**What does the Supreme Court Regard as Cruel and Unusual Punishment? An Analysis of Criminal Justice Cases**

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The purpose of this paper is to analyze the Supreme Court’s jurisprudence on the question of punishment. The Eighth Amendment bans cruel and unusual punishment, and the Supreme Court understands that to mean that the Eight Amendment applies only to criminal cases. The Court does not consider civil regulations, which can be quite punitive, to be punishment under the Eighth Amendment. Thus, laws that ban convicted sex offenders from living within 1,000 feet of a park, playground, or any place where children congregate is not punishment under the Eighth Amendment. Not only do sex offenders not agree that these regulations are not punishment, judges, legislators, and a fair cross-section of the American public do not agree, either. There is a difference between how the Court understands punishment and how legal theorists, legal practitioners, and lay people understand punishment.

Is the Eighth Amendment’s meaning, as Chief Justice Earl Warren once wrote (Trop v. Dulles 1957, 101), derived “from the evolving standards of decency that mark the progress of a maturing society.” Or is the Eighth Amendment’s meaning confined to the original meaning of punishment.

At the time the Eighth Amendment was ratified, the word “punishment” referred to the penalty imposed for the commission of a crime.…As a legal term of art, “punishment” has always meant a “fine, penalty, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him.” And this understanding of the word, of course, does not encompass a prisoner’s injuries that bear no relation to his sentence (Helling v. McKinney 1993, 38).

The view from *Trop* leads to judicial policymaking, but it has the virtue of placing limits on majorities bent on vengeance and state actors that legislatures cannot control. The originalist or textualist view recognizes the importance of judicial minimalism in areas in which courts lack competence, and has the virtue of letting deliberative majorities decide what constitutes punishment. But it can lead to unhealthy and even violent conditions in prisons that can last for decades. In this paper, I ask: can the Supreme Court tell us what punishment is.

Legal theorists divide punishment theories into four categories: retribution, utilitarian, rehabilitation and incapacitation. Retribution focuses on a subject’s criminal act and holds that persons deserve punishment for criminal acts. For retributivists, “punishment is justified by the desert of the offender” (Moore 1997, 87). If retributivism is backward looking, utilitarianism is forward-looking. Utilitarianism seeks to deter future criminal acts. Rehabilitation is the idea that convicted criminals can return to society as non-dangerous through psychological and behavioral therapies that treat the subject more as a patient than a criminal (Schopp 1995). Incapacitation is the removal of an offender from society and, like rehabilitation, is a subset of utilitarianism (Corrado 1996). Retributivism and utilitarianism are the two dominant theories of punishment. As the Supreme Court has noted, the “traditional” understanding of punishment includes “retribution and deterrence” (Kennedy v. Mendoza-Martinez 1963, 168).

Mixed theories of punishment combine attributes of retribution and utilitarianism (Hart 1988; von Hirsch 1976, chap. 6). H.L.A. Hart’s view is the classic mixed view. Punishment for Hart contains the following five ideas: (1) “It must inflict pain” or impose some unpleasantness; (2) it can only be imposed on those who violate legal rules; (3) the punishment imposed must be on the person thought to be the criminal; (4) those who administer punishment must not be the offender; and (5) those who administer punishment must be duly constituted by a legal authority (Hart 1988, 4-5). Despite Hart’s criticisms of retribution and utilitarianism, he remains committed to understanding punishment in utilitarian terms. As Richard Wasserstrom has noted, “The actual punishment of persons is necessary only to keep the threat of punishment credible” (Wasserstrom 1967, 111). Hart regards punishment not as a good to be enforced but as an evil to avoid.

According to Émile Durkheim, however, punishment is not just negative. It unites a community. It neither seeks to satisfy the greatest number within a society or community nor does it attempt to establish justice on the basis of desert.

Durkheim’s understanding of punishment as a form of social solidarity is complex and need not be recounted in depth, though one point is important to stress. Durkheim rejects as too mechanical the idea that punishment can rehabilitate and deter. The “real function” of punishment, he writes, “is to maintain inviolate the cohesion of society by sustaining the common consciousness in all its vigor” (Durkheim 1984, 63). Punishment for Durkheim imposes a stigma on the criminal, but its effect is positive not negative. In sex offender cases, for example, it is argued that prohibitions on residency create stigmas which sex offenders cannot remove. The stigma is cruel and therefore violates the Eighth Amendment. For Durkheim, however, the value of punishment lies in social solidarity. Put more critically, punishment is the tribute vice pays to virtue for violating social norms. Crime has no moral meaning for Durkheim, as it does for Kant and Hegel. The state has no right to punish on the basis of desert. Punishment for Durkheim is normative and relativistic. “The criminal is simply the man…who has refused to obey the laws of the city” (Aron 1970, 19).

This view is commonly called expressivism, which Thom Brooks defines as “the emphatic denunciation by the community of a crime” (Brooks 2012, 102). Expressivism provides a link, however imperfect, between deterrence and retribution. Expressivists take from retribution the idea that the criminal is to be punished for what he or she did (and there should be no other grounds for punishment). What expressivists abandon from retributivism is the idea of desert. There is no underlying principle behind punishment except to reclaim communal solidarity. At the same time, they take from deterrence theory the idea that reforming the criminal is in society’s best interest. Despite its faults, expressivism draws attention to the role of public opinion as a valid source for laws. Moreover, expressivists, unlike retributivists, tend to follow positivistic social science – the science of the emotions – in fashioning the outlines of their theory. Joel Feinberg, for example, criticizes retributivism in the name of expressivism for failing to consider “an assessment of the character of the offender” over his “whole life” (Feinberg 1994, 88; Primoratz 1990, 2). Expressivism runs the risk that in the attempt to understand all, we must forgive all. In any event, what we gain from expressivism is the idea that the law cannot be limited to deterring behavior only because, as Durkheim and other expressivists show, humans are subject to more than just the sensations of pleasure and pain.

None of the punishment theories mentioned above fit perfectly with American conceptions of punishment and practices. As Andrew von Hirsch writes (1976, 51), the “primacy of the individual’s fundamental rights” does not fit well with formal theories of punishment. As philosophical systems, utilitarianism and retributivism were developed after the United States was founded, as was expressivism, and each has its origins in older philosophical traditions, which the founders were keenly aware of (Pestritto 2000). Von Hirsch’s understanding has its limits. Ours is not, strictly speaking, a regime of individual rights. Founded on the social contract tradition, which presupposes a strong government, and in part upon the idea that popular opinion is a guide to democratic administration, the criminal law cannot be indifferent to the “sentiments of the law-abiding population” (Berns 1979, 136). This quasi-expressivism is helpful in trying to understand that there is more to punishment than deterrence and desert, but also because it recognizes that the law is not the product of a sharp distinction between emotion and reason. Punishment, particularly retribution, presupposes an educative function of the law, and thus exists in dialogue with the passions and reason.

Unlike Bentham and his modern defenders (Hart 1976), Publius believed that criminal justice forms the “great cement of society” because it impresses “upon the minds of the people, affection, esteem, and reverence” (The Federalist 2001, 102 [no. 17]) for law. What the law teaches when it punishes wrongdoing is respect not for the abstraction of justice as fairness, but for the “forms of justice” that mete out punishment. The forms of justice refer to the institutions of governance, which guide citizens toward reasonable and moderate responses to punishment. The criminal must be tried in front of a jury of his peers, with an impartial judge presiding, and with an attorney of his own choosing. Trials reinforce the deliberative idea that the people are rightfully angry at crime and the criminal. They soften those views by reinforcing the idea of justice under law, and justice is the “end” or the goal “of government” (The Federalist 2001, 334 [no. 51]). Trials moderate the peoples’ passion with a strong dose of juridical and formalistic reason, strengthening “the habit of law-abidingness among the people” (Berns 1979, 147-48).

In general, the Supreme Court is uncomfortable imposing one punitive idea on the criminal law. Expressivism provides the Court with a democratic and deliberative basis for upholding state-sanctioned punishment, because, as Publius wrote: “The government of the Union, like that of each State, must be able to address itself immediately to the hopes and fears of individuals” (The Federalist 2001, 98, [no. 16]). But this cannot be the sole justification for punishment. Courts must look to deliberative majorities, as well as our principles, history, and traditions to determine a law’s constitutionality. However, a reliance on social science data, rather than on the people’s hopes and fears, is inherently undemocratic and undeliberative. If we understand punishment as a real-world consequence of willful criminal actions, filtered through a (democratic and formal) system of separation of powers, checks and balances, and due process, then we can say that the constitutionality of post-conviction sex offender legislation is premised not upon its fit with various punitive theories (or social science data), but because it conforms to the aims of a limited, deliberative, and moderate constitutional government.

Stanley Brubaker (1988, 821) provides us with a comprehensive understanding of punishment’s meaning under liberalism. He writes that “Liberalism is a doubting philosophy of politics. It doubts that the human good, or human excellence, exists.” By doubting that the highest good exists, liberals cast doubt on the limited purposes of punishment, because punishment involves a judgment that it is good to punish the bad. Punishment “invokes a vision of the moral order where the virtuous flourish and the wicked suffer” (Brubaker 1988, 825). Punishment represents, Arthur Shuster (2016, 140) writes, the clearest expression of “the moral demands of…political life.” But liberals, Brubaker suggests, being ethical relativists, disdain moral and political judgment, and prefer to rely on social science data, which purport to show that individuals can be rehabilitated and are not wholly responsible for the things they do. It is this uncertainty about modern punishment, I argue, that lies at the core of the constitutional problem of the Eighth Amendment’s meaning.

# According to Brubaker, the inability of liberals to punish rests on four ideas, which I will reduce to three. First, Brubaker argues that anger is a legitimate component of punishment (but not its *raison d’être*) and liberals want to dampen the passions that lead to cruelty (Brubaker 1988, 831; Terchek and Brubaker 1989, 1313; Moore 1997, 84; Shklar 1982; Berns 1979, 136, 147). Liberalism replaces the quest for the good life, which presupposes having knowledge of, and being concerned about, good and evil (Hobbes 1994, chap. 17), with material satisfaction and personal happiness. Second, punishment has a strong connection to the public good. It “vindicates the community in its standard of right” (Brubaker 1988, 825). Liberals prefer the individual to the common good. In Michael Sandel’s phrase (1982, 1), liberalism’s essence is the “priority of the right over the good.” Thus, liberals can justify punishment only insofar as they either (1) adopt utilitarianism’s notion of the greatest good for the greatest number of people (and thereby abandon their focus on the individual and the rights of individuals), or (2) they punish the deserving, but with a bad conscience, because they regard retribution as irrational and unjust.

Brubaker’s third and fourth points are related, and extensions of his second. For Brubaker, the inner core of classical liberalism is self-preservation. Therefore, liberalism cannot account for an understanding of punishment that is “expressive of reprobation and resentment” (Brubaker 1988, 825; Tarcov 1989, 107-23). Pain, Brubaker writes (1988, 825), “bears a statement about the human good.” Liberals, then, cannot satisfy the desire for justice that lies at the root of all societies. Liberals are critical of both major strands of punishment theory. They dislike retribution because it is, strictly speaking, indifferent to the voices that call for punishment or its limitation. They are, furthermore, distrustful of the idea that punishment is deserved (Golash 2005, 78-85). Deterrence, Brubaker argues, is not enough to satisfy the public’s need for justice. Nor, without borrowing retributive principles about the relationship between the crime and its punishment, can utilitarians contain the need to deter.

Brubaker is certainly correct to note that modern-day social scientists and theorists of punishment cast a jaded eye on punishment, particularly in its retributive form, regarding punishment not as an act of sovereignty against willful citizens or as a reaffirmation of “moral values” (von Hirsch 1976, 49), but as “dependent upon a wide array of…social forces” (Garland 1993, 20). In this view, punishment (or the regulation of released prisoners) has no moral purpose. It exists to reinforce the power of the state (or the vengeance of a majority of voters). This view flows from Michel Foucault, who writes that modern punishment is based upon “’scientific’ discourses…entangled with the practice of the power to punish” (Foucault 1979, 23). This is also the view of Nicola Lacey (1988, 61), who writes: “the most convincing account of punishment has at its core a notion of the desirability of the maintenance of the state and the criminal justice system as a whole.” And of Jonathan Simon, who denies that punishment can be explained as a “relationship of sovereignty between the state and the citizen.” Viewing punishment as relational and arbitrary, he rejects the state’s sovereignty over a population as a “semimystical assumption,” and argues that punishment is meted out “amid patterns of nonstate actions” (Simon 1993, 10-11), such as parole supervision. Ted Honderich writes that we should think of punishment not as inflicting suffering on the guilty, but as the attempt to comprehend the fullness of the lives of the guilty. “A good, just or right society,” he writes, “is one directed by the Principle of Equality” (Honderich 1984, 240). Such a society does not punish for desert-based reasons, knowing that culpability is based upon “[u]ntenable suppositions about factual equivalence between offence and penalty” (Honderich 1984, 34). Along similar lines, Deidre Golash (2005, 153) makes the case against punishment in its entirety by focusing on the “structural, cultural, and psychological causes of crime.” And Gresham Sykes (2007, 79) writes that punishment is not simply a legal enforcement against a wrong, but an existential exercise: punishment attacks “the very foundations of the prisoner’s being.”

While structuralists bathe in the light of social forces shaping individual movement, the Supreme Court still regards the core of liberalism – reason and judgment – to be congruent with the core of the law. It thus continues to hold individuals accountable. The question is whether the Court has articulated a coherent notion of punishment that lives up to the promise of liberalism.

**The Supreme Court Defines Punishment**

State and federal legislators, as well as state and federal judges, are not committed to one theory of punishment, and the Supreme Court’s understanding of punishment “is complicated and in some disarray” (Artway v. Attorney General of New Jersey 1996, 1242). Punishment in the United States has long been subject to “competing influences” (Pestritto 2000, 17; Hart 1988, 3). As the Supreme Court noted in *Jones* v. *U.S*., a civil commitment case, “A particular sentence of incarceration is chosen to reflect society’s view of the proper response to commission of a particularcriminal offense, based on a variety of considerations such as retribution, deterrence, and rehabilitation” (Jones v. U.S. 1983, 368-69).

In 1963, the Supreme Court created a test for determining whether a congressional act is “penal or regulatory in character.” That test included seven factors:

[1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment – retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions (Kennedy v. Mendoza-Martinez 1963, 168-69).

The *Mendoza-Martinez* test is less a reflection of rational analysis about the meaning of punishment than a “grab-bag of many individual tests” (Artway v. Attorney General of New Jersey 1996, 1263), and, as such, the Court has made a number of changes to it. In the 1980s, the Court revised the *Mendoza-Martinez* criteria by calling for greater legislative deference. The Court held that *Mendoza-Martinez* is “helpful,” but its criteria are “neither exhaustive nor dispositive” (U.S. v. Ward 1980, 249). The Court expanded upon this idea in three cases, *United States* v. *Halper* (1989), *Austin* v. *United States* (1993), and *Montana Department of Revenue* v. *Kurth Ranch* (1994). “In the *Halper* line [of cases], the Court seems to focus exclusively on whether the sanction serves the dual aims of statutory sanctions, namely retribution and deterrence” (Goodman 1996, 786). In the latter-half of the 1990s, the Court revisited the punitive criteria in use in cases that can involve punishment but which are either civil, criminal, or both. Recognizing the intractability of the conflicts over what constitutes punishment, the Court chose to emphasize legislative intent in such cases as *Salerno v. United States* (1987), *United States* v. *Ursery* (1996), *Bennis* v. *Michigan* (1996), *Kansas* v. *Hendricks* (1997), *Hudson* v. *United States* (1997) and *United States* v. *Bajakajian* (1998). In *Salerno* v. *U.S*. (1987, 747), the Court’s aim was clear: “To determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent.” In *California Department of Corrections* v. *Morales* (1995), the Court rejected the contention that a law that lowered the plaintiff’s chances of being paroled was punishment. But it did note, as Daniel Feldman (1997, 1097) has written, “that a sufficiently severe burden or sanction could constitute punishment, notwithstanding” the non-punitive goals of the law. Civil regulations that cross-over into unconstitutional punishment are context dependent. The Court has not created a clear jurisprudential line demarcating when a non-punitive regulation becomes an Eighth Amendment violation.

In 2017, a federal district court held Colorado’s registration requirement for sex offenders unconstitutional as applied to David Millard, Eugene Knight, and Arturo Vega. Each defendant had been convicted of sexual assault against minors. The court differentiated the cases under review from *Smith* v. *Doe* (2002). In that case, the Court upheld Alaska’s registry requirement for sex offenders by denying that registration with the police violated the Eighth Amendment. In *Millard* v. *Rankin*, however, the federal district court noted that sex offender information that appears on the internet is no longer “merely informational,” as *Smith* suggests, but causes “humiliation” and stigma (Millard v. Rankin 2017, 1228 n. 9). For the Colorado district court, just as *Trop*’s evolving standards of decency determine the meaning of punishment, so changes in society regarding the power of social media to influence viewpoints about others requires changing conceptions of punishment. The district court did not make clear why or how humiliation and stigma became part of Eighth Amendment analysis. To be sure, praise and blame are always “connected to desert and guilt” (Primoratz 1990, 62), but one suspects that the judge in *Millard* meant by humiliation something more than blame, something like stigma and ostracism, though he never connected the dots from humiliating an innocent person to blaming a guilty one (Doe No. 1 v. Williams 2001; Doe v. Lee 2001).

In *Doe* v. *Poritz*, the New Jersey supreme court made an important point about the distinction between civil regulations and criminal punishments: “We assume that if the legislative purpose was to deter sex offenders, the law would be invalid; and we have no doubt that if the government ordered punishment, the law would be invalid” (Doe v. Poritz 1995, 44). This seems to be in agreement with the thrust of the Supreme Court’s punishment cases of the past decade or so. The Court in *Bennis* v. *Michigan* (1996, 452) for example, made it clear that civil regulations may have deterrent purposes that are “distinct from any punitive purpose.” Similarly, in *Hudson* v. *U.S*., the Court denied that the monetary penalties involved in the case made the law criminal. “To hold that the mere presence of a deterrent purpose renders such sanctions ‘criminal’ for double jeopardy purposes would severely undermine the Government’s ability to engage in effective regulation of institutions such as banks” (Hudson v. U.S. 1997, 105; Klein 1999). Incidental effects do not constitute punishment, the New Jersey supreme court declared. Rather, the question is “whether punishment is ‘the *purpose*[ ] that the [sanction] may *fairly* be said to serve” (Doe v. Poritz 1995, 54; italics in original).

*Poritz* and the cases mentioned above have the virtue of focusing a judge’s attention on legislative intent, and lead away from the retribution-deterrence axis by suggesting that judges can understand what punishment is by its overall effect on what is being regulated, and not by relying on abstract concepts of punishment. To be sure, in these cases, the meaning of punishment remains vague, and to be clear, no judge in the cases mentioned has suggested that punishment should be based solely upon retributive principles. Because of this ambiguity, it is worth looking at Supreme Court cases that involve laws that aim specifically to inflict punishment, rather than at laws that incidentally may slide into punishment, to determine what punishment is. We can begin with a hypothesis: that criminal justice cases that specifically refer to the state’s power to punish infractions will lead to clarity about what punishment is, rather than to what punishment is not.

*Three-Strikes Laws*

Three-strikes laws are recidivism statutes that raise two important questions, the first relating to utilitarianism, the second to retribution: (1) whether it is proper for the state to sentence someone based on the accumulation of prior convictions and a new conviction to deter the future behavior of the accused and of others, and (2) what is the relationship in equity between the punishment of a crime and the crime itself? The first point is utilitarian because it is deterrence based. It seeks the greatest good for the greatest number of persons, without regard for individual or fundamental rights or any sense of the proportionality of the punishment to the crime. It treats offenders as means to a public safety end. Consequently, it raises the second point, retribution, because three-strikes legislation implicate the question of proportionality (Ewing v. California 2003, 31; Christopher 2002; Primoratz 1990, 162-64). “The concept of proportionality is central to the Eighth Amendment” (Graham v. Florida 2010, 59).[[1]](#footnote-1) But proportionality is not part of the “primary goals” of three-strikes laws, which “are to deter repeat offenders and…to segregate that person from the rest of society for an extended period of time” (Rummel v. Estelle 1989, 284). Three-strikes laws embody deterrent or utilitarian principles – and they are constitutional. Because the punishment in such cases is longer than what the individual would have received for the final crime, these laws cannot avoid confronting the problem of proportionality.

Proportionality is a principle of retribution and not of utilitarianism because “any punishment in excess of what is deserved for the criminal conduct is punishment without guilt” (Gross 1979, 436). The Court’s proportionality review includes two areas of law. The first “involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty” (Graham v. Florida 2010, 59).

Justice Lewis Powell sketched out a plan to assess disproportionate sentencing in *Rummel* v. *Estelle*. He wrote that judges should consider “(i) the nature of the offense; (ii) the sentence imposed for commission of the same crime in other jurisdictions; and (iii) the sentence imposed upon other criminals in the same jurisdiction” (Rummel v. Estelle 1980, 295). In *Graham* v. *Florida* (2010, 72), the Court held that attacks against sentences must show that “the punishment is not grossly disproportionate in light of the justification offered.” To be clear, both cases apply only to sentences attached to convictions and not to post-conviction regulations, such as parole and probation. The only justification for proportionality in such cases is as a limiting principle on the extent of deterrence-based punishments. It is an awkward fit, coming as it does after sentencing (Primoratz 1990, 37).

In *Rummel* v. *Estelle*, the Court’s first foray into three-strikes legislation, the Court upheld Texas’s sentence of life in prison to William James Rummel for his third felony offense, all of which were non-violent. The Court rejected the idea that the punishment was disproportionate to the offense because “[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare” (Rummel v. Estelle 1980, 272). Since 1976, when the Court reinstated capital punishment, a majority of justices have been willing to apply proportionality to death penalty cases because “death is different” (Gregg v. Georgia 1976, 188). But the criteria for comparison in non-capital cases are difficult to assess, something that should be considered in the context of sex offender and other civil regulations (Lee 2008). There is also federalism to consider.

That a State is entitled to treat with stern disapproval an act that other States punish with the mildest of sanctions follows *a fortiori* from the undoubted fact that a State may criminalize an act that other States do not criminalize *at all* (Harmelin v. Michigan 1991, 989; italics in original).

William Rehnquist, writing for the Court in *Rummel*, upheld the sentence on legislative deference and general deterrence grounds. He pointed out that the Court had an institutional “reluctance to review legislatively mandated terms of imprisonment” (Rummel v. Estelle 1980, 274), on the idea that it is not the purpose of the justices to impose their notions of just punishments.

In the next three-strikes case, *Solem* v. *Helm*, the Court reversed itself, and held that a South Dakota law that allowed for life imprisonment without the possibility of parole for repeat offenders was unconstitutional because it was disproportionate to the offense. Jerry Buckley Helm had committed seven felonies, including grand larceny and driving while intoxicated. For those offenses plus “uttering a ‘no account’ check for $100,” he was sentenced to life in prison. The Court held that proportionality analyses “should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions” (Solem v. Helm 1983, 281, 292). While this case resorts to proportionality as a limiting principle on utilitarianism, it demonstrates the weakness of proportionality as a principle of utilitarianism in general and in non-capital cases in particular (see the attempts by Rawls 1955; Lacey 1988, 119; 176-77; 198-201; Weinreb 1986).

Proportionality is particularly problematic in non-capital cases because the boundary is difficult to set. The Court’s three-part analysis provided no guidance to determine how many crimes constitute disproportionality in sentencing. Justice Harry Blackmun, who was in the majority in *Rummel,* joined *Rummel*’s dissenters to form a majority in *Solem* (though he did not explain why; in the interim, Justice O’Connor had replaced Potter Stewart, who had voted with the majority in *Rummel*, and she joined those who made up the dissent in *Solem*). *Solem* does not overturn *Rummel*. It distinguishes it by noting the differences between the two states’ parole possibilities (Solem v. Helm 1983, 288, 297).

Justice Antonin Scalia rejects a proportionality principle in the Eighth Amendment. “Proportionality…is inherently a concept tied to the penological goal of retribution,” he wrote in *Ewing* v. *California* (2003, 31). In *Harmelin* v. *Michigan*, he wrote that proportionality becomes meaningless “once deterrence and rehabilitation are given significant weight” (Harmelin v. Michigan 1991, 989), a view that forced him to reject any resort to proportionality in non-capital cases because of their heterodox intentions. For Scalia, the Eighth Amendment “disables the Legislature from authorizing particular forms or ‘modes’ of punishment – specifically, cruel methods of punishment that are not regularly or customarily employed” (Harmelin v. Michigan 1991, 976). Now this may result in some harshness toward defendants and it may be constitutionally rigid – it may even be a denial of the necessary role that judgment plays in deciding cases. But Scalia is trying to prevent judges from making policy based upon subjective factors and transhistorical events, such as Justice John Paul Stevens’ resort to the “world community” in the death penalty case *Atkins* v. *Virginia* (2002, 316 n. 21). When judges decide what is “grossly out of proportion” (Roper v. Simmons 2005, 589), they turn themselves into legislators and subvert democratic practices.

It is possible to acknowledge a role for proportionality while tamping down its subjective side. Justice Kennedy’s position, in *Harmelin* v. *Michigan*, focuses on “the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors.” He then adds that the “Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are ‘grossly disproportionate’ to the crime” (Harmelin v. Michigan 1991, 1001). To be sure, the different outcomes in *Rummel* and *Solem* may be unprincipled, and therefore a sure sign that judges cannot adhere to neutral principles of adjudication. This was Frankfurter’s position in *Dennis* v. *U.S*. (1951, 525): “Full responsibility for [balancing interests] cannot be given to the courts. Courts are not representative bodies. They are not designed to be a good reflex of a democratic society.” For this reason, I would say that courts should refrain from interfering with punitive claims by prisoners, except to “determine whether a statute is sufficiently definite to meet the constitutional requirements of due process” (Dennis v. U. S. 1951, 525). If judges must engage, then at least they could follow Justice Rehnquist, in *Edmund* v. *Florida* (1982, 816, 823), who suggested that judges balance proportionality with culpability, which would narrow a judge’s power.

In the next two three-strikes cases, decided the same day, the Court upheld the laws in question. In *Ewing* v. *California*, Justice Sandra Day O’Connor, writing for a plurality, upheld a “narrow proportionality principle” that “applies to noncapital sentences” (Ewing v. California 2003, 20) and found California’s three-strikes law constitutional. While on parole, Gary Ewing committed his last felony offense (he had three others, plus burglary offenses), walking out of a sporting goods store with “three golf clubs, priced at $399 apiece” (Ewing v. California 2003, 28). That forced the prosecutor to charge Ewing under California’s three-strikes law. The court sentenced Ewing to 25 years to life.

In upholding California’s law, Justice O’Connor turned to legislative deference as a priority, which she married to the Court’s agnosticism regarding the aims of punishment: “Our traditional deference to legislative policy choices finds a corollary in the principle that the Constitution ‘does not mandate adoption of any one penological theory’…. Selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts” (Ewing v. California 2003, 25). In *Lockyer* v. *Andrade* (2003, 77), the Court upheld Lockyer’s conviction, holding that the “gross disproportionality principle reserves a constitutional violation for only the extraordinary case.”

Rather than defining punishment, these cases turn on the meaning of proportionality. Proportionality, however, is perhaps more suitable to death penalty cases, given their finality. In *Pulley* v. *Harris*, the Supreme Court rejected the claim that the Eighth Amendment requires states to conduct comparative proportionality reviews in capital punishment cases (Pulley v. Harris 1984, 44; on the difficulties of comparative review, see Harmelin v. Michigan 1991, 989). But in *Coker* v. *Georgia* (1977), *Enmund* v. *Florida* (1982), *Ford* v. *Wainwright* (1986), *Thompson* v. *Oklahoma* (1988), *Atkins* v. *Virginia* (2002), *Roper* v. *Simmons* (2005), and *Kennedy* v. *Louisiana* (2008), all capital punishment cases, the Court used proportionality principles to limit the application of the death penalty, holding that punishments that are “grossly disproportionate” (Coker v. Georgia 1977, 592); “totally without penological justification” (Gregg v. Georgia 1976, 183); which “involve the unnecessary and wanton infliction of pain” (Gregg v. Georgia 1976, 173); and do not comport with “evolving standards of decency” (Atkins v. Virginia 2002, 312) violate the Eighth Amendment. But in no capital case, including *Furman* v. *Georgia* (1972), has the Court held that capital punishment is disproportionate to the crime is purports to deter.

The hypothesis has failed. We have not learned what punishment is in these cases. We do know what it is not: the Court will not interfere with the “legislative prerogative” (Rummel v. Estelle 1980, 274) over punishments unless such laws reveal gross violations of what is cruel and unusual. Indeed, resorting to a proportionality principle in non-capital cases risks interfering with the “appropriate level of deference to state legislative policymaking” (Sheketoff 2010, 2217) that is so important to our constitutional system. To examine further our hypothesis, I next turn to conditions of confinement cases.

*Conditions of Confinement*

Conditions of confinement cases concern challenges by prisoners (and pretrial detainees) to prison conditions and regulations. Unlike three-strikes cases, conditions of confinement cases tell us something positive about punishment. According to this view, punishment is not just an evil, it is an indignity. Dignity has become an ethical maxim of contemporary life and a foundational idea in law, undergirded by the idea of progress in human affairs (Rao 2011). Samuel Pillsbury (1982, 1117) writes that dignity refers to “contemporary standards of human decency.” Dignity, however, also suffers from being subjective, symbolic, and amorphous.

Dignity accrues to individuals through their awareness of their status in their own eyes and in the eyes of others. Further, dignity represents a symbolic status distinct from a person’s material well-being. Dignity underscores the equal worth of all persons. Moreover, dignity is used in reference to humans’ capacity to make decisions about their own lives. Dignity also engenders a set of practices, linked to a person’s bounded being (Resnik and Suk 2003, 1929).

It is difficult to see how these metaphysical ideas apply to the Constitution in general or the Eighth Amendment in particular, but let’s see how this works in practice.

J.W. Gamble was an inmate in Texas who was injured performing prison work. After numerous doctor visits and prescribed medications, Gamble insisted that he was not fit for work and that the work he continued doing, while in a condition of pain, was cruel and unusual punishment. Prison administrators disagreed and imposed penalties upon him for his failure to work.

Traditionally, punishment is unconstitutional if (1) it is state imposed; and (2) it reaches or goes beyond the meaning of “cruel and unusual.” Gamble’s work requirement would not normally fall under the Eighth Amendment. But since the Court’s decision in *Trop* v. *Dulles* (1958), the Eighth Amendment is thought to embody “‘broad and idealistic concepts of dignity, civilized standards, humanity, and decency’ against which we must evaluate penal measures” (Estelle v. Gamble 1976, 102). Consequently, the Court held that “These elementary principles establish the government’s obligation to provide medical care for those whom it is punishing by incarceration” (Estelle v. Gamble 1976, 103). The Court held that the standard for assessing incidences of “unnecessary and wanton infliction of pain” are subject to a “deliberate indifference” test (Estelle v. Gamble 1976, 104).

In *Hutto* v. *Finney* (1978, 685), the Court declared that “[c]onfinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards.” But it was not until *Rhodes* v. *Chapman* (1981, 335) that the Court “considered a disputed contention that the conditions of confinement at a particular prison constituted cruel and unusual punishment.” In *Rhodes*, the challenge was that double-celling inmates violated the Eighth Amendment. The Court refused the challenge, and created the “totality of conditions” test for determining deliberate indifference. In *Whitley* v. *Albers*, the Court heard a challenge from an inmate who was shot during a prison riot, seemingly accidentally, by an officer firing a warning shot. This case is not a conditions of confinement case, but it addressed deliberate indifference. The Court ruled that although “deliberate indifference” applies to a “prisoner’s serious illness or injury,” this was not the case here. Instead, “a deliberate indifference standard does not adequately capture the importance of such competing obligations…necessarily made in haste, under pressure, and frequently without the luxury of a second chance” (Whitley v. Albers 1986, 320).

In *Wilson* v. *Seiter*, Pearly Wilson alleged that an assortment of prison conditions – “overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with mentally and physically ill inmates” – violated the Eighth Amendment’s prohibition against cruel and unusual punishments (Wilson v. Seiter 1991, 295). In the preceding line of cases, the Court had established that “Eighth Amendment claims based on official conduct that does not purport to be the penalty…require inquiry into state of mind” (Wilson v. Seiter 1991, 302). But Justice Scalia, for the majority, held that a prisoner claiming that conditions of confinement violate the cruel and unusual clause “must show a culpable state of mind on the part of prison officials,” as well as significant injury (Wilson v. Seiter 1991, 296). Overall, the Court (Scalia and Clarence Thomas excepted) has established that cruelty can be inflicted by state actors and need not be limited to sentencing. The Court defines cruelty by certain objective conditions. Has the focus on dignity obscured the meaning of what punishment is or what it purports to accomplish?

In *Hudson* v. *McMillian* (1992, 4) Keith Hudson, an inmate in Louisiana, claimed that two prison guards, Jack McMillan and Marvin Woods, beat him up while another guard, the supervisor on duty, Arthur Mezo, watched but did nothing to stop the beating. Hudson claimed that the beating constituted cruel and unusual punishment. The Court sidestepped the issue of the lack of state sanction in the “punishment” inflicted, with Justice Sandra Day O’Connor writing that “When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated” (Hudson v. MacMillian 1992, 9). Implicitly, the decision accepts the idea that punishment does not have to be state-sanctioned to be considered unlawful punishment under the Eighth Amendment, and it downplays *Wilson* v. *Seiter*’s holding that the pain inflicted should be substantial.

Finally, in *Farmer* v. *Brennan*, the Court confronted a challenge to the Eighth Amendment by Dee Farmer (born Douglas Coleman Farmer), who was in the middle of receiving treatment for sex reassignment when Farmer was convicted of credit card fraud. The prison placed Farmer in the general population of a men’s prison. Farmer was subsequently raped and beaten. Farmer sued, arguing deliberate indifference on the part of prison officials.

The Court took the case to resolve a conflict among federal courts over the meaning of deliberate indifference. Some federal courts had stressed the subjective test, others more objective factors (Farmer v. Brennan 1994, 836). Justice David Souter, writing for the Court, held that “only a prison official’s subjective awareness of a substantial risk of harm to an inmate constitutes a valid Eighth Amendment claim” (Cozad 1995, 190; Farmer v. Brennan 1994, 828). He also held that prisoners are entitled to medical care and treatment, and the lack of these features is a violation of the Eighth Amendment. The Court declared that a state actor’s deprivation of an inmate’s liberty must be “sufficiently serious,” and must “result in the denial of ‘the minimal civilized measure of life’s necessities.” The inmate must show that he or she is living under conditions which pose “a substantial risk of serious harm.” Moreover, “only the wanton infliction of pain” qualifies as an Eighth Amendment violation. The prison official must have a “culpable state of mind” (Farmer v. Brennan 1994, 825, 834).

In drawing a line between the poles of recklessness and objectivity, the Court made it clear that punishment is what prison officials do when they perform certain duties beyond their constitutional requirements (or fail to perform in violation of those requirements). The Court in *Farmer* did not, however, adopt Justice Harry Blackmun’s concurring opinion that “the Eighth Amendment prohibits all punishment, physical and mental, which is ‘totally without penological justification’” (Farmer v. Brennan 1994, 852). Blackmun could find no constitutional basis for Scalia’s argument in *Wilson* v. *Seiter*, which Blackmun read to mean “only pain that is intended by a state actor to be punishment is punishment.” Rather, viewing punishment from the point of view of the victim of punitive measures, Blackmun held that “A prisoner may experience punishment when he suffers ‘severe, rough, or disastrous treatment’” (Farmer v. Brennan 1994, 854).

In examining a series of cases about three strikes and conditions of confinement, it is clear that the Supreme Court has not come to a conclusion regarding what constitutes punishment under the Eighth Amendment. This is not to say that all punishment is constitutional. The Court has given us some sense of what cruelty is, though even that term remains dependent upon context. Other punishment cases could have been enlisted, but the result would be the same. *Furman* v. *Georgia*, for example, the case that held that capital punishment violates the Eighth and Fourteenth Amendments, does not tell us why capital punishment is unconstitutional. With the exception of Brennan’s and Marshall’s categorical denial of capital punishment’s constitutionality, the Court did not hold that the mode of punishment is unconstitutional; only its method is. Justice Potter Stewart tells us that punishment that is “wantonly and so freakishly imposed” constitutes punishment (Furman v. Georgia 1972, 310), which paved the way for capital punishment’s reinstatement under *Gregg* v. *Georgia* (1976). Justice Byron White held that capital punishment is “cruel in the dictionary sense,” which he understood was a meaningless assessment. He sided with the majority because of capital punishment’s “negligible returns” (Furman v. Georgia 1972, 312-13), that is, it is not much of a deterrent, given its infrequency. Justice William Douglas thought that capital punishment was discriminatory because of its disproportionate effect on the poor and racial minorities, and thus violates the equal protection clause. Justice Brennan focused on capital punishment’s lack of “comport[ment] with human dignity” (Furman v. Georgia 1972, 270), an elusive concept at best. And Justice Thurgood Marshall stressed that capital punishment is a form of eugenics (Furman v. Georgia 1972, 355). As other death penalty cases have upheld the practice while restricting its application to unique defendants (minors, the mentally ill), there is no sense from the Court that the worst punishment is unconstitutional. Nor is there a sense that punishment that violates the Eighth Amendment is something we know when we see it.

The problem of determining what punishment is is complicated by the introduction of dignity into jurisprudence. In *Florence* v. *Board of Chosen Freeholders*, a case about strip-searching all detainees who enter jail, Justice Stephen Breyer, in dissent, stated: “I doubt that we seriously disagree about the nature of the strip search or about the serious affront to human dignity and to individual privacy that it presents” (Florence v. Board of Chosen Freeholders 2012, 347). Perhaps the other justices shared Breyer’s sentiment, but the Court rejected Albert Florence’s assertion that strip-searching all incoming detainees was an indignity that violated the Eighth Amendment. How one experiences punishment cannot determine what punishment’s meaning under the Eighth Amendment.

**Conclusion**

Prison cases get to the heart of punishment’s meaning, but more often than not, the Court regards prison regulations as constitutional. In *Turner* v. *Safley*, the Court created a four-part test to assess the constitutionality of prison regulations. First, “there must be a ‘valid, rational connection’ between the prison regulation and the legitimate governmental interest put forward to justify it.” Second, “whether there are alternative means of exercising the right that remain open to prison inmates.” Third, courts must consider the effect the “accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally.” And fourth, “the absence of ready alternatives is evidence of the reasonableness of a prison regulation” (Turner v. Safley 1987, 89-90). What the confinement cases, *Turner*, and *Florence* teach us is that an excessive reliance on dignity undermines the rule of law and its equal application. Dignity creates a problem for the equal application of the law because it says: “I’m sufficiently different to create an exception,” although those who make the claim of difference base it upon a universal standard of dignity and perhaps reason. Dignity subverts the rule of law because the exercise and enforcement of rights require standards, as *Turner* and *Florence* make clear, first to avoid arbitrariness, and second to conform the exercise of rights to the basic meaning of due process, shared by all. Dignity jurisprudence undermines that goal, forging idiosyncratic psychological claims into constitutional trump cards. Moreover, dignity demands little from those claiming its violation, and it broadens the claims individuals can make against the Constitution, requiring greater judicial intervention. Indeed, because of its stress on individual autonomy, it assumes that society has no need of a “unifying and civilizing ethos” (Clor 1996, 76), so it questions the foundation of law and society itself. Dignitarian jurisprudence erodes the idea that there is a necessary and formal element in the understanding (and bestowal) of rights, one that restricts the application of rights and limits the state’s ability to rectify inequalities, because it fails to accept the institutional, deliberative, and democratic nature of politics.

The claim against non-capital punishment, particularly civil regulations, is never that it is ipso facto unconstitutional, as Brennan and Marshall held capital punishment to be. Rather, it is that it is “cruel in a dictionary sense” (“and unusual” is conveniently ignored) and punitive in effect, though the intent of the law is not punishment but deterrence. Such claims, then, run up against legislative deference prerogatives. Cruelty, indignity, and a lack of individualized assessment are made to substitute for traditional Eighth Amendment analysis. Brubaker, then, has pierced the veil of liberal punishment. The problem is not punishment but liberalism; punishment only reveals liberalism’s weakness. Though the Court may not know what punishment is, we should not take that to mean that states can punish as they wish. Nevertheless, we can conclude that the Court’s punishment jurisprudence does not make a good case for demonstrating what punishment is. It remains to be known where we should look for punishment’s meaning.

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1. This is true only if the Eighth Amendment embodies retributive principles. It is not clear from the historical record that it does. [↑](#footnote-ref-1)