The argument presented here would fall under the "positive" strategy, following Aristotle and others in finding the essentially human trait to be the capacity for practical reason (as defined above). Note, as well, that since Margalit focuses only on disrespect as humiliation, he fails to see how disrespect can involve physical as well as mental cruelty.

[171] *See* Derek Parfit, "Personal Identity and Rationality," *Synthese* 53 (1982): 227-41; *Reasons and Persons* (Oxford University Press; revised reprint, Oxford: Clarendon, 1987).

[172] Taylor, *Sources of the Self*, *supra* note 160 at 51.

While I accept Taylor's argument, the more important point to make is that the metaphysical objection is not dispositive. If we do not share an identity with our past and future selves, that need not vitiate the conclusions from this section. The achievement of a "good life" would simply become something of a group project. That is, the teenager and the old man that he becomes could be different people, but nonetheless could be said to be living, and working on, the same life. They would be distinct and yet impossibly bonded, perhaps the purest form of family. And we could reasonably maintain that their respective capacities to work together and to honor one another, as it were, were their most essential and valuable capacities. I take no position on whether this indeed describes the metaphysical nature of our existence through time. Much more would need to be said to flesh out its details. The point is that some such view is coherent, at least, and that even a radical Parfittian metaphysics need not vitiate our moral convictions about the diachronic nature of human value.

VI. Torture as Extreme Disrespect

We can now combine the analyses of respect and human value, and return to the inquiry into torture's wrong-making features, for the purpose of discerning degradation-limiting reasons more generally. If a person's value is constitutive of her capacity to stitch moments together through time and construct a good life, then torture, by forcing her ken into a terrifying, panic-stricken moment, is egregiously disrespectful of that capacity, and primarily in a non-symbolic or physical manner. If the value creation and exhibition machine that is a person depends for its functioning upon the employment of its practical reasoning capacities (at least autonomy, value recognition, imagination, and memory), then torture obliterates that machine—at least temporarily and while risking permanently damage, as I discuss further below. To force the torture victim into *this maximally horrible moment* is to force her outside of the pursuit of her good life and outside of time, as it were,

as she loses awareness of where she came from and where she is going, of who she is and what she values, losing the ability to "see" the world, as Scarry writes.

When Améry writes that the torture victim is incapable of betrayal, given her lack of awareness of the commitments or values that she may betray by confessing or informing, he demonstrates torture's non-symbolic disrespect for a victim's capacities of memory and value recognition. The demands of the past and the future lose their stringency, as the victim's instinctual and utter panic collapses her sense of self and conception of value into a terrifying present, and she is prepared to do or say anything to end the ordeal. At least that is the torturer's intention. Torture, by inducing such panic, is similarly disrespectful in the non-symbolic sense of one's capacity for autonomy. It effectively ruins this capacity (again, at least temporarily). It is not just that genuine deliberation is impossible under the throes of panic, as it would be when experiencing extreme pleasure or, indeed, when sleeping. Panic takes a further step by actively hijacking one's powers of deliberation and decision-making, as one's mental apparatus is concentrated at full blast toward the singular aim of ending or escaping from the source of one's terror. If suffusive pleasure tends to transfix, perhaps rendering action impossible, suffusive panic absolutely animates, demanding action—wild, unthinking action—even if that just means desperately flailing about. Overwhelming pain, containing within it the likelihood of such panic, is thus generally the greater autonomy violation than overwhelming pleasure, *contra* Sussman.[173] But should extreme pleasure, against odds, generate this experience, then there would be no difference between the two with regard to their impact on autonomy.

The disrespect of torture takes a step beyond preventing a person from generating value, as would death or forcing someone to sleep for the rest of her life. Torture also forces the victim into a locus of *disvalue*. It is not just that the victim loses the thread of her life and so fails to exhibit or create value, but that

[173] Sussman, "What's Wrong With Torture?" *supra* note 38 at 15.

her new existence, as it were, is necessarily horrible for however long it may last. As argued above, disvalue constitutes wanton suffering, suffering that does not represent an investment into one's flourishing life as a whole. If respect involves the duty to maintain the possibility of something's engagement with value, it entails as a corollary the duty not to use that thing to generate disvalue.[174] Torture does involve a "perversity," then, as Sussman argues, but it is not the forced self-betrayal that he articulates. The perversity involves taking a creature capable of engaging with value in such a profound and interesting way, and then converting it into in a site of pure disvalue, of suffering and nothing else. We can return here to Beccaria's point about how torture saturates the victim with suffering. The physics of the human brain are such that we can experience only a certain amount of suffering. If we imagine torture via running electricity though someone's body, above a certain voltage the victim will experience the same maximum amount of pain and anxiety. The aim of torture is just to trigger the experience of panic which pushes someone over that threshold. The torture victim, suffused with suffering, is thus maxing out her capacity for disvalue. Whether he tortures to punish, to interrogate, to terrorize a populace, etc., the intended experience for the victim is the same, at least when viewed from this perspective on value. In sum, torture is the exemplar of disrespect. With regard to (a) the duty to enable or at least not to destroy a person's capacity to generate value and (b) the correlated duty not to turn a person into a locus of disvalue, torture is the most disrespectful thing that you can do to someone, for as long as it lasts: it completely halts the victim's value generating capacities and completely maximizes her disvalue generating capacities.[175]

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[174] This corollary duty would only apply to conscious creatures, which are capable of generating disvalue in the form of wanton suffering. By comparison, while it is possible to disrespect a painting, insofar as one precludes the possibility of its value realization by, say, burning it; it is not possible to make the painting itself a locus of disvalue, given that the painting cannot experience suffering.

[175] There are very unusual cases where the torturer inflicts a suffusive panic as a byproduct of realizing his intention to *help* the "victim." In such cases, the torturer would affirm rather than reject the individual's essentially human value. Consider, for instance, emergency battlefield surgery without anesthesia, as well as Christopher Hitchens' torture. *See* discussion *supra* 134-35. By waterboarding

Are there any purely symbolic forms of disrespect involved with torture? An element of symbolic humiliation inheres undeniably in converting someone from an upright, dignified being into a "shrilly squealing piglet," given that all human cultures seem to value maintaining one's composure in the presence of others. There is also the symbolically meaningful fact that torture converts a "person" into a squealing "animal," as it were, as I discuss further below. It may also depend on the means of torture. To torture someone in public, for instance, as was the case with historic penal tortures, would add an additional layer of symbolic disrespect and humiliation.[176] Certain forms of torture, furthermore, may be more culturally-specific, using symbolic disrespect as a tool of bringing about a suffusive panic, perhaps forcing a religious person to violate a spiritual commitment in an extreme manner. In general, though, we should think that in the case of genuine torture, any *purely* symbolic disrespect would be drowned out by the non-symbolic, physical impact of a suffusive panic, consistent with the above conclusions regarding the "language-destroying" nature of torture, whereby torture effectively takes the victim outside of his linguistic and cultural setting, in which symbolic forms of expression have meaning and register.

A. Degradation and the Spectrum of Disrespect

Is all torture equally disrespectful? This conclusion is tempting, but it is not true. First, there seems to be a qualitative difference between very brief tortures, like breaking a single finger without any threat of further harm, and longer tortures, like those experienced by Améry, Timerman, Alleg, and Trung. We might think, in the former case, that the suffusive panic does not have an opportunity to sink in,

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Hitchens with his consent, Hitchens's torturers were in fact aiding his realization of the good, a process which for him involved participatory journalism and engagement with foreign policy debates. We might excise these very unusual cases from the word "torture," such that neither battlefield patient nor Hitchens were really "tortured," even though they experienced the phenomenology of torture.

[176] For a critical explication of historic public tortures, in particular that of Robert-François Damiens in 1757, see Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage Books, 1977), Part One.

as it were, and obliterate the victim's personality. We ought to remove the former cases from the term torture, I think, their brutality and cruelty notwithstanding. Let us move forward with the understanding that when we use the term torture, we are referring to experiences on a par with Améry, Timerman, Alleg, and Trung's.

Second, and more importantly, torture is traumatic and contains within it a serious risk of long-term damage, as seen with Trung, who experiences debilitating panic attacks decades after his ordeals. As Améry writes, "Whoever was tortured stays tortured. Torture is ineradicably burned into him…"[177] Ian Thomson, Primo Levi's biographer, argued that, in addition to his responsibility for his elderly mother and mother-in-law, traumatic memories of his time in Auschwitz caused his depression and ultimate suicide.[178] Elie Wiesel was more succinct: "Primo Levi died at Auschwitz forty years later."[179] In many instances, torture entails the risk of long-term *physical* damage, as well. A willingness to inflict or to seriously risk long-term damage, psychological and physical, is absolutely a component of the disrespect of torture; I will discuss this issue further in the following chapter, which considers the risks inherent to sentencing someone to, say, twenty years in prison. We should not think, however, that all tortures pose the exact same long-term risks to a victim's capacity to build a good life. Those that pose more of a risk are yet more disrespectful than those that pose less of a risk. To torture someone by cutting off his fingers and toes seems yet more disrespectful than, say, waterboarding him, assuming he is ultimately released back into society. The reason is that building a good life is much more difficult without one's fingers and toes, even if both forms of torture contain the risk of long-term psychological damage. But does this

[177] Jean Améry, *At the Mind's Limits, supra* note 77 at 34.
[178] Ian Thomson, *Primo Levi: A Life* (New York: Metropolitan Books, Henry Holt and Company, 2003).
[179] Diego Gambetta, "Primo Levi's Last Moments," *Boston Review,* June 1, 1999.

variation in the disrespectfulness of torture matter for the purposes of discerning dispositive degradation limitations?

There is a spectrum from maximum respect to maximum disrespect for the value of an individual human being. Let us assume for the moment that all the harmful aspects of the acts on the spectrum are intentionally brought about (e.g. if a victim experiences a suffusive panic, let us assume that someone brings it about intentionally, as her means or end, and not accidentally or as an unwanted byproduct of her intended means or end).[180] This chapter clarifies the nature of maximum disrespect. I concluded that torture is the most disrespectful thing that you can do to someone *for as long as it lasts.* As such, torturing someone *for an eternity*—somehow rendering her immortal and somehow placing her under non-stop torture—is the most disrespectful thing imaginable.[181] It does not merely risk long-term damage; it guarantees the worst possible long-term outcome: suffusive panic forever. As we work our way down the spectrum, we will see other forms of torture, with those entailing a greater risk of long-term damage higher up on the ladder than those that entail less of such risk. This idea of a spectrum of disrespect is key to understanding the concept of a dispositive degradation penal limitation. A form of punishment need not be the singularly most disrespectful thing imaginable to surpass a dispositive degradation limitation. That is, assuming such limitations exists, they will rule out more than penal torture for an eternity. Even if certain forms of torture are yet more disrespectful than others, all forms of penal torture can still surpass a dispositive degradation penal limitation.[182]

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[180] In Chapter 3, at 227-240, I consider how an agent's intentions might impact the degree of disrespect embodied by his actions.

[181] James Joyce, in a fictional sermon, offers a searing description of Hell as torture for an eternity. James Joyce, *A Portrait of the Artist as a Young Man* [1914-15] (London: Penguin, 2000), 128-143.

[182] We can appeal to the concept of a "range property" here, as well, with idea being that all forms of treatment above the line are impermissibly disrespectful, even if some are yet more disrespectful than others. *See* discussion of range properties *supra* note 169.

But where, exactly, on the spectrum of disrespect shall the "dispositive" line be drawn, beyond which we would say not merely that such treatment is degrading, but that it is absolutely impermissibly degrading, such that you simply cannot do that to a human being as a form of state punishment, no matter the stringency of the other reasons pushing in favor of such treatment? We cannot determine this with precision. The central idea, however, is something like this: the treatment is so disrespectful that it embodies a rejection of the offender's standing as a human being. This is a vague (and familiar[183]) formulation, but it gains some precision when understood in the context of the above analyses into respect and respect for persons. Given that respect involves the process of responding to something's value, disrespect for a person always embodies a rejection, to some degree, of her value. But, as we have seen, there are different modes of disrespect; one might just disrespect another's value as, say, a musician, consistent with Darwall's conception of "appraisal" respect (e.g. the symbolic disrespect of saying "your song is not very good."). But when delivered in a certain manner and degree, disrespect can embody a rejection of someone's essentially human value, which is grounded on her capacity to build a good life through time. It expresses the conviction—the false conviction, the lie—that this creature does not matter, at least not like a normal human being does, such that we can *ruin* it or do whatever we want with it, without regard for its practical reasoning capacity or its capacity to suffer, as if it were a mere thing or animal.[184] To "ruin" something involves

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[183] *See, e.g.,* Margalit, *The Decent Society, supra* note 140 at 143 ("Rejecting a human being by humiliating her means rejecting the way she expresses herself as a human. It is precisely this fact that gives content to the abstract concept of humiliation (i.e. degradation) as the rejection of human beings as human."); Murphy, "Cruel and Unusual Punishments," *supra* note 81 at 233 ("Sending painful voltage through a man's testicles to which electrodes have been attached, or boiling him in oil, or eviscerating him, or gouging out his eyes—these are not *human* ways of relating to another person.").

[184] This "mere thing or animal" language dovetails with Kantian themes. Kant writes: "In the kingdom of ends everything has either a *price* or a *dignity*. What has a price can be replaced by something else as its *equivalent*; what on the other hand is above all price and therefore admits of no equivalent has a dignity…Now, morality is the condition under which a rational being can be an end in itself, since only through this is it possible to be a lawgiving member in the kingdom of ends. Hence morality, and humanity insofar as it is capable of morality, is that which alone has dignity." Immanuel Kant,

destroying to some very significant degree its capacity to realize or exhibit value, e.g., ruining a sandcastle by pouring water on it.[185] Above the "dispositive" line, we can say that punishment embodies a rejection of the offender's humanity because it "ruins" his essentially human capacity to realize value in diachronic manner or, as I will discuss further, it embodies the legitimacy of ruining this capacity.[186]

As suggested above, this degree of disrespect is much more likely to be present when the means are non-symbolic. What better way for a punishment to embody a denial of an offender's humanity than for it to literally ruin his capacity to realize diachronic value as a non-symbolic matter of physics. But it seems that more symbolic forms of expressing disrespect could be so extreme as to reside above the "dispositive" line. Of course, merely saying a phrase like, "You're worthless – you should be tortured to death!" would not qualify. But some non-linguistic, yet still symbolic forms of disrespect are inherently more serious and meaningful. Consider "Derby's Dose," a horrible punishment invented by the slave overseer Thomas Thistlewood in the mid-18th Century for runaway slaves. An addition to beating the runaway and rubbing salt pickle, bird pepper, and lime juice into his or her wounds, what made it "Derby's Dose" was that another slave would defecate into the runaway's mouth, after which he or she would be gagged for four or five hours.[187] Let us just consider the process of forcing someone to eat human excrement, ignoring the beatings and the gagging. This need not, as matter of physics, vitiate her ability to realize value, but it seems to embody the same message as

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Groundwork of the Metaphysics of Morals [1785], in ed. and trans. Mary Gregor (Cambridge: Cambridge University Press, 1996), 37-108, at 42 (4:434-35). Nonetheless, we should not think that the conclusions presented here flow straightforwardly from Kant's complex system, with its focus *inter alia* on people's moral capacities and the universalizability of our maxims.

[185] Thanks to Peter Ramsay for helpful discussion on the concept of "ruin."

[186] We can see here the connection between extreme disrespect and the dictionary definition of "degrade": "To reduce from a higher to a lower rank, to depose from…a position of honour or estimation." *OED Online* (Oxford University Press, April 2018), www.oed.com/view/Entry/49100. Impermissibly degrading treatment involves denying someone the "rank" of human and granting them the rank of some lesser creature or thing.

[187] *See* Malcolm Gladwell, *Outliers: The Story of Success* (London: Penguin Books, 2009), 282

something that does. A willingness to inflict that component of Derby's Dose, like a willingness to torture, genuinely expresses the conviction that the victim does not matter—in the most direct sense that her capacities to generate human value and disvalue do not matter—and that no form of treatment is beyond the pale morally.

The concept of "disgust" seems to be involved with such symbolic forms of extreme degradation. Martha Nussbaum argues that "disgust embodies a shrinking from contamination that is associated with the human desire to be nonanimal…"[188] By forcing the runaway to do something utterly disgusting, and thereby "contaminating" herself like an animal, Thistlewood acts to reject her humanity and standing as a nonanimal person. This connects with the position that people's diachronic capacities are their "essentially human" capacities. Animals—unlike people—do not purposefully construct good lives, as Velleman explains; they are *synchronic* creatures that live moment-to-moment.[189] To force a person to *symbolically* become an animal is thus to deny her humanity by denying the presence or worth of her diachronic capacities. It is to express the conviction that she *is* a synchronic animal and therefore *not* a diachronic person.[190] The same can be said, of course, about the process of torturing someone and *non-symbolically* converting them into howling beast for a period of time.[191]

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[188] Martha Nussbaum, *Hiding from Humanity: Disgust, Shame, and the Law* (Princeton: Princeton University Press, 2006), 74. *See also* Valerie Curtis, *Don't Look, Don't Touch, Don't Eat: The Science Behind Revulsion* (Chicago: Chicago University Press, 2013).

[189] *See* discussion *supra* note 161.

[190] *See* Waldron, "Inhuman and Degrading Treatment," *supra* note 26 at 282 ("The 'higher than the animals' sense of human dignity gives us a natural sense of 'degrading treatment': it is treatment that is more fit for an animal than for a human, treatment of a person as though he were an animal."); Murphy, "Cruel and Unusual Punishments," *supra* note 81 at 233 (arguing that a punishment is "in itself" degrading when it "treats the prisoner as an animal instead of a human being" or "perhaps even is an attempt to *reduce* him to an animal or a mere thing.").

[191] I am grateful to Peter Ramsay for pressing me to explore the connection between degradation and animalization.

B. Inviolability and Degradation

Such a rejection of someone's value conflicts with the liberal commitment to the separateness of persons, discussed in the previous chapter, whereby each individual is deemed inviolate or sacred—somehow, a universe of value unto herself. This is a central point. We must remember, however, that we are concerned here with genuine offenders in a reasonably just society, not blameless runaway slaves. We are concerned, furthermore, with otherwise proportional forms of punishments. That is, we are assuming that the punishments in question are proportional means of realizing our legitimate penal aims—inflicting suffering or censure commensurate with the offender's wrongdoing, forcing the offender to fulfill a duty of repair toward his victim, forcing the offender to fulfill a duty of repair toward society as a whole, or whatever it may be. The idea of a dispositive degradation limitation is that even if a form of treatment above the line is proportional in accordance with such "internal" penal reasons, it is impermissible given that its degree of disrespect embodies a denial of the offender's basic humanity or worth. It does not matter that the offender is culpable; we cannot reject or destroy his human value—ruining him or breaking him—as a tool for realizing our social aims. Human inviolability, in sum, requires that agents incorporate into their reasoning a certain profoundly high valuation of each person, as well as a commitment to the separateness of persons, such that we do not view individuals as merely fungible components of a wider social good. And it thus rules out actions, like the tortures considered above, and like Derby's Dose, that could only be carried out if one rejected such a valuation and commitment.

In this way, human inviolability, which forecloses sacrificing offenders to mitigate harms or threats for which they lack responsibility, also constrains the means by which we can force people to repair those harms or threats for which they *are* responsible. Deontology thus pushes and pulls. The individual offender, conceived of in the liberal mode as a responsible agent, is deemed (following

Chapter 1) to have a duty to repair the wrongs that he has committed against other inviolable individuals, but then his *own* inviolability entails that there are methods that we cannot employ to force him to fulfill his duty, even if it goes unfulfilled as a result. All of this, of course, is not without cost. There may be, say, significantly more criminality in society as a result of our refusal to thoroughly degrade offenders. That might not be true as an empirical matter, of course. But if it were true—if our refusal to, say, inflict penal rape meant that rapists could not fulfill their duties of repair, such that there was significantly more rape in society—it would not impact our conclusion. We should not lose sight of this fact, though—that degradation-limiting penal reasons can have genuine costs, genuine *moral* costs. This, of course, is analytic to all deontological constraints.

Finally, we should consider the possibility that otherwise dispositive degradation-limiting reasons could be overwhelmed when the costs were above a certain threshold or when the offender's duty was above a certain threshold of stringency, such that he effectively forfeits his standing as a human being, and we can do anything to him permissibly (torture, rape, mutilation, etc.).[192] If such a threshold exists, it seems far more likely to be passed by a forward-looking duty of prevention than a backward-looking duty of rectification,[193] when, say, the offender is responsible for an imminent threat of sufficiently great magnitude, we are sufficiently sure of this fact, for some reason the only way to force him to prevent the threat involves extreme degradation, and there are no non-degrading means of forcing him to fulfill a lesser, but still significant portion of his duty. I take no

[192] This is Matthew Kramer's position with regard to act-impelling torture being "always and everywhere wrong," but nonetheless "morally optimal" in rare cases. *See* discussion *supra* at 120-21.

[193] Tadros considers why "the transition from self-defense to punishment may not be entirely smooth," such that it may be permissible to inflict greater harms on someone (a) to force him to eliminate a threat for which he is responsible than (b) to force him to rectify a prior wrong. Victor Tadros, *The Ends of Harm: The Moral Foundations of the Criminal Law* (Oxford: Oxford University Press, 2011), 347-48.

position here on the moral coherency of such a threshold,[194] nor on whether, if such a threshold does exist, the potential for abuse means that we ought to rule it out as a legal matter.[195] I will make two points, however, on the issue. First, if such a threshold exists, it need not vitiate the idea that degradation-limiting reasons represent relatively free-standing considerations, considerations which are overwhelmed in those very unusual cases, but which can be dispositive elsewhere. That is, those cases would involve a tragedy. The conclusion would not be that we simply harmed the wrongdoer to a proportional degree, akin to fining him $10, *without any moral remainder*; the conclusion would be that we harmed the wrongdoer to a proportional degree and, as a result, by denying his basic worth or standing as a human being, we enacted an abomination. Second, if such a threshold exists, there is little reason to believe that it is relevant in criminal court, where judges are concerned to sentence offenders with regard to their backward-looking duties or liabilities, possibly in addition to their non-imminent forward-looking looking duties of prevention. It may be proven that an offender is a danger to people moving forward, insofar as he is unreasonably unreliable with regard to upholding the criminal law's prohibitions on violence, but very doubtfully will it be proven that he is imminently about to murder a great number of people. Thus, even if torture is somehow permissible above the threshold, let us move forward with the conclusion that *penal* torture, at least, is absolutely impermissible, and for degradation-limiting reasons derived from the liberal conception of the inviolable individual.

In closing, I should emphasize that this was not an attempt to provide a knock-down argument for the existence of dispositive degradation-limiting penal reasons. Our understanding of the grounds of deontology is too limited for that,

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[194] For clear discussion on threshold deontology, see Eyal Zamir and Barak Medina, *Law, Economics, and Morality* (Oxford: Oxford University Press, 2010), ch. 2 ("Threshold Deontology and its Critique").
[195] *See* Jeff MacMahan, "Torture in Principle and in Practice," *Public Affairs Quarterly* 22 (2008): 111-28 (arguing that torture could be justified as a means of self-defense, but that it ought to be categorically outlawed due to its potential for abuse); *but see* Steinhoff, *On the Ethics of Torture*, *supra* note 40 at 53-60.

and not just in the extra complicated penal context, where we are dealing with culpable individuals.[196] We do not have anything close to a clean justification for even the easiest cases for deontology, say, the idea that it is wrong to harvest the organs of one innocent person to save five people's lives.[197] As such, the most honest thing to do might be to restate the conclusions in a conditional manner. That is, we have been interested to discern the basis and contours of degradation limitations, *assuming they exist*. Of course, such an assumption is relatively uncontroversial. Most people, I think, have the strong conviction not only that deontological limits exist with regard to innocent people, but also that they generate dispositive degradation limitations with regard to the culpable (e.g. most people would oppose penal rape for rapists, I think, even when proportional by reference to their favored positive theory of punishment). Moreover—and as further evidence of the plausibility of degradation limitations—most legal systems have incorporated such limitations, as indicated above. We can restate our general conclusion, then, as follows: *assuming that dispositive degradation-limiting reasons exist*, then following the inquiry into the wrong-making features of torture, we ought to understand the metric of degradation to be disrespect for a person's capacity to realize value, with dispositive degradation-limiting reasons emerging above a certain point on the spectrum of disrespect, above which the treatment embodies a denial of the

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[196] Even Rawls and Nozick do not attempt to ground or justify their deontological commitments, and present them essentially as assumptions in the first few pages of their seminal works. *See* Rawls, *A Theory of Justice, supra* note 160 at 3-4 ("Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override."); Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), at ix ("Individuals have rights, and there are things no person or may do to them (without violating their rights)."); *id.* at xiv ("This book does not present a precise theory of the moral basis of individual rights…").

[197] For attempts to ground deontological constraints, see, e.g., Frances Kamm, "Inviolability," *Midwest Studies in Philosophy* 20 (1995): 165-75; Frances Kamm, *Intricate Ethics* (Oxford: Oxford University Press, 2007), ch 7; Thomas Nagel, "The Value of Inviolability," in ed. Paul Bloomfield, *Morality and Self-Interest* (Oxford: Oxford University Press, 2007). For relevant discussion, see, e.g., John M. Taurek, "Should the Numbers Count?" *Philosophy & Public Affairs* 6 (1977): 293-316; Michael Otsuka, "Saving Lives and the Claims of Individuals," *Philosophy & Public Affairs* 34 (2006): 109-35, Kasper Lippert-Rasmussen, "Kamm on Inviolability and Agent-Relative Restriction," *Res Publica* 15 (2009): 165-178.

individual's standing as a human, that is, as a creature with the capacity and right to build a good life through time.

Chapter 3. Long-Term Incarceration and Human Value

This chapter applies our inquiry into the bases of degradation limitations to assess the punishment of long-term incarceration. Where on the ladder of disrespect does long-term incarceration reside? Is it so disrespectful that, like penal torture or Derby's Dose, it embodies a rejection of the offender's standing as a human? Sections I – III (pages 175-207) begin the investigation by examining the meaning of incarceration *simpliciter*. What deprivations are inherent to incarceration, regardless of sentence length? There is a great diversity in prison quality, as I outline below, from a prison where thousands of inmates are packed in against one another without space even to sit down to a quiet penal island with beaches, bicycles, and flocks of sheep. This diversity means that incarceration for any period of time can entail a wide array of possible deprivations. There is, however, one deprivation inherent to all prisons: inmates will be unable to freely associate with other citizens in society. This, I argue, is the deprivational minimum and essence of incarceration. I refer to it as the denial of "the freedom of general association."

Sections IV and V (pages 207-28) add the variable of sentence length to the analysis, moving from the meaning of incarceration *simpliciter* to that of *long-term* incarceration. I define a prison term as *long-term* if it represents *a severe risk of ruining an offender's life, just in virtue of the amount of time that he is denied the freedom of general association*. It is a slow-forming, essentially non-phenomenological injury to one's life project.[1] Long-term confinement away from society inhibits the realization of certain *temporal* and *associational* goods, that is, those goods which require cultivation

[1] By "phenomenological" I mean that which is consciously experienced. The injuries of physical pain and at least certain forms of humiliation are thus "phenomenological injuries," as they depend on the victim's conscious experience for their injuriousness (i.e. the victim needs to consciously *feel* the physical pain or the humiliation). By "essentially non-phenomenological injury," I mean an injury which does not depend for its injuriousness on the victim's conscious experience. An essentially non-phenomenological injury may, however, also feature phenomenological components. That is, the injury of long-term incarceration need not *hurt* for it to be injurious, as I explain below; though, it very well may hurt and, in those cases, that fact will be part of what makes it injurious.

over time in association with other people, like maintaining a family and a meaningful career. Such goods are central to almost all conceptions of the good life.

If impermissible degradation embodies an affirmative rejection of someone's humanity, then its degradation-making features must be intentionally inflicted, I argue in Section VI (pages 228-57). The permissibility of long-term incarceration thus depends on whether the state *intends* to ruin the offender's life, or at least intends to severely risk that outcome. This depends, in turn, on the underlying theory of punishment (as well as one's theory of intention). If the reason to long-term incarcerate is to incapacitate a dangerous individual, I argue, the costs to an inmate's life project can be unintended byproducts of the state's aim to prevent him from committing very serious offenses. It would pose no problem on a genuine incapacitation theory if prison were somehow an inmate's private Xanadu, where he could lead a flourishing (and crime-free) life. Long-term incarceration for reasons of retribution or deterrence, however, is different. On those two rationales, the state damages an offender's life project intentionally, using the suffering and costs of long-term incarceration to generate moral desert and crime prevention, respectively. Retributivists would argue, for instance, that the offender does not deserve Xanadu; and deterrence theorists would argue that allowing him to live there would incentivize crime. This chapter concludes that long-term incarceration could only be justified for reasons of incapacitation. Non-long-term incarceration is a separate issue. As a dispositive degradation limitation on this view, a liberal state cannot intentionally ruin an offender's life, nor can it intentionally create a severe risk of ruining of ruining his life, regardless of how heinous his offence or how useful it might be to do so, just as it cannot inflict penal torture.

I. Deprivation of What Liberty?

What is incarceration *simpliciter?* When we hear that John has been sentenced to a one-week term of imprisonment, what has the state done to him? If a punishment, by definition, involves a deprivation or set of deprivations, what

exactly has John been deprived of?[2] The standard view, that incarceration is "the deprivation of liberty," is inadequate.[3] A fine deprives someone of the liberty to spend his money as he wishes, for instance, but a fine is not incarceration.[4] "Liberty" is a famously slippery concept and unadorned it is unhelpful as a guide to the meaning of incarceration.[5] Rather than carrying out a forced conceptual analysis or "sharpening" of liberty as it relates to incarceration, let us consider a more direct question, derived from Amartya Sen and Martha Nussbaum's "capability approach." What valuable activities or states of being does incarceration limit an inmate's access to, and to what degree?[6]

In accord with Aristotle and Marx, Sen and Nussbaum argue that we ought to assess political arrangements by examining people's "real opportunity" *to do* or *to be* certain valuable things (e.g. to fly a kite, to get married, to watch television, to attend university, to be healthy, to be enthusiastic, etc.), as opposed to their level

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[2] *See, e.g.,* Hugo Adam Bedau and Erin Kelly, "Punishment," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (Winter 2017 Edition), https://plato.stanford.edu/archives/win2017/entries/punishment/ ("Punishment…is *the authorized imposition of deprivations*…").

[3] *See, e.g.,* Victor L. Shammas, "Pains of Imprisonment," in ed. Kent R. Kerley, *The Encyclopedia of Corrections* (Hoboken: John Wiley & Sons, 2017), 1-5, at 2 ("The fundamental premise of prisons is to remove or restrict liberty.").

[4] In *Turner v. Rodgers*, 564 U.S. ___ (2011), the US Supreme Court addressed whether states must provide an indigent defendant with counsel in civil contempt proceedings to enforce child support judgments, when he faces possible incarceration. The Court refers to the risk of erroneous incarceration, but not to the risk of making erroneous child support payments, as the risk of an erroneous "deprivation of liberty." *Id.* at 14. In *Foucha v. Louisiana*, 504 U. S. 71, 80 (1992) (quoting *U.S. v. Salerno*, 481 U.S. 739, 750 (1987)), as well, the Court explained that it has been "careful not to 'minimize the importance and fundamental nature' of the individual's right to liberty," where "liberty" refers to freedom from confinement in a facility.

[5] *See* David Miller (ed.), *Liberty* (Oxford: Oxford University Press, 1991).

[6] *See* Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000); *Creating Capabilities: The Human Development Approach* (Cambridge, MA: Harvard University Press, 2011); "Human Functioning and Social justice. In Defense of Aristotelian Essentialism," *Political Theory* 20 (1992): 202–246; "Capabilities as Fundamental Entitlements: Sen and Social Justice," *Feminist Economics* 9 (2003): 33–59; Amartya Sen, "Equality of What?" in ed. Sterling M. McMurrin, *Tanner Lectures on Human Values* (Cambridge: Cambridge University Press 1980); *Commodities and Capabilities* (Amsterdam: North-Holland, 1985); "Capability and Well-being," in eds. Martha Nussbaum and Amartya Sen, *The Quality of Life* (Oxford: Clarendon Press, 1993); "Capabilities, Lists and Public Reasons: Continuing the Conversation," *Feminist Economics* 10 (2004): 77–80; "Elements of a Theory of Human Rights," *Philosophy & Public Affairs* 32 (2004): 315–56.

of desire fulfillment, happiness, or resources.[7] One's circumstances, they explain, will to a significant degree govern what she wants, and what will make her happy. That a poor, disabled person has adapted to her misfortune, and feels happy and satisfied with her life, does not mean that society should not worry about her inability to be or to do certain things—her inability to realize certain "functionings," in the language of Sen or Nussbaum—like her inability to, say, ride public transportation. While the ability *to be* happy is a crucially important "capability," Sen explains, it is only one of many such capabilities, and it warps public policy to pursue it monomaniacally.[8] Meanwhile, resources are of merely instrumental worth on this view, relevant only insofar as one can convert them into valuable functionings. That is, two people with same amount of resources do not have the same standard of living, if one has a greater capacity to convert his resources into valuable functionings. Nussbaum explicates Aristotle's view on the instrumental nature of resources (or "commodities")—in the process clarifying the connection between the Aristotelean capabilities approach and the Aristotelean conception of human value discussed in Chapter 2:

> "The aim of political planning is the distribution to the city's individual people of the conditions in which a good human life can be chosen and lived. This distributive task aims at producing capabilities. That is, it aims not simply at the allotment of commodities, but at making people able to function in certain human ways."[9]

On this view, resources are not ends in themselves, but rather the means of realizing the functionings that are constitutive of a good life as a diachronic whole.

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[7] Nussbaum, *Creating Capabilities*, *supra* note 6 at x ("Known as the 'Human Development' approach, and also as the 'Capability Approach' or 'Capabilities Approach,' it begins with a simple question: What are people *actually* able to do and to be? What *real opportunities* are available to them?") (emphasis added); Amartya Sen, *Inequality Reexamined* (New York: Russell Sage Foundation, Harvard University Press, 1992), 31 (explaining that our set of capabilities will determine "the *real opportunity* that we have to accomplish what we value.") (his emphasis).

[8] Amartya Sen, "Well-being, Agency and Freedom: the Dewey Lectures," *Journal of Philosophy*, 82 (1985): 169-221, at 200.

[9] Martha Nussbaum, "Nature, Functioning and Capability: Aristotle on Political Distribution," *Oxford Studies in Ancient Philosophy* (Supplementary Volume) 6 (1988): 145–84, at 145.

While Sen and Nussbaum employ the "capability approach" in the realms of distributive justice, development economics, and constitutional design, it is useful as well in the realm of sentencing theory, as I hope will become clear, given its insight into the nature of injuries and deprivations. For the purposes of sentencing theory, however, we can leave behind the question of what qualifies as a "real opportunity" to realize a certain functioning, of how easy or costless it must be for someone to do or to be something before we can say with confidence that she has the "capability" to do or to be that thing.[10] With such a flattened capability approach in mind, we can ask to what degree incarceration makes it *harder* or *more difficult* for an inmate to realize certain valuable functionings, that is, to what degree incarceration makes it harder or more difficult to engage in valuable activities or states of being. The emphasis on the degree of deprivation is important. Prison makes it harder, but not impossible for an inmate to realize a number of functionings, like, for instance, speaking to his family members. Though, of course, sometimes the limitation will be complete or near complete, as with an inmate's ability to, say, take a ride on an airplane. Finally, and importantly for the argument below, the deprivations of incarceration, so conceived, could also be a matter of *risk*, in that incarceration risks limiting an inmate's access to certain functionings.[11]

At this stage, the inquiry is more semantic and sociological. There is a term—"incarceration" (or "imprisonment")—and we are looking out to the world

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[10] On the difficulty of determining when someone has a full-fledged "capability," Bernard Williams writes: "How far should we consider the costs of doing something, when we are trying to decide whether someone has the capability of doing it? For instance, is it the case that I can go to Cortina d'Ampezzo for the winter? Well, I *could go* to that resort for the winter: it would merely involve my deserting my family, resigning my job, mortgaging my house, and going even further and irremediably into overdraft. So I can go, but there is a very high cost attached to it. Is it a capability that I have?" Bernard Williams, "The Standard of Living: Interests and Capabilities," in Amartya Sen, *The Standard of Living: The Tanner Lectures,* ed. Geoffrey Hawthorne (Cambridge, MA: Cambridge University Press, 1987), 94-102, at 99.

[11] Adam Kolber writes, "Although we sometimes foresee harms that are virtually certain to befall a prisoner, other times we merely foresee *risks* of harm. For example, a judge might reasonably foresee that a particular offender will face a higher risk of physical or sexual violence in prison than outside prison. If so, the state ought to have some justification for increasing the offender's risk of harm." Adam Kolber, "Unintentional Punishment," *Legal Theory* 18 (2012): 1-29, 18.

to see what practices the term captures. It refers to, as indicated above, a great variety of practices. The aim is to catalogue this diversity, while at the same time discovering which deprivations are shared by all instances of incarceration, understood in terms of limited access to valuable functionings. In this way, we should be able to discover the "essence" of the punishment. Are there particular functionings that all prisons make impossible or very difficult to realize? It is important to catalogue non-universal deprivations, as well, to understand the full array of issues a judge might reasonably consider in sentencing someone to a term of incarceration. By comparison—and rather obviously—the punishment of fining involves fewer variables. Across time and place, the experience of being fined, whether in pesos, rubles, pounds, or dollars, whether in ancient Greece or in contemporary New York State, has been very similar.[12]

II. Carceral Diversity

Let us now demonstrate some of the diversity of incarceration—and also attempt to gain some limited understanding of what the punishment might feel like for an inmate in his day-to-day experience—by looking at a number of historical and contemporary examples. In this section, we are aiming to discover and consider the deprivations of incarceration to a degree *atemporally* and *amorally*, that is, with relative ignorance of both (a) how long the offender experiences these deprivations and (b) the state's penal rationale(s), which would inform us (partially) of the extent to which the state intends a particular deprivation, as opposed to it merely being an unwanted byproduct of the desired outcome. I will introduce the

[12] On the practice of fines in ancient Greece, see Edward M. Peters, "Prison Before the Prison: The Ancient and Medieval Worlds," in eds. Norval Morris and David J. Rothman, *The Oxford History of the Prison: The Practice of Punishment in Western Society* (New York: Oxford University Press, 1998), 7-8. One exception to the similarity of fining across time and place is the Scandinavian policy of "day fines," the amount of which depends on the offender's wealth. *See, e.g.,* Hans Thornstedt, "The Day Fine System in Sweden," *Criminal Law Review* 9 (1975): 307-12. Another, related exception depends on the social safety net. Fines may have dramatically different impacts on low-income offenders in different jurisdictions, depending on the degree of welfare support within their respective societies. Thanks to Nicola Lacey for raising both of these exceptions.

examples of incarceration from most to least severe, in five steps—pausing along the way to consider some of the deprivations entailed. As indicated above, I will incorporate the variable of sentence length in Sections IV and V and then penal rationale and intent in Section VI.

Step 1: Horror

(1) In 1994 approximately 7,000 Hutus charged with genocide in Rwanda were held in the Gitarama Prison, a walled space half the size of a football pitch.[13] The complex was built for 400 inmates. There were only 20 latrines. Packed in against one another, most of the inmates had no option but to stand, constantly, in the open courtyard. Those too weak to stand squatted in filth. Foot sores became gangrenous. At the end of the courtyard a concrete block housed the longest-serving prisoners, a dark cellar filled with hundreds of men. One meager meal a day was passed throughout the prison. One in eight inmates died over a nine-month period from 1994 to 1995, according to Médecins Sans Frontières.[14]

(1A) The first-century B.C. historian, Diodorus Siculus, described the *Tullianum,* a prison in which Perseus, the King of Macedonia, was placed by the Praetor of Rome after his capture by the Roman Army in the early second-century B.C.[15] There were various levels to the facility, and Perseus was placed in the lowest, and worst. It was not clear that Perseus himself was awaiting execution, but we should add to this gruesome picture the fact that his jailers threw down a sword and a noose, and urged him to commit suicide:

> "The prison is a deep underground dungeon, no larger than [a dining-room that could hold nine people], dark and noisome from the large numbers [of people] committed to the place, who were men under condemnation on capital charges, for most in this category were incarcerated there at this period. With so many shut up in such

[13] David Orr, "Hutus held in 'worst prison in the world': 7,000 suspects of Rwanda massacre are kept in a jail built for 400," *The Independent,* July 15, 1995. http://www.independent.co.uk/news/world/hutus-held-in-worst-prison-in-world-1591700.html.

[14] Médecins sans Frontières, "Diagnosing the State of Prisoner Health: The Gitarama Example," March 1995 Report, http://speakingout.msf.org/en/node/643.

[15] Peters, "Prison Before the Prison," *supra* note 12 at 19.

> close quarters, the poor wretches were reduced to the appearance of brutes, and since their food and everything pertaining to their other needs was all so foully commingled, a stench so terrible assailed anyone who drew near it that it could scarcely be endured."[16]

An important variable in assessing the deprivations inherent to a particular prison is the nature of the relationship between inmates. How much and what sort of access do inmates have to one another, for better or for worse? In the *Tullianum* and the Gitarama Prison, the relationship between the inmates is perverse, marked by extraordinarily close physical proximity. The horror of these facilities derives, in large part, from being forced to live and breathe so close to other people and their bodies. The lack of access to more than a few feet of personal space, when combined with the lack of sanitation and nutrition, generates a nearly unending list of further deprivations. One would be deprived, almost completely, of access to quiet, friends, family, medical care, entertainment, consensual or private sex, clean water, fresh air, and so forth. In the "doings" and "beings" language of the capability approach, it would be extremely difficult, if not entirely impossible, as a result of these deprivations, to do or be much of anything of value (e.g. to be healthy, to make art, to be happy, etc.), let alone to maintain a sense of calm and composure. Indeed, these are places of suffering, perhaps in every single moment of confinement. And while we can only speculate as to the severity of that suffering, confinement in either facility would surely risk, to some significant degree, the suffusive panic which is constitutive of torture, as discussed in the prior chapter. Indeed, the jailers' urging of Perseus to commit suicide relies on the dungeon generating a literally overwhelming disutility, where one is motivated to do anything to end the experience, even kill himself.

[16] *Id.*

Step 2: Solitary Confinement

(2) Inspired by the works of John Howard, two acts of Parliament allowed for the building of the Pentonville "penitentiary," which opened in 1842 on the Caledonian Road in north London.[17] It housed 450 male inmates in solitary cells of 7.5 ft x 13.5 ft.[18] I will recreate the mid-19th Century daily schedule at the Pentonville, following Michael Ignatieff's description in *A Just Measure of Pain*:[19]

> 5:30 AM: A bell rings for wake-up.
> 6:00 – 7:30 AM: You work in your cell at a cobbler's bench or loom.
> 7:30 AM: Breakfast of cocoa and a piece of bread is served through a trapdoor in your cell.
> 7:50 AM: You put on a spade-shaped mask with holes for your eyes, to prevent recognition of friends and accomplices.
> 7:50 AM – 8:00 AM: You are led to the chapel, where you sit in a boxlike compartment that prevents viewing other inmates.
> 8:00 AM – 8:30 AM: Chapel service.
> 8:30 AM – 9:00 AM: You are marched to the yard and placed in walled, small area. You march around in time shouted out by the warder.
> 9:00 AM – 9:10 AM: You are marched back to your cell.
> 9:10 AM – 12:00 PM: You work in your cell at a cobbler's bench or loom.
> 12:00 PM – 2:00 PM: Lunch of gruel is served. Time allotted for rest, contemplation, and bible study.
> 2:00 PM – 6:00 PM: You work in your cell at a cobbler's bench or loom.
> 6:00 – 9:00 PM: Dinner of stew, and sometimes cheese and onion, is served. Time allotted for rest, contemplation, and bible study.
> 9:00 PM: Lights out.

This schedule means that inmates spent approximately 23 hours a day in their cell, working for about 8.5 of those hours. The Pentonville allowed inmates one visit every six months, in a compartment divided in two by a screen and only big enough for two people.[20] The visit could last for 15 minutes. Inmates could write and receive one letter every six months.[21] Communication of any form between inmates

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[17] Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750-1850* (New York: Pantheon Books, 1978), 3.
[18] *Id.* at 4.
[19] *Id.* at 3-14.
[20] *Id.* at 7.
[21] *Id.*

was forbidden, and one could be sent to a cold, dark cell in the basement for a gesture, smile, or whisper. At night, the men, risking such punishment, tapped out the faintest of messages to each other through the walls and drainpipes.[22]

(2A) The highest-security federal prison in the United States is the Administrative Maximum Facility (ADX) located in the mountains near Florence, Colorado. Created approximately 150 years later, it shares a number of features with the Pentonville. While the Pentonville had 450 solitary cells at 7.5 ft x 13.5 ft, the ADX Florence has 490 at 7 ft x 12 ft.[23] Travis Dusenbury was sent to the ADX Florence after assaulting a prison guard in a Florida federal prison in 2005. He described his 10 years in the "supermax" facility after his release in 2015.[24] Everything in the cell is made out of concrete: walls, floor, desk, sink, even the bed frame. The exterior door is solid, preventing prisoners from seeing one another. He could not see the sky from his narrow, 4 in x 3 ft cell window.[25] The windows are designed so inmates do not know where they are housed in the complex.[26] In California's Pelican Bay State Prison, by comparison, the approximately 1,000 inmates in solitary confinement live in 7.6 ft x 11.6 ft cells without any windows at all, sometimes for decades.[27] Five days a week, in parallel to conditions at the

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[22] *Id.* at 9. A memorable fictional account of inmates in solitary confinement tapping out messages to each other through drainpipes is in Arthur Koestler, *Darkness at Noon*, trans. Daphne Hardy (London: Vintage Books, 1940).

[23] Catherine Tsai, "Prison Guards Say Supermax is Understaffed," *The Associated Press*, November 7, 2006.

[24] Eli Hager, "My Life in the Supermax," *The Marshall Project*, January 8, 2016, https://www.themarshallproject.org/2016/01/08/my-life-in-the-supermax#.8fazd2Yje;
see also Admission and Orientation Handbook, US Penitentiary Administrative Maximum Facility, Florence, Colorado (Department of Justice, November 2008), https://www.bop.gov/locations/institutions/flm/FLM_aohandbook.

[25] Mark Binelli, "Inside America's Toughest Prison," *The New York Times*, March 26, 2015.

[26] Robert Windrem, "Worse than Guantanamo? Terror Suspects Face Infamous Colorado Supermax," *NBC News,* April 19, 2016, https://www.nbcnews.com/news/us-news/new-prison-would-be-safer-harsher-much-colder-guantanamo-n542741

[27] Solitary confinement at Pelican Bay is designed to minimize human interaction. Cell doors open electronically and corrections officers communicate with inmates through an intercom. In 2012, there were 308 inmates who had been living in solitary confinement at Pelican Bay for more than a decade. Erica Goode, "Solitary Confinement: Punished for Life," *The New York Times,* August 3, 2015.

Pentonville, Dusenbury spent 22 to 23 hours a day alone in his room, with one to two hours outside in an individual, fortified cage, though sometimes they cancelled this outside activity without explanation.[28] There are also indoor "gyms," windowless cells containing chin-up bars that inmates can access alone.[29] Prisoners are allowed a maximum of 10 hours of exercise a week outside their cell, between the "gym" and the outdoor cage.[30] In distinction to the Pentonville, there is no work requirement at the ADX Florence. Inside his cell he had access to reading materials, a radio, pen, and paper. The lack of television indicates that Dusenbury was housed in the H-Unit, where inmates are under certain "Special Administrative Measures."[31] Most cells outside of the H-Unit have black-and-white televisions with limited programming; news shows are not permitted.[32] Dusenbury's pen was small and floppy, to prevent turning it into a weapon, and was therefore useless as a writing utensil.[33] Meals enter through door slots.[34] Any contact with guards, psychiatrists, or clergy occurs through these slots, as well.[35] Amnesty International reported that prisoners at the ADX Florence "routinely go days with only a few words spoken to them."[36] Dusenbury writes:

> "The one thing I would have liked to be able to do was sleep. But I had this monstrous insomnia. I just couldn't sleep. I'd lie there all night…not being able to sleep, and by the end I had this sleep deprivation that was absolutely monstrous. The cell just became my world and I couldn't get out of it, not even into sleep…

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[28] Hager, "My Life in the Supermax," *supra* note 24.
[29] Windrem, "Worse than Guantanamo?" *supra* note 26.
[30] Binelli, "Inside America's Toughest Prison," *supra* note 25.
[31] Windrem, "Worse than Guantanamo?" *supra* note 26; *see also* Charles Montaldo, "Maximum Security Federal Prison: ADX Supermax," *ThoughtCo*, April 5, 2008, https://www.thoughtco.com/adx-supermax-overview-972970 (describing the differences between the six units within the prison).
[32] Windrem, "Worse than Guantanamo?" *supra* note 26.
[33] Hager, "My Life in the Supermax," *supra* note 24.
[34] Windrem, "Worse than Guantanamo?" *supra* note 26.
[35] Binelli, "Inside America's Toughest Prison," *supra* note 25.
[36] Amnesty International, "USA: Prisoners held in extreme solitary confinement in breach of international law," July 16, 2004, https://www.amnesty.org/en/latest/news/2014/07/usa-prisoners-held-extreme-solitary-confinement-breach-international-law/

> It's so claustrophobic in there. I know claustrophobia is a condition, but I think that *place* was claustrophobic. It got to the point where absolutely anything that changed, like if I saw snow falling outside, was what allowed me to survive."[37]

Dusenbury described the limited opportunities for communicating with other inmates: when they were moved to another unit together, when one was cleaning another's cell as an assigned "orderly," and when their recreational times matched up and they were in adjacent cages outside.[38] The cages are similar to the individual walled areas on the Pentonville's grounds. Sometimes, Dusenbury continues, he would yell as loud as he could down the unit until someone would yell back. In parallel to the Pentonville prisoners tapping out messages on the pipes, Dusenbury explains that it was sometimes possible to talk to people in adjacent cells, if the piping lined up, by speaking through a toilet paper roll held over a drain.[39] While these were the limits of oral communication, the closest physical contact was "finger handshakes" through the fencing in adjacent outdoor cages.[40] Inmates at the ADX Florence are allowed five monthly "social visits" (as opposed to "attorney visits") with up to five people per visit, from a list of 20 people approved after investigation, with a maximum of 7 hours per visit.[41] Contact is not permitted during the visits.[42] Prisoners in the H-Unit are only allowed visits from their immediate family and attorneys.[43] If any inmate misbehaves he can be sent to

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[37] Hager, "My Life in the Supermax," *supra* note 24.
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] Visiting Procedures, Administrative Maximum Facility, Florence, Colorado (U.S. Department of Justice, May 7, 2014), https://www.bop.gov/locations/institutions/flm/FLM_visit_hours.pdf; Craig Haney, a social psychologist who has researched inmates held in long-term solitary confinement in California's Pelican Bay State Prison reported that some inmates had not a had a single visitor during their sometimes decades-long sentences. "I got a 15-minute phone call when my father died," said an inmate who had been isolated for 24 years to a reporter covering conditions in the facility. "I realized I have family I don't really know anymore, or even their voices." Goode, "Solitary Confinement," *supra* note 27.
[42] Visiting Procedures, ADX Florence, *supra* note 41.
[43] Windrem, "Worse than Guantanamo?" *supra* note 26.

the Z-Unit, which contains darkened, sound-proofed cells, and at least the possibility of being strapped down to a bed.[44]

Whereas the Gitarama and the *Tullianum* inflict the extreme absence of privacy, the solitary confinement of the Pentonville and the ADX Florence inflict its extreme presence. Whereas the former are filthy and loud, the latter are sterile and silent. Solitary confinement radically separates an inmate from other human beings. In this way, *for as long as it lasts*, it cleanses an inmate of the risks associated with contact with other people; unlike the Gitarama and the *Tullianum*, for instance, it represents no inherent risk to inmate's bodily health. But at the same time, of course, solitary confinement removes the opportunities afforded by contact with others. Solitary confinement, that is, deprives an inmate of access to the functionings that he can only realize in concert with, or in the presence of, other people—most of the valuable functionings in existence, undoubtedly, which I will discuss further below.[45]

But what of those valuable activities or states of beings that an individual can realize alone, such as enjoying peace and quiet, or engaging in personal contemplation or meditation, of which the Gitarama and *Tullianum* surely deprive their

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[44] *Id.*

[45] In addition to being tortured by agents of the Argentinian junta, as discussed in the prior chapter, Jacobo Timerman was held in solitary confinement for extended periods. The openings in the cell doors were only big enough to risk punishment by looking out with one eye. Timerman expresses the need for human contact generated by solitary confinement, writing of a night in which he believes he and another inmate were looking at each other:

> "And now I must talk about you, about that long night we spent together, during which you were my brother, my father, my son, my friend. Or, are you a woman? If so, we passed that night as lovers. You were merely an eye, yet you too remember that night, don't you?…You must remember, I need you to remember, for otherwise I'm obliged to remember for us both, and the beauty we experienced requires your testimony as well. You blinked. I clearly recall you blinking."

Jacobo Timerman, *Prisoner Without a Name, Cell Without a Number* (Weidenfeld and Nicolson: London 1981), 5-6.

inmates of to some very high degree? Richard Lovelace, from inside the Gatehouse Prison in 1642, writes of such inherently "personal" functionings:

> "Stone walls do not a Prison make,
> Nor I'ron bars a Cage;
> Mindes innocent and quiet take
> That for an Hermitage;
> If I have freedome in my Love
> And in my soule am free,
> Angels alone that soar above,
> Enjoy such Libertie."[46]

Oscar Wilde echoes Lovelace: "After all, even in prison, a man can be quite free. His soul can be free. His personality can be untroubled. He can be at peace."[47] It would seem, in theory, that solitary confinement would afford an inmate unmitigated access to such valuable functionings. Indeed, John Howard envisioned the Pentonville as an aggressive church of sorts, a place uniquely fertile for the realization of such introspective goods, and of reformative penitence (i.e. a literal "penitentiary"). On his view, only by removing an offender from his chaotic and depraved social reality to a place of faith, diligence, and repose, could an offender reform his habits and character, and then return to society restored and responsible. Ignatieff explains that Howard's spiritual concern to save inmates' souls was closely associated with a materialist worldview, ascendant at the time, which maintained that a person comes into being as a *tabula rasa*, with his ideas formed entirely by external sensory inputs.[48] The idea of the penitentiary, then, was to re-engineer inmates, as it were, by controlling and limiting their sensory inputs, with their minds ultimately reflecting the rigid order and rationality of their daily prison schedule.

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[46] Richard Lovelace, "To Althea, From Prison," in *The Poems of Richard Lovelace* (Oxford: Clarendon Press, 1953), 78-9.
[47] Oscar Wilde, *The Soul of Man and Prison Writings,* ed. Isobel Murray (Oxford: Oxford University Press, 1990), 11.
[48] Ignatieff, *A Just Measure of Pain, supra* note 17 at 67-70.

Solitary confinement, as it turns out, does alter the psychologies of inmates, but not in the salutary way envisioned by Howard. Howard's rehabilitative vision emerges as ironical and farcical, and ultimately cruel, as the infliction of extreme peace and quiet tends to bring about anxiety and madness.[49] Back in 1890 the US Supreme Court outlawed the use of solitary confinement on Colorado's death row, recognizing its psychiatric risks, and holding that it was too cruel even for people sentenced to death:

> "This matter of solitary confinement is not…a mere unimportant regulation as to the safe-keeping of the prisoner…A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others, still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community."[50]

Stuart Grassian, a psychiatrist on the faculty of the Harvard Medical School, evaluated over two hundred prisoners in solitary confinement in various state and federal penitentiaries in the US.[51] Among other symptoms, he found that more than half of the prisoners reported a progressive inability to tolerate ordinary stimuli, like the clanking of a cell door; almost a third experienced auditory hallucinations, often in whispers and saying frightening things; over half

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[49] This was clear even in Howard's time. Every year at the Pentonville, between five and fifteen men were taken away to the asylum. *Id.* at 9. From 1842-48, offenders were meant to spend 18 months in solitary confinement at the Pentonville, after which they would be "cured" and ideally sent to Australia. After evidence of the mental damage it inflicted on offenders, the period was reduced to 12 months from 1848-52, and thereafter to 9 months. By comparison, offenders were meant to serve out their entire sentences in solitary confinement in the Cherry Hill prison in Philadelphia, another mid-18th Century experiment in solitary confinement. *Id.* at 222 note 4; Phillip Collins, *Dickens and Crime*, 3d ed. (London: MacMillan, 1994), 143-45. For a fictional account of the mental illness induced by solitary confinement, see Charles Dickens' portrayal of Dr. Manette in *A Tale of Two Cities* [1859] (London: Penguin Books, 2000) and that of Mr. Dorrit and his children in *Little Dorrit* [1857] (London: Penguin Books, 1998). For careful discussion of both Dickens and the history of the Pentonville and Cherry Hill, see Collins, *id.* at 117-63.

[50] *In re Medley,* 134 U.S. 160, 167-68 (1890).

[51] Stuart Grassian, "Psychiatric Effects of Solitary Confinement," *Washington University Journal of Law and Policy* 22 (2006): 325-83.

experienced severe panic attacks; almost half reported the emergence of entirely unwelcome and uncontrollable revenge fantasies with regard to prison guards; and almost half reported paranoid and persecutory fears.[52] He concludes that solitary confinement causes a discreet syndrome with characteristic symptoms—one that is "strikingly unique" by comparison to other psychiatric illnesses.[53] In the beings and doing language of the capabilities approach, then, we can say that solitary confinement, to some significant degree, risks depriving an inmate of the capacity *to be* mentally healthy, or *to be* sane. Solitary confinement, that is, not only deprives an inmate of access to valuable interpersonal, social functionings, but also to a very significant degree risks depriving him of access to any of the valuable "personal" functionings that he might realize alone.

Step 3: Medium Security

(3) Michael Romero, convicted of five bank robberies in the San Diego area, described in November 2012 his daily life in the San Quinten State Prison in Marin County, California on the north side of the San Francisco Bay.[54] Founded in 1852, San Quinten is the oldest prison in California.[55] The facility provides a range of confinement: minimum and medium security general populations, the state's only death row population, and a "Reception Center" that serves prisons in 17 counties in the greater Bay Area.[56] From his description, Romero is in the medium-security general population. He is confined to a cellblock of 120 prisoners. From his cellblock, he can move to the courtyard, the mess hall, work areas, and

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[52] *Id.* at 335-36. Chronic loneliness, from solitary confinement or otherwise, is also associated with an array of risks to bodily (and not merely psychological) health. *See* John T. Cacioppo and William Patrick, *Loneliness: Human Nature and the Need for Social Connection* (New York: W.W. Norton, 2008).

[53] Grassian, "Psychiatric Effects of Solitary Confinement," *supra* note 51 at 337.

[54] Michael Romero, "A Day in the Life of a Prisoner," *Pen America* (pen.org), November 16, 2012, https://pen.org/a-day-in-the-life-of-a-prisoner/

[55] Don Chaddock, "Unlocked History: Explore San Quinten, the State's Oldest Prison," *Insider CDCR*, December 4, 2014, https://www.insidecdcr.ca.gov/2014/12/unlocking-history-explore-san-quentin-the-states-oldest-prison/

[56] California State Auditor, *California Department of Corrections: Its Plans to Build a New Condemned-Inmate Complex at San Quentin are Proceeding, but its Analysis of Alternate Locations and Costs was Incomplete* (Sacramento: California State Auditor, 2004), 7.

the visitor center. Movements from one area to another are only allowed hourly in ten-minute intervals. Except for meals, anyone leaving the cellblock must get a pass signed by a guard. Romero's cell is approximately 6 ft x 12 ft. It was built for one person, but, given the overcrowding in California's state prison system, he has a cellmate (who was also convicted of bank robbery, in Los Angeles).[57] At the time of Romero's writing, the prison had 3,943 inmates, but a design capacity of 3,082.[58] In his cell there is a wooden double bunk, a large, barred window looking outside, and a metal door with a narrow 3 in x 18 in window. Breakfast is at 6:00 AM, lunch at 12:00 PM, and supper at 5:00 PM. Everyone who is able to work must, with payment topping out at $3.10/hour, according to Romero.[59] There is some choice in terms of one's employment. Romero usually skips breakfast, rising around 7:00 AM. He works for about an hour and a half tending to the grounds outside his cellblock, raking out footprints and caring for the sparse foliage. By comparison, James "JC" Cavitt, another San Quinten inmate, works from 8:00 AM – 2:00 PM in the prison's general maintenance shop as a metal fabricator and welder (at 32 cents/hour).[60] Romero describes the scene before lunch, hinting at the threat of violence inside the prison:[61]

> "Some twenty cons are gathered in the dayroom now, waiting for lunch. The talk is of two recent stabbings here and other assorted

[57] The Supreme Court, in *Brown v. Plata*, 563 U.S. 493 (2011), held that overcrowding in California state prisons constituted "cruel and unusual" punishment.

[58] This was down from 5,984 inmates in January 2003. Monthly Total Population Report, California Department of Corrections and Rehabilitation, https://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly/Monthly_Tpop1a_Archive.html

[59] Romero, "A Day in the Life of a Prisoner," *supra* note 54. According to available data, the average minimum wage for work in state prisons in the US is 86 cents/hour and the average maximum is $3.45/hour. Wendy Sawyer, "How much do incarcerated people earn in each state?" *Prison Policy Initiative,* April 10, 2017, https://www.prisonpolicy.org/blog/2017/04/10/wages/. With few exceptions, regular prison jobs are unpaid in Alabama, Arkansas, Florida, Georgia, and Texas. *Id.*

[60] James "JC" Cavitt, "What is a Typical Inmate Day like in San Quinten? What's the Schedule?" *Huffington Post,* March 2, 2012, https://www.huffingtonpost.com/quora/what-is-a-typical-inmate_b_1315012.html

[61] *See* Nancy Wolff and Jingh Shi, "Contextualization of Physical and Sexual Assault in Male Prisons: Incidents and their Aftermath," *Journal of Correctional Health* 15 (2009): 58-82 (reporting, based on a random sample of 6,964 male inmates in US prisons, that 21% of were assaulted during a 6-month period and estimating the prevalence of sexual assault at between 2-5%).

> mayhem. Boredom seems to breed talk of violence. Our dialogs continually drift toward violent acts and monstrous deeds. So much so that the talk becomes a form of monotony in itself. Many convicts become steeped in that way of thinking and completely lose their sense of humor. When they attempt to smile, their mouths are as rigid as the coin return on the Coke machine. Many guards suffer from that syndrome, too."[62]

Lunch in the mess hall is crowded and noisy, and food quality has improved somewhat after a one-meal strike, Romero explains.[63] Romero eats quickly. Guards watch him eat. They are close by throughout Romero's day, and though they are usually within earshot of inmates' conversations, they rarely participate.[64] After lunch, Romero heads out to the courtyard, where various athletic activities are available. "It's the place where we play," Romero writes, "shaking off the dust, disease, and gloom of the cage."[65] The yard is regularly closed, though, for security reasons during deliveries, for instance, and sometimes without explanation. Assuming they are let outside, inmates are recalled to their cells at 3:45 PM for a "standing" count at 4:00 PM. They then wait about an hour for supper. Inmates are allowed one 15-minute collect call per evening, though they must make an appointment a day in advance. Romero is locked in his cell with his cellmate at 10:00 PM. Recreational drugs are available—"not enough for a habit, but enough to take the edge off a bit."[66] While Romero does not mention rehabilitative programs, Cavitt writes that he spends two hours before and after dinner in self-help groups and college classes.[67] Inmates in the general population may receive "contact visits" on Saturday and Sunday from 7:30 AM to 2:30 PM.[68] That means that they may sit

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[62] Romero, "A Day in the Life of a Prisoner," *supra* note 54.
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] Cavitt, "What is a Typical Inmate Day like in San Quinten?" *supra* note 60.
[68] Visiting a Friend or Loved One in Prison, California Department of Corrections Manual, http://www.cdcr.ca.gov/visitors/docs/inmatevisitingguidelines.pdf

with their visitors, embrace and kiss at the beginning and end of the visit, and hold hands during the visit.[69]

The medium-security section at San Quinten represents a significant reduction in the level of deprivation by comparison to the four facilities considered above. For starters, unlike the Gitarama and the *Tullianum*, the risk of a literally overwhelming suffering does not seem immediate; to hand Romero a sword and a noose and encourage him to commit suicide would not be of the same moment as it likely was for Perseus. San Quinten, that is, does not in short order force a person to the extreme of human misery. Nor does it represent any obvious risk to an inmate's bodily health. Nor does it seem to represent an immediate risk to an inmate's basic mental stability, though Romero implies that living there tends to harden one's mentality.[70] We might say, at a minimum, that placing someone inside San Quinten makes *being happy* or *light-hearted* or *contented* or *joyful* extremely challenging.[71]

By comparison to the four facilities considered above, Romero and Cavitt have greater access to space and to other people. They have some freedom to move around the facility—around their cellblock, the yard, the mess hall, and their work areas—though only for specific reasons, and within limited periods. By comparison to the four facilities, there are also a number of people to talk to and interact with in a potentially meaningful manner. We can assume, for instance, that the possibility of forming and maintaining a genuine friendship exists to some

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[69] *Id.*

[70] For discussion on the mental health aspects of incarceration, *see generally* Seena Fazel, et. al. "The mental health of prisoners: a review of prevalence, adverse outcomes and interventions," *Lancet Psychiatry* 9 (2016): 871–881; Cherie Armour, "Mental Health in Prison: A Trauma Perspective on Importation and Deprivation," *International Journal of Criminology and Sociological Theory* 5 (2012): 886-894.

[71] We should be careful to appreciate the difference between such a medium-security facility and solitary confinement in terms of the mental health risks. Craig Haney, a social psychologist who researched inmates at Pelican Bay State Prison, found that while 63 percent of those in solitary confinement for more than 10 years said they felt close to an "impending breakdown," only 4 percent of those interviewed in the maximum-security, non-solitary population reported such feelings. Goode, "Solitary Confinement," *supra* note 27.

significant degree, unlike at the other facilities. Romero mentions having long conversations with his cellmate.[72] Of course, with the exception of visiting hours, San Quinten inmates only have the opportunity to interact with other San Quinten inmates—and usually only a small subset of them—and to some artificial degree with the guards working at the facility. Additionally, these interactions are further constrained by the fact that they occur generally under human and video surveillance.

What does a term of imprisonment in a particular facility deprive an inmate of? The most relevant comparison in considering this issue is not, of course, how his access to valuable goods and activities compares to that of inmates at the absolutely worst prisons, but rather how it compares to his prior access *outside* of prison. As we sentence him to a punishment we might ask ourselves: What does he have now, in terms of access to valuable goods or activities, that we are taking away from him? Again, this question is easy when we are talking about fines, where the state reduces, and only reduces, and offender's access to money. When considering the medium-security San Quinten facility from this perspective, the list of day-to-day deprivations is limited only by one's imagination (e.g. one cannot eat in a restaurant, go to a movie theater, start a business, talk with people not on the approved visitor list, etc.). Nonetheless, the comparison with "extreme" prisons is important for the purpose of isolating variables, and for understanding with at least some clarity what is and is not at issue in considering the deprivations inherent to a putatively "normal," non-degrading prison when considered day-to-day—or when considered over longer periods of time. Whereas "extreme" prisons *hurt,* perhaps in every single moment, the injury of a sentence to a "normal" prison is subtler, and less phenomenological, as I discuss further below. Let us consider two further, yet more mild forms of contemporary confinement.

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[72] Romero, "A Day in the Life of a Prisoner," *supra* note 54.

Step 4: Minimum Security

(4) Matthew Kluger, a lawyer convicted in US federal court in 2012 of insider trading, described his life inside Federal Correctional Institution (FCI) Morgantown, a minimum-security federal prison in West Virginia.[73] It is an all-male facility built for approximately 1,300 inmates.[74] While each inmate is required to work, more people are assigned to each task than necessary, Kluger explains. Kluger helps to serve breakfast and lunch in the dining room. He wakes at 5:30 AM to help with breakfast, but his duties entail at most 20 minutes of wiping down a counter before returning to his cell. Lunch requires about an hour of work. He is free for the day from 11:30 AM.[75] Options for spending his free time include a library, where he often helps people with legal work for an hour or two, a track, a form of paddle tennis, a gym with scheduled activities like spin classes, religious services, television in communal rooms, musical instruments, cards, and board games.[76] There are also group athletic activities, including a softball league. "The daily life is not that bad," Kluger says.[77]

Kluger needs to be by his cell bunk at 4:00 PM and 9:00 PM for a count. There is no fence around the facilities and no guards posted outside. Inmates sometimes sneak away to a local store to purchase cigarettes to resell inside for profit inside. Once a week, inmates can purchase goods from a store, including hygiene items, packaged foods, and clothes to wear inside the prison (though, they must wear the prison uniform when interacting with visitors). The main form of currency inside the facility, Kluger explains, is canned mackerel purchased from the store. Inmates can also purchase unlimited email access and up to 300 minutes

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[73] Daniel Roberts, "Life Behind Bars: Matthew Kluger reveals all," *Fortune Magazine*, July 7, 2014, http://fortune.com/2014/07/07/matthew-kluger-talks/

[74] FCI Morgantown West Virginia, *Admissions and Orientation Handbook 2016*, https://www.bop.gov/locations/institutions/mrg/MRG_aohandbook.pdf

[75] Roberts, "Life Behind Bars," *supra* note 73.

[76] FCI Morgantown, *Handbook*, *supra* note 74 at 19.

[77] Roberts, "Life Behind Bars," *supra* note 73.

of phone calls a month. However, they are limited to $300 for all purchases each month. Bathrooms are communal with private showers with curtains. Kluger remarks, though, on the general lack of private spaces in the prison. New admissions usually live in open dormitory-style areas or semi-private cubicles before private double rooms become available.[78] Kluger stated that the mattresses were thin, with no springs. He said he does not worry about physical or sexual violence.[79] Emails are monitored and Kluger was sent to the Special Housing Unit (SHU) for eight weeks as punishment for emailing a corrections officer he had befriended at the medium-security facility the Federal Bureau of Prisons (BOP) had placed him at initially. Such communication between inmates and officers is against BOP rules, which the prior facility enforced less rigorously, according to Kluger. Kluger was locked in a cold, small room with another inmate, and given food through a slot. The bathroom was in the room and he was let out to shower three days a week; whether he was let out otherwise is unclear.

Visiting hours are on Friday, Saturday, Sunday, and Federal Holidays.[80] Members of the immediate family may be placed on the visiting list, but others will be included only pending investigation.[81] Contact, according to the prison manual, is limited to one hug and kiss at the start and end of a visit.[82] Any limitations on monthly visitor hours is unclear from Kluger's interview and the prison's visitor manual. BOP policy is that federal inmates are entitled to at least four hours of visitation a month, with possibility of more based upon the Warden's discretion.[83] But we saw above that even at the ADX Florence inmates were granted the

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[78] FCI Morgantown, *Handbook*, *supra* note 74.
[79] Inmates are selected for minimum security facilities in large part due to their low risk of violence. *See* U.S. Department of Justice, Bureau of Prisons, Program Statement P5100.08 (Sept. 2006) (setting forth procedures for determining whether to send offenders to minimum, low, medium, or high security facilities).
[80] FCI Morgantown, *Handbook*, *supra* note 74 at 51.
[81] *Id.*
[82] *Id.* at 52.
[83] Federal Bureau of Prisons, General Visiting Information, https://www.bop.gov/inmates/visiting.jsp

possibility of more than the four-hour minimum. Conjugal visits are not allowed for federal prisoners in the US.[84]

The level of deprivation at the FCI Morgantown is yet less severe than that experienced by Romero and Cavitt at San Quinten, to say nothing of the other facilities considered above. Kluger has free reign of almost the entire facility during the day. Unlike Romero and Cavitt, he need not wait for special 10-minute intervals, or a signed pass from a guard, to move between approved areas. Related, Kluger has access to significantly more recreational activities than Romero and Cavitt. He does not have to share a cell built for one. He has greater daily access to more people, and with less of a threat of violence than is present within San Quinten, consistent with the facility's minimum-security status. Though, for Kluger as well, the population that he might interact with—again, with the exception of visiting hours—consists of other inmates and to a limited degree with the guards. As we see with Kluger's punishment for emailing a guard, interactions with guards are limited as a formal, legal matter. Kluger highlights the importance of the fact that he is limited to interacting with other inmates.

> "[Y]ou know what, if this were filled with 1,100 people that you want to hang out with, this would be a fine place to be. Unfortunately it's not. So, the biggest problem is other people. It's being with this diverse crowd of people who are generally angry, somewhat antisocial, not the kinds of people that you want to spend your time with in the outside world. So that makes it hard."[85]

Kluger mentions two other issues relevant for considering the deprivations of imprisonment. First, he discusses what we might call the "dignitarian" deprivations of prison, where one is denied the symbolic respect, as defined in the previous chapter, that he might expect to receive on the outside.[86]

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[84] A handful of states permit conjugal visits for certain prisoners. *See* Christopher Hensley, Sandra Rutland, and Phyllis Gray, "Conjugal Visitation Programs: The Logical Conclusion," in ed. Christopher Hensley, *Prison Sex: Practice and Policy* (Boulder: Lynne Reinner, 2002), 143-57.
[85] Roberts, "Life Behind Bars," *supra* note 73.
[86] *See* Chapter 2 at 146-48.

> "[W]hat I would say is probably the hardest thing to get used to is that you're just going to be a number. And that, by virtue of the fact that he got a federal job, someone who you probably don't have a whole lot of respect for is going to tell you to mop the floor. You just have to shut up and mop the floor."[87]

Other "dignitarian" deprivations relate to the fact that inmates are treated to a significant degree like children, closely monitored and presented with an artificial array of choices for activities.[88] The human dignity ideal—of an adult *standing tall*, freely and confidently determining his or her own existence, and *looking other people in the eye* as a social equal—is surely difficult to realize within any prison.[89] Though, this consideration is a matter of degree, as well, and the dignity ideal is likely further difficult to realize in San Quinten (again, to say nothing of the other facilities), where, among other considerations, inmates are presumed to have less self-control than those in FCI Morgantown, as evidenced by the facility's external walls and the greater presence of guards.

Second, and finally, Kluger comments, interestingly, on the *benefits* of day-to-day incarceration at the FCI Morgantown (as opposed to its deprivations).

> "There are frustrations, but I think for white-collar people, there's also absence of frustrations. I don't pay bills. I don't deal with traffic. I don't have a lot of the same commitments that I had on the outside. So life is much less stressful in a lot of ways. And it's a bad thing to say that it's kind of like a spa experience, but in some ways it is."[90]

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[87] Roberts, "Life Behind Bars," *supra* note 73.

[88] *See* Jeremy Waldron, "Inhuman and Degrading Treatment: The Words Themselves," *Canadian Journal of Law & Jurisprudence* 23 (2010): 269-286, at 282 (arguing that "infantilization," the process of treating an adult like an infant, is one of the four species of indignity and degradation).

[89] *See* Jeremy Waldron, *Dignity, Rank, and Right,* ed. Meir Dan-Cohen (Oxford: Oxford University Press, 2012), 21-22 (discussing the "moral orthopedics of human dignity," the connection between having dignity and "uprightness of bearing."); Philip Pettit, "Two Republican Traditions," in eds. Andreas Niederberger and Philipp Schink, *Republican Democracy: Liberty, Law, and Politics* (Edinburgh: Edinburgh University Press, 2013), 169-204, at 173 ("[U]nder the republican vision, a citizen would be a *liber* or a free-man insofar as he enjoyed sufficient power and protection in the sphere of the basic liberties – and a corresponding normative status – to be able to walk tall among others and look any in the eye, without reason for fear or deference.").

[90] Roberts, "Life Behind Bars," *supra* note 73.

Of course, non-white-collar inmates would also enjoy the absence of bills to pay, traffic, and so forth. We should understand such benefits to represent the flip-side of the infantilization inherent to incarceration. What the facility provides, an inmate need not worry about providing for himself (nor derive any satisfaction from providing for himself). While Kluger is engaging in hyperbole by referring to the FCI Morgantown as "like a spa experience"—they do not have Special Housing Unit facilities for solitary confinement at most spas—what would it mean to sentence someone to a literal spa for one year? For 5 years? For 15? For 30? Before considering the additional deprivations caused by incarceration when we add the variable of sentence length, let us consider one final institution, the one arguably more like a spa than any other prison in existence.

Step 5: Norwegian Island

(5) Norway's present-day minimum-security Bastoy prison island lies a few miles off the coast in the Oslo fjord.[91] One inmate described his life there as follows:

> "It's like living in a village, a community. Everybody has to work. But we have free time so we can do some fishing, or in summer we can swim off the beach. We know we are prisoners but here we feel like people."[92]

The prison hosts approximately 115 inmates at a time, many of whom have been convicted of serious and violent crimes. (To break though the "amoral" wall for a moment, and consider the state's penal purposes, inmates are selected for the Bastoy based upon their commitment to and capacity for rehabilitation.[93]) Each hold

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[91] Erwin James, "The Norwegian prison where inmates are treated like people," *The Guardian*, February 25, 2013; https://www.theguardian.com/society/2013/feb/25/norwegian-prison-inmates-treated-like-people; John Sutter, "Welcome to the World's Nicest Prison," *CNN.com*, May 24, 2012, http://edition.cnn.com/2012/05/24/world/europe/norway-prison-bastoy-nicest/index.html

[92] James, "The Norwegian prison," *supra* note 91.

[93] *Id.*

the keys to his own room in either a dormitory or a house of up to six people.[94] Each house has a "house father." There are no uniforms. One meal a day is provided in the dining hall. Inmates are expected to cook their other meals together in communal kitchens with food that they have grown on the island or purchased from the island's mini-supermarket. In addition to a food stipend of around £70 a month, the men earn the equivalent of £6 a day. The working day begins at 8:30 AM and ends at 3:30 PM. Jobs include tending to sheep, cows, and chickens, looking after fruit and vegetable gardens, doing laundry, caring for the horses that pull the island's carts, repairing bicycles that many prisoners purchase with their own money, or working ground maintenance. Only three or four guards remain on the island after 4:00 PM. There is a large building where weekly visits take place, in private family rooms. Conjugal relations are allowed. There is a church, a school, and a library. The "Bastoy Blues Band" was given permission to attend a music festival in support of the rock group, ZZ Top. A guard on the island who had worked there for 17 years said to a visiting journalist, "Let me tell you something. You know, on this island I feel safer than when I walk on the streets in Oslo."[95]

In what ways does the Bastoy prison represent a place of less deprivation than the FCI Morgantown? What valuable goods, activities, or states of being do inmates in the Bastoy have greater access to than inmates in the FCI Morgantown? It is a matter of interpretation, of course, and there can be no single authoritative list, but there are at least six considerations worth highlighting. First, it appears that Bastoy inmates have greater access to at least somewhat enjoyable or meaningful work, by comparison to Kluger's description of nonchalantly wiping down counters in the FCI Morgantown's dining hall. Though, it is easy to romanticize this issue, and it depends ultimately on the extent to which one finds seven hours of

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[94] Sutter, "Welcome to the World's Nicest Prison," *supra* note 91.
[95] James, "The Norwegian prison," *supra* note 91. For an examination of the history and sociology of penal mildness within Scandinavia, see John Pratt and Anna Eriksson, *Contrasts in Punishment: An Explanation of Anglophone Excess and Nordic Exceptionalism* (Abingdon: Routledge, 2013).

manual labor and farming activities more enjoyable or meaningful by comparison to an hour or two of low-impact dining hall work. Second, it appears that Bastoy inmates have greater access to natural beauty, including a beach. Nussbaum argues that "[b]eing able to live with concern for and in relation to animals, plants, and the world of nature" is one of the ten "central human capabilities" essential to living a "truly human existence."[96] Aside from the FCI Morgantown, compare this to the experience of Dusenbury, who could not see the sky from his cell at the ADX Florence, or to the solitary inmates in Pelican Bay, who lack windows entirely. Third, is the issue of privacy. A relative deprivation of privacy is inherent to any contemporary prison; but at the Bastoy it appears to be of a much lesser degree, both with regard to the official gazing of prison guards and to the possible intrusions of other inmates, as evidenced by the fact that only a handful of guards remain on the island after 4:00 PM and by the existence of private rooms with personal locks. Fourth, and related, inmates have more privacy with their visitors, including the possibility of conjugal visits. Visits at the FCI Morgantown, by comparison, occur in a large public room. Fifth, it appears that inmates are treated with more symbolic respect by guards. The possibility of being told "to shut up and mop the floor" seems remote. Whether this is so because of legal rules constraining guards or because of the prison's culture is unclear. Sixth, inmates have at least some opportunity to leave the prison during their sentence, as seen with the Bastoy Blues Band playing at the musical festival; though, the extent to which this opportunity remains severely limited is important, as I discuss below.

III. The Freedom of General Association

Robert Hood, the former warden at the ADX Florence, described the facility as "a clean version of hell."[97] If that is the case, then the Gitarama and the

[96] Nussbaum, *Women and Human Development, supra* note 6 at 80.
[97] Interview with CBS News, October 11, 2007, https://www.cbsnews.com/news/supermax-a-clean-version-of-hell/

dungeon at the *Tullianum* are something like the "normal" version. Indeed, prison, as we saw in the first four examples, can sometimes inflict extraordinary levels of deprivation, and even during relatively short-sentences. It can represent a very severe risk of death, and of insanity. It can cause overwhelming physical and mental agony. It can make suicide a legitimate consideration. But as the other examples have demonstrated, prison need not be so extreme. It's a rather variable form of punishment. Prison is not always hell. Sometimes, indeed, prison means playing softball in the hills of West Virginia, or swimming after a day of tending to a flock of sheep on a pleasant Norwegian island.

A. Deprivational Essence

What, then, is the punishment of imprisonment? What is the deprivation, or set of deprivations, that unite the seven institutions considered above, such that each inflict a punishment within the same linguistic or sociological category? The array of deprivations inherent to a given carceral institution will always be a matter of creative list making to a degree; but, as indicated above, I believe that one deprivation is *essential* to a term of incarceration, and which must be included on all such lists. That is, a punishment that failed to entail this deprivation would not qualify as incarceration as a linguistic or sociological matter. This deprivation is the denial of the "freedom of general association." What unites the seven institutions is their remove from the broader society. They each represent a form of quarantine, by severely depriving inmates of the ability to associate with other people.

The degree to which prisons deprive inmates of the freedom of association will nonetheless vary, as we have seen, with the variables being how much access inmates have to (a) other inmates, (b) guards, (c) visitors, and (d) non-visitors. Access to non-visitors would involve emails and other forms of internet communication, letters, and phone calls. While the Pentonville scores much lower than the Bastoy by reference to all four variables, inmates in the Bastoy are still profoundly deprived of meaningful access to other people in society, limited to the

115 men on the island, the limited number of guards, and their visitors, with whom they can only interact with once a week for short periods. There is also the very occasional opportunity to meet other people on field trips; though, we should suspect that band members were not given free reign at the music festival. As discussed above, when we sentence someone to a punishment, to understand what exactly we are doing we might ask ourselves: What does he have now, in terms of access to valuable functionings, that we are taking away from him? Imprisonment, in terms of its deprivational essence and minimum, severely constrains one's ability to associate with a great percentage of people in society, including every person he interacts with regularly outside of prison. In so doing, it severely deprives him of access to those functionings that he can only realize by associating freely with those people.

Amy Gutmann expresses the importance—and the breadth—of the freedom of association. It enables people "to create and maintain intimate relationships of love and friendship, which are valuable for their own sake," she writes, "as well as the pleasure that they offer."[98] She continues:

> "Freedom of association is increasingly essential as a means of engaging in charity, commerce, industry, education, health care, residential life, religious practice, professional life, music and art, recreation and sports…By associating with one another we engage in camaraderie, cooperation, dialogue, deliberation, negotiation, competition, creativity, and the kinds of self-expression that are possible only in association with others."[99]

George Kateb concurs as to the intrinsically valuable nature of association:

> "There is a basic truth about almost all associative life and activity, a truth not confined to love and friendship. People find in association a value in itself. The point is obvious, but it has not received enough judicial attention or protection. In pursuing their ends, and needing to associate in order to do so, people discover numerous

[98] Amy Gutmann, "Freedom of Association: An Introductory Essay," in ed. Amy Gutmann, *Freedom of Association* (Princeton: Princeton University Press, 1998), 3-32, at 3.
[99] *Id.* at 4

> sources of pleasure apart from the pleasure of success in their specific pursuits."[100]

Nussbaum writes that of her list of ten "central human capabilities," those capabilities which are constitutive "fully human" living, the capability of *affiliation* (as well as that of *practical reason*) stands out as being of "special importance," since it "organize[s] and suffuse[s] all the others."[101] She writes: "To plan for one's own life without being able to do so in complex forms of discourse, concern, and reciprocity with other human beings is…to behave in an incompletely human way."[102]

Imprisonment, by separating an inmate from people in society, limits his ability to engage in a wide variety of valuable activities and modes of beings for as long as the term of confinement lasts. It limits his ability to realize the associational functionings that, as Gutmann, Kateb, and Nussbaum argue, are not merely instrumentally but also intrinsically valuable, in the sense that their realization just is what it means to live well or to flourish. While I am mostly concerned with inherently "personal" associational functionings, like maintaining a marriage, we must remember, as Peter Ramsay argues, that prison also limits one's access to more "political" associational functionings, which are central to democratic citizenship, like taking part in public debate.[103] Aristotle, for one, understood political

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[100] George Kateb, "The Value of Association," in ed. Amy Gutmann, *Freedom of Association* (Princeton: Princeton University Press, 1998), 35-63, at 36-7.

[101] Nussbaum, *Women and Human Development*, *supra* note 6 at 82.

[102] *Id.*

[103] Peter Ramsay, "A Democratic Theory of Imprisonment," in eds. Albert Dzur, Ian Loaders, and Richard Sparks, *Democratic Theory and Mass Incarceration* (Oxford: Oxford University Press, 2016), 91 ("Civil liberty is then an essential characteristic of political equality, and this explains why each and every act of imprisoning a citizen deprives that citizen of political equality for the duration of their imprisonment. At minimum, it strips the citizen of the right to move, assemble, associate, and enjoy a private life. While imprisonment does not deprive citizens of their nationality, or necessarily prevent them from exercising a right to vote or stand in elections, it does entail executive coercion that prevents a prisoner from participating in the political process *on equal terms with other citizens*."); Peter Ramsay, "Voters Should Not Be in Prison! The Rights of Prisoners in a Democracy," *Critical Review of International Social and Political Philosophy* 16 (2013): 421-38.

engagement to be the prime instance of virtuous practical activity and therefore to be constitutive of the good life—at least on some interpretations.[104]

Beyond *the particular*—husbands and wives, parents and children, friends, fellow party members or parishioners, and so forth—prison also limits an inmate's ability to interact and associate with *the general*—strangers and near-strangers. Consider the immense number and diversity of *new people* that we come into contact with on a regular basis in modern society, on the street, in a café, in a work setting, friends-of-friends, and so forth. The opportunity to mix with new people is hugely valuable, most importantly as a potential source of close associates—*new* friends or colleagues or interlocuters or group members or lovers—but also for the sense of community and comradery that comes with "everyday" interactions, as well as being a great fount of entertainment and fascination. Life without a regular supply of strangers is impoverished, in part because it is more boring.[105]

Once more, these associational deprivations—the personal and the political, the particular and the general—need not be absolute. Depending on the facility, it will be possible, to some degree, to engage in some of the associational activities and exhibit some of the associational virtues that Gutmann mentions. The qualitative variation within prisons in terms of access to the internet and to phones[106] will make a significant difference, to be sure, especially given the

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[104] *See* Richard Kraut, *Aristotle on the Human Good* (Princeton: Princeton University Press, 1989), 5.

[105] There is concerted engagement in the sociological literature regarding chance interactions with the unfamiliar in society, including encounters between strangers. *See, e.g.,* Lyn H. Lofland, *A World of Strangers: Order and Action in Urban Public Space* (Prospect Hills, IL: Waveland Press, 1973); Erving Goffman, *Relations in Public: Microstudies of the Social Order* (New York: Basic Books, 1971); Georg Simmel, "The Metropolis and the Mental Life," in *On Individuality and Social Forms*, ed. D. Levine (Chicago: University of Chicago Press, 1971), at 143-49; Patricia Simões Aelbrecht, "'Fourth places': the Contemporary Public Settings for Informal Social Interaction Among Strangers," *Journal of Urban Design* 21 (2016): 124-52.

[106] Many US prisons charge extortionate rates for using the phone, sometimes more than $1/minute, further constraining inmates' ability to speak to family members and friends. In 2015, the Federal Communications Commission voted to cap intra- and inter-state call rates for state and federal inmates at 11 cents/minute. Telecommunications firms profiting from the high rates sued. The DC Circuit overturned the intra-state regulation on the grounds that the FCC lacked legal authority to regulate intra-state rates; as to interstate rates, the Court remanded the case to the FCC on a technical issue

increasing importance of online relationships.[107] Also, one will certainly meet "new people" in prison—but generally in a context and setting that is far less conducive to meaningful interaction by comparison to life outside of prison. Furthermore, one will not be able to choose which sort of "new people" he might meet, as we can in free society by congregating in certain areas or places.

We can invoke Wesley Newcomb Hohfeld's dyadic legal relations to understand the associational deprivations of prison with more precision, following Kimberly Brownlee's analysis of the freedom of association *simpliciter*.[108] An inmate loses the Hohfeldian "privilege"—the legal option—of forming certain associations, namely, those that require his presence outside of prison (i.e. not including associations that he might cultivate via the internet, phone calls, and prison visits).[109] Outside of prison one has the "privilege" of, say, attending religious services at a certain church. Once inside prison, however, he loses this privilege. We can conclude that he has a "no-right" to attend those services, or to form any association that requires his presence outside of prison, as an incident of his "duty" to stay inside the prison and the related fact that not a single person has a "duty" to allow him to form such associations.[110] We can also say that his presence inside

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related to determining ancillary fees. *See Rates for Interstate Inmate Calling Services* ("*Order*"), 30 FCC Rcd. 12763, 12775–76, 12838–62 (Nov. 5, 2015), 80 Fed. Reg. 79136-01 (Dec. 18, 2015); *Global Tel*Link v. FCC*, No. 15-1461 (D.C. Cir. 2017).

[107] Thanks to Nicola Lacey for raising this point. Were we somehow to reach the stage where "online" society provided the immediacy, depth, and opportunities for advantage of the present-day "real world" society—and were prisoners afforded generally unmitigated and unmonitored access to such a society—then that would dramatically alter our conclusions about the injury of prison.

[108] Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," *Yale Law Journal* 23 (1913): 16–59. *See* Kimberlee Brownlee, "The Freedom of Association: It's Not What You Think," *Oxford Journal of Legal Studies* 35 (2015): 267-82, at 268 (arguing that the freedom of association is more limited than the "standard liberal position" would indicate, and concluding that "intimate associative freedom is neither a general moral permission to associate or not as we wish nor a content-insensitive moral claim-right that protects us in behaving wrongly when we do so."); "Freedom of Association," in eds. Kasper Lippert-Rasmussen, Kimberly Brownlee, and David Coady, *A Companion to Applied Philosophy* (Chichester, UK; Hoboken, NJ: John Wiley & Sons, 2016), 356-369.

[109] Hohfeld, "Some Fundamental Legal Conceptions," *supra* note 108 at 32-44 (comparing "privileges" and "no-rights").

[110] *Id.* at 32 (discussing "duties").

prison severely diminishes his Hohfeldian "powers" of association, such that he has a general associational "disability."[111] Such "powers" endow one with the ability to alter other people's moral and legal privileges or claims. I exercise an *associational* power when I offer to form or agree to form an association that entails privileges or claims (e.g. a marriage). Once inside prison, then, one loses those associational powers that require his outside presence. The "powers" to, say, form a new business partnership or a meaningful friendship with someone who resides outside of prison become almost impossible to exercise, such that they are at least *de facto* non-existent.

Finally, one has a Hohfeldian "immunity" if he is free from "the legal power or 'control' of another as regards some legal relation," and a "liability" if he is not so free.[112] In free society people have, to a significant degree, an immunity from associating with people when they do not want to; there are, of course, limits—in public places, if one has a child (perhaps), in the context of military conscription, and so forth.[113] Whatever the extent of this immunity outside of prison, inside of prison one is far less "immune" and far more "liable" to the powers of the state with regard to his associations. He will not choose those people with whom he will live, work, and eat together in close quarters, nor potentially the person or persons with whom he will share a cell, locked in together each night.

B. The Freedom of Movement

What about the freedom of movement? Is not the limitation on the freedom of movement also an essential deprivational component of prison, in addition to the denial of the freedom of general association?[114] While it undoubtedly is, we should be careful not to fetishize the bare ability to move. Imagine that an offender

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[111] *See id.* at 44-55 (comparing "powers" and "liabilities").
[112] *Id.* at 55, 55-59 (comparing "immunities" and "disabilities").
[113] *See* Brownlee, "The Freedom of Association," *supra* note 108 at 271-77 (arguing that the "freedom to exclude" is more limited that the standard liberal view assumes).
[114] Thanks to Nicola Lacey for pressing me to clarify this point.

was banished, along with basic provisions for shelter and sustenance, to a vast, empty planet for the duration of his sentence, a planet many times bigger than Earth. Imagine, as well, that there are no legal restrictions on his movement on the planet, while the presence of non-inmates on the planet is illegal. In that scenario, where he loses any legal rights to move around Earth but *gains* the legal right to move around the larger penal planet, he would in fact be a net winner when it comes to the legal freedom of movement, having much more area in which, legally, he could roam. Nonetheless, such freedom would not be worth very much to him. In this way, the limitation on movement inherent to prison is not primarily a deprivation because it limits the size of the area in which one can move. It is primarily a deprivation because it limits one's access to the sources of value and flourishing—most importantly, the other people—that reside within the prohibited areas. Nonetheless, beyond the associational deprivation, the limitation on movement also entails a lack of environmental diversity—with "environment" very broadly defined—with life limited to a series of prison buildings. Even if an inmate somehow had normal access to people in prison—including to "new people" he might meet in public places or elsewhere—and in a way that was somehow equivalent to his access outside of prison in terms of the security of the interactions, his social status, the opportunities for advantage, and so forth, the fact that he could not leave the complex and experience other environments would surely represent an important deprivation in and of itself. While I will continue to focus on the associational deprivations of prison, we ought to remain aware of what we might call *the deprivation of environmental diversity*.

IV. Long-Term Deprivations

What does it mean to incorporate the variable of time into our analysis of prison's deprivations? Why is it an interesting or complicated variable? Why doesn't the argument work as follows? (1) Each day in prison entails a certain set of deprivations, the exact content of which will vary from prison-to-prison, but

which will always involve a severe deprivation of the freedom of association (and environmental diversity); (2) That set of deprivations will generate a Daily Disutility or Disvalue Level (DDL), which will incorporate not only the experience of boredom, loneliness, lack of satisfying work, anxiety, etc. within prison, but also the opportunity costs of prison. That is, it will account for the lost opportunities for utility or value that one would have had outside of prison; (3) To determine the severity of a term of imprisonment, we multiply DDL by the total days of confinement. So, a 100-day sentence is worth 100 DDLs and a 10,000-day sentence (27.4 years) is worth 10,000 DDLs, with latter being 100 times worse than the former. This argument, in one form or another, grounds the administration of ordinally "proportional" sentences in the US and England, such that—all else equal—an offender whose crime was 10 times "worse" than another's ought to have a sentence 10 times as long.[115] To understand what this gets wrong, and to understand what long-term incarceration does to people, we need to return to the discussion of human value.

[115] The US Federal Sentencing Guidelines includes a "Sentencing Table," which is arranged along two axes: 43 "Offense Levels," from 1 at the top to 43 at the bottom, which measure the culpability of the offense, and 6 "Criminal History Categories," from Category I at the left to Category VI at the right, which measure the offender's degree of recidivism. Within the resulting 258 boxes, the range of recommended months of incarceration increases gradually as one moves downward, increasing the Offense Level, or rightward, increasing the Criminal History Category. US Sentencing Guidelines Manual (US Sentencing Commission, 2016), ch. 5, pt. A, at 420. For instance, the "Base Offense Level" for "Burglary of a Residence" is 17, which for a first or second time offender (Criminal History Category I) means a recommendation of 24-30 months. *Id.* at §2B2.1, 118-19. However, the Offense Level for residential burglary can increase up to 8 levels, depending on the value of the property taken, damaged, or destroyed. "More than $5,000" adds one level, "More than $20,000" adds another level, and so forth, with "More than $9,500,000" adding the full 8 levels. If the burglary involves "more than minimal planning" that will add 2 levels. If it involves the taking of a "firearm, destructive device, or controlled substance" that will add 1 level. And if the burglar possessed a "dangerous weapon (including a firearm)" that will add 2 levels. That means a possible 13 additional levels on top of the Base Offense Level of 17. The resulting maximum Offense Level 30, at Criminal History Category I, entails a recommendation of 97-121 months; at Criminal History Category VI it is 168 to 210 months. Thus, the recommended range for residential burglary begins at 24 months (2 years) and then increases gradually to 210 months (17.5 years).

A. Temporal Goods

As discussed in Chapter 2, humans construct and exhibit value diachronically, stitching moments together through time via the combined exercise of their capacities for, at least, autonomy, value recognition, memory, and imagination.[116] The concept of human flourishing, I argued, is wrapped up with this diachronic project. One flourishes on this Aristotelean view in the context of her good life *as a whole*. The point, once more, is not that a flourishing person will be singularly obsessed with "her life." Her internal monologue need not be that of a fastidious "life planner." The idea, rather, is that, unlike goldfish, we know that our past shapes our present and that our present shapes our future. We aren't born completely anew each moment, or day, or year. We have the capacity, furthermore, to purposively act in the present to build a more valuable future, with a personal identity that retains sufficient integrity over time, such that "we" will still be there in the future, to some very significant degree, to reap the costs or benefits of our present decisions.[117] Finally, and crucially, the idea is that our most valuable functionings depend upon this knowledge and this capacity. Unlike goldfish, that is, we have the ability to work on projects, broadly conceived, that require cultivation over time. We can develop our personalities. We can build families. We can develop expertise. We can maintain friendships. Let us refer to such functionings as *temporal goods*. The phrase "goods" should not distract us from our focus on functionings; temporal goods are valuable activities and states of beings that require cultivation over time to realize. Let us contrast them with *momentary goods*, like enjoying an ice-cream cone. These are functionings that do not require cultivation over time to be realized.[118] To be clear, no good is entirely "momentary." It will

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[116] *See* Chapter 2 at 151-60.

[117] *See id.* at 136-37 (considering the metaphysical objection to the diachronic conception of the human good).

[118] *See* David Velleman, "Well-being and Time," *Pacific Philosophical Quarterly* 72 (1991): 48-77 (distinguishing between synchronic and diachronic well-being); Chapter 2 at 156-57.

require some amount of time to be realized. And it will be realized within the context of our overall, diachronic lives. We choose an ice-cream flavor, for instance, based upon years of careful experimentation. And, as argued in Chapter 2, the value of enjoying a momentary good depends on its connection to the pursuit of a good life over time. That is, a momentary good only qualifies as such insofar as it constitutes part of one's broader good life; a putative momentary good, like the experience of ecstasy, would not qualify if it acts to drain rather than infuse one's life *considered as a whole* with value, as might be the case with a heroin user's ecstasy upon shooting up.

But isn't a temporal good, like maintaining a friendship or family, simply a number of momentary goods strung together? I think not. The ice-cream cones I've enjoyed have no meaningful relationship to each other. They each stand alone as momentary goods. By comparison, the moments I have enjoyed with a close friend are connected. They are stitched together, with the past moments governing the present ones, and the present ones governing the future ones. There is set of jokes, memories, and stories that make sense and have meaning only in the context of a relationship that exists through time. That is, the enjoyment that we might experience during an engagement with an old friend is not in fact a momentary good; it is a complex achievement that is connected with past and future engagements. While temporal goods tend to enable the realization of momentary goods, they can have value even when they do not do this, and even when they provide little phenomenological benefit at all. We can still value an old friendship, for instance, and aim to maintain it or honor it, even when we stop enjoying the friend's company. Along the same lines, caring for an aging parent is generally not a phenomenologically satisfying experience, but nonetheless we tend to see great value in doing so (and even if we knew that we would not ourselves reap the benefits of

this social practice as we aged ourselves).[119] The concept of a temporal good helps to make sense of this conviction.

Nussbaum expresses the centrality of temporal goods to human flourishing on the Aristotelean view:

> "Aristotle…argues that a total way or mode of life consisting only in the activities of nutrition and growth, or organized distinctively around those activities, would not count as a human life; so that total mode of life cannot be what we are seeking. Nor would a life organized around the activity of sense-perception, in which sense-perception was the distinctive and organizing feature, the one that gave the life as a whole its distinctive character or shape. That would be merely an animal life. The truly human life, by contrast, is a life organized by the activity of practical reasoning (1098a3-4: praktike tis tou logon echontos), in which it is that activity that gives the life as a whole its distinctive shape and tone."[120]

Aristotelean practical reason aims beyond the animalistic pursuit of "nutrition or growth" or pleasing sense-perceptions. It aims, rather, at temporal goods: at activities and relationships that are long-term achievements rather than momentary enjoyments, those achievements which can infuse one's "life as a whole" with value. We can conclude, on the Aristotelean view at least, that a "truly human life," in contrast to an "animal life," involves the pursuit of temporal goods. A life with only momentary goods—hooked up to a pleasure machine—is not a good human life overall.[121] There is little worry here, I think, of an overly "western" bias, given

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[119] *See* Karen I. Fredriksen-Goldsen and Andrew E. Scharlach, *Families and Work: New Directions in the Twenty First Century* (New York: Oxford University Press, 2001), 3 (reporting that more than one in seven adults in the US is involved in caring for ill or disabled friends or relatives, and that eighty-five percent of the care provided to the disabled elderly is provided informally and without pay by family members and other unpaid helpers).

[120] Nussbaum, "Nature, Functioning and Capability," *supra* note 9 at 44.

[121] Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 42-45 (introducing the concept of the pleasure machine as a counter-example to hedonism, since hedonism entails that we would have an overriding reason to give up "real" life and to hook ourselves up to the machine).

that the pursuit of temporal goods—families, friendships, careers, artistic and intellectual endeavors—seems central to every culture.[122]

This distinction between temporal and momentary goods dovetails closely—though, not perfectly—with Ronald Dworkin's distinction between "experiential" and "critical" interests, and Amartya Sen's distinction between "well-being freedom" and "agency freedom"[123] As discussed in Chapter 2, according to Dworkin, "experiential interests" are interests in having pleasurable sensory experiences and positive emotional states.[124] "Critical interests," by comparison, are not essentially phenomenological. They are interests in realizing one's personal values and commitments, such as one's interest in completing a work project or seeing a loved one succeed. To realize a critical interest would certainly qualify as a temporal good; it would represent a personal "achievement." And while realizing an experiential interest would normally qualify as a momentary good, realizing certain refined experiential interests would likely qualify as a temporal good. Consider someone enjoying herself as she plays a complicated concerto on a violin; or someone quietly meditating after years of training. It both cases, it would seem that one realizes a critical and an experiential interest at the same time. It represents a diachronic achievement—a successful investment of one's time, and an expression of her ethical values—that she can have that phenomenological experience. The meditation example reveals how even the Buddhist, who aims to "live in the moment" (if we might radically oversimply that belief system), pursues temporal rather than merely momentary goods. Rejecting her instinctual set of desires as entirely misguided from the perspective of building and honoring value, she must work diligently for years to reshape her moment-to-moment mentality.

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[122] For thoughtful discussion on objectivity and western bias within the capability approach, and for a defense of universal values, see Nussbaum, *Women and Human Development*, *supra* note 6 at 34-69.
[123] Ronald Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (New York: Knopf, 1993), 199-208; Sen, "Well-being, Agency and Freedom," *supra* note 8.
[124] *See* discussion in Chapter 2 at 153.

"The central feature of well-being," Sen writes, "is the ability to achieve valuable functionings."[125] "A person's agency aspect," however, "cannot be understood without taking note of his or her aims, objectives, allegiances, obligations, and—in a broad sense—the person's conception of the good."[126] While "well-being freedom" concerns "a person's capability to have various functioning vectors and to enjoy the corresponding well-being achievements," "agency freedom" concerns "what a person is free to do and achieve in pursuit of whatever goals or values he or she regards as important."[127] The distinction is between having access to valuable functionings, and having the power and control to choose which particular functionings one will pursue in light of her ethical and moral values.[128] To see how they are distinct consider the following: Coffee A is far more delicious than Coffee B, but the workers who produce Coffee A are exploited. Alex, who is deeply committed to workers' rights, would never knowingly drink Coffee A. Bob serves her Coffee A, but tells her that it is Coffee B. She enjoys it immensely. In this case, Alex would realize well-being, insofar as enjoying coffee is a valuable functioning, but not her agency. While realizing a temporal good would almost always involve the exercise of one's agency freedom, at least in a liberal society where people can generally choose their own long-term projects, this need not be the case as a conceptual matter. If a pacifist were conscripted into her nation's military, the strength, skills, and fortitude that she develops over time would represent temporal goods that failed to express her agency. She would be equipped with valuable functionings that required time to cultivate, but their presence would not result from her pursuit of her own conception of the good life.

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[125] Sen, "Well-being, Agency and Freedom," *supra* note 8 at 200.
[126] *Id.* at 203.
[127] *Id.*
[128] *Id.* at 209-10.

B. Temporal Goods as Associational Goods

We now have this concept of a temporal good, which closely but not perfectly aligns with Dworkin's concept of a critical interest and Sen's concept of agency freedom. And we have an understanding that temporal goods are fundamental to the successful pursuit of a good life considered as a diachronic whole. The next step is to point out that many of these temporal goods are also *associational* goods. That is, we can realize these valuable forms of functioning only by associating with other people. The temporal good could be *intrinsically* associational, as with the maintenance of a marriage, family, or friendship; that is, the good itself just is a special form of association. Or the temporal goods could be *instrumentally* associational, in the sense that associating with other people is the means by which one realizes that functioning, as with the development of most forms of professional expertise. This relates to Nussbaum's point that associational functionings "organize and suffuse" all the other "central human capabilities."[129]

Let us now reconnect this discussion to our inquiry into the deprivations of incarceration, and of long-term incarceration. What is missing in the conclusion that a 100-day sentence is worth 100 DDLs and a 10,000-day sentence (27.4 years) is worth 10,000 DDLs? What is missing is an understanding that the set of functionings that one is deprived of during 100-days of incarceration is very different from the set that one is deprived of during 10,000-days. In analyzing the deprivations of the 10,000-day sentence we cannot merely break it down into blocks of 100 days. Given (a) the severe limitation on the freedom of association inherent to any prison and (b) the fact that most temporal goods are also associational goods, we can understand that 27 years of incarceration in any prison makes it profoundly more difficult, if not impossible, to realize a wide array of the most important temporal goods: maintaining a family, a marriage, a home, long-term friendships, a career, developing a professional expertise, participating meaningfully in a political

[129] Nussbaum, *Women and Human Development*, *supra* note 6 at 82.

movement, and so forth. It generates this deprivation, as suggested above, both by limiting one's access to people he associated with before his confinement, as well as by limiting his access to "new people" in an environment conducive to forming meaningful associations. Long-term incarceration, I believe, by depriving one of access to such functionings, represents a distinct form of punishment. If the Singaporean practice of "caning" entails bodily pain and public humiliation, the practice of long-term incarceration entails making it extremely difficult to realize a number of associational, temporal functionings, which are central to all or nearly all conceptions of a good life. 100 days in prison may complicate the realization of such functionings, to be sure, but in a manner and a degree qualitatively different than 10,000 days, as I discuss below.[130]

In "Happiness and Punishment," John Bronsteen, Christopher Buccafusco, and Jonathan Masur argue that inmates adapt to a degree to prison life over time, in terms of their reported happiness levels.[131] They conclude, then, that the marginal harm of incarceration actually *decreases* over time, and they then consider the implications of this for determining proportionate retributivist and deterrent sentences. That hedonistic philosophies entail (or might entail) such conclusions is in large part what motivated Nussbaum and Sen to develop the capability theory. The relevant issue for assessing penal harm is not the offender's happiness level, but rather his level of deprivation, understood in terms of the valuable functionings—valuable activities and modes of being—that his punishment forecloses or makes

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[130] Furthermore, the pursuit of associational, temporal goods tends to be challenging and to demand our full attention and therefore to be stimulating. We use our powers, as it were, when we attempt to maintain and realize such goods. There is a sense, along these lines, that long-term incarceration can be relatively monotonous and boring, given the limited opportunities to pursue such goods. The lack of environmental diversity will also contribute to this outcome, undoubtedly, as one looks at the same walls and courtyard day after day, month after month, year after year. So will the lack of "chance encounters" with people that one experiences outside of prison. *See supra* note 105. We can say, then, that long-term incarceration makes it considerably more challenging for inmates to realize the functionings of *being interested* or *being stimulated*, functionings which themselves are constitutive of human flourishing.

[131] John Bronsteen, Christopher Buccafusco, and Jonathan Masur, "Happiness and Punishment," *University of Chicago Law Review* 76 (2009): 1037-81.

more difficult to realize. In parallel, as Nussbaum and Sen explain, that a woman in a deeply patriarchal and illiberal society has adapted to her situation, and is happy, does not mean that she has no complaint. John Vorhaus writes succinctly on this issue: "Familiarity and adjusted expectations may go some way towards alleviating levels of fear, anguish and humiliation, but the degrading status of ill-treatment cannot be said to grow or diminish according to the extent to which prisoners successfully accommodate themselves to the brutality of the regime."[132]

How, though, are we to draw a line between "long-term incarceration" and "non-long-term incarceration"? Does 5 years count? 10 years? Given (a) the close relationship between the realization of associational, temporal goods and the realization of a good life in the Aristotelean, diachronic sense and (b) the fact that we are embracing a "flattened" rather than "sufficentiarian" capability approach concerned with the *degree* to which punishments threaten particular valuable functionings, we can best capture these concerns with the following definition. A sentence is "long term" if *it represents a severe risk of ruining an inmate's life, just in virtue of the amount of time he has to spend inside prison*. Or, more precisely: A sentence is "long term" if *it represents a severe risk of ruining an inmate's life, just in virtue of the amount of time he is denied the freedom of general association.* This idea of "ruining" someone's life, I hope, concisely captures the notion that long-term incarceration, by severely limiting one's access to associational, temporal goods, endangers an inmate's pursuit of his own conception of a good life.[133] We could, however, if necessary, express the same idea with somewhat more modest language, arguing that long-term incarceration makes it much more difficult for an inmate to infuse his life considered as a whole with value, just in virtue of the amount of time he is denied the freedom of general association. Nonetheless, I think the "life ruining" definition clarifies

[132] John Vorhaus, "On Degradation Part Two: Degrading Treatment and Punishment," *Common Law World Review* 32 (2003): 65-92, at 69.
[133] For discussion of the concept of "ruin," see Chapter 2 at 166-67.

what is at stake, and so I will continue with that definition below. On either formulation, that it is matter of degree and of risk is important. The point is not that it is *impossible* for the long-term incarcerated to build a good life or to infuse his life as a whole with value. And we must remain aware of the many offenders who have, against odds, rebuilt their lives after very long sentences.

How many years, then? These considerations do not pop out a specific number of years that qualify as "long-term incarceration." There will be a vague middle ground. We can conclude that the longer the sentence, the greater the relevance of these concerns, while nonetheless rejecting the idea that a 10,000-day sentence merely represents 10,000 DDLs and thus while maintaining that there is a qualitative difference between long-term and non-long-term incarceration in terms of its impact on one's life project. For the sake of clarity, however, let us continue the discussion with a sentence that I think is clearly above the zone of vagueness: 20 years.

How does the diversity of incarceration fit into this story, with its focus on the variable of sentence length? The other variables discussed above do not fade away. The point has been to bring attention to the variable of time due to its immense importance—an importance that is nonetheless easy to miss, as I discuss further below. But we should not diminish the difference between the five steps discussed above. 20 years in the Gitarama or the *Tullianum* would almost certainly mean death. 20 years in the Pentonville or ADX Florence would represent a severe risk of insanity. And 20 years in San Quinten is worse than 20 years in the FCI Morgantown, which is worse than 20 years in the Bastoy. The point, however, is that 20 years in any of these latter three facilities—even in the Bastoy—is a profound, potentially *life ruining* punishment. The variable of time converts the mundane and perhaps even the pleasant into the cruel and the degrading. Richard Lovelace, who wrote that prison could be a "hermitage" where one could enjoy

the liberty of angels if he had freedom in his love and if in his soul he was free, was only confined to the Gatehouse Prison from April 30 to June 21, 1642.[134]

In the background of all of this is our mortality. We only have so much time to realize temporal goods en route to realizing a conception of the good life. And given our limited time, 20 years in the Bastoy would, I believe, represent a severe risk of ruining one's life project, as he is forced to farm day-after-day, month-after-month, year-after-year on a small, isolated island, in the presence of "generally angry, somewhat antisocial" men, let us assume, sleeping alone in his little private room, with only a few hours each week with his gradually aging family, assuming they still go to the trouble of taking the ferry to the island to visit as the years pass on. Even if one is comfortable in the Bastoy during his 20 years—and thus can realize certain *momentary* goods—his ability to realize certain foundational *temporal* goods, like the functionings of *being a good father* or *being a good husband* is very limited. And when he returns to society, much older, without much of any professional experience, he will have "to start over," as it were. It will, of course, depend on the particular offender. 20 years in the Bastoy might mesh with some people's conception of the good life, or at least might not severely endanger its realization. It would then be impossible to "long-term" incarcerate those individuals in the Bastoy, consistent with the "life ruining" definition provided above. Regardless, to return to the diversity point: just because one has difficulty in prison realizing certain functionings foundational to his life as a whole does not mean that he is indifferent to the quality of his everyday life. How much disvalue—wanton suffering—does confinement in a facility generate? What functionings does he have the opportunity to realize within the prison during his sentence? Even if he cannot, say, build a family or a career, it will still matter very much to him what else he can do with his time. These are distinct and crucial questions when

[134] Thomas Crofts (ed.), *The Cavalier Poets: An Anthology* (Mineola, NY: Dover Publications, 1995), 68.

considering what we are doing to somebody, exactly, when we confine them to a facility for a long period of time.[135]

There is another penal variable that we have not yet considered. This is the variable of *post-carceral deprivations*. What deprivations are offenders subjected to after their release from prison? Examples include the presence of an intrusive and threatening probation officer, inability to access public housing, loss of the job one held before prison, difficulty finding work due to gaps on one's CV, as well as

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[135] Liora Lazarus is right, along such lines, to emphasize the differences between inmates' rights inside Germany's more rehabilitative prisons and England's more retributive prisons. However, by largely ignoring the variable of sentence length, she fails to capture arguably the most important difference between the two regimes: that the average sentence length is much higher in England than in Germany. *See* Ministry of Justice, "The Story of the Prison Population: 1993–2012, England and Wales, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/218185/story-prison-population.pdf; Richard S. Frase, "Sentencing in Germany and the United States: Comparing Äpfel with Apples," Freiburg: Max Planck Institute, 2001, https://www.mpicc.de/shared/data/pdf/frase-endausdruck.pdf. However, this point only strengthens her broader argument that German criminal and sentencing law contains valuable lessons for the Anglophone world. *See* Liora Lazarus, *Contrasting Prisoners' Rights: A Comparative Examination of England and Germany* (Oxford: Oxford University Press, 2004); "Conceptions of Liberty Deprivation," *Modern Law Review* 69 (2006): 738-69. More generally, though, Lazarus's view of German criminal law and of German prisons, with their rehabilitative concern, may be overly sanguine. She argues that German criminal law has—or is conceived of having—three steps or pillars, each with a distinct purpose: (1) threats of punishment, with the purpose of deterrence, (2) criminal sentences, with the purpose of retribution, and (3) prison itself, with the purpose of rehabilitation. How these three purposes interrelate is not entirely clear. They cannot, as Lazarus implies, fit together seamlessly. There will be tradeoffs. Most importantly, it is not as if even a German prison is the ideal place for rehabilitation. As John Pratt writes, "Of course, one must recognize that however relaxed a prison regime, whatever material comforts are provided, prisoners are still prisoners. There are rules, levels of surveillance, record-keeping, denials of choices, deprivations and sanctions that will differentiate any prisoner from free people." John Pratt, "Scandinavian Exceptionalism in an Era of Penal Excess, Part 1: The Nature and Roots of Scandinavian Exceptionalism," *British Journal of Criminology* 48 (2008): 119-37, at 123. If no prison is the ideal place for rehabilitation, but the German state sentences people to prison, is the German concern with rehabilitation thereby secondary to the pursuit of deterrence and retribution? Perhaps German criminal law is a form of limiting retributivism, whereby rehabilitation and deterrence are pursued within the confines of vague upper and lower retributive cardinal limits. Or is it some form of "limiting deterrence"? *See* discussion on limiting retributivism, Chapter 1 at note 15. There is also the issue that a harsher prison environment will generate more retributive harm than a gentler, more rehabilitative environment. As such, *looking only to the deliverance of retributive harm*, it seems that the state has a choice between shorter sentences in harsher prisons or longer sentences in milder prisons. *See* Lisa Kerr, "Sentencing Ashley Smith: How Prison Conditions Relate to the Aims of Punishment," *Canadian Journal of Law and Society* 32 (2017): 187-207; Patrick Tomlin, "Time and Retribution," *Law and Philosophy* 33 (2014): 655-82. Has the German state then made the decision to incarcerate offenders for longer periods of time in more rehabilitative prisons (though, still for less time than average English or American sentences)?

employers' right to check their ex-convict status, placement on a sex offender registry, and losing one's right to vote and sit on juries.[136] What if these post-carceral deprivations, collectively, severely risk ruining an offender's life, even after short-term incarceration? If they do—if (a) short-term incarceration plus (b) post-carceral deprivation—is not qualitatively different in terms of its impact on one's pursuit of a good life than long-term incarceration, then there would be no difference between the two for the purposes of discerning dispositive degradation limitations. We should keep in mind, however, at least two issues. First, at an absolute minimum, people have ready access to friends and family outside of prison. This is a huge difference. Second, many post-carceral deprivations are legal in nature and, as such, could be easily remedied (at least as a matter of law, if perhaps not politics). Not every country presents great official obstacles to offenders' reintegration into society.[137] There is, however, no such remedy for long-term incarceration. The denial of access to temporal and associational goods is analytically connected to the experience. But what about *non-legal* forms of post-conviction deprivation? Any term of incarceration, even without legal post-carceral obstacles, will disrupt one's personal and professional plans. While that is a crucial point, with serious implications for limiting the use of incarceration *simpliciter*, it seems unlikely to collapse the qualitative difference between short- and long-term incarceration with regard to their impact on one's pursuit of a good life and with regard to the degradation question. If one serves six months in prison, but then has his civil and social rights restored—with employers lacking the right to look

[136] *See generally* James Jacobs, *The Eternal Criminal Record* (Cambridge, MA: Harvard University Press, 2015); Alice Goffman, *On the Run: Fugitive Life in an American City* (Chicago: University of Chicago Press, 2014); Amy E. Lerman and Vesla M. Weaver, *Arresting Citizenship: The Democratic Consequences of American Crime Control* (Chicago and London: University of Chicago Press, 2014); Christopher Uggen, et. al., "The Edge Of Stigma: An Experimental Audit of the Effects of Low-Level Criminal Records on Employment," *Criminology* 52 (2014): 627-54.

[137] *See* Koichi Hamai, et. al. (eds.), *Probation Round the World: A Comparative Study* (London: Routledge, 1995).

into his convict status, and so forth—the notion that such a punishment represents a severe risk of ruining his life, akin to living in prison for 20 years, is hyperbolic.

V. A Quiet Injury: Long-Term Incarceration vs. Torture

The concepts of "temporal good," "associational, temporal good," and "the pursuit of a good life" are abstract. We cannot point to an associational, temporal good like an old friendship as easily as we can point to an apple or a car. If we see two old friends discussing a film over coffee, it requires an exercise of our imagination to distinguish it from two strangers who happen to sit next to each other in a cafe and have the exact same dialogue. The two old friends, we can assume, are committed to maintaining that old friendship *qua* temporal good. That is, consistent with the discussion above, the friendship is not just a source of momentary goods for them, and they would (to some degree) sacrifice the realization of momentary goods to maintain their relationship. And yet, as they sit there chatting about the film, the fact that they are realizing the momentary good of *enjoying a cup of coffee* is likely conscious, while the fact that they are realizing the temporal good of *maintaining an old friendship* is likely unconscious or at least backgrounded in their awareness. Temporal goods are somehow both loud and quiet, demanding all and none of our attention at the same time. They are loud in that their pursuit takes up most of our day. We are impelled toward their realization, sometimes to the point of exhaustion, especially when it comes to family relationships and careers. And yet they are quiet in their abstraction, and also their gradualism. They take shape only over time, while we are constantly living in the present moment, as it were. They appear as somehow distinct from our *real* lives, which we live day-to-day—and yet our day-to-day existences only make sense in the context of their pursuit. This "quiet" nature of temporal goods, I believe, makes it surprisingly easy to miss or underestimate how much disrespect the state demonstrates to offenders by diminishing their access to such goods. Indeed, their "quiet" nature helps to explain, I believe, how a punishment as extreme as long-term incarceration—a punishment

that may *ruin your life*—could become so commonplace and uncontroversial in supposedly thoughtful, liberal societies like the United States. There are many political, economic, and sociological variables at play in understanding how we have reached this moment of mass incarceration.[138] But the difficulty of perceiving and communicating the injury of long-term incarceration—due to the abstract and gradual nature of temporal goods—is, I think, an important piece of the story. Let us return to Elaine Scarry's work on the body in pain. This will help us to develop this point, as well as to enable the comparison between long-term incarceration and penal torture with regard to the level of disrespect each demonstrate toward an offender.

Scarry argues that pain is "inexpressible," given its presence *inside* someone, as I discussed briefly in the previous chapter.[139] Language occurs by reference to objects in the external world, she argues, and pain cannot—or cannot easily—be expressed by reference to such objects. She quotes Virginia Woolf: "English, which can express the thoughts of Hamlet and the tragedy of Lear has no words for the shiver or the headache…The merest schoolgirl when she falls in love has Shakespeare and Keats to speak her mind for her, but let a sufferer try to describe a pain in his head to a doctor and language at once runs dry."[140] She continues:

> "For the person whose pain it is, it is 'effortlessly' grasped (that is, even with the most heroic effort it cannot *not* be grasped); while for the person outside the sufferer's body, what is 'effortless' is *not* grasping it (it is easy to remain wholly unaware of its existence; even with effort, one may remain in doubt about its existence or may retain the astonishing freedom of denying its existence; and, finally, if with the best effort of sustained attention one successfully apprehends it, the aversiveness of the 'it' one apprehends will only be a shadowy fraction of the 'it'). So, for the person in pain, so incontestably and unnegotiably present is it that 'having pain' may come to be thought of as the most vibrant example of what it is to 'have

[138] *See* Chapter 1 at note 180.
[139] Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* (New York and Oxford: Oxford University Press, 1985), 3-11. *See* discussion Chapter 2 at 129-31.
[140] *Id.* at 4.

> certainty,' while for the other person it is so elusive that 'hearing about pain' may exist as the primary model of what it is to 'have doubt.' Thus pain comes unsharably into our midst as at once that which cannot be denied and that which cannot be confirmed."[141]

Scarry argues that pain's lack of *verbal* representation leads to its lack of *political* representation: "It is not simply accurate but tautological to observe that given any two phenomena, the one that is more visible will receive more attention."[142] And because pain is "so nearly impossible to express, so flatly invisible," Scarry argues, "even where it is virtually the only content in a given environment, it will be possible to describe that environment as though the pain were not there."[143] She points out that regimes can describe torture without mentioning the use and the presence of pain, as mere acts of "*information*-gathering" or "*intelligence*-gathering."[144] In this way, she concludes, it has been possible to neglect torture as an issue of moral and political concern.

Scarry elides two distinct issues here: (a) articulating the nature of an injury in detail and with precision and (b) communicating the very existence or severity of an injury. That the difficulty of communicating the very existence or severity of an injury may diminish the political attention drawn to that injury is a point that seems both important and true. We should take this to be Scarry's central insight. But that a type of injury is difficult to articulate in detail and with precision need not vitiate the process of communicating its very existence or severity—and thus it need not have the implications with regard to political attention. Torture, along these lines, is not a good example for her central insight. That is, I doubt that the lack of a complex vocabulary to describe the experience of overwhelming pain impacts one's ability to communicate its presence or urgency. We howl, groan, or scream in agony, and people understand. Indeed, the soundtrack of torture

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[141] *Id.*
[142] *Id.* at 12.
[143] *Id.* at 12.
[144] *Id.*

illuminates in its very *lack* of vocabulary, as creatures with the capacity for complex speech become "shrilly, squealing piglets," in Jean Améry's words.[145] When we hear someone howling, Scarry must be wrong when she writes that, as to the underlying pain, "it is easy to remain wholly unaware of its existence; even with effort, one may remain in doubt about its existence or may retain the astonishing freedom of denying its existence."[146] Her argument makes sense with regard to minor or non-agonizing pain. In those cases—when someone calmly states, "my stomach hurts"—then not believing her is indeed all too easy.

But given that Scarry's focus is on torture, her argument seems misplaced. It is not, as she writes, easy to describe torture without describing the presence of pain. Doing so requires a great exercise in *willful blindness,* of *looking away* from what one knows is really happening.[147] The torture victim, with electricity running through her body, with panic saturating her consciousness, does not need Shakespeare or Keats to express or interpret her true feelings. Her involuntary shouts and pleas tell the whole story for anybody within earshot, no matter what language they speak. And, indeed, I think the natural *communicability* of agonizing pain has played a role in the level of empathy people have for torture victims—even for those victims who seek to murder innocent civilians as a means of installing totalitarian political systems—and in the enormous political attention and moral condemnation brought to bear upon the practice of torture. Scarry must be wrong—and must have been wrong at the time of her writing, given that she wrote during Amnesty International's ultimately successful drive to pass the Convention Against Torture[148]—that torture has been neglected as an issue of political

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[145] Jean Améry, *At the Mind's Limit: Contemplations by a Survivor on Auschwitz and its Realities*, trans. Sidney Rosenfeld and Stella P. Rosenfeld (Bloomington: Indiana University Press, 1980), 35. *See* discussion in Chapter 2 at 126-28.

[146] Scarry, *The Body in Pain, supra* note 139 at 4.

[147] On the centrality of "willful blindness" to the process of "disrespecting" something, see Chapter 2 at 149.

[148] *See* Samuel Moyn, "Torture and Taboo: On Elaine Scarry," *The Nation*, February 5, 2013. https://www.thenation.com/article/torture-and-taboo-elaine-scarry/

concern. In sum, torture proves Scarry's broader point about the communicability of a type of injury impacting the amount of attention it receives, but in the exactly opposite manner that she intended.

Long-term incarceration, however, proves her point in the intended direction. Given the abstract and gradual nature of temporal goods, the injury of limiting one's access to such goods is comparatively difficult to communicate in terms of its existence and severity. As discussed above, the injury of long-term incarceration is not essentially phenomenological. It need not hurt. One need not cry out in pain. It goes beyond even the difficulties of communicating non-agonizing pain. For given that our awareness of our pursuit of temporal goods tends to be unconscious or at least backgrounded, the offender *himself* may lack a precise awareness of what exactly the state has done to him by long-term incarcerating him, as he goes about his day-to-day life inside the facility.[149] Of course, there are many inmates, like Kevin Ott, who can articulate the injury with precision:

> "My name is Kevin Ott. My number's 2030903. I'm in here for trafficking methamphetamine. I start my 14th year in just a couple of months, and I will be here until I die. Yeah, I have life without parole for 3 ounces of methamphetamine. Yep. I fucked up, but I don't think I should die for it. I have life without parole, which means I'll stay in prison until I die. That's a death sentence in my opinion, a slow death sentence. I have to wait until I die."[150]

While it seems impossible to witness someone being repeatedly waterboarded and not perceive his pain and his panic, it is very possible to visit a relatively clean and safe prison, chat with an inmate sentenced to a 20-year term, and then walk away without a clear awareness of his level of deprivation. There will not always be

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[149] Bernard Williams writes: "There are forms of exploiting men or degrading them which…cannot be excluded merely by considering how the exploited or degraded men see the situation. For it is precisely a mark of extreme exploitation or degradation that those who suffer it do *not* see themselves differently from the way they are seen by the exploiters; either they do not see themselves as anything at all, or they acquiesce passively in the role for which they have been cast." Bernard Williams, "The Idea of Equality," in *Problems of the Self* (Oxford University Press: Oxford, 1969), 230-49, at 237.

[150] From the 2012 documentary, *The House I Live In*, directed by Eugene Jarecki.

someone like Ott to articulate what is happening. And even when he's there it requires a level of focus and imagination to understand his point, and to keep it in mind. It is not as easy and involuntary as understanding and worrying about the cries of the torture victim. And I think this helps to explain, in part, how the criminal sentencing scales have risen so dramatically in the United States and also the United Kingdom since the 1970s. If the policy at the height of the crack epidemic in the United States in the 1980s was to literally torture crack dealers, there would have been outrage. It would have been impossible to look away from *that*. And yet, we need to understand that long-term incarcerating a crack dealer—at least when done with certain intentions in mind, as I explain in the following section—is not qualitatively different than penal torture with regard to the level of disrespect it demonstrates toward the offender, the most basic consideration, as I have argued, for understanding and comparing injuries, and assessing the degree of degradation.

In the previous chapter, I argued that to "respect" something involves aiding or at least not interfering with the possibility of that thing's exhibition of value, as well as potentially symbolically expressing or honoring its value.[151] With the understanding that an object has value when people might engage with it in beneficial ways, I explained that to pour water on a beautiful sandcastle is to disrespect the sandcastle's value, while pouring water on a plant, generally, is to respect the plant's value. The demands of respect, in this way, depend on what the object actually does to exhibit value, on the "mechanism" of its value exhibition, as it were, and the ways in which our actions help or hinder the working of that mechanism. To apply this logic to human beings directly, I argued, we need an understanding of what humans do, exactly, to exhibit value. I argued that human beings exhibit value due to their capacity to flourish, that is, due to their capacity to stitch moments together through time and construct a good life. They are diachronic creatures with pasts and futures of their own construction to a significant degree, capable not

[151] Chapter 2 at 142-50.

only of experiencing momentary goods, but also of *achieving* temporal goods, as I have argued in this chapter. While suffering may play a role in the production of temporal goods and in the pursuit of a good life, as with the suffering involved with certain forms of professional training, I argued that humans retain the capacity to generate *disvalue*, which constitutes merely *wanton* suffering. With this conception of human value in mind, I concluded that torture is the *exemplar* of disrespecting a human being. It (a) completely halts his value generating capacities, as he loses the thread of his diachronic identity and (b) maximizes his capacity for disvalue, with his consciousness saturated with suffering. In short, it takes a being capable of living broadly and purposefully through time and, via the intentional infliction of a suffusive panic, restricts his ken to a maximally terrible present.

Long-term incarceration, I contend, can express a level of disrespect for offenders that is not qualitatively different than certain forms of torture. Compare 20 years in the Bastoy to being waterboarded 20 times. But they act in very different ways. Whereas torture is immediate and urgent, long-term incarceration is gradual and subtle; torture explodes a person; long-term incarceration erodes a person. In the end, though, the question is the same: To what degree does the practice interfere with or symbolically dishonor the offender's capacity to exhibit and construct value? Long-term incarceration, by severely limiting an offender's access to certain temporal goods, which are fundamental to the pursuit of a good life as a whole, interferes with his value generating capacity in a direct and profoundly damaging manner. If torture removes someone, entirely, from his diachronic process of value generation, long-term incarceration acts to ensure—or at least to severely risk—that this process fails. Both work to "erase" one's existence as someone who builds value through time, we might say.

But what about the individual who leads an utterly desperate existence, where he is merely trying to survive day-to-day, *before* his long-term incarceration? Have his diachronic capacities not already been "erased," by his own choices or by

the neglect of a callous society? By intentionally harming him in a way that ensures that he does not turn his life around, as it were, the state demonstrates the same disrespect for his diachronic capacities as it does to the offender who was positively flourishing before incarceration. The conviction expressed by the state is the same: your essentially human capacity to build a good life does not matter.

In sum, that the disrespect of torture is so shocking and undeniable does not mean that it stands alone on the pantheon of injuries, as something qualitatively different from any other form of aversive treatment. For, as discussed above, there is a reason why we are intuitively more concerned with the infliction of agonizing pain and suffusive panic than with non-phenomenological injuries like severely limiting one's access to certain temporal, associational goods. The latter form of injury is vaguer and more difficult to perceive with definition. Nonetheless, upon reflection we can appreciate the epistemic limitations of our knee-jerk moral sensibilities in these cases, and can grasp the reality and the profundity of the injury that long-term incarceration inflicts.

VI. Intentional Disrespect

Given the above, it might seem straightforward to conclude that long-term incarceration rejects the offender's status as a human being, that is, as a creature with the capacity and right to build a good life, and therefore surpasses a dispositive degradation limitation.[152] It might seem straightforward to conclude, that is, that we must simply remove the arrow of long-term incarceration from our quiver of policy options, just as we have done with penal torture. While very tempting, there is an important—and somewhat challenging—complication to this conclusion. This is the matter of intent. If torture constitutes the *intentional* infliction of suffusive panic, can we say, in parallel, that the state, when long-term incarcerating someone, *intends* to ruin his life or *intends* to severely risk that outcome? Does it really matter? I argue below that it does, that if impermissible degradation

[152] *See* Chapter 2 at 165-70.

constitutes an affirmative rejection of someone's humanity, then the degradation-making features of the treatment in question must be intentionally inflicted. To *intentionally* ruin someone as either your means or your end—to see his ruin as a *reason for action*—is profoundly more disrespectful than to *knowingly* ruin him as a byproduct of a permissible goal. It is not only a matter of consequences when determining whether one's actions are impermissibly degrading, whether they embody—whether they bring into the world and honestly assert—an impermissibly low valuation of a person. One's reasons for action, as constituted by her intentions, are also paramount.

These considerations enable the conclusion indicated above, that long-term incarceration for the sole purpose of incapacitation can be permissible—beneath the line of dispositive disrespect. Unlike long-term incarceration for the purpose of retribution or deterrence, if administered for the sole purpose of incapacitation—and if proportional to an established threat of future crime posed by the offender (a huge evidential if)—the damage that long-term incarceration causes to an offender's life project can, in special circumstances, represent a permissibly inflicted byproduct of preventing him from committing crimes. If inflicted for the purpose of retribution or deterrence, however, I conclude that the potentially life-ruining harm of long-term incarceration is intentionally delivered and impermissibly degrading.

A. Intentions and Side-Effects: Sophisticated and Vengeful Terror Bombers

To insist that intentional harms are, all things equal, harder to justify than merely foreseen harms is to rely upon the Doctrine of Double Effect (DDE). Thomas Aquinas is credited with introducing the DDE to explain the permissibility of self-defensive killing, *contra* Augustine.[153] Aquinas argued that killing in self-

[153] Thomas Aquinas, *On Law, Morality, and Politics*, 2d edition, eds. William P. Baumgarth and Richard J. Regan, trans. Richard J. Regan (Indianapolis/Cambridge: Hackett Publishing Co., 1988), 169-71 (ST II-II, Question 64).

defense is very different morally than killing in cold blood, and that the killer's intentions must explain this difference. Unlike the cold-blooded killer, the self-defensive killer does not intend to kill, but rather kills as a byproduct of realizing his "good intention" of preventing an unjust attack. Aquinas, importantly, added a proportionality requirement: "But an action originating from a good intention can be rendered unlawful if the action should be disproportionate to the end. And so it will be unlawful to use greater force than necessary to defend one's life."[154]

Theorists since Aquinas have extended the DDE beyond self-defense cases. Douglas Husak explains how the intend-foresee distinction is foundational to numerous provisions of substantive criminal law, as well as to everyday morality (e.g. burglary is defined at common law as the act of breaking and entering the house of another at night *with the intention* to commit a felony therein).[155] It is also central to *jus in bello* just war theory, as outlined in the following example by Michael Bratman:

> "Both Terror Bomber and Strategic Bomber have the goal of promoting the war effort against Enemy. Each intends to pursue this goal by weakening Enemy, and each intends to do that by dropping bombs. Terror Bomber's plan is to bomb the school in Enemy's territory, thereby killing children of Enemy and terrorizing Enemy's population. Strategic Bomber's plan is different. He plans to bomb Enemy's munitions plant, thereby undermining Enemy's war effort. Strategic Bomber also knows, however, that next to the munitions plant is a school, and that when he bombs the plant he will also destroy the school, killing the children inside. Strategic Bomber has not ignored this fact. Indeed, he has worried a lot about it. Still, he has concluded that this cost, though significant, is outweighed by

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[154] *Id.* at 170.

[155] Douglas Husak, "The Costs to Criminal Theory of Supposing that Intentions are Irrelevant to Permissibility," in *The Philosophy of Criminal Law: Selected Essays* (Oxford: Oxford University Press, 2010), 69-90, at 77. *See also* S. Matthew Liao, *Intentions and Moral Permissibility* (UC Berkeley: Kadish Center for Morality, Law and Public Affairs, 2008) (providing cases in which intentions have intuitive moral significance); David Enoch, "Intending, Foreseeing, and the State," *Legal Theory* 13 (2007): 69-99, at 71 (discussing the centrality of the intend-foresee distinction to everyday morality).

> the contribution that would be made to the war effort by the destruction of the munitions plant."[156]

The DDE is meant to explain the conviction that Terror Bomber and Strategic Bomber are engaged in very different moral enterprises, and that the former's actions are much harder to justify than the latter's, even though the result is the same in terms of loss of life—in parallel to the cold-blooded and self-defensive killers. What Terror Bomber does, let us assume, is impermissible. But what about Strategic Bomber? The DDE, importantly, will not immediately endorse her actions. It depends on at least two further questions. First, is Aquinas's *proportionality requirement*. Is the intended outcome important enough to justify causing the children's deaths (e.g. Enemy was secretly developing nerve gas in the plant, with plans to kill tens of thousands of civilians as soon as the research was completed)? Second, is what we can call the *minimization requirement*. Has Strategic Bomber minimized the harmful byproduct? Michael Walzer argues that agents have duties to minimize foreseen harm even if this means foregoing some benefit or accepting additional risks.[157] Could Strategic Bomber have killed fewer children, perhaps by bombing a different, similarly important munitions plant or research facility, or by somehow warning the children? If those were viable alternatives, then her action would convert from permissible to impermissible, even though she does not intend to kill the children, and even though the bombing would otherwise be proportional.

Some theorists, most notably Jonathan Bennett, have objected that the intend-foresee distinction is too manipulable to have much meaning.[158] It is important to see how this objection is ultimately irrelevant to our discussion. Bennett raises the challenge of what we might call Sophisticated Terror Bomber.

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[156] Michael Bratman, *Intention, Plans, and Practical Reason* (Cambridge, MA: Harvard University Press, 1987), 139-40.
[157] Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Allusions* (New York: Basic Books, 1977), 152–9.
[158] Jonathan Bennett, *The Act Itself* (Oxford: Oxford University Press, 1995).

Sophisticated Terror Bomber does not intend for Enemy civilians to die. She intends, rather, for them *to appear* dead—long enough to demoralize Enemy and to cause it to surrender—after which the civilians will wake up, she hopes, as if from a deep sleep. It is extraordinarily unlikely that they *will* wake up, but it is also extraordinarily unlikely that the civilians will survive the Strategic Bomber's attack. In both cases, continues the objection, we can understand the civilians' deaths to be foreseen, but unintended consequences of the bombers' true intentions—making the civilians *appear* dead and destroying the munitions plant, respectively. Neither bomber is positively aiming at "death to the civilians" as either her means or ultimate end; and, as such, neither kills them intentionally. Thus, the objection concludes, the DDE cannot distinguish between Sophisticated Terror Bomber and Strategic Bomber. And, therefore, its central distinction fails to provide much moral guidance, for any Terror Bomber who would prefer that Enemy civilians live, so long as her broader war aims were realized, is in fact a Sophisticated Terror Bomber.

This is an important challenge to the DDE, especially as it relates to just war theory, and defenders of the DDE have introduced a number of interesting replies.[159] I will not, however, engage with that debate, for the case of the

[159] *See, e.g.,* William Fitzpatrick, "The Intend/Foresee Distinction and the Problem of 'Closeness,'" *Philosophical Studies* 128 (2006): 585-615, at 589-91 (arguing that Sophisticated Terror Bomber is an intentional killer, because she intends to kill the civilians *as a means* of making them appear dead); Philippa Foot, "The Problem of Abortion and the Doctrine of Double Effect," in *Virtues and Vices* (Oxford: Basil Blackwell, 1978), 21-22 (arguing that, with Sophisticated Terror Bomber, killing the civilians is sufficiently "close" to making them appear dead, either conceptually or causally, such that one must treat the killing as if it were strictly intended); Warren S. Quinn, "Actions, Intentions, and Consequences: The Doctrine of Double Effect," *Philosophy & Public Affairs* 18 (1989): 334-51 (arguing that Sophisticated Terror Bomber, unlike Strategic Bomber, *uses* the civilians as a means without their consent, treating them as if they existed only for her purposes); Victor Tadros, "Wrongful Intentions Without Closeness," *Philosophy & Public Affairs* 43 (2015): 52-74 (arguing, first, that *intentionally using* people in a harmful manner bears an extra burden of justification because "people are entitled to determine for themselves which ends to pursue, even if their ends are not the most valuable ends considered impartially," *id.* at 65, and, second, that *intentionally affecting* people in a harmful manner bears an extra burden of justification because "a person who lacks a duty to serve an end at a certain cost may not normally be compelled to serve that end at the same cost," *id.* at 73.)

Sophisticated Terror Bomber is not relevant to our comparison: (a) long-term incarceration for the purpose of retribution or deterrence vs. (b) long-term incarceration for the sole purpose of incapacitation. This comparison requires only the most basic version of the DDE, with its distinction between *clearly* intentional and merely foreseen harming. For whether or not the DDE can distinguish between Sophisticated Terror Bomber and Strategic Bomber, it can surely distinguish between *Vengeful* Terror Bomber and Strategic Bomber. Vengeful Terror Bomber wants revenge for Enemy terror bombing *her* people. She would not be satisfied if Enemy civilians somehow woke up. She wants them to die. Retributivist and deterrent theorists, *with regard to their intention to harm offenders,* are like Vengeful Terror Bomber, not Sophisticated Terror Bomber. They are motivated to harm, using a broad understanding of harm as anything which is aversive or which negatively affects one's interests.[160] To realize their penal aims they require punishment, incarceration or otherwise, to be harmful. Retributivists generally see this harm as an end in itself, as the intrinsic good of deserved suffering or censure; though, Duff, at least, sees retributive penal harm as having instrumental value, as well, insofar as it enables the offender's reformation and social reintegration.[161] Deterrence theorists, meanwhile, see penal harm as an instrumental good, as a tool for threatening would-be future offenders. If it was not harmful, then it would fail as a deterrent.

To emphasize this point, that retributivist and deterrent justifications of punishment entail *intentional* penal harming, let us consider Tadros's examination of two famous hypotheticals:

> "*Trolley*: A trolley is heading on a track toward five people. If D, a bystander, does nothing, the five will be killed. D can save the five only by pulling a lever diverting the trolley to another track where V is situated. V will then be killed."[162]

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[160] *See* Joel Feinberg, *The Moral Limits of the Criminal Law, Volume 1: Harm to Others* (New York: Oxford University Press, 1987), 31 (defining a "harm" as a "setback to interest").
[161] *See* Chapter 1 at 32.
[162] Tadros, "Wrongful Intentions Without Closeness," *supra* note 159 at 54

> *"Bridge*: D is on a bridge with V. A trolley is heading on a track under the bridge toward five people who will be killed if D does nothing. D can save the five only by throwing V from the bridge onto the tracks. V's body will stop the trolley, saving the five, but V will be killed."[163]

Tadros explains how the standard conception of the DDE, with its distinction between intended and merely foreseen harms, has some difficulty explaining why D's actions in *Bridge* are harder to justify than D's actions in *Trolley*. Tadros explains that in *Bridge,* just like in *Trolley,* D does not actually intend to harm V—akin to Sophisticated Terror Bomber.

> "D intends to stop the trolley with V's body. The stopping of the trolley with V's body, though, is not identical to V being harmed. As long as the trolley is stopped with V's body, D completes his plan of saving the five, regardless of whether V is harmed."[164]

Retributivist and deterrent theorists are *not* like D in *Bridge*. They are *aiming at* the harm of offenders as their means or their end, and therefore are clearly intentional harmers. By comparison to *Bridge,* consider a hypothetical I will call *Life Force*, where V's "life force" somehow powers the trolley, and the only way to stop the trolley is to kill V. If D kills V in *Life Force*, he would be stopping the trolley *by* killing V. The harm to V would be the *means* by which he realizes his aim; and, therefore, we can easily deem him an intentional harmer. With regard to their intention to harm, retributivist and deterrence theorists are like D in *Life Force*.

But what about the deterrent prospect of illusory penal harm, punishments that merely appeared harmful, such that they deterred others, but which were not in fact harmful? Retributivist theorists would, of course, object to illusory penal harm, since it would frustrate their ambition to inflict deserved suffering or censure, which requires the infliction of real penal harm. But could not deterrence theorists view illusory penal harm as their ideal, and therefore be said not to clearly

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[163] *Id.* at 53.
[164] *Id.* at 54.

intend harm, akin to Sophisticated Terror Bomber? This cannot be the case. Unlike Sophisticated Bomber, who only needs the appearance of the civilians' death to last for a short while before she can realize her goal of Enemy's somehow irreversible surrender, deterrence theorists have a goal—protection from crime in society—that has an indefinite timeline. The idea that deterrent theorists could aim at illusory punishments is thus sophistic, given that people would soon enough learn that offenders were not in fact harmed, and the deterrent effect would be vitiated.

By comparison, there is no analytic connection between harm borne by the offender and the successful pursuit of what I call "specific prevention" policies. These policies—only one instance of which is carceral incapacitation—aim to decrease the chances that a specific person offends in the future.[165] This aim could be realized in any number of non-harmful or even beneficial ways, including therapy and rehabilitation. Indeed, we might "specifically prevent" a career thief by, say, guaranteeing him a huge annual income and thereby draining him of the incentive to steal. Along these lines, if incarceration was a proportional means of specific prevention, and if incarceration happened to be non-harmful, the sentencer concerned only to incapacitate would certainly not object. Indeed, she would prefer that the offender was somehow immediately rehabilitated and then released upon his first day in prison. Or, in another direction—as indicated above—it would pose no problem if prison were somehow an inmate's private Xanadu, where he could lead a flourishing (and crime-free) life. By comparison, there is indeed an analytic connection between the infliction of harm and successful retributive or deterrent incarceration. Retributivists would argue that the offender does not deserve Xanadu; and deterrence theorists would argue that

[165] *See* Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford: Oxford University Press, 2014), 2-5 (outlining seven types of coercive preventive measures, only one of which is carceral incapacitation).

allowing him to live in such conditions would incentivize crime. Of course, the above discussion indicates that it is extremely unlikely that a long-term incarcerated offender will in fact flourish during his sentence (or become immediately rehabilitated). But that fact does not, in and of itself, mean that the state inflicts carceral harm *intentionally*, given that, as I discuss further below, the incapacitory state is not *motivated* to harm the offender, in the sense that it does not see the offender's harm as an instrumental or intrinsic good. In parallel, it is extremely unlikely that Enemy civilians will survive Strategic Bomber's attack, but we can maintain nonetheless that she does not kill them intentionally.

B. Intent, Motive, and Respect

Why should we should think that the intend-foresee distinction is a sound moral guide? Why is it that Strategic Bomber's actions are easier to justify than Vengeful Terror Bomber's, if Strategic Bomber *knows* that the result will be the same, in terms of killing innocent children? Why should we believe that intentions in such cases actually matter? We do not have a clean answer. But the explanation seems to lie in the connections between (a) intent and motive and (b) motive and reasons for action. Antony Duff argues that we intend a result when we act "in order" to achieve that result, that is, when we are *motivated* to bring about that result.[166] He presents the "test of failure" for determining whether a result is intended.[167] A result is intended if the actor would consider it a failure if the result did not occur. Michael Bratman argues, similarly, that an outcome is intended if one engages in means-end reasoning about how to bring it about, screens out alternative intentions inconsistent with the outcome, and endeavors to bring about the outcome.[168] Intentions, then, are something like motivations in action, and motivations matter. Kimberly Kessler Ferzan argues, however, that not all

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[166] R.A. Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (Oxford: Blackwell, 1990), 58, 61.

[167] *Id.*

[168] Bratman, *Intention, Plans, and Practical Reason, supra* note 158 at 140-43

intentions are motivationally significant. She believes that we can intend to bring about an outcome without being motivated to bring about that outcome, that is, without seeing any reason to bring it about.[169] She argues, furthermore: "Because intentions are not co-extensive with motivational significance, we would do better if our laws and our normative discourse focused directly on motivational significance (when relevant) and stopped relying on intentions."[170] If Ferzan's argument succeeds, that does not vitiate the DDE, but rather limits its focus to *motivationally significant* intentions. When using the words intent or intention, then, I mean *motivationally significant* intent or intention (whether or not all intentions should be characterized in this manner).

But why, to continue, do motivations matter morally? Finnis argues that they matter "because free choice matters."[171]

> "And the states of affairs which one commits oneself to bringing about—one's instrumental and basic purposes—are precisely those identified under the intelligible description which made them seem rationally appealing and choosable. And what one thus adopts is, so to speak, synthesized with one's will, i.e., with oneself as an acting

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[169] Kimberly Kessler Ferzan, "Beyond Intention," *Cardozo Law Review* 29 (2008): 1147-91. Ferzan's position on intentions is fully subjectivist. She argues that intentions are broader than motivational significance, "because they encompass the wealth of meanings an actor gives to her intentional object." *Id.* at 1184. She writes: "[W]e ask the wrong question when we ask if an intention to *a* is equivalent to an intention to *b*. Rather, if the agent understands descriptions *a* and *b* to pertain to the same objects, then an intention to *a* is one and the same intention as the intention to *b*." On this view, an intention to do Act A is the same as an intention to do Act B when they are synonymous "in the mind of the actor." *Id.* at 1183. If, as in Robert Audi's example, the lobster is the most expensive thing on the menu, and one knows that by ordering it she is at the same time ordering the most expensive thing on the menu, then, Ferzan argues, one intends both to order lobster and to order the most expensive thing on the menu. Robert Audi, "Intending," *Journal of Philosophy* 70 (1973): 387-403, at 396. But—and here is the point—that does not mean, as Ferzan explains, that she is *motivated* by both facts when she places her order. She could very well be motivated only by the fact that she will eat delicious lobster. Perhaps she could care less about the cost, or wish that it were cheaper. One can thus intend bring about an outcome—like ordering the most expensive thing on the menu—that was not motivationally significant to her decision to act as she did, Ferzan concludes. *See also* Michael Bratman, "Two Faces of Intention," *The Philosophical Review* 93 (1984): 375–405, at 399-401 (arguing that he intentionally wears down his shoes if he runs a marathon).

[170] *See* Ferzan, "Beyond Intention," *supra* note 170 at 1190.

[171] John Finnis, "Intention and Side-Effects," in eds. R.G. Grey and Christopher W. Morris, *Liability and Responsibility: Essays in Law and Morals* (Cambridge: Cambridge University Press, 1991), at 61.

> subject; one *becomes* what one saw reason to do and chose and set oneself to do—in short, what one intended."[172]

Duff writes along similar lines:

> "It is through the intentions with which I act that I engage in the world as an agent, and relate myself most closely to the actual and potential effects of my actions; and the central or fundamental kind of wrong-doing is to *direct* my actions towards evil—to *intend* and to *try* to do what is evil."[173]

We judge agents, in very large part, on the "why?" question.[174] Why did you do that? That is, what were you aiming at? Or, more precisely, what reasons did you have in mind when you chose to do that? An assessment of one's intentions—that is, one's motives—is central to answering these questions. To deny that motives matter is just to deny, then, that our reasons for acting matter in judging our actions; and it would entail, at the extreme, an inability to distinguish between even purposeful and accidental harms. Vengeful Terror Bomber and Strategic Bomber have very different motivations. That is, they positively aim at different outcomes and therefore they act for different reasons. This does not mean that Strategic Bomber's actions are necessarily permissible. But it does mean that we can judge their actions differently, even though the result is the same.

This dovetails with the theory of respect discussed in the prior chapter. Respect, as I explained, involves the process of *seeing* the objective value in something and then responding appropriately, as suggested by the Latin source of respect, *respicere,* which means "to look back at" or "to look again." It concerns one's subjective process of valuation, and then her non-symbolic and symbolic responses to that appraisal. One of these steps has gone awry for Vengeful Terror

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[172] *Id.* at 61-62.
[173] Duff, *Intention, supra* note 168 at 113. *See also* Michael S. Moore, *Placing Blame: A Theory of Criminal Law* (Oxford: Clarendon Press, 1997), 409 ("We are the authors of evil when we aim to achieve it in a way we are not if we merely anticipate that evil coming about as a result of our actions."); Thomas Nagel, *The View from Nowhere* (Oxford: Oxford University Press, 1986), 180.
[174] G.E.M. Anscombe, *Intention* (Oxford: Basil Blackwell, 1957), 11.

Bomber. Either she fails to *see* or *behold* the civilians' value, understanding them to have the value of Enemy buildings or tanks, or she *sees* their value but then fails to respond appropriately, understanding them to be undeserving of the treatment accorded to "normal," "good," or "our" people. In this way, we can see how being *motivated* to destroy someone—to see the destruction of his capacity to realize value as a reason in favor of acting—involves a rejection or denial of his value. By comparison, Strategic Bomber's process of valuation with regard to the civilians seems very different. She is not motivated to tear the civilians apart; that is, she does not see their destruction as a reason in favor of acting. Indeed, she deeply regrets their deaths, as evidenced by the fact that she will seek out ways to prevent their occurrence, following Walzer.[175] There is not the same process of devaluation. The idea that Enemy civilians are like tanks or buildings, or that they have less value than "normal," "good," or "our" humans, does not feature in her reasoning. It seems that Strategic Bomber should be able to say to Enemy civilians, "Given the atrocities that I will prevent by achieving my mission of destroying the munitions plant, I would drop these bombs even if they risked not your deaths, but the deaths of civilians from my own nation." Respect involves a subjective recognition and appreciation of something's capacity to exhibit value, whatever it may be—a sandcastle, plant, person, etc. Whatever that thing is, it is impossible to recognize and appreciate its value while being motivated toward its destruction, while seeing its destruction as a reason for action, as an instrumental or intrinsic good.

Elizabeth Anderson and Richard Pildes make a related argument in a different context, emphasizing the importance of the intend-foresee distinction to their "expressivist" theory of US constitutional law.[176] The valuation "expressed"

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[175] *Cf.* Tadros, "Wrongful Intentions Without Closeness," *supra* note 149 at 59 (arguing that a person may intend harm, but fail to closely associate himself with it, considering it "a thoroughly regrettable but necessary way to achieve the good.").

[176] Ellizabeth Anderson and Richard Pildes, "Expressivism: A General Restatement," *University of Pennsylvania Law Review* 148 (2000): 1503-75.

by a particular law and therefore its constitutionality, they argue, depends on whether the questionable outcome was intended, among other considerations. They write on the constitutionality of "protectionist" legislation, by which one US state passes a regulation that favors the economic interests of its own residents:

> "As we would put it, protectionist legislation expresses a constitutionally impermissible attitude toward the interests of other States in the political union. The harm inflicted on out-of-state interests is not a by-product of otherwise legitimate aims, but rather is directly intended as a mechanism through which to enhance local economic well-being. State A takes economic product from State B producers and gives it to State A producers just because they are in State A. Such behavior has no place in a genuine political union of any kind."[177]

They draw the same logic out of speech regulations that disparately impact particular messages or ideologies,[178] as well as on laws that disparately impact racial groups.[179] The message expressed to the speakers or racial groups in question, they explain, depends in part on whether the law *intentionally* impacts them disparately—with the state directly motivated to disadvantage them—or whether it does so as a byproduct of another state aim.[180] They explain, furthermore, that laws which have no demonstrable disparate impact can be unconstitutional if they were passed with a discriminatory purpose.[181] We look beyond consequences when discerning the message expressed by state action, they explain, as "attitudes are expressed in the

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[177] *Id.* at 1554.
[178] *Id.* at 1545-51.
[179] *Id.* at 1533-45.
[180] *See City of Mobile v. Bolden*, 446 U.S. 55, 65-80 (1980) (holding that an at-large electoral system does not violate the Fifteenth Amendment just because it has a disproportionate racial impact); *Washington v. Davis*, 426 U.S. 229, 248 (1976) (holding that a facially neutral law is not unconstitutional solely because it has a racially disproportionate impact).
[181] *See City of Richmond v United States*, 422 U.S. 358 (1975). Richmond annexed land, which decreased the percentage of black voters in the city. This did not disparately impact the black community's voting power, since, after annexation, the city converted from at-large to district voting, which favored the community. Whether or not the plan in fact decreased the black community's voting power, the Court provided that it could still be unconstitutional if passed for that invidious purpose. *Id.* at 378-79. The Court remanded the case to a lower court, which overturned the annexation after finding that that the city indeed had such a purpose.

purposes for which people act and the principles that justify their action."[182] "A person suffers an expressive harm," they continue, "in being treated in accordance with principles that express inappropriate attitudes toward her."[183]

Whether or not expressivism can ground all of law and morality, as Anderson and Pildes believe, it certainly has resonance in the degradation context, so long as we are clear on the relationship between "attitudes" and "reasons." Anderson and Pildes can be slippery on this point. "Attitudes" are morally relevant, at least on my view, only to the extent that they emanate from one's reasons and valuations. Someone concerned to act morally does not aim directly at having the right attitude, but rather at endorsing the right reasons and valuations. Also, the term "expressive harm" is too weak, especially in the degradation context (but also, one would think, in the racial discrimination context). The offender who has, say, experienced penal torture was not merely "expressively harmed." The expression was written on his body, as it were, and the term "expressive harm" risks missing this point. Regardless, Anderson and Pildes provide support for a number of ideas pursued here: (1) the permissibility of state actions can depend on the valuations of people that they express or embody, (2) we must look beyond consequences to motivating reasons when interpreting and assessing state actions in this manner, and (3) whether or not the questionable outcome was intentional, in the sense that the state saw its occurrence as an instrumental or intrinsic good, is of paramount importance in making this assessment.

C. Two Conclusions

Let us take stock before moving forward. We have been maintaining that there are dispositive degradation limitations—that there is a line in the spectrum of disrespect above which punishments must not cross, no matter how heinous the offender's crime nor how useful it might be to disrespect the offender to that

[182] Anderson and Pildes, "Expressivism," *supra* note 176 at 1569.
[183] *Id.*

degree. A commitment to the ideal of human inviolability renders treatment above this line, like penal torture, impermissible. We are now clarifying the role of intent and motive within this story. We held these variables constant in Chapter 2, assuming that all the treatment on the spectrum of disrespect was intentionally inflicted.[184] However, when the degradation-making features of degrading treatment are delivered with intent, for reasons just discussed, that is profoundly more disrespectful, all things equal, than doing so accidentally or with mere foresight. This is so whether we are talking about symbolic or non-symbolic disrespect. Accidental symbolical disrespect is indeed possible, say, when you are ignorant of social customs (e.g. you offer to shake hands instead of bowing in Japan); this is surely less disrespectful than its intentional counterpart (e.g. you know the custom of bowing, but refuse out of nationalist pride). With long-term incarceration, though, we can focus on the non-symbolic aspects of disrespect, given that prison walls are, most importantly, non-symbolic, physical interferences with an inmate's capacity to realize value (insofar as they prevent him from freely associating with people in society).

In Chapter 2, we concluded that above the "dispositive" line, punishment rejects the offender's status as a human, by "ruining" his essentially human capacity to realize diachronic value or by embodying the legitimacy of doing so. With this intent analysis in mind, we can refine the conclusion. A punishment is impermissibly degrading when the state *intentionally* ruins the offender in this way as a form of punishment, or when it *intentionally* inflicts harms that embody the legitimacy of doing so. That is, our *motivation to punish* cannot be to ruin offenders or to inflict harms that embody the legitimacy of ruining them.

We can now ask the following question: If (a) treatment that intentionally and severely risks ruining someone's life embodies the legitimacy of ruining his capacity to realize human value and (b) long-term incarceration represents a severe

[184] *See* Chapter 2 at 165.

risk of ruining an inmate's life, then (c) does the state bring about this outcome intentionally? If it does—as would be the case when it long-term incarcerates for the purposes of retribution or deterrence—then, according to theory presented here, it is impermissibly degrading (Conclusion 1). If it does not—as it would be the case when the state long-term incarcerates for the sole purpose of incapacitation—then we must ask the subsidiary questions of whether the state has met the demands of *proportionality* and *minimization* (Conclusion 2). Let us consider these two conclusions further.

D. Motivated to Ruin

Supporters of retributivist or deterrent long-term incarceration might object that they are not motivated to ruin offenders' lives, nor to severely risk that outcome. All they want is for offenders to experience a certain amount of suffering, consistent with their retributive desert or efficient crime deterrence. Perhaps they do not want 20 years in prison to be like living in Xanadu, they might continue, but that does not mean that they want to ruin offender's lives. They might insist, indeed, that they would much prefer that offenders' lives not be ruined. This is akin, however, to someone (say, Francis) arguing that all she wanted to do was to inflict physical pain on another (say, George) by repeatedly punching him in the face; she didn't want to *give him a black eye*, and she would have much preferred if she could have caused George pain consistent with repeatedly punching him in the face without giving him a black eye. We cannot guarantee the result of any of our actions; we cast risks of good and bad outcomes with everything we do. And the pertinent question, I believe, is *whether or not one is motivated to harm*. Does the agent see the infliction of harm as a reason for action, like D in *Life Force* or Vengeful Terror Bomber? If one is indeed motivated to inflict harm, as either her means or her end, then we should understand her to positively aim at the full range of harms that her actions at least severely risk bringing about (and of which she was aware or perhaps ought to have been aware). Francis was motivated to harm George and

she succeeded; she could not have been sure which of the array of specific harms that she severely risked bringing about would emerge.

If one is *not* motivated to harm, however, the analysis must be different. Consider a mother who drops her baby from the roof of a burning building, hoping that the baby survives, but knowing that it is extremely likely—indeed, a "virtual certainty"—that the baby will die from the fall.[185] She was never motivated to cause harm to her baby and so we cannot say that she aimed at the array of harms that her actions might cause. As such, if the baby dies, we ought not deem her an intentional or obliquely intentional killer. Recounting the statistical likelihood of her action causing the baby's death, and the fact that she knew of this likelihood, is not enough to consider her morally equivalent to someone who, with the same knowledge, was motivated to hurt the baby by dropping it from the roof. We need the DDE and the focus on motivations to reach this sensible conclusion, and to avoid the legal outcome that the mother obliquely intended to kill her baby.[186]

Along these lines, Adam Kolber argues that retributivist theorists must account for all the harmful impacts of the prison experience. They cannot pick and choose, and maintain that only "purposeful" deprivations count as punishment or retribution. He asks us to consider two equally blameworthy offenders, Purp and Fore:

> "They are alike in all pertinent respects and receive identical sentences in identical prisons. The only difference between them is that different aspects of their sentences are imposed intentionally. Purp is purposely limited in his liberty to move about, see family, have

[185] In *R v Woollin* [1999] A.C. 82 (providing that a jury can declare a defendant an intentional killer when death was a "virtual certainty" as a result of his actions, and he was aware of that fact).
[186] In *R v Matthews and Alleyne* [2003] EWCA Crim 192 (CA), the Court of Appeal clarified that when the *Woollin* standard is met the jury is *entitled* to find that the defendant killed intentionally, but that such a finding is not strictly required as a matter of substantive law. One instance where we should not find the defendant to be an intentional killer, even though she appreciated that her actions entailed a virtual certainty of death, is where she was not motivated to harm the decedent, as in the example of the mother and baby. This conclusion flows directly from the understanding that intentions matter, in very large part, only insofar as they are motivationally significant.

> sex, express himself, possess personal property, vote, and so on. By contrast, Fore is purposely limited in moving about, but all of his other hardships are merely foreseen accoutrements of prison."[187]

Kolber explains that, if only "purposeful" deprivations count as punishment or retribution, it would require the absurd conclusion that Fore was punished to a lesser degree than Purp, given that fewer harms were inflicted on him purposively. This would entail the yet more absurd conclusion that Fore deserves a longer sentence than Purp to account for his less severe punishment. Kolber only discusses retributive punishment. He does not consider how his argument relates to deterrent or incapacitory punishments. But, given the above discussion, the implications are relatively straightforward. We should understand the conclusion to be that when the state is motivated to harm offenders, as with retributive or deterrent punishment, the state must be deemed to have intentionally inflicted the full array of harms the punishment severely risks bringing about; when the state is *not* motivated to harm offenders, however, as with specific prevention, this conclusion does not follow. To (A) restrict someone's access to free society for 20 years for the intrinsic or instrumental purpose of harming him is to (B) harm him by severely limiting his access to associational, temporal goods, which, in turn, is to (C) severely risk ruining his life. To intend A is to intend B and C, too. As such, retributivist or deterrence theorists, who are motivated to harm offenders via long-term incarceration, cannot escape the dispositive degradation limitation. The punishment they endorse is egregiously disrespectful—to the humanity-denying degree—of offenders and their diachronic capacities of value generation. In sum, the maximum available sentence for the pursuit of deterrence or retribution must be "non-long-term." It must not represent a severe risk of ruining an offender's life, just in virtue of the amount of time that he is separated from free society. This determination is unavoidably vague, as discussed above, but it will not be difficult

[187] Kolber, "Unintentional Punishment," *supra* note 11 at 3.

to identify communities, like contemporary America and Britain, that reject this principle or fail to apply it in good faith.

Let us consider a final, related objection to Conclusion 1. What if the state—or the collection of people charged with determining sentences—is not actually aware that long-term incarceration represents a severe risk of ruining an offender's life? How, in those cases, could long-term incarceration represent an intentional denial of someone's essentially human value?[188] I argued myself that the deprivation of associational, temporal functionings is a "quiet" injury that is all too easy to overlook. Is long-term incarceration for the purposes of retribution or deterrence impermissibly degrading only when the state has awareness of these deprivations and therefore of the life-ruining component? We can assume that Francis was aware that she was risking a black eye for George when she punched him repeatedly. But what if the retributivist or deterrent state is not aware of the life-ruining risk of long-term incarceration? This objection is not especially worrisome. The state surely has a positive duty to know what it is doing to people when it inflicts penal harm on them, lest it inflict a disproportionate and undeserved amount or type of harm. The very failure to look into the matter would evince the lack of respect for the offender's capacity to build a good life that we have deemed impermissibly degrading.

E. Proportional Long-Term Incapacitation

I have argued that, *with regard to the motivation to inflict harm*, long-term incarceration for the sole purpose of incapacitation is like Strategic Bombing, while long-term incarceration for the purpose of retribution or deterrence is like Vengeful Terror Bombing. The conclusion, though, was that, even if the latter is flatly

[188] Can the state—a corporate entity—even have "awareness" of facts and have related "intentions" or "attitudes" that evince respect or disrespect? For a careful argument that it can, see Anderson and Pildes, *supra* note 176 at 1514-27. Duff's theory of punishment depends on answering this in the affirmative as well, with his vision of the community as a whole speaking to and censuring the offender via state punishment. Cf. Enoch, "Intending," *supra* note 155 at 84-91.

impermissible, the former is permissible only if it meets the proportionality and minimization requirements. What do these two requirements demand in the context of incapacitory long-term incarceration? I will consider five distinct issues.[189]

1. Evidential Assumptions

Proportionality analysis here concerns whether long-term incarceration is proportional to the threat of future crime posed by the offender. Determining this threat level depends upon challenging evidential questions, as briefly considered in Chapter 1 in relation to the social defense theory.[190] Which types of evidence ought to be admissible? Surely, to have any hope of legitimacy, the central form of evidence must be past instances of offending. But what is the role, if any, for actuarial statistics? How high should the state's burden of proof be in establishing that the offender will commit future crimes? Presumably, it should be "beyond a reasonable doubt"?[191] Who ought to be empowered to make factual determinations (e.g. judge, multiple judges, jury of six, jury of twelve, psychiatrist, jury of psychiatrists, parole board)? Should we answer any of these questions differently when considering a sentence of incapacitation versus a sentence concerned with retribution or deterrence, where the issue is not what a person will do in the future, but what they did in the past?[192] What if, as would likely be the case, the trial concerns both

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[189] In Chapter 1, I argued that carceral incapacitation could, in rare cases, be a permissible form of social defensive punishment. As I discuss further in the Conclusion, what follows should thus be understood to form part of the social defense theory.

[190] *See generally* Mike Redmayne, *Character in the Criminal Trial* (Oxford: Oxford University Press, 2015). *See* Chapter 1 at 65-6.

[191] *Cf.* Carol Steiker, "Proportionality as a Limit on Preventive Justice: Promises and Pitfalls," in eds. Andrew Ashworth, Lucia Zedner, and Patrick Tomlin, *Prevention and the Limits of the Criminal Law* (Oxford: Oxford University Press, 2013), 194-213, at 202 ("The degree of procedural reliability that is required increases with the intrusiveness of the preventive intervention at issue, with long-term confinement requiring the greatest assurances of reliability."); Michael Louis Corrado, "Punishment and the Wild Beast of Prey," *Journal of Criminal Law and Criminology* 86 (1996): 778-814, at 793-94 (arguing that the burden of proof ought to be lower for preventive detention than for backwards-looking punishment, because inaccuracy in the former case has greater costs, in the form of people harmed by those we ought to have detained).

[192] Note that forward-looking social defensive punishment, aiming to erase an offender's *ongoing* criminality contributions, could be geared toward deterrence and not incapacitation. *See* Chapter 1 at 58-9.

backward- and forward-looking questions? This is a very small subset of the many complex questions that we must answer in order to justify any form of preventive treatment, let alone preventive long-term incarceration.[193] All of this is rife with the possibility for abuse, of course, with regard to the presumption of innocence and the broader prohibition on merely sacrificing individuals toward the greater good of crime prevention.[194] Imagine, say, that the state could appeal only to actuarial statistics (e.g. about people from certain postcodes who pray at certain mosques), with the defendant bearing the burden of proof to establish with sufficient confidence that he is committed to the authority of the law and the rights of others. Nonetheless, let us move forward with the assumption that the evidential questions can in some cases be answered sufficiently well, such that preventative treatment can in those cases be a legitimate and practicable penal reason. Consider, at the extreme, a serial killer who himself insists that he will try to kill again.[195] To be clear, though, if this assumption proves altogether too brave, with sufficiently reliable predictions elusive or with the possibility of abuse uncontainable, then incapacitation would be impermissible.

2. Life-Ruining Harm and the State's Burden

If the assumption indeed holds, the next question to consider is as follows. What would need to be proven at the incapacitation trial—or the incapacitation phase of the trial—in terms of an offender's threat level, for long-term incarceration to be a proportionate means of incapacitation? Given that long-term incarceration involves, at a minimum, depriving someone of the freedom of

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[193] For further discussion, see, e.g., Norval Morris, "Keynote Address: Predators and Politics," *Puget Sound Law Review* 15 (1992): 517-23; D.J. Cooke and C. Michi, "Limitations of diagnostic precision and predictive utility in the individual case: a challenge for forensic practice," *Law and Human Behavior* 34 (2010): 259-74.

[194] *See* Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (Oxford: Oxford University Press, 2012); Bernard Harcourt, *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age* (Chicago and London: University of Chicago Press, 2007). *See also* Chapter 1 at 59-66.

[195] For real-world examples rather close to this, see Christopher Slobogin, "A Jurisprudence of Dangerousness," *Northwestern Law Review* 98 (2003): 1-62, at 1.

general association for many years, what needs to be proven, at a minimum, is that the state will prevent an equal or greater risk of life-ruining harm from being inflicted on at least one other person.[196] Perhaps it ought to be understood as a statistical matter in terms of (a) the probability of harm inflicted or prevented and (b) the degree of harm inflicted or prevented, keeping in mind that we are less than 100% sure than the offender will offend, but we are certain that we will inflict grave injuries on the offender via long-term incarceration. We might frame the question in this manner: Are we sufficiently convinced that the offender will inflict deprivations on others as or more damaging than the potentially life-ruining deprivations that we will inflict upon him? This would seem to limit long-term incarceration to the prevention of the most severe offenses (e.g. murder, rape, child sexual abuse, and grievous bodily harm). If someone were extremely likely to, say, steal a car in the future, then long-term incarceration would be disproportionate and impermissible. With this framework in mind, it seems that the first question that needs to be answered in the affirmative, so as to justify a term of incarceration that could well become long-term incarceration, ought to be at least close to this: Is it beyond a reasonable doubt that the offender will attempt to kill, rape, sexually abuse a child, or commit grievous bodily harm in the future, if he is not incarcerated?

There is, however, a complication. What if it's not one car, but 1,000 cars? Would not the inconvenience and economic cost to the 1,000 car owners equate to one life? What about 5,000 cars? I argued above that, when considering *intrapersonal* harms—100 days in prison for one person vs. 10,000 days in prison for that same person—there is a qualitative difference between those harms that severely risk ruining a person's life and those that do not. Implied was the conclusion that life-ruining harms are not only *qualitatively* worse than non-life-ruining harms for an individual, but also *lexically* worse. If we imagine non-life ruining harms on

[196] *See id.* at 20 (arguing that, given the grave harm it causes, preventive detention ought to be limited to exceptional cases).

one side (e.g. common allergies) and harms that severely risk ruining one's life on the other (e.g. brain damage), no amount of non-life-ruining harm for an individual could be worse for that individual than a single life-ruining harm.[197] This follows straightforwardly from the conclusion that value and disvalue need to be understand in the context of a person's life *as a whole*. Though the logic is not as tight, I think that we can extend this argument to the distinct issue of *interpersonal* harms. The idea is that a life-ruining harm for *one person* is worse, impartially considered, than any amount of non-life ruining harm inflicted on *other people*. This would lead us to conclude, again, that long-term incarceration is justifiable only when the person is sufficiently likely to commit potentially life-ruining offenses like murder, rape, child sexual abuse, and grievous bodily harm were he released. Prevention of a great amount of non-life ruining harm, like the prevention of many car thefts, would not suffice. There is, however, an ongoing debate on when and how to aggregate harms when making interpersonal comparisons. It derives in large part from Thomas Scanlon's hypothetical: Should we allow someone to be very painfully shocked for 15 minutes, or save him from the pain at the cost of billions of people missing the final 15 minutes of a World Cup match?[198] I think the concept of a life-ruining harm and the idea that life-ruining harms are lexically worse than non-life ruining harms can illuminate this debate. But I will not engage with the details of the contending arguments. Let us move forward with what I think is the intuitive position, that only preventing a life-ruining harm can justify inflicting a life-ruining harm, but with the understanding that the debate exists, and that however it concludes will decisively impact our analysis. If the counter-intuitive position prevails, such that we ought to, say, let a person die so that the billions

[197] This assumes that the putatively non-life ruining harms in question do not aggregate into a harm that severely risks ruining one's life (e.g. one's allergies, in combination, could be so bad that she has to live in a sanitized, indoor environment and loses the capacity to engage with the world in valuable ways).

[198] Thomas Scanlon, *What We Owe To Each Other* (Cambridge, MA: Belknap Press, 1998), 235.

can enjoy one extra scoop of ice cream during their lives, then long-term incapacitation would be proportionate if the *collective harms* the offender is sufficiently likely to cause would be as or more damaging, considered together, than severely risking the ruin of a single person's life by denying him associative opportunities.

3. Rehabilitation and Release

The third issue concerns the offender's right to prove that he is no longer sufficiently unreliable with regard to upholding the criminal law for his incarceration to be proportional. The logic of long-term incapacitatory incarceration depends upon the offender maintaining a set of normative commitments that involves denying the authority of the law and the rights of other people as an ongoing matter.[199] Once that set of commitments changes sufficiently, such that the evidential requirements for incapacitation are not met, then *at that moment* further incarceration becomes disproportional. Accordingly, the state ought to provide the offender with regular opportunities to prove that he no longer meets the evidential requirements.[200] As Andrew Ashworth and Lucia Zedner write, "the absence of periodic review and impossibility of release suggests that the preventive element is subsidiary to the punitive."[201] It would seem, furthermore, that the burden ought to remain on the state to prove that the offender warrants further incapacitation.[202] As a corollary to these concerns, and as part of its minimization duty, the state must provide the incarcerated offender with appropriate educational or psychological resources, which might aid his rehabilitation.[203] There is a certain analogy

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[199] *See* Chapter 1 at 57-8.

[200] *See* Steiker, "Proportionality," *supra* note 191 at 198, 203-4; Rinat Kitai-Sangero, "The Limits of Preventive Detention," *McGeorge Law Review* 40 (2016): 903-34, at 298.

[201] Ashworth and Zedner, *Preventive Justice, supra* note 165 at 156.

[202] California's "Sexually Violent Predator" law requires an application for extension every two years, at which point it must be determined at trial beyond a reasonable doubt that the offender fulfils the criteria for confinement. James Vess, "Preventive Detention versus Civil Confinement: Alternative Policies for Protection in New Zealand and California," *Psychiatry, Psychology and Law* 12 (2005): 357–66, at 360-62.

[203] *See Case of M. v Germany* (App no. 19359/04) IHLR 3709 (ECHR 2009), at para [129] ("persons subject to preventive detention orders must be afforded such support and care as part of a genuine attempt to reduce the risk that they will reoffend, thus serving the purpose of crime prevention and

between incapacitory incarceration and quarantine[204]; and we can understand the analogy here to involve the quarantining authority's duty to regularly test the person confined to ensure that she no longer has the disease, or is no longer contagious, as well as to provide medical care, so as to bring her back to health sooner.

With regard to the state's appreciation of the offender's diachronic capacities, this sharpens the difference between incapacitory long-term incarceration and retributive or deterrent long-term incarceration. The incapacitory sentencer revisits the issue regularly, let us say every six to twelve months. At each interval, she hopes that the offender will rehabilitate himself in the interim and she will provide him with great resources toward this end; though, she knows that he very well may not rehabilitate himself, in part because prison is not the ideal environment for rehabilitation, and thus that she is adding 6-12 months to what may end up as a very long term.[205] In this way, it is not long-term incarceration, but *potentially* long-term incarceration. At no point does she declare, as the retributive and deterrent long-term sentencer will: "Go away from free society for 20 years." She says: "Come back in 6-12 months." There is thus not the same process, or the same moment, of seeing the offender's life as a whole and then deciding to effectively erase a large portion. Of course, a reasonable retributive or deterrent sentencer will also be committed to providing the offender with opportunities for rehabilitation, but we are assuming—as is often the case in the US and the UK—that successful rehabilitation will not reduce the retributive or deterrent sentence, or at least will not

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making their release possible'); *cf. Kansas v. Hendricks*, 521 US 346 (1997) (approving Hendrick's confinement under Kansas's "Sexually Violent Predator" law, even though the State had failed to prove him with therapeutic resources). *See also* Slobogin, "A Jurisprudence of Dangerousness," *supra* note 196 at 16.

[204] *See Jacobson v. Massachusetts,* 197 U.S. 11, 34-35 (1905).

[205] Given that prison is not the ideal environment for rehabilitation, any argument that incarceration, long-term or otherwise, can be justified purely on rehabilitative grounds is immediately suspect. At best, rehabilitation in the prison context is a component of *penal parsimony*, as successful rehabilitation might limit the costs, both to the offender and to society, of pursuing whatever aim in fact justifies his confinement. *See* discussion *supra* at note 135.

reduce it to a "non-long-term" sentence. To be clear, this does not accurately portray every real-world sentencer concerned to incapacitate. Often, their message indeed is: "Go away from free society for 20 years." Nonetheless, we are examining principle here, and the point is that the logic of incapacitation *could* coherently embody a different message when it comes to long-term incarceration, by comparison to the logic of retribution and deterrence.

This issue relates to the ECHR's "right to hope" line of cases, which hold that life sentences without the possibility for parole violate Article 3 of the European Convention on Human Rights.[206] Article 3 prohibits torture as well as "inhuman or degrading treatment or punishment." The judges were concerned, mainly, to prevent terms of incarceration that, given an offender's rehabilitation, were no longer justifiable by reference to a member state's penal rationale.

> "The Convention does not prohibit the imposition of a life sentence on those convicted of especially serious crimes, such as murder. Yet to be compatible with Article 3 such a sentence must be reducible *de jure* and *de facto*, meaning that there must be both a prospect of release for the prisoner and a possibility of review. The basis of such review must extend to assessing whether there are legitimate penological grounds for the continuing incarceration of the prisoner. These grounds include punishment, deterrence, public protection and rehabilitation."[207]

In this way, the Court aimed to establish a punishment limitation "internal" to the state's positive theory of punishment. Do the reasons that you, Member State, have to inflict penal harm justify the offender's continued incarceration? If not, the Court concludes, the offender's further incarceration violates Article 3. While we are maintaining that long-term incarceration for the reason of incapacitation is, in some cases, not impermissibly degrading, the "internal" proportionality question

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[206] *Vinter and Others v. the United Kingdom* [GC], (App nos. 66069/09, 130/10 and 3896/10) [2013] ECHR 786; *Trabelsi v Belgium* (App no. 140/10) [2014] ECHR 893; *Hutchinson v. the United Kingdom* (App no. 57592/08) [2017] ECHR 65. *See* discussion of Article 3 in Chapter 2 at 106-110.
[207] *Hutchinson*, *supra* note 206 at para [42].

nonetheless remains, as the Court understands, with regard to the amount and degree of carceral incapacitation, and it requires the possibility of "review" and "release." In a few places, the Court does gesture toward a more robust external stop on the pursuit of non-rehabilitative penal rationales—akin to a dispositive degradation limitation—which would guarantee offenders the opportunity for release upon their rehabilitation, as a matter of their "human dignity."[208] Regardless, the most recent case, *Hutchinson v the UK*, limited the scope of the legal "right to hope" dramatically. The ECHR provided that an offender's life term would be legal, so long as there was some chance, even a very remote chance, of release upon his rehabilitation, as set out in advance by relatively clear procedures. The Court found that Hutchinson's life term was acceptable, given the UK Secretary of State's power to release him, as set out in Section 30 of the Crime (Sentences) Act:

> "(1) The Secretary of State may at any time release a life prisoner on licence if he is satisfied that exceptional circumstances exist which justify the prisoner' s release on compassionate grounds."[209]

The ECHR followed the (England and Wales) Court of Appeal's judgment in *R v. McLoughlin* in holding that the "exceptional circumstances" and "compassionate grounds" language did not unduly limit the Secretary of State to the current practice of releasing offenders only when they were terminally ill, bedridden, or similarly limited.[210] Such a thoroughly discretionary regime ("The Secretary of State *may* at any time release a life prisoner"), with a customarily if not necessarily legally constrained standard for release ("exceptional circumstances exist"), one that furthermore denies offenders' regular occasions to prove their rehabilitation, would be far too limited an opportunity for release when it comes to the logic of incapacitory long-term incarceration set out here.

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[208] *See Vinter, supra* note 206 at para [113]. *See also* Judge Power-Forde's concurrence, *id.* at 54.
[209] The Crime (Sentences) Act 1997, s.30(1).
[210] *R v. McLoughlin* [2014] EWCA Crim 188.

4. Mixed Motives

The fourth issue concerns the question of "mixed motives." Let us assume that the state has proven with sufficient confidence that the offender is sufficiently likely to, say, kill or rape again, such that long-term incapacitation—or, more precisely, *potentially* long-term incapacitation—is proportional. What if, however, the state does not only want to incapacitate the offender, but also has "retributive hatred" for him and wants to make him suffer by preventing him from associating with other people outside of prison for thirty years?[211] If the incapacitory penal motivation is permissible, but the retributive motivation is not—given that it embodies a rejection of the offender's essentially human value—is the offender's long-term incarceration as a whole permissible? I think the answer has to be *yes*. Imagine that A is running across a very long hall toward B with sword, clearly intending to kill B. B has a gun and, when A is in range, he shoots at B. B has mixed motives, though. He wants to stop A's attack and save his own life, but he also wants to act out his anger towards A by killing him. Indeed, as he sees A running across the hall, B makes a promise to himself that if he is able to prevent A's attack without killing him, then he will later kill him in cold blood, as a matter of revenge. If B has no less harmful way of defending himself, it seems clear that he is permitted to shoot A, even if by doing so he acts upon an improper motive at the same time. To bring the analogy around, it would entail that if long-term incarceration is genuinely justified for incapacitory reasons, just like B is genuinely justified in shooting in self-defense, then it will be justified even if the state acts for impermissible reasons of retribution or deterrence at the same time. The justification of long-term incarceration will, however, still depend on the state fulfilling

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[211] *See* Jeffrie G. Murphy, "Retributive Hatred: An Essay on Criminal Liability and the Emotions," in eds.
R. G. Frey and Christopher W. Morris, *Liability and Responsibility: Essays in Law and Morals* (Cambridge: Cambridge University Press, 1991).

its "minimization" duty, as I discuss further presently, which it will be much less likely to fulfill if it also long-term incarcerates for reasons of retribution.[212]

5. Non-Carceral Incapacitation and Penal Deprivation

If long-term incarceration indeed represented a proportional means of incapacitation, given the severity of the offense or offenses that the inmate is sufficiently likely to commit, the "minimization of harm" question remains nonetheless. This involves at least two distinct components. First, the long-term incarcerating state has a duty to ensure that the punishment entails the smallest degree of deprivation possible beyond the unavoidable deprivation of the freedom of general association. While there will be constraints on resources, inevitably, the state has a duty to make incapacitory long-term incarceration much more like the Bastoy, and much less like San Quinten, to say nothing of the ADX Florence.[213] Second, just as the Strategic Bomber must, if possible, bomb the munitions factory without causing the children's death, the incapacitating state must see if there are means less harmful than long-term incarceration of securing protection for other people in society. For instance, perhaps monitoring, tracking, probation, or some combination thereof, would be sufficient.[214] While all such methods entail, among other things, a severe loss of privacy, the loss of privacy is surely greater within prison, to say nothing of the other deprivations inherent to incarceration. Most importantly, those non-carceral forms of restraint need not significantly limit one's ability to associate with family, friends, and colleagues. I cannot determine here

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[212] *See* Thomas Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Cambridge, MA: Belknap Press, 2008), 12 (arguing that an agent's intention can have "predictive significance" in terms of how she will respond to real-world options).

[213] *See* Ashworth and Zedner, *Preventive Justice, supra* note 165 at 169.

[214] *See generally* Mike Nellis, Kristel Beyens, and Dan Kaminski (eds.), *Electronically Monitored Punishment: International and Critical Perspectives* (New York: Routledge, 2013); Mike Nellis, "Understanding the Electronic Monitoring of Offenders in Europe: Expansion, Regulation and Prospects," *Crime, Law and Social Change* 62 (2014): 489-510; Kirsty Hudon and Trevor Jones, "Satellite Tracking of Offenders and Integrated Offender Management: A Local Case Study," *Howard Journal of Crime and Justice* 55 (2016): 188-206; Brian K. Payne and Matthew DeMichele, "Sex offender policies: Considering unanticipated consequences of GPS sex offender monitoring," *Aggression and Violent Behavior* 16 (2011): 177-187.

whether non-carceral forms of protection are sufficient for those especially dangerous individuals for whom incarceration would otherwise represent a proportionate means of incapacitation. We can conclude, at a minimum, that the state has a duty to find out, especially given recent advances in technology.

Conclusion

This chapter was concerned to assess the permissibility of long-term incarceration by reference to our degradation limitations. It examined the wide array of possible deprivations inherent to incarceration *simpliciter* before arguing that the deprivational minimum and essence of incarceration is the denial of the freedom of general association. It then argued that, regardless of prison quality, denying an offender the freedom of general association for a long enough period of time makes it extremely difficult for him to realize certain temporal and associational goods which are constitutive of a good life. Long-term incarceration, in this way, represents a severe risk of ruining an offender's life. This chapter continued that the permissibility of long-term incarceration depends on whether or not the state is motivated to harm the offender. If the state is so motivated, in accordance with retributivist or deterrent theories of punishment, then long-term incarceration surpasses a dispositive degradation limitation. It is impermissible morally, violating our most basic liberal commitment to human inviolability, and it ought to be illegal. It disrespects the offender in a manner that is not qualitatively different than penal torture, insofar as both "ruin" the offender's capacity to realize human value or embody the legitimacy of doing so. This chapter concluded, however, that if the state long-term incarcerates purely for reasons of incapacitation, such that it is in no way motivated to harm the offender, then long-term incarceration can in principle be permissible, so long as it is proportional to the offender's established threat of harm, and so long as the state fulfills its duty to minimize penal harm.

Conclusion

This thesis has attempted to outline a distinctly *liberal* conception of the criminal law and criminal sentencing. The underlying question has been this: how much and what sort of harm may the state inflict on an offender, given that, consistent with our liberal ideals, he is inviolable? In pursuing this question, I have argued that two sets of reasons are determinative: the reasons that justify the infliction of penal harm and the reasons that limit the infliction of degrading punishments. While these sets of reasons are relatively independent from one another, as I argued in the Introduction, both are grounded upon the same commitment to individual inviolability.

A. Corrective Justice and Social Defense

In Part I, I explained that this commitment is constitutive of a moral principle: we must not sacrifice individuals as a means of mitigating harms or threats for which they are not responsible. The challenge, in justifying the infliction of *any* penal harm, is to understand how this principle is consistent with the practice of deterrent punishment. When it comes to deterrent punishment, the state harms an offender for the purpose of scaring off would-be future offenders, for whom the offender has no responsibility. How is this *not* in violation of the non-sacrifice principle? In responding to this challenge, I first considered and ruled out possible utilitarian, retributivist, and Hegelian solutions. I then examined the function of the criminal law as a state institution. I argued that its function is to provide citizens with a system of protections—protections against murder, rape, assault, and so forth—which they can rely upon for their assured civic liberty. An effective criminal law thus enables the pursuit of the *associational* human good that I forwarded in Chapter 3, by affording the possibility of secure human interactions. I then argued that an offender hinders the institutional aims of the criminal law, and thereby diminishes the assured liberty of people within the jurisdiction when he fails to self-apply a criminal law norm. When he does this, he contributes to the social

threat of "criminality." Criminality—the objective threat of crime within a jurisdiction—represents a form of socio-legal pollution. It chills the exercise of our rights, forces us to take expensive precautions, and exposes us to unreasonable risks of harm. The offender thus has a duty, owed to society as a whole, to repair the harm caused by his criminality contributions. The presence of this duty, I argued, explains how the infliction of deterrent punishment can be consistent with his inviolability. When the state harms him as a prudential warning to would-be future offenders, it not merely sacrificing him for the greater good, to mitigate a problem for which he has no responsibility. The state is rather enforcing an equitable remedy in response to his own wrongdoing. It is compelling him to fulfill his own personal duty to "erase" his criminality contributions. Over time, ideally—with future offenders appropriately deterred—it would be as if he had never contributed to criminality at all, in terms of the average threat level faced by society.

This conceptual framework, I explained, entails two related theories of punishment: the corrective justice and the social defense theories of punishment. The corrective justice theory concerns the offender's *past* criminality contributions, while the social defense theory concerns the offender's possibly *ongoing* criminality contributions. The two theories, while both conceiving of punishment as a means of repairing criminality contributions, have very different evidential bases. With the corrective justice theory, the completed or attempted past offense is dispositive proof that the offender contributed to criminality in the past and thus that he owes a duty of rectification. What evidence suffices to prove that the social defense theory applies—such that the offender is unreasonably unreliable with regard to upholding the criminal law as an *ongoing* matter—is considerably more fraught.

The corrective justice and social defense theories generate three "internal" punishment limits, I argued—that is, three limits associated with the demand to inflict penal harm only insofar as it furthers the realization of its own justificatory goods. According to these two theories, legitimate punishment must be (1)

parsimonious, (2) reparative, and (3) equitable. The limitations ought to be considered in that order. Before asking whether it is equitable, we ask whether it is reparative; and before asking if it is reparative, we ask if it is parsimonious. Penal harm is *parsimonious* when it acts to deter criminality and when it is the most efficient use of crime prevention resources. This first limit derives from the two theories' non-retributivism. That is, the two theories conceive of penal harm as, at best, an instrumental and not an intrinsic good. Penal harm is *reparative* when it is the means by which the offender fulfills his duty of repair. Thus, if Alex, with his intention to steal a car, increased criminality by 10 units, he (and other car thieves) can be harmed to deter 10 units of criminality, *but no more*. Beyond the 10 unit mark, any further harm would be *non-reparative*. It would be an impermissible violation of the non-sacrifice principle. It might be beneficial for society to inflict further harms upon him, but securing those benefits is not his responsibility. Finally, penal harm is *equitable* when it is not entirely out of proportion to the stringency of the offender's duty of repair. This limitation applies—or would apply—in those cases where penal harm was somehow inefficient. If, in the case of Alex and other car thieves, the only way to generate their respective 10 units of deterrence was to incarcerate them for 30 years each, the two theories would deem such a punishment *inequitable* and therefore impermissible. Such a degree of harm would bear the entirely wrong relationship or proportion to the stringency of Alex's own duty and to the reparative benefit gained by society as a result.

While the deterrent threat of at least *some* state punishment is almost certainly necessary for maintaining civic order in modern society, as I argued, these three internal limitations would rule out the US Federal Sentencing Guidelines, at least, as impermissibly severe. This results from the tenuous relationship between sentence severity and deterrence, as well as all that we might otherwise do with crime preventative resources, from increased investment in childhood education to increased police presence. That is, the extremely long American sentences inflict

merely *wanton* or *gratuitous* harm, with the state wasting its crime preventive resources on injuring and warehousing offenders, who are forced to bear harms that have little relationship to their own personal duties of repair. The ideal from the perspective of the two theories is low levels of criminality and low sentence severity; certain European nations have proven that this is not overly idealistic, though I emphasized that many variables contribute to such an outcome. Finally, these three internal limitations cannot ground all of our intuitive sentencing principles regarding the pursuit of deterrence. Were the offender's criminality contributions especially severe, these limits could not rule out long-term incarceration for the purpose of deterrence—or any other severely degrading punishment—as an internal matter of principle. They could only rule them out, as I explained, as a contingent empirical matter regarding the deterrent impact of such punishments. This was a key point. Degradation could very well be parsimonious, reparative, and equitable. There is nothing conceptually incoherent in that statement.

While the corrective justice and social defense theories are primarily concerned to justify a schedule of deterrent punishments, I argued that the social defense theory can also justify forms of specific prevention, including carceral incapacitation. But, once more, why does this forward-looking theory not *always* justify carceral incapacitation? There are two reasons, as I explained. First, depending on the structure of the prison and the types of criminal norms that the offender is failing to self-apply, carceral incapacitation may simply shunt the costs of an offender's unreliability with regard to the criminal law onto other imprisoned offenders, who do not lose their right to the criminal law's protections inside prison. As such, the offender's duty to erase his ongoing criminality contributions would often remain unfulfilled unless his imprisonment acted to deter other offenders. Second, for reasons that have become clearer in Chapter 3, we should not assume that prison, for any length of time, is the preferred method of punishment. Even if a short-term sentence does not represent a severe risk of ruining the offender's

life, it is still hugely disruptive, especially when taking into account post-carceral deprivations.[1] Imposing fines, terms of community service, and forms of monitoring should be the presumptive methods of reducing the ongoing level of criminality in society—and even if that means that offenders remain free and potentially unreformed in society. Consistent with the demand for "parsimonious" punishments, we must prefer those punishments that enable an offender to fulfill his duty with the smallest degree of injury in the process. When, though, is carceral incapacitation an appropriate social defensive remedy, given that it could very well become *long-term* carceral incapacitation, if the offender does not reform himself? As I argued in Chapter 3, this ought to be a possibility only when they state can sufficiently prove—something close to beyond a reasonable doubt—that the offender will attempt to commit a potentially life-ruining offense like murder, rape, child sexual abuse, or grievous bodily harm in the future if he is not incarcerated. This assumes, furthermore, that prison will be structured or monitored in such a way that he does not pose such a risk to other inmates.

B. Long-term Incarceration and Degradation

The second set of reasons that I considered in this thesis are degradation-limiting penal reasons. These reasons operate with relative independence from other penal considerations. They preclude certain punishments as impermissibly degrading, regardless of the fact that the corrective justice and social defense theories may recommend such treatment as the appropriate response to the offender's wrongdoing. In considering the content and nature of this set of reasons, I examined the wrong-making features of torture, generally considered the exemplar of impermissibly degrading treatment. The wrong-making features of torture, I maintained in Chapter 2, simply are our degradation-limiting reasons, or at least the most fundamental of such reasons.

[1] *See* Chapter 3 at 218-19.

In assessing torture's normative features, I first ruled out the legal conception of torture's wrongness ("the intentional infliction of severe suffering"), as well as the conceptions forwarded by Henry Shue ("an assault on the defenseless"), David Sussman ("a kind of forced self-betrayal"), and Matthew Kramer ("torturers sully their moral integrity by endeavouring to elevate themselves to a position of minutely directive dominance"), because, among other reasons, they are all overly broad, encompassing practices that are clearly not torture. I then considered a number of first-hand accounts by victims as I developed a novel conception of torture, concluding that torture constitutes *the intentional infliction of a suffusive panic*. Torture overwhelms and obliterates, converting the victim into a "shrilly, squealing piglet," in Jean Améry's words.[2]

The concepts of respect and disrespect, I continued in Chapter 2, are central to understanding the wrong-making features of torture, and therefore of impermissible degradation more generally. Disrespect constitutes a rejection, to some degree, of something's value. It may take non-symbolic or symbolic forms, with the former representing a physical interference with something's value-generating mechanism, and with the latter being more cultural means of expression (e.g. language, but also actions like spitting on someone). I was careful to emphasize, however, that non-symbolic forms of disrespect are *also* means of expression. Indeed, they are usually the strongest, most authentic means of expression. Compare Alex saying to Billie, "You're worthless; you should die!," a symbolic form of disrespect, with Alex murdering Billie, a non-symbolic form of disrespect.

To understand the degree of torture's disrespect, I continued, we need to know what humans do to exhibit value; only then could we understand, most importantly, how torture non-symbolically interferes with someone's value-generating mechanism. I argued that the human value-generating mechanism is the

[2] Jean Améry, *At the Mind's Limit: Contemplations by a Survivor on Auschwitz and its Realities*, trans. Sidney Rosenfeld and Stella P. Rosenfeld (Bloomington: Indiana University Press, 1980), 35.

meta-capacity for practical reason—the combined capacities of at least autonomy, value-recognition, memory, and imagination—which a person can employ to stitch moments together through time to construct a good life as a whole. While suffering may sometimes represent an investment into one's good life, I argued that humans retain the capacity to generate *disvalue*, which constitutes merely *wanton* suffering. With this conception of human value in mind, we saw how torture, by inflicting a *make it stop right now* panic, is the archetype of disrespect for a person, with her special capacities for generating value and disvalue. Torture completely halts the victim's value generating capacities, as she loses the thread of her diachronic identity, and completely maximizes her capacity for disvalue, with her consciousness saturated with panic. Torture forces a *diachronic* being capable of living broadly and purposefully through time into howling *synchronic* being whose awareness is restricted to a perfectly miserably present.

There is a spectrum of disrespect, I continued, with *torture for an eternity*—suffusive panic forever—at the very top. Actions less disrespectful than eternal torture, however, can still be impermissibly disrespectful and degrading. Treatment is dispositively disrespectful, I argued, when it "ruins" someone's capacity to build a good life, or embodies the legitimacy of doing so. Such an action rejects someone's humanity, by rejecting the worth of her essentially human, diachronic capacities. Certain symbolic forms of disrespect could be so extreme as to qualify, I argued, as with Derby's Dose. Forcing someone to eat human excrement and then gagging them for four hours—just like strapping someone down and running electricity through her body until her flesh burns and she wails—is to genuinely reject her humanity, to express the view that her essentially human capacities for generating value and disvalue are of no moment. This is so even if this rejection is primarily symbolical, related to the process by which forcing someone to do something utterly disgusting symbolically associates them with nonhuman animals.

We can see here how a commitment to human inviolability, with its refusal to merely sacrifice people for the greater good, grounds our degradation limitations, as well. These limitations foreclose actions that genuinely reject someone's humanity, regardless of how useful or satisfying such a rejection might be to the wider society, and indeed regardless of any other reasons pushing in favor of such treatment. Human inviolability, I argued, requires that agents incorporate into their reasoning a certain profoundly high valuation of each person, as well as a commitment to the separateness of persons, such that we do not view individuals as merely fungible and tradeable components of a wider social good. And it thus rules out actions, like the tortures suffered by Améry, Timerman, and Alleg, and like Derby's Dose, that could only have been carried out intentionally if the agent rejected such a valuation and commitment.

In Chapter 3, I employed this framework to assess whether long-term incarceration is impermissibly degrading—*in addition* to it generally being ruled out by the corrective justice and social defense theories as a contingent empirical matter. I first considered the deprivations inherent to incarceration *simpliciter,* ignoring the variable of sentence length. I followed the capability approach of Martha Nussbaum and Amartya Sen in defining a deprivation as a limitation of access to a valuable activity or state of being. I examined the great diversity of penal deprivations, from the foul horror of the *Tullianum* and the Gitarama Prison, to the austere misery of the Pentonville and the ADX Florence, to San Quinten, where the threat of violence tempers the boredom, to the FCI Morgantown, with its empty days, and, finally, to the Bastoy Prison, where inmates are separated from society, but to a quiet island of beaches, bikes, and farm animals.

It is this separation from society, I argued, which represents the deprivational minimum and essence of incarceration. I referred to it as the deprivation of the freedom of general association. To some very significant degree, inmates lose access to those people they associated with before their incarceration, as well as to

those *new people* that they might have interacted with in free society. I then added the variable of sentence length to the analysis, considering what it means to deprive someone of the freedom of general association for decades. I distinguished between *temporal goods*, which require cultivation over time to realize, and *momentary goods*, which can be realized fully in the moment. I then argued that the most important goods from the perspective of building a good life as a whole are both *temporal* and *associational*, in the sense that they require cultivation over time in concert with other people, like maintaining a family or long-term friendship or developing professional expertise. I concluded that long-term incarceration, by severely limiting an inmate's access to temporal, associational goods, represents a severe risk of ruining his life. It becomes extremely challenging for him to use his practical reasoning capacity to infuse his life as a whole with value.

If impermissible degradation embodies an affirmative rejection of someone's humanity, then its degradation-making features must be intentionally inflicted, I argued in Chapter 3. Whether long-term incarceration is impermissibly degrading thus depends on the underlying theory of punishment. When carried out for the purpose of incapacitation, I concluded that long-term incarceration can in principle be permissible. This applies to the social defense theory in the rare case where it justifies carceral incapacitation. Given that the incapacitory state is not motivated to harm the offender, the life injuries that long-term incarceration generates can be unintentional. They can be *byproducts* of the aim to prevent him from committing very serious offenses in the future. This is evidenced by the fact that the incapacitory state inflicts only *potentially* long-term incarceration, assuming the state fulfills its duty to provide the offender with significant rehabilitative resources, as well as regular opportunities to prove that the state can no longer meet its evidential burden.

When long-term incarceration is carried out for reasons of retribution or deterrence, however, I argued that the moral considerations are very different. This

applies to deterrent long-term incarceration in accordance with the corrective justice theory, as well as the social defense theory in those cases where it licenses deterrent punishment. In all such instances, the state is indeed motivated to harm the offender. It sees harming the offender in a way that severely risks ruining his life as *a reason for action*, that is, as an intrinsic or instrumental *good* to positively aim at. This is impermissibly disrespectful and degrading. With regard to respecting an offender's value, which is grounded on his diachronic capacities, I concluded that it is not qualitatively different from penal torture. It affirmatively rejects the offender's humanity, by intentionally and severely risking that he fails to exercise his essentially human capacities successfully. In sum, when a liberal state pursues deterrence or retribution, the maximum available sentence cannot be "long-term." For a liberal state—that is, a state committed to human inviolability—cannot intentionally ruin an offender's life, nor can it intentionally inflict a severe risk of that outcome, just as it cannot inflict penal torture.

C. Future Research

This has been a moral argument about a legal institution. If it has succeeded that means that we ought to reform our criminal sentencing laws in the US, as well as the UK. This thesis is thus directly relevant for debates within the Congress and Parliament, and relevant agencies, like the US Sentencing Commission. However, the courts also play a crucial role in this context; and this had not been a legal brief. Nonetheless, the jurisprudence over the 8th Amendment prohibition on "cruel and unusual" punishments is distinctly moral, as indicated above, with its concern for offenders' "human dignity," and its architectonic prohibition on penal torture. As such, the moral reasons presented here are, to some significant degree, distinctly *legal* reasons, and I hope to see how we might convert this moral argument into a full-fledged legal argument that long-term incarceration, at least for reasons of deterrence or retribution, is "cruel and unusual" and therefore unconstitutional.

Coda: Joe Byrd Cemetery

When inmates die in Texas state prison, and their families are unable or uninterested in claiming their remains, they are buried on "Peckerwood Hill" in Walker County.[3] Officially known as Joe Byrd Cemetery, it has been in operation since the 1850s. Many of the tombstones only have prison identification numbers; and some are completely blank. Jack Washman, from Corpus Christi, is in his mid-50s. Clad in his white uniform, in the Texas summer heat, under the gaze of his crew boss, he worked to place tombstones over seven new graves. "I can't judge them. Only God can do that," he said of the recently deceased. "You can't work out here and not recognize your own mortality."

Washman is serving 38 years for heroin possession.

[3] Allan Turner, "Eternity's gate slowly closing at Peckerwood Hill," *The Houston Chronicle,* August 3, 2012, https://www.chron.com/news/houston-texas/article/Eternity-s-gate-slowly-closing-at-Peckerwood-Hill-3761731.php

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