

# “Punishment” and the Eighth Amendment

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Eighth Amendment doctrine may be headed for a showdown. The Supreme Court has unduly softened the Amendment’s central limitation: its applicability to nothing but “punishments.”<sup>1</sup> This prerequisite is finessed in cases involving conditions of confinement and is ignored in cases involving use of force. As a result, Eighth Amendment doctrine lacks a backbone of principle. This Article offers a few doctrinal repairs that would restore punishment as a threshold element in Eighth Amendment cases, and thus put sense back in the interpretation and application of a great constitutional protection.

The Eighth Amendment—like so many other constitutional provisions<sup>2</sup>—underwent dramatic liberalization during the twentieth century.<sup>3</sup> That is good to the extent that constitutional liberties have been made real in the lives of ordinary citizens who formerly could look to the Constitution as a source only of aspiration and not of protection.<sup>4</sup> But liberalization has its limits, and

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<sup>1</sup> The Eighth Amendment states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. Amend. VIII.

<sup>2</sup> Constitutional liberties arguably remained undeveloped until the middle of the century. See, e.g., MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 4-5 (1991) (describing process by which Supreme Court became preoccupied with individual rights in middle of century); Archibald Cox, *Storm over the Supreme Court*, in *THE EVOLVING CONSTITUTION* 3, 8-11 (Norman Dorsen ed., 1987) (describing Court’s increased attention to civil rights and civil liberties beginning in 1940s and 1950s). But the process really can be traced back to the turn of the century. See Thomas K. Landry, *Unenumerated Federal Rights: Avenues for Application Against the States*, 44 FLA. L. REV. 219, 229-32 (1992) (explaining origins of doctrine of incorporation by which constitutional rights were held applicable to the states).

<sup>3</sup> See *Helling v. McKinney*, 509 U.S. 25, 38-40 (1993) (Thomas, J., dissenting) (recounting historical development of Eighth Amendment doctrine).

<sup>4</sup> See Hendrik Hartog, *The Constitution of Aspiration and “The Rights That Belong to Us All,”* in *THE CONSTITUTION AND AMERICAN LIFE* 353 (David Thelen ed., 1988) (discussing opposition in constitutional perspectives between Constitution of fixed meaning and “constitutional rights consciousness” that subjects constitutional meaning to shifting aspirations of Americans); Judge A. Leon Higginbotham, Jr., *Foreword* to GENNA R. MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* at xv, xvii (1983) (describing how work of advocate Charles Houston made

constitutional adjudication for the past quarter-century has been a process of defining those limits—of staking out liberalization's claim.<sup>5</sup> Occasionally, the Supreme Court has pulled up stakes and redefined the limits.<sup>6</sup> Adjustments were inevitable in the face of the expansive "land grab" that liberalization achieved. And adjustment remains necessary in Eighth Amendment doctrine: It lacks textual mooring, coherence with the rest of the Constitution, and respect for decisions that we the people have—and have not—made.<sup>7</sup> These problems are especially destabilizing since our society has lost faith in liberal attitudes

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Constitution "a living and more relevant document" to black Americans); Laurence H. Tribe & Thomas K. Landry, *Reflections on Constitution-Making*, 8 AM. U. J. INT'L L. & POL'Y 627, 642-43 (1993) (suggesting that broad wording of constitutions fosters citizens' devotion). Perhaps the most famous example is Frederick Douglass's belief that the original Constitution prohibited slavery. See Frederick Douglass, Speech delivered in Glasgow, Scotland, Mar. 26, 1860, *The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?*, in 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 467 (Philip Foner ed., 1950).

<sup>5</sup> See, e.g., Daniel J. Capra, *Prisoners of Their Own Jurisprudence: Fourth and Fifth Amendment Cases in the Supreme Court*, 36 VILL. L. REV. 1267, 1321 (1991) ("[T]he Burger-Rehnquist Court has been able to limit Fourth Amendment protection by taking advantage of certain Warren Court cases which left considerable room for further limitation of personal rights."); George Deukmejian & Clifford K. Thompson, Jr., *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975, 975 (1979) (noting "Burger Court limitations on Warren Court decisions"); Dr. Patricia A. Lucie, *White Rights As a Model for Black: Or—Who's Afraid of the Privileges or Immunities Clause?*, 38 SYR. L. REV. 859, 862 (1987) (asserting that Burger Court set limits on Warren Court's recognition of unenumerated constitutional rights and refused most claims for recognition of additional such rights). Professor Bruce Ackerman might characterize the Warren, Burger, and Rehnquist Courts as engaged in the same enterprise: "codifying," or reducing to specifics, a constitutional change that the people had ordered in the New Deal era. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 268, 288-90 (1991) (explaining codification stage of Ackerman's theory of constitutional change).

<sup>6</sup> See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 218 (1990) (stating that Warren Court expanded rights and Burger Court limited rights); David Adamany, *The Supreme Court*, in *THE AMERICAN COURTS: A CRITICAL ASSESSMENT* 5, 17 (John B. Gates & Charles A. Johnson eds., 1991) ("The Rehnquist Court, especially since the addition of Justice Anthony Kennedy, is further restricting liberties established during the Warren Court."); cf. *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* at xiii (Vincent Blasi ed., 1983) ("[T]he Burger Court's work does not lend itself to any concise, comprehensive characterization. In certain areas, the recent Court has consolidated the landmark advances of the Warren years. In other areas, a mild retrenchment has taken place."); Gene R. Nichol, Jr., *An Activism of Ambivalence*, 98 HARV. L. REV. 315, 320 (1984-1985) (reviewing *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* (1983)) ("The Burger Court has indirectly narrowed constitutional protections by limiting the procedures available to vindicate them.").

<sup>7</sup> See *infra* Parts II.B.2, II.C.2.

toward criminality.<sup>8</sup> That shift in attitude may properly find reflection in judicial doctrine.<sup>9</sup> It is time to make sense of the Eighth Amendment.

The Eighth Amendment applies only to governmental action that can be classified as "punishment."<sup>10</sup> And the condition of Eighth Amendment doctrine is closely tied to the manner in which courts and commentators have interpreted—or ignored—that word. It might seem strange that any interpretive controversy could exist here. Punishment is a clear concept to anyone who has ever recognized the authority of a parent, a religion, a government, or other figure. A reasonable definition drawn from those life experiences might be that punishment is a penalty deliberately imposed in response to unwanted behavior.<sup>11</sup> For example, "twenty years in the penitentiary for armed robbery"

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<sup>8</sup> See George C. Thomas III & David Edelman, *An Evaluation of Conservative Crime Control Theology*, 63 NOTRE DAME L. REV. 123, 147 (1988) ("[T]he influence of conservative thinking has affected society's willingness to tax itself as well as the societal attitude toward crime and criminals. Thus, legislatures are likely to increase prison sentences and refuse to build new prisons at the same time."); John J. DiIulio, Jr., Editorial, *The Value of Prisons*, WALL ST. J., May 13, 1992, at A14 ("Virtually every public opinion survey shows that since 1974 the American people have become increasingly conservative on crime and punishment.").

<sup>9</sup> See LOUIS FISHER, CONSTITUTIONAL DIALOGUES 12 (1988) (suggesting that the Supreme Court "maintains its strength by steering a course that fits within the permissible limits of public opinion"); CHRISTOPHER G. TIEDEMAN, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES 43 (photo. reprint 1974) (G.P. Putnam's Sons ed., 1890) (stating that constitutional law is really found in judicial and legislative activity, and is "flexible, and yields to the mutations of public opinion"); cf. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1208 (1992) (stating that Court can reinforce social change but will encounter backlash if it attempts to lead in giant strides).

<sup>10</sup> See *Farmer v. Brennan*, 114 S. Ct. 1970, 1979–80 (1994) (explaining intent requirements in Eighth Amendment doctrine as consequences of Amendment's limitation to punishment); *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979) (distinguishing between punishment of pretrial detainees, which is always prohibited, and punishment of convicts, which is permissible if not cruel and unusual); John J. Phillips, Note, *Jailhouse Shock: Hudson v. McMillian and the Supreme Court's Flawed Interpretation of the Eighth Amendment*, 26 CONN. L. REV. 355, 368 (1993) ("[A]s a threshold matter, the conduct or activity complained of must be 'punishment' within the meaning of the Eighth Amendment. After all, '[i]f a practice cannot be characterized as punishment, the Amendment does not prohibit it, no matter how cruel and unusual it may be.'" (quoting JAMES J. GOBERT & NEIL P. COHEN, RIGHTS OF PRISONERS § 11.01, at 310 (1981) (second alteration in original)).

<sup>11</sup> Cf. *Helling v. McKinney*, 509 U.S. 25, 38 (1993) (Thomas, J., dissenting).

At the time the Eighth Amendment was ratified, the word 'punishment' referred to the penalty imposed for the commission of a crime. That is also the primary definition of the word today. As a legal term of art, 'punishment' has always meant a 'fine, penalty, or

is a penalty ("twenty years in the penitentiary") imposed in response to ("for") unwanted behavior ("armed robbery").

Yet modern Eighth Amendment discourse has consisted of a competition among three flawed definitions of punishment. First is a *strictural* definition, which limits punishment to the terms of the penal statute and sentence and excludes reference to conditions or events in prison. Second is an *experiential* definition, which includes within punishment all that a prisoner experiences—all prison conditions and all uses of force—regardless of any government agent's intentions. Third is a *subjectivist* definition, which steers a middle course between the first two and includes not only the terms of the penal statute and sentence, but also those conditions or events in prison that are attributable to the subjective intent of any government agent. This definition now commands a majority on the Supreme Court.

The present Article advances a fourth alternative: a *governmentalist* definition, which includes not only the terms of the penal statute and sentence, but also those conditions or events in prison that are attributable to the punitive intent of the government in its role as monopolist over the machinery of punishment. In doctrinal terms, this definition entails three elements: (1) a

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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.'

*Id.* (quoting BLACK'S LAW DICTIONARY 1234 (6th ed. 1990)) (citations and quotations omitted); *Wilson v. Seiter*, 501 U.S. 294, 300 (1991) (characterizing the infliction of punishment as "'a deliberate act intended to chastise or deter'") (quoting *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985)); John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955).

I begin by defining the institution of punishment as follows: a person is said to suffer punishment whenever he is legally deprived of some of the normal rights of a citizen on the ground that he has violated a rule of law, the violation having been established by trial according to the due process of law, provided that the deprivation is carried out by the recognized legal authorities of the state, that the rule of law clearly specifies both the offense and the attached penalty, that the courts construe statutes strictly, and that the statute was on the books prior to the time of the offense.

*Id.* at 10.

Punishment is defined in a typical dictionary: "1. a. An act of punishing. b. The condition of being punished. 2. A penalty imposed for wrongdoing. 3. *Informal*. Rough handling; mistreatment." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1060 (1976). The word "punish" is defined in the same source: "1. To subject (someone) to penalty for a crime, fault, or misbehavior. 2. To inflict a penalty on a criminal or wrongdoer for (an offense). 3. To handle roughly; injure; hurt 4. *Informal*. To deplete (a stock or supply) heavily." *Id.*

penalty, (2) inflicted for criminal conduct, (3) pursuant to regular processes of governmental administration and thus attributable to the government in its role as monopolist over punishment. In practical terms, this definition recognizes as punishment all that a legislature or sentencer expects and intends a prisoner to endure, including the physical setting of confinement and the quality and quantity of life's daily incidents (*e.g.*, food, clothing, and activities) over which prisoners are denied choice. It does not include accidental, exigent, random, or illegal injuries, whether inflicted by prison guards, fellow prisoners, or chance.

One commentator has suggested an approach that would yield similar results, but that approach was different analytically and less developed theoretically.<sup>12</sup> And the Supreme Court has noted potential problems with its own definition without pursuing any alternatives (much less developing theoretical bases for them).<sup>13</sup> This Article picks up where those suggestions left off.

Part I of the Article explains the three prevalent definitions of punishment in Eighth Amendment discourse: the structural definition,<sup>14</sup> the experiential definition,<sup>15</sup> and the subjectivist definition.<sup>16</sup>

Part II explains the problems with each definition. The structural definition reflects a stingy formalism and yields a stunted conception of a prison sentence.<sup>17</sup> The other definitions are too permissive; they at most depend on the intentions of individual prison officials and not on whether officials' actions respond to criminal behavior or administer any fairly understood sentence.<sup>18</sup> The definitions do a disservice to the Constitution, to the prisoners who undergo punishments, to the officials who set those punishments, and to the public that needs to understand these matters and whose consent is the foundation of our constitutional democracy.

Part III explains an alternative definition of punishment—a *governmentalist* definition—tied to the nature of government-inflicted punishment and thus

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<sup>12</sup> See Jeffrey D. Bukowski, Comment, *The Eighth Amendment and Original Intent: Applying the Prohibition Against Cruel and Unusual Punishments to Prison Deprivation Cases Is Not Beyond the Bounds of History and Precedent*, 99 DICK. L. REV. 419 (1995) (recommending application of Eighth Amendment to conditions of confinement but not to use of force).

<sup>13</sup> See *Hudson v. McMillian*, 503 U.S. 1, 12 (1992) (noting issue but dismissing as insubstantial for procedural and factual reasons); *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (recognizing that Eighth Amendment was being applied to "conduct that does not purport to be punishment at all").

<sup>14</sup> See *infra* text accompanying notes 29–35.

<sup>15</sup> See *infra* text accompanying notes 36–57.

<sup>16</sup> See *infra* text accompanying notes 58–86.

<sup>17</sup> See *infra* text accompanying notes 87–96.

<sup>18</sup> See *infra* text accompanying notes 97–184.

faithful to the premises of the Eighth Amendment.<sup>19</sup> Prison officials' actions should be considered punishment only when they are attributable to government as part of the penalty designated in response to criminal behavior. Attribution can be determined by asking whether actions are taken pursuant to regular processes of the system for administering punishments.<sup>20</sup> This definition provides a unitary meaning of punishment for the Eighth Amendment, applicable alike to prison conditions and uses of force. Part III also addresses several collateral issues: 42 U.S.C. § 1983,<sup>21</sup> the Ex Post Facto Clause,<sup>22</sup> and prison discipline.

Part IV demonstrates that the current strain on the Eighth Amendment is unnecessary because other provisions could be interpreted to give prisoners much the same protection without doing violence to the constitutional text.<sup>23</sup> The Due Process Clauses,<sup>24</sup> the Fourth Amendment<sup>25</sup> and state tort and criminal law<sup>26</sup> all would provide ample basis for remedying deprivations now addressed at the expense of the Eighth Amendment. Current constitutional doctrine thus does not necessarily reach wrong results; rather, it generally reaches right results in the wrong way

Part V explains why reaching right results in the wrong way should concern us. For one thing, judicial decisionmaking is partly a habit of mind, and bad habits that are harmless in one doctrinal area may yet prove harmful in another.<sup>27</sup> More important, the integrity of the decisionmaking process has

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<sup>19</sup> See *infra* text accompanying notes 185–287

<sup>20</sup> See *infra* text accompanying notes 203–33.

<sup>21</sup> 42 U.S.C. § 1983 (1994).

<sup>22</sup> U.S. CONST. art. I, § 10, cl. 1.

<sup>23</sup> See *infra* text accompanying notes 288–323.

<sup>24</sup> See *infra* text accompanying notes 291–303. The Due Process Clause of the Fifth Amendment, which applies to the federal government, states in pertinent part: “No person shall be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V. The Due Process Clause of the Fourteenth Amendment, which applies to the state governments, states in pertinent part: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV.

<sup>25</sup> See *infra* text accompanying notes 309–11. The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV

<sup>26</sup> See *infra* text accompanying notes 312–13.

<sup>27</sup> See *infra* text following note 338.

consequences for judicial legitimacy. This is especially true where countermajoritarian provisions are involved, and perhaps nowhere more true than in the Eighth Amendment's protection of justly disfavored criminals.<sup>28</sup>

## I. "PUNISHMENT"—TODAY'S MENU OF THREE PREVAILING DEFINITIONS

Three alternative definitions of punishment dominate Eighth Amendment discourse: the strictural definition, the experiential definition, and the subjectivist definition.

### A. *The Strictural Definition*

The strictural definition is that punishment includes only what a legislature or sentencing court specifically prescribes. Punishment is treated as the superficial intent of the sentencer, expressed in the language of the sentence as pronounced. Little room remains for doctrine in this approach. Statutes and sentences (*e.g.*, "*x years in prison*") can be tested only for their facial civility and proportionality—their superficial content as textual decrees—and not for details of their actual execution. The Eighth Amendment thus limits legislatures when they establish penalties and judges when they pronounce sentences in particular cases,<sup>29</sup> but it limits neither prison conditions nor the unauthorized use of force.

According to the stricturalists, this definition held sway until *Estelle v Gamble*<sup>30</sup> in 1976. Earlier decisions applied the Eighth Amendment only to abstract sentences—not to prison conditions and not to use of force.<sup>31</sup> Thus, the Court of Appeals for the Fifth Circuit reasoned in 1934 that

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<sup>28</sup> See *infra* text accompanying notes 341–51.

<sup>29</sup> Of course, state legislatures and judges could ignore the Eighth Amendment until the Fourteenth Amendment extended it over them, or more accurately, until the Supreme Court recognized as much in *Robinson v. California*, 370 U.S. 660, 666 (1962).

<sup>30</sup> 429 U.S. 97 (1976).

<sup>31</sup> See *Hudson v. McMillian*, 503 U.S. 1, 19–20 (1992) (Thomas, J., dissenting) (citing cases for proposition that courts did not apply Eighth Amendment to prison conditions until 1976). Justice Thomas's dissent drew public criticism, see, *e.g.*, Editorial, *The Youngest, Cruellest Justice*, N.Y. TIMES, Feb. 27, 1992, at A24, but neither the majority nor critics challenged his recitation of history.

[t]he prison system of the United States is under the control of the Attorney General and Superintendent of Prisons, and not of the District Courts. The court has no power to interfere with the conduct of the prison or its discipline, but only on habeas corpus to deliver from the prison those who are illegally detained there.<sup>32</sup>

Today, Justice Clarence Thomas is the most vocal supporter of the structural definition. He maintains that “judges or juries—but not jailers—impose ‘punishment.’”<sup>33</sup> For example, the Eighth Amendment cannot be violated if inmates assault another inmate, even if prison officials could have prevented it. Because an “unfortunate attack”<sup>34</sup> on an inmate is not “part of his sentence,” it does not “constitute ‘punishment’ under the Eighth Amendment.”<sup>35</sup>

### B. *The Experiential Definition*

The experiential definition is that punishment includes all conditions of confinement and uses of force, regardless of any prison official’s intent. This definition sweeps a great deal within the Eighth Amendment’s compass.

*Estelle* was the Court’s first application of the Amendment to prison conditions, and *Whitley v. Albers*<sup>36</sup> was the first application of the Amendment to prison officials’ use of force. *Estelle* did not even perceive an issue whether inadequate medical treatment constituted punishment. Rather, *Estelle* established a judicial test—a tool of judicial restraint, pragmatism, and formalism—to determine whether the presumed punishment of inadequate

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<sup>32</sup> *Platek v. Aderhold*, 73 F.2d 173, 175 (5th Cir. 1934). This doctrine arguably should have given way in 1947 when the Supreme Court decided *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947). The Court there rejected on the merits a prisoner’s Eighth Amendment claim that the State could not electrocute him a second time after a first attempt failed by accident. *See id.* at 463–64. This claim arguably concerned the manner in which prison officials administered the penalty rather than the electrocution sentence itself. Yet courts continued their hands-off approach after *Resweber*. *See, e.g., Sutton v. Settle*, 302 F.2d 286, 288 (8th Cir. 1962) (per curiam) (“Courts have uniformly held that supervision of inmates of federal institutions rests with the proper administrative authorities and that courts have no power to supervise the management and disciplinary rules of such institutions.”). Perhaps death was regarded as different even then. *See Harmelin v. Michigan*, 501 U.S. 957, 994 (1991) (noting respects in which Court has held that “‘death is different,’ and ha[s] imposed protections that the Constitution nowhere else provides”).

<sup>33</sup> *Helling v. McKinney*, 509 U.S. 25, 40 (1993) (Thomas, J., dissenting).

<sup>34</sup> *Farmer v. Brennan*, 114 S. Ct. 1970, 1990 (1994) (Thomas, J., concurring).

<sup>35</sup> *Id.*

<sup>36</sup> 475 U.S. 312 (1986).



medical care violated the Eighth Amendment. The joint opinion in *Gregg v. Georgia*,<sup>37</sup> a death penalty case, had defined Eighth Amendment violations as “unnecessary and wanton infliction of pain.”<sup>38</sup> *Estelle* held that in the context of prison medical care, the *Gregg* standard would be satisfied only if prison officials acted with “deliberate indifference.”<sup>39</sup> But no mention was made of whether punishment was involved in the first place.

The Court at least perceived the punishment issue in *Whitley*. But the result was not much different. Despite recognizing that the use of force did “not purport to be punishment at all,”<sup>40</sup> the Court established a judicial test to determine whether the nonpurported punishment violated the Eighth Amendment. This time the *Gregg* standard would be satisfied only if prison officials acted “maliciously and sadistically for the very purpose of causing harm”<sup>41</sup>—a bow to the exigent circumstances in which the Court figured that prison officials use force.<sup>42</sup>

Together, *Estelle* and *Whitley* put the Court’s stock in the experiential definition, assuring that the Amendment would follow a prisoner from the sentencing court to the penal institution and stand guard until the punishment was over. This definition continues to be influential. Justice Blackmun supported it with a passage in one of his last opinions—a concurrence in *Farmer v. Brennan*:<sup>43</sup> “‘Punishment’ does not necessarily imply a culpable state of mind on the part of an identifiable punisher. A prisoner may experience punishment when he suffers ‘severe, rough, or disastrous treatment,’ regardless of whether a state actor intended the cruel treatment to chastise or deter.”<sup>44</sup> In prison-conditions cases, responsibility “inevitably is diffuse”<sup>45</sup> but “the experience of the inmate is the same”<sup>46</sup> regardless of who is responsible for the conditions. Thus, prisoners sentenced to the same amount of time might undergo different punishments depending on where they are imprisoned. One prisoner might be placed in a “relatively safe, well-managed prison, complete with tennis courts and cable television,”<sup>47</sup> and the other in a prison

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<sup>37</sup> 428 U.S. 153, 158–207 (1976) (joint opinion of Stewart, Powell, & Stevens, JJ.).

<sup>38</sup> *Id.* at 173.

<sup>39</sup> *Estelle*, 429 U.S. at 104.

<sup>40</sup> *Whitley*, 475 U.S. at 319.

<sup>41</sup> *Id.* at 320–21 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)).

<sup>42</sup> *See id.*

<sup>43</sup> 114 S. Ct. 1970 (1994).

<sup>44</sup> *Id.* at 1988 (Blackmun, J., concurring) (citation omitted) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1843 (1961)).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

"characterized by rampant violence and terror."<sup>48</sup> These different conditions of confinement, the Justice argued, should be recognized as resulting in "differ[ent] punishment[s]" for Eighth Amendment purposes.<sup>49</sup>

In prison-conditions cases and use-of-force cases alike, the experiential definition not only yields a let-it-all-in version of punishment, but rules out pragmatic, subjective-intent requirements that limit judicial review of prison administration. Justice Stevens has been the most consistent at this. Beginning with *Estelle*, he opposed consideration of prison officials' subjective intent and instead urged consideration merely of whether conditions were "cruel and inhuman."<sup>50</sup> In *Wilson v. Setter*,<sup>51</sup> he joined three other Justices<sup>52</sup> in opposing any intent requirement in conditions-of-confinement cases.<sup>53</sup> And in *Whitley v. Albers*,<sup>54</sup> he joined three others<sup>55</sup> in opposing any intent requirement—especially a heightened intent requirement—in use-of-force cases.<sup>56</sup> The experiential definition is consistent with such efforts to restrict the question to whether an infliction was objectively unnecessary or wanton.<sup>57</sup>

### C. The Subjectivist Definition

The subjectivist definition currently enjoys a majority on the Supreme Court. This majority found its voice in *Whitley* and *Wilson*, and embraces subjective intent requirements. *Whitley* established the intent requirement for use-of-force cases. Gerald Albers was serving a sentence in the Oregon prison system (for what or how long we are not told in any of the court opinions).<sup>58</sup> A

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<sup>48</sup> *Id.*

<sup>49</sup> *See id.*

<sup>50</sup> *See Estelle v. Gamble*, 429 U.S. 97, 117 (1976) (Stevens, J., dissenting); *see also Farmer v. Brennan*, 114 S. Ct. 1970, 1989 (Stevens, J., concurring) ("I continue to believe that a state official may inflict cruel and unusual punishment without any improper subjective motivation") (citations omitted). Most of the "liberal" Justices agreed in *Estelle* that a minimal subjective "deliberate indifference" requirement was appropriate because unintentional harm would not be unnecessary and wanton. *See Estelle*, 429 U.S. at 103–06.

<sup>51</sup> 501 U.S. 294 (1991).

<sup>52</sup> Justices White, Marshall, and Blackmun.

<sup>53</sup> *See Wilson*, 501 U.S. at 306 (White, J., concurring).

<sup>54</sup> 475 U.S. 312 (1986).

<sup>55</sup> Justices Marshall, Brennan, and Blackmun.

<sup>56</sup> *See Whitley*, 475 U.S. at 328–30 (Marshall, J., dissenting); *infra* text accompanying notes 58–60.

<sup>57</sup> Justice Marshall's dissent in *Whitley* made no mention of the deliberate indifference standard applicable to prison-conditions cases.

<sup>58</sup> *See Albers v. Whitley*, 546 F. Supp. 726 (D. Or. 1982), *aff'd in part, rev'd in part*, 743 F.2d 1372 (9th Cir. 1984), *rev'd*, 475 U.S. 312 (1986).

prison guard shot Albers in the leg at the end of a prison disturbance.<sup>59</sup> The Court held that a heightened intent requirement applied to use-of-force cases: Cruel and unusual punishment occurred only if prison officials acted “maliciously and sadistically for the very purpose of causing harm.”<sup>60</sup>

*Wilson* subsequently established that the *Estelle* intent standard would be applied in conditions-of-confinement cases generally.<sup>61</sup> Pearly Wilson was serving a sentence in the Ohio prison system (for what and how long we are not told in any of the court opinions).<sup>62</sup> He challenged a variety 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.”<sup>63</sup> The Court held that *Estelle*’s deliberate indifference requirement applied generally to such conditions of confinement and not just to prison medical care.<sup>64</sup>

*Whitley* and *Wilson* represented the subjectivists’ first epiphanies on the significance of the word “punishment” in the Eighth Amendment. The Court in *Estelle* had introduced the deliberate indifference requirement as a proxy for the substantive requirement of cruelty and unusualness and said nothing of punishment.<sup>65</sup> *Whitley*’s heightened intent requirement was based partly on the same consideration and partly on the exigencies of prison security. But the Court added a new rationale: “To be cruel and unusual punishment, *conduct that does not purport to be punishment at all* must involve more than ordinary lack of due care for the prisoner’s interests or safety.”<sup>66</sup> One of the reasons for

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<sup>59</sup> See *Whitley*, 475 U.S. at 316–17.

<sup>60</sup> *Id.* at 320–21 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)). The Second Circuit in *Johnson* had used the malicious-and-sadistic test as a factor in determining whether a substantive due process claim was stated.

<sup>61</sup> See *Wilson v. Seiter*, 501 U.S. 294, 303 (1991).

<sup>62</sup> See *Wilson v. Seiter*, 893 F.2d 861 (6th Cir. 1990), *vacated*, 501 U.S. 294 (1991).

<sup>63</sup> See *Wilson*, 501 U.S. at 296.

<sup>64</sup> See *id.* at 303.

<sup>65</sup> See *Estelle v. Gamble*, 429 U.S. 97 (1976).

[A]n inadvertent failure to provide adequate medical care cannot be said to constitute ‘an unnecessary or wanton infliction of pain’ or to be ‘repugnant to the conscience of mankind.’ In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend ‘evolving standards of decency’ in violation of the Eighth Amendment.

*Id.* at 105–06.

<sup>66</sup> *Whitley v. Albers*, 475 U.S. 312, 319 (1976) (emphasis added).

an intent requirement was thus to honor the Eighth Amendment's limitation to punishment.

The *Wilson* Court elevated the punishment rationale to the primary analytical basis for the intent requirement:

The source of the intent requirement is not the predilections of this Court, but the Eighth Amendment itself, which bans only cruel and unusual *punishment*. If the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify.<sup>67</sup>

The subjectivists recently elaborated on the meaning of deliberate indifference in *Farmer v. Brennan*.<sup>68</sup> Dee Farmer, an effeminate transsexual, was serving a long sentence in federal prison for credit card fraud.<sup>69</sup> Although Farmer had "overtly feminine characteristics,"<sup>70</sup> he was preoperative, and according to federal prison practice, was incarcerated with male prisoners.<sup>71</sup> Farmer alleged that he was beaten and raped by another inmate after two weeks in the general population of the federal penitentiary to which he had been transferred.<sup>72</sup> He claimed that prison officials knew that the facility was dangerous and that he would be "particularly vulnerable."<sup>73</sup> Beating and rape surely seem to be disproportionate, cruel and unusual punishment for the crime of credit card fraud.<sup>74</sup> But it was another inmate, not prison officials, who harmed Farmer. The question therefore concerned prison officials' deliberate indifference, not active aggression.<sup>75</sup>

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<sup>67</sup> *Wilson v. Seiter*, 501 U.S. 294, 300 (1991).

<sup>68</sup> 114 S. Ct. 1970 (1994).

<sup>69</sup> *See id.* at 1974-75; *Farmer v. Haas*, 990 F.2d 319, 320 (7th Cir. 1993).

<sup>70</sup> *Farmer v. Brennan*, 114 S. Ct. 1970, 1986 (Blackmun, J., concurring).

<sup>71</sup> *See id.* at 1975.

<sup>72</sup> *See id.*

<sup>73</sup> *See id.*

<sup>74</sup> *Cf. id.* at 1987 (Blackmun, J., concurring) ("Although formally sentenced to a term of incarceration, many inmates discover that their punishment, even for nonviolent offenses like credit-card fraud or tax evasion, degenerates into a reign of terror unmitigated by the protection supposedly afforded by prison officials.").

<sup>75</sup> *See id.* at 1975.

[T]he complaint alleged that respondents either transferred petitioner to USP-Terre Haute or placed petitioner in its general population despite knowledge that the penitentiary had a violent environment and a history of inmate assaults, and despite knowledge that petitioner, as a transsexual who 'projects feminine characteristics,' would be particularly vulnerable to sexual attack by some USP-Terre Haute inmates.

The Court confirmed the punishment rationale for intent requirements: "The Eighth Amendment does not outlaw cruel and unusual 'conditions', it outlaws cruel and unusual 'punishments.'" [A]n official's failure to alleviate a significant risk that he should have perceived but did not cannot be condemned as the infliction of punishment."<sup>76</sup> Thus, "deliberate indifference serves under the Eighth Amendment to ensure that only inflictions of punishment carry liability."<sup>77</sup> The strictural and experiential definitions were cast to the margins. Justice Thomas found himself alone in a concurrence expressing the strictural view,<sup>78</sup> despite Justice Scalia's agreement with him just two years earlier.<sup>79</sup> And Justices Blackmun and Stevens were left to express the experiential view.<sup>80</sup>

*Whitley*, *Wilson*, and *Farmer* establish that punishment under current doctrine means all that a legislature or sentencing court explicitly prescribes, *plus* implicit or unprescribed pains *if* the official charged with their infliction possesses a requisite intent as defined in those decisions. Specifically, punishment includes pain experienced in prison after sentencing, but only if officials act with a sufficiently culpable state of mind: subjective recklessness in conditions-of-confinement cases,<sup>81</sup> and malicious and sadistic intent in use-of-force cases.<sup>82</sup> The decisions anchor the intent requirements in the word "punishment." Those requirements are thus not just mechanisms for judicial

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*Id.*

<sup>76</sup> *Id.* at 1979.

<sup>77</sup> *Id.* at 1981; *see also id.* at 1982 ("[P]rison officials who lacked knowledge of a risk cannot be said to have inflicted punishment"); *id.* at 1980.

[T]he reasons for focusing on what a defendant's mental attitude actually was (or is), rather than what it should have been (or should be), differ in the Eighth Amendment context from that of the criminal law. Here, a subjective approach isolates those who inflict punishment; there, it isolates those against whom punishment should be inflicted.

*Id.*

<sup>78</sup> *See id.* at 1990–91 (Thomas, J., concurring).

<sup>79</sup> *See Hudson v. McMillian*, 503 U.S. 1, 17 (1992) (Thomas, J., dissenting); Marjorie Rifkin, *Farmer v. Brennan: Spotlight on an Obvious Risk of Rape in a Hidden World*, 26 COLUM. HUM. RTS. L. REV. 273, 289 (1995) (making same observation).

<sup>80</sup> *See Farmer v. Brennan*, 114 S. Ct. 1970, 1986–89 (1994) (Blackmun, J., concurring); *id.* at 1989 (Stevens, J., concurring); *supra* text accompanying notes 36–57.

<sup>81</sup> *See supra* text accompanying notes 61–77.

<sup>82</sup> *See supra* text accompanying notes 58–60.

deference to prison administrators,<sup>83</sup> or proxies for cruelty and unusualness,<sup>84</sup> but an authentic alternative expression of the textual reference to punishment.<sup>85</sup>

Treating the intent requirements as inevitable aspects of the Eighth Amendment's textual reference to punishment is a post-hoc rationalization. Deliberate indifference originally served the cruelty and unusualness aspect of the Eighth Amendment without mention of the punishment aspect.<sup>86</sup> The subjectivists' recognition of a punishment prerequisite was novel. "Better late than never," you might say. Unfortunately, the better saying would be "Close, but no cigar."

## II. PROBLEMS WITH THE THREE PREVAILING DEFINITIONS (NOTHING GOOD ON THE MENU)

The prevailing definitions of punishment are flawed. They do a disservice to the Constitution, to prisoners and prison officials, and to the public.

### A. *The Structural Definition*

The structural definition is too narrow. It is myopic, stingy, and internally contradictory. It is myopic<sup>87</sup> and stingy because it inquires only into the statutory penalty and the sentence as pronounced. Those are abstractions—facades. Real punishment is not words or a term of years, but an intended experience. "Twenty years in the penitentiary" is impressive not just because twenty years is a long time to spend in one place. It is impressive because we

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<sup>83</sup> See *Whitley v. Albers*, 475 U.S. 312, 321–22 (1986) (grounding malicious-and-sadistic requirement on deference to prison administrators' judgments about maintaining security).

<sup>84</sup> See *id.* at 320–21 (justifying malicious-and-sadistic requirement as proper test for whether actions are unnecessary and wanton); *Estelle v. Gamble*, 429 U.S. 97, 105–06 (1976) (justifying deliberate indifference requirement as proper test for whether actions are unnecessary and wanton, or repugnant to the conscience of mankind, or offensive to evolving standards of decency).

<sup>85</sup> See *Farmer*, 114 S. Ct. at 1979–82; *Wilson v. Seiter*, 501 U.S. 294, 300 (1991); *Whitley*, 475 U.S. at 312, 319. I have elsewhere developed a view of constitutional doctrine as a body of alternative expressions of the original text. See Thomas K. Landry, *Constitutional Invention: A Patent Perspective*, 25 RUTGERS L.J. 67, 74–85 (1993); cf. *Farmer*, 114 S. Ct. at 1970, 1980 (describing deliberate indifference standard as a "judicial gloss").

<sup>86</sup> See *supra* text accompanying note 65.

<sup>87</sup> See *Farmer*, 114 S. Ct. at 1988 (Blackmun, J., concurring) (describing Court's doctrine as "myopic").

know—or have an idea—what that place called a penitentiary is like. We know—or have an idea—what it would be like to be there.<sup>88</sup> The Eighth Amendment calculus cannot simply be an evaluation of the morality and proportionality of a superficial sentence—“*x years in prison*.” The nature of a punishment of imprisonment depends on the terms and conditions of imprisonment, just as the nature of a criminal offense depends on the facts of the crime.

Legislatures, sentencing judges, and judges considering Eighth Amendment claims should not be permitted to hide behind abstract pronouncements of sentence. Their decisions are not just words written in codes or spoken in courts. Their decisions are orders that a defendant shall or may be punished in the penal system as it exists (or as it will exist, in case it is lawfully changed during the prisoner’s punishment). A sentence and any decision upholding its execution *imply* all of the arrangements that the government has made for its inmates: prison walls, barbed wire, guard towers, guns, searches and seizures, meals, recreation time and facilities, and a system of rules governing inmate behavior; the list goes on and on. When convicts are sentenced to imprisonment, all of the arrangements are part of the meaning of their punishment.

The strictural definition is internally contradictory because it champions objectivity, yet masks the true mental state of legislatures, sentencing judges, and judges considering Eighth Amendment claims. These people really do not act upon pure abstractions after all. Rather, they have well-developed personal conceptions of what prison is. These conceptions may be imaginary, but they are no less reified. The product of imagination, after all, is an *image*.<sup>89</sup> The strictural definition insists that the Eighth Amendment forbids consideration of prison conditions and other matters besides the abstract term of years, but in truth decisionmakers consult their own beliefs and indulge their own assumptions.

Consider Justice Thomas’s opinions.<sup>90</sup> He insists that the Eighth

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<sup>88</sup> See Melvin Gutterman, *The Contours of Eighth Amendment Prison Jurisprudence: Conditions of Confinement*, 48 SMU L. REV. 373, 397–98 (1995) (“It seems unlikely that state judges are not familiar with conditions in their state prisons.”). Professor Gutterman makes the interesting point that prisoners enter plea agreements to get sent to preferred facilities. See *id.* at 398. Courts thus sometimes specifically “countenanc[e] the conditions of confinement,” which therefore “[p]erhaps . . . should be viewed as expressly provided in the sentence.” *Id.*

<sup>89</sup> The words “image” and “imagination” are both rooted in the Latin “*imago*,” meaning an imitation or copy. See WEBSTER’S NEW TWENTIETH CENTURY DICTIONARY 907 (2d ed. 1983).

<sup>90</sup> See *Farmer*, 114 S. Ct. at 1990–91 (Thomas, J., concurring); *Helling v. McKinney*, 509 U.S. 25, 37–42 (1993) (Thomas, J., dissenting); *Hudson v. McMillian*, 503 U.S. 1, 17–

Amendment does not "regulate[] prison conditions not imposed as part of a sentence."<sup>91</sup> He reasons:

[P]rison was not a more congenial place in the early years of the Republic than it is today; nor were our judges and commentators so naive as to be unaware of the often harsh conditions of prison life. Rather, they simply did not conceive of the Eighth Amendment as protecting inmates from harsh treatment.<sup>92</sup>

Justice Thomas declares the Eighth Amendment irrelevant to prison conditions. But he does so by invoking personal beliefs about modern prison conditions and comparing them to prison conditions of centuries ago. What would he say if prison *was* a more congenial place in the early years of the Republic? Would the opinions of ancestral judges and commentators still control? His reasoning does not demonstrate that prison conditions are categorically outside the scope of the Eighth Amendment; rather, it posits that prison conditions are not cruel and unusual, which amounts to a substantive response to the Eighth Amendment claim.

When imposing punishment, courts consider the facts of a crime, not just the type of crime.<sup>93</sup> An especially cruel violation of a penal provision will justify a far stiffer sentence than a crime that barely and technically violates the

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29 (1992) (Thomas, J., dissenting).

<sup>91</sup> *Farmer*, 114 S. Ct. at 1991 (Thomas, J., concurring); *see also Helling*, 509 U.S. at 37-42 (Thomas, J., dissenting); *Hudson*, 503 U.S. at 18-20 (Thomas, J., dissenting).

<sup>92</sup> *Hudson*, 503 U.S. at 19 (Thomas, J., dissenting).

<sup>93</sup> *See, e.g., United States v. Michalek*, 54 F.3d 325, 336 (7th Cir. 1995) (Ferguson, J., concurring in part and dissenting in part) (describing the "structure of [Federal] Sentencing Guidelines, whereby the core crime corresponds to the base offense level and the enhancements correspond to the particular facts of the crime as it was committed by the defendant"). *See generally* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 9-12 (1988) (explaining operation of federal sentencing guidelines); David A. Harris, *Justice Rationed in the Pursuit of Efficiency: De Novo Trials in the Criminal Courts*, 24 CONN. L. REV. 381, 411 (1992) ("[A] number of states and the federal government use sentencing guidelines that typically give courts a range within which to sentence a defendant, based on facts about both the offense and the defendant."); Ronald F. Wright, *Complexity and Distrust in Sentencing Guidelines*, 25 U.C. DAVIS L. REV. 617 (1992).

The typical unstructured sentencing statute will classify crimes according to seriousness, provide wide ranges of possible sentences, and perhaps give the sentencing court a list of facts and perspectives to consider, such as characteristics about the crime and other past experiences of the defendant or certain objectives of criminal sentencing generally.



same penal provision.<sup>94</sup> That makes sense. Not all assaults are alike, not all armed robberies are alike, not all murders are alike.<sup>95</sup> Why then, when courts consider Eighth Amendment claims, should the facts of prison conditions not be taken into account? Not all prisons are alike. Courts must consider the facts of imprisonment if crime and punishment are to be fairly weighed.<sup>96</sup>

The stricturalists should abandon their disingenuous position that prison conditions are not part of the punishment inflicted. They should admit that prison conditions are fair game for an Eighth Amendment claim, and honestly make their true case: that prison conditions are never cruel and unusual. They rely on a disingenuous definition of punishment at the expense of open discussion and doctrinal clarity

### B. *The Experiential Definition*

The experiential definition is too broad because it treats anything that a prisoner undergoes—including all incidents of confinement and interpersonal uses of force—as punishment under the Eighth Amendment. Punishment is a penalty imposed in response to unwanted behavior.<sup>97</sup> Not all of a prisoner's experiences can fairly be characterized as part of the government's response to a prisoner's crime.<sup>98</sup> But this is irrelevant under an experiential definition. Such hyperextension of the Eighth Amendment levels one of the dramatic peaks of the Constitution, conflates the Amendment with other patches of the constitutional text, and generally fails to take seriously the text and structure of

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<sup>94</sup> See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 5K2.8 policy statement (1994).

If the defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim, the court may increase the sentence above the guideline range to reflect the nature of the conduct. Examples of extreme conduct include torture of a victim, gratuitous infliction of injury, or prolonging of pain or humiliation.

*Id.*

<sup>95</sup> See Breyer, *supra* note 93, at 9 (observing that "particular crimes may be committed in different ways, which in the past ha[s] made, and still should make, an important difference in terms of the punishment imposed").

<sup>96</sup> See Gutterman, *supra* note 88, at 398 (suggesting that "[p]erhaps prison conditions should be viewed as expressly provided in the sentence" so that "all conditions of confinement are considered as authorized by the sentencing judge").

<sup>97</sup> See *supra* text accompanying note 11.

<sup>98</sup> Cf. *Helling v. McKinney*, 509 U.S. 25, 38 (1993) (Thomas, J., dissenting) (observing that traditional understanding of punishment "[did] not encompass a prisoner's injuries that bear no relation to his sentence").

the Constitution.<sup>99</sup>

The excess of the experiential definition is apparent from its implications. Injuries suffered by accident, or at the hands of fellow prisoners, could be regarded as prison conditions—punishment—subject to the Eighth Amendment. And any use of force by prison officials would be regarded as punishment, no matter how illegal or how unconnected to the prisoner's original crime. None of the results comports with a common-sense understanding of punishment.

Experientialist attempts to counter the punishment prerequisite prove downright disingenuous. For instance, Justice Blackmun in his *Farmer v. Brennan*<sup>100</sup> concurrence quoted from a dictionary that defined punishment as “severe, rough, or disastrous treatment.”<sup>101</sup> But the full entry for punishment in that source reads:

1 : the act of punishing : the infliction of a penalty 2 a : retributive suffering, pain, or loss : PENALTY      b : a penalty inflicted by a court of justice on a convicted offender : a penalty for an offense and for reformation and prevention; *broadly* : any damage or pain inflicted on an offender through judicial procedure aiming at either prevention, retribution, or reformation—compare CRUEL AND UNUSUAL PUNISHMENT 3 : severe, rough, or disastrous treatment      102

Justice Blackmun thus selected an obviously less relevant definition of punishment than his own source offered and conveniently omitted mention of the more relevant, more limited definition. That would be bad as scholarship; it is worse as judging.

Dictionaries contemporaneous with the adoption of the Bill of Rights are of no greater help to the experientialist position. For instance, Samuel Johnson's *A Dictionary of the English Language* defined punishment simply as: “Any infliction imposed in vengeance of a crime.”<sup>103</sup>

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<sup>99</sup> Cf. Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1237 (1995) (urging respect for the Constitution as a “complex system whose parts fit together into a multidimensional whole”). For additional consideration of Professor Tribe's approach and its relation to the ideas presented here, see *infra* text accompanying notes 330–37.

<sup>100</sup> 114 S. Ct. 1970 (1994).

<sup>101</sup> *Id.* at 1988 (Blackmun, J., concurring) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1843 (1961)).

<sup>102</sup> WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1843 (1961).

<sup>103</sup> 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, W. Strahan 1773). There was no significant change in this understanding between the adoption of the Bill of Rights and the adoption of the Fourteenth Amendment (which is the basis for applying the Eighth Amendment to the states, see *Robinson v. California*, 370 U.S. 660, 666

The degree to which an experientialist definition of punishment has gained currency on the Supreme Court is debatable. Where use of force is concerned, the Court more clearly accepts an experientialist definition of punishment. A majority of the Court consistently applies the Eighth Amendment to use of force by prison officials, and ignores the issue of punishment.<sup>104</sup>

Where prison conditions are at issue, the Court at first did not recognize the issue of punishment<sup>105</sup> and appeared to adopt an experientialist definition. But the Court later limited the Eighth Amendment's reach to conditions caused by prison officials acting with a minimum level of subjective intent and tied that limitation to the Amendment's punishment requirement.<sup>106</sup> Although the majority thus departed from an experientialist definition, some Justices continued to hum the tune, if not sing the words, of the old song. Justice Stevens, for example, continued to argue that the subjective intent of prison officials is irrelevant to whether cruel and unusual punishment is inflicted.<sup>107</sup> And other Justices continued to lend rhetorical support to that position, despite ultimately accepting an intent requirement.<sup>108</sup>

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(1962)). Punishment is defined in an 1878 edition of Worcester's dictionary simply as "[t]he act of punishing; any infliction, suffering, or pain, imposed on one who has committed a fault or crime, or has neglected the performance of a required act; a penalty; correction." JOSEPH E. WORCESTER, A DICTIONARY OF THE ENGLISH LANGUAGE 1155 (Philadelphia, J.B. Lippincott & Co. 1878). That dictionary defines punish as "1. To afflict with pain, loss, confinement, death, or other penalty, for some fault or crime; to chastise; to correct; to castigate; to chasten. 2. To reward, or take vengeance on, by punishing the offender." *Id.*

<sup>104</sup> See, e.g., *Hudson v. McMillian*, 503 U.S. 1 (1992); *Whitley v. Albers*, 475 U.S. 312 (1986).

<sup>105</sup> See *supra* text accompanying notes 36–39 (explaining that *Estelle v. Gamble*, 429 U.S. 97 (1976), extended deliberate indifference standard to prison-conditions cases without questioning whether prison doctor's alleged negligence constituted punishment).

<sup>106</sup> The Court laid down the law on prison conditions in *Wilson v. Seiter*, 501 U.S. 294 (1991), and *Farmer v. Brennan*, 114 S. Ct. 1970 (1994). *Wilson* requires prisoners to show that conditions result from prison officials' deliberate indifference, see *Wilson*, 501 U.S. at 303, and *Farmer* defines deliberate indifference as equal to criminal recklessness: disregard of a serious risk about which the officials had actual knowledge (as opposed to a risk about which the officials merely *should* have known), see *Farmer*, 114 S. Ct. at 1978–80.

<sup>107</sup> See, e.g., *Farmer*, 114 S. Ct. at 1989–90 (Stevens, J., concurring) (joining majority's conclusion because it is faithful to Court's precedents, but reiterating position that intent is irrelevant); *Estelle*, 429 U.S. at 116 n.13 (Stevens, J., dissenting) (asserting that prison doctor's negligence could constitute cruel and unusual punishment because government has obligation to provide competent medical care to prisoners).

<sup>108</sup> Justice White and others in *Wilson* argued that "[i]nhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison," and "intent simply is not very meaningful when considering a challenge to an institution, such as a prison system." *Wilson*, 501 U.S. at 310 (White, J., concurring).

To be fair, however, opposition to a subjective intent requirement might not indicate adherence to a true experientialist definition. Even Justice Stevens appears to place some limitations on the prison experiences that count as punishment.<sup>109</sup> And the Justices who sought to limit the subjective intent requirement in *Wilson* and *Farmer* were the same ones who agreed in *Estelle* that accidental harm could not be cruel and unusual punishment.<sup>110</sup> Indeed, that

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Similarly, Justice Blackmun's concurrence in *Farmer* contains numerous passages that support an experiential reading. See *supra* text accompanying notes 43-49; see also *Farmer*, 114 S. Ct. at 1988 (Blackmun, J., concurring) (quoting *The Supreme Court—Leading Cases*, 105 HARV L. REV 177, 243 (1991)) (“[S]tate-sanctioned punishment consists not so much of specific acts attributable to individual state officials, but more of a cumulative agglomeration of action (and inaction) on an institutional level.”). Commentators have presented similar ideas. See, e.g., Gutterman, *supra* note 88, at 395 (“The particularized requirement of subjective deliberate indifference misperceives the nature of state-sanctioned punishment. [Poor conditions] may arise from legislative neglect rather than prison policy. The legislature, judiciary, and correctional personnel are all components of a continuous system of administration of justice.”).

The concern about identifying responsible officials is unconvincing. As towering as the criminal justice system might be, it is nonetheless run by individuals who can be identified and whose decisions and intentions can be evaluated. Government actors responsible for prison conditions are probably *not* hard to identify. Prison conditions generally arise from the actions or inactions of one government agent or another: the maintenance employee who sets the temperature too low, the purchasing agent who supplies beds that are too small, or the architect who designs a ceiling that collapses. Such conditions could be traced to a responsible governmental actor. It is thus no surprise that none of the Court's conditions-of-confinement decisions has rejected a prisoner's complaint for failure to identify a responsible government official. Cases where the prisoner's claim failed were handled on the basis of what the official did, not the official's anonymity. See, e.g., *Estelle*, 429 U.S. at 104-05 (explaining that indifference of prison doctors or guards to medical needs may violate Eighth Amendment).

<sup>109</sup> See *Estelle*, 429 U.S. at 116 n.13 (Stevens, J., dissenting).

Of course, not every instance of improper health care violates the Eighth Amendment. Like the rest of us, prisoners must take the risk that a competent, diligent physician will make an error. Such an error may give rise to a tort claim but not necessarily to a constitutional claim. But when the State adds to this risk, as by providing a physician who does not meet minimum standards of competence or diligence or who cannot give adequate care because of an excessive caseload or inadequate facilities, then the prisoner may suffer from a breach of the State's constitutional duty.

*Id.* (Stevens, J., dissenting).

<sup>110</sup> See *id.* at 105 (“An accident, although it may produce added anguish, is not on that basis alone to be characterized as wanton infliction of unnecessary pain.”). The Justices who sought to limit the subjective intent requirement in *Wilson* were Justices White, Marshall, Blackmun, and Stevens. See *Wilson*, 501 U.S. at 295. Only Justice Stevens dissented from

was old hat,<sup>111</sup> and their language in *Wilson* and *Farmer* did not explicitly recant the accepted Eighth Amendment status of accidental harm.<sup>112</sup> The experientialist definition's currency in conditions-of-confinement cases appears to have been more rhetorical than doctrinal.

In any event, there are three major problems with an experientialist definition in conditions-of-confinement and use-of-force cases alike. First, it does not comport with any ordinary understanding of the word punishment. Second, such punishments cannot rationally be analyzed under Eighth Amendment doctrine. Third, treating interpersonal uses of force as punishment under the Eighth Amendment disrespects the solemn nature of governmental punishment for crime.

### 1. *The Text*

First is the simple problem of text: No ordinary sense of the word punishment includes inflictions that are unrelated to prior wrongdoing. In conditions cases, truly accidental harm is just that: accidental. It has nothing to do with responding to the prisoner's crime and therefore cannot fairly be characterized as punishment.<sup>113</sup> The same goes for other "conditions" like unpredictable attacks by other inmates or the contraction of a sexually transmitted disease through voluntary sexual conduct.

Similarly, use of force similarly cannot fairly be characterized as punishment. For example, consider *Hudson v McMillian*.<sup>114</sup> Keith Hudson was serving a twenty-year sentence in the Louisiana prison system for armed

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*Estelle* on the ground that intent was irrelevant, although it might be significant that Justice Blackmun concurred without opinion. See *Estelle*, 429 U.S. at 108, 116–17.

<sup>111</sup> The *Estelle* Court relied on *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), which rejected an Eighth Amendment claim for a second attempt at electrocution after a first attempt failed because of an "unforeseeable accident." *Id.* at 464. An interesting point about *Estelle* is that the prisoner claimed cruel and unusual punishment based on negligent medical care, but not based on what caused him to need that care: A bale of cotton fell on him while he was unloading a truck as part of his prison labor. See *Estelle*, 429 U.S. at 99. If intent were truly irrelevant, that injury presumably would be considered part of the punishment and subject to the Eighth Amendment.

<sup>112</sup> The majority opinions in *Farmer* and *Wilson* referred to accidents but drew no response from those who had lent support to an experientialist definition. See *Farmer v. Brennan*, 114 S. Ct. 1970, 1980 (1994); *Wilson*, 501 U.S. at 297–98, 300.

<sup>113</sup> An "accident" may result from dangerous conditions that are established or maintained out of enmity for prisoners. Such inflictions are better termed "punishment" than "accident."

<sup>114</sup> 503 U.S. 1 (1992).

robbery.<sup>115</sup> He and a neighboring prisoner argued in the wee hours of October 30, 1983 when Hudson refused to stop washing his clothes in his toilet (presumably a noisy activity),<sup>116</sup> and was reprimanded by a guard, Jack McMillian.<sup>117</sup> Hudson and McMillian then argued.<sup>118</sup> McMillian and another guard handcuffed and shackled Hudson to take him to an isolation cell.<sup>119</sup> On the way, they beat him, causing the following injuries: minor bruises; swelling of the face, mouth, and lip; loosened teeth; and damage to a partial dental plate.<sup>120</sup>

The Court applied the Eighth Amendment despite recognizing that the beating might not have been "punishment" in any ordinary sense of the word.<sup>121</sup> Although the Court noted conflicting precedents on whether the unauthorized use of force is punishment,<sup>122</sup> it gave short shrift to the subject and indicated that it thought Hudson's beating was indeed punishment.<sup>123</sup> The Court explained that the guards also beat the other prisoner (with whom

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<sup>115</sup> See David Margolick, *From a Lonely Prison Cell, an Inmate Wins an Important Victory for Civil Liberties*, N.Y. TIMES, Mar. 6, 1992, at B8.

<sup>116</sup> There was "conflicting testimony about almost all aspects of the case," Hudson v. McMillian, No. 83-1385-A, slip op. at 25 (M.D. La. Apr. 30, 1987), and no court ever took a position on how the trouble actually started. But the neighboring inmate gave his account while testifying on Hudson's behalf, *see id.* at 20-21, and the Solicitor General's office essentially agreed in its brief supporting Hudson before the Supreme Court, *see* Brief for the United States as Amicus Curiae Supporting Petitioner at 2, Hudson v. McMillian, 503 U.S. 1 (1992) (No. 90-6531) (hereinafter Hudson Brief).

<sup>117</sup> See Hudson v. McMillian, No. 83-1385-A, slip op. at 21 (M.D. La. Apr. 30, 1987); Hudson Brief, at 2; *see also* Lynn S. Branham, *Significant Versus Insignificant Beatings: Does the Eighth Amendment Draw such a Distinction?*, 1991-92 PREVIEW OF U.S. SUP. CT. CASES 69, 104.

<sup>118</sup> See Hudson, No. 83-1385-A, slip op. at 21, Hudson Brief, at 2; *See also* Branham, *supra* note 117 at 104.

<sup>119</sup> See Margolick, *supra* note 115, at B8.

<sup>120</sup> *See id.*

<sup>121</sup> See Hudson, 503 U.S. at 11-12 (rejecting argument that beating was not punishment); *see also supra* text accompanying note 11 (suggesting ordinary definition of punishment: penalty imposed in response to unwanted behavior).

<sup>122</sup> See Hudson, 503 U.S. at 11-12 (citing *George v. Evans*, 633 F.2d 413, 416 (5th Cir. 1980) ("[A] single, unauthorized assault by a guard does not constitute cruel and unusual punishment"); *Johnson v. Glick*, 481 F.2d 1028, 1032 (2d Cir. 1973) ("[A]lthough a spontaneous attack by a guard is 'cruel' and, we hope, 'unusual,' it does not fit any ordinary concept of 'punishment.'"). *But see* *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985) ("If a guard decided to supplement a prisoner's official punishment by beating him, this would be punishment").

<sup>123</sup> See Hudson, 503 U.S. at 12. The Court also gave procedural reasons: The question about authorized punishment had not been raised in the circuit court and was not the subject of the Court's grant of certiorari. *See id.*

Hudson had argued), thus suggesting a pattern of behavior as opposed to an isolated incident,<sup>124</sup> and that the guards' supervisor expressly condoned the beatings.<sup>125</sup>

Justice Thomas, in dissent, observed:

While granting petitioner relief on his Eighth Amendment claim, the Court leaves open the issue whether isolated and unauthorized acts are "punishment" at all. This will, of course, be the critical question in future cases of this type. If we ultimately decide that isolated and unauthorized acts are not "punishment," then today's decision is a dead letter. That anomaly simply highlights the artificiality of applying the Eighth Amendment to prisoner grievances, whether caused by the random misdeeds of prison officials or by official policy.<sup>126</sup>

This point is quite serious, and may eventually garner Justice Thomas partial vindication<sup>127</sup> in spite of the fierce criticism that his dissent drew.<sup>128</sup> Hudson was not punished in any normal sense of the word<sup>129</sup>—and the word's use in the Eighth Amendment is nothing if not normal.

## 2. *Square Peg, Round Hole*

The second major problem is that the experiential definition yields "punishments" that are impossible to analyze sensibly under settled modes of Eighth Amendment analysis. Cruel and unusual punishments have

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<sup>124</sup> See *id.*

<sup>125</sup> See *id.*

<sup>126</sup> *Id.* at 22 n.2 (Thomas, J., dissenting).

<sup>127</sup> For reasons already discussed, see *supra* text accompanying notes 89–96, Justice Thomas's view suffers from its own deficiencies.

<sup>128</sup> See *supra* note 31 and accompanying text.

<sup>129</sup> Cf. Phillips, *supra* note 10, at 390 (describing various forms of contact with prisoners that do not qualify as punishment).

been divided into three categories:<sup>130</sup> (1) per se barbarity,<sup>131</sup> (2) disproportionality,<sup>132</sup> and (3) unpunishable crimes.<sup>133</sup> Under which of these benchmarks are conditions of confinement and use of force cruel and unusual? The third benchmark can be ignored<sup>134</sup> while the first two pose interesting challenges to the Court's reasoning.<sup>135</sup>

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<sup>130</sup> See *Ingraham v. Wright*, 430 U.S. 651 (1977).

[T]he Cruel and Unusual Punishments Clause circumscribes the criminal process in three ways: First, it limits the kinds of punishment that can be imposed on those convicted of crimes; second, it proscribes punishment grossly disproportionate to the severity of the crime; and third, it imposes substantive limits on what can be made criminal and punished as such.

*Id.* at 667 (citations omitted); *Estelle v. Gamble*, 429 U.S. 97, 102-03 & n.7 (1976) (similar categorization).

<sup>131</sup> See, e.g., *In re Kemmler*, 136 U.S. 436, 447 (1890) ("Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life."); Anthony F. Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CAL. L. REV. 839, 839, 842, 865 (1969) (explaining that longstanding interpretation of cruel and unusual punishments in United States was limited to barbarity and torture, but that this was based on misunderstanding of prerevolutionary English law). The Court has occasionally described this category of punishments as including "more than physically barbarous punishments," *Estelle v. Gamble*, 429 U.S. 97, 102 (1976), because the standard is an evolving one. See *id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). This is a petty distinction—unnecessary if barbarity is itself simply understood as an evolving concept to be determined according to current values. Thus, unnecessary and wanton infliction of pain can easily be understood as a form of barbarity, although the Court might treat it as a separate category of per se unconstitutional punishment. See *id.* at 103.

<sup>132</sup> See, e.g., *Solem v. Helm*, 463 U.S. 277 (1983) (invalidating life imprisonment without parole for seventh nonviolent felony conviction); *Rummel v. Estelle*, 445 U.S. 263 (1980) (upholding life imprisonment, with possibility of parole, for third nonviolent felony conviction); *Weems v. United States*, 217 U.S. 349, 367, 368, 381 (1910) (invalidating fifteen years' imprisonment at painful labor in chains and shackles, followed by life under governmental supervision, for falsification of public document). The specifics of proportionality review are in flux; the Court was unable to reach a majority in its last decision on the subject. See *Harmelin v. Michigan*, 501 U.S. 957 (1991) (upholding life imprisonment for first offense of possessing 672 grams of cocaine).

<sup>133</sup> See, e.g., *Robinson v. California*, 370 U.S. 660 (1962) (invalidating criminal punishment of narcotics addiction).

<sup>134</sup> The third category is "to be applied sparingly," see *Ingraham*, 430 U.S. at 667, and does not relate to the interpretations of punishment that are the subject of this Article.

<sup>135</sup> One might question whether these three categories are or should be exclusive. On the



a. *Per Se Barbarity*

Is an accident or other unpredictable development a barbarous-per-se prison condition? Conditions may indeed be barbarous, and it is this ground rather than disproportionality that supports a finding of unconstitutionality in the typical conditions-of-confinement case. But the concept of barbarity is stretched beyond its limit when applied to accidents, unpredictable inmate attacks, and the like. Barbarity is a strong word and implies a rather damnable level of intent that is simply not present in such cases.

Is use of force barbarous per se? Surely not. The Court has never suggested that corporal punishment is per se unconstitutional.<sup>136</sup> And its decisions give few practical indications of how much force may be used in punishment consistent with the Eighth Amendment. Some decisions catalog in dicta a few of the primitive punishments that the Framers had in mind: “draw[ing] or dragg[ing] to the place of execution, in treason”,<sup>137</sup> “embowell[ing] alive, behead[ing] and quarter[ing], in high treason”,<sup>138</sup> “public dissection in

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other hand, one might question whether any such set of benchmarks is truly distinct, or whether all of them really boil down to one: proportionality. Barbarous punishments and unpunishable crimes can be understood as just opposite kinds of extreme proportionality: barbarous punishments being punishments that are too great for any crime, and unpunishable crimes being crimes for which any punishment is too great. Cf. STEPHEN NATHANSON, *AN EYE FOR AN EYE? THE MORALITY OF PUNISHING BY DEATH* 76 (1987).

[Proportional retributivism] does not require that we treat those guilty of barbaric crimes barbarically. This is because we can set the upper limits of the punishment scale so as to exclude truly barbaric punishments [T]he proportionality view is genuinely general, providing a way of handling all crimes. Finally, it does justice to our ordinary belief that certain punishments are unjust because they are too severe or too lenient for the crime committed.

*Id.* This understanding admittedly may be incomplete; perhaps we resist barbarous punishments to avoid debasing ourselves, even if the punishment seems to fit the crime.

<sup>136</sup> The Court in *Ingraham* rejected a claim against corporal punishment of public school students, but that was because “[t]he prisoner and the schoolchild stand in wholly different circumstances.” *Ingraham*, 430 U.S. at 669. Prisoners are completely at the mercy of government, while schoolchildren may return home and schools are subject to community supervision. See *id.* at 670. The Court did not suggest that corporal punishment—paddling, in that case—would not qualify as punishment under the Eighth Amendment.

<sup>137</sup> *Wilkerson v. Utah*, 99 U.S. 130, 135 (1878) (citing 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*370).

<sup>138</sup> *Id.*

murder";<sup>139</sup> "burning alive in treason committed by a female";<sup>140</sup> and "crucifixion, breaking on the wheel, or the like."<sup>141</sup> None have suggested that force may never be applied. And the Court is not lily-livered: It upholds the death penalty in various forms and through various procedures.<sup>142</sup> Other courts have rarely applied the Eighth Amendment to statutorily prescribed physical punishments short of death, and have given little more indication about the limits.<sup>143</sup> The bottom line is that whether a use of force in punishment is barbarous depends on its particulars. Moreover, per se barbarity is a polar test: A punishment is either impermissibly barbarous or not. The set of cases in which the Court addresses the issue of barbarity will inevitably comprise a subset of cases involving punishments that are barbaric and a remainder of cases involving punishments that are not barbaric. And the punishments that are barbaric will be harsher than those that are not.

These simple principles indicate that the Court in its two use-of-force decisions—*Whitley*<sup>144</sup> and *Hudson*<sup>145</sup>—did not rely on per se barbarity as the

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *In re Kemmler*, 136 U.S. 436, 446 (1890); see also Granucci, *supra* note 131, at 862–65 (quoting BLACKSTONE, *supra* note 137, at \*369–72, and speculating that Framers might have misread Blackstone's catalog of punishments as objects of Eighth Amendment's English antecedents).

<sup>142</sup> See, e.g., Michael Vitiello, *Payne v. Tennessee: A "Shunning Ipse Dixit"*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 165, 234–35 (1994) ("The Court has upheld various state statutes that allow the imposition of the death penalty based on the state's showing of aggravating circumstances."); Stephanie O. Joy, *Casenote*, 4 SETON HALL CONST. L.J. 361, 385–86 & n.112 (1993) (noting Supreme Court's validation of punishments of electrocution and shooting, and circuit courts' validation of punishments of hanging and lethal gas). Perhaps few limits would seem to exist if death may be inflicted, save perhaps a prohibition of lingering and painful torture. Ironically, Justice Scalia's position is that proportionality review is inappropriate *except* in capital cases, precisely because death is different. See *supra* note 32.

<sup>143</sup> See *Jackson v. United States*, 102 F. 473, 487–88 (9th Cir. 1900) (upholding punishment of ten years at hard labor in penitentiary, but noting that "there may be exceptional cases, in relation to the whipping post, pillory, or other extreme, isolated, and exceptional cases, where the courts have held the sentence to be in violation of the provisions of the constitution"); *Balser v. State*, 195 A.2d 757 (Del. 1963) (upholding whipping—twenty lashes—plus twenty-five years in prison, a \$500 fine, and costs of prosecution, as punishment for robbery); *State v. Cannon*, 190 A.2d 514 (Del. 1963) (upholding whipping as punishment for various crimes); *Garcia v. Territory*, 1 N.M. 415 (1869) (upholding whipping—thirty to sixty lashes on bare back—as punishment for animal theft).

<sup>144</sup> *Whitley v. Albers*, 475 U.S. 312 (1986).

<sup>145</sup> *Hudson v. McMillian*, 503 U.S. 1 (1992).

basis for decision. The prisoner in *Whitley* suffered a shotgun blast to his leg.<sup>146</sup> The prisoner in *Hudson* suffered punching and kicking.<sup>147</sup> Yet, according to the Court, the “punishment” in *Whitley* did not violate the Eighth Amendment and the “punishment” in *Hudson* did. An honest barbarity test would suggest opposite results and does not explain the Court’s use-of-force decisions.

### b. *Disproportionality*

The exact test for proportionality is in flux.<sup>148</sup> At a minimum, a majority of the Court would probably agree that *grossly* disproportionate sentences are unconstitutional.<sup>149</sup>

Disproportionality analysis is feasible in conditions-of confinement cases, even those involving accidental or otherwise unpredictable “conditions” of confinement. The harm from such conditions could be compared to the gravity of a prisoner’s original offense, and a decision could be reached. There are problems with the experiential definition of punishment, but this is not one of them.

Disproportionality analysis harder to fathom in use-of-force cases. Can use of force be unconstitutionally disproportionate? That depends on the offense. Proportionality is easy enough to understand when it involves comparing crime and sentence. In prison use-of-force cases, however, identifying the relevant crime poses a problem. What is being punished? Force is often used in response to something a prisoner does while in prison, not in response to the crime that originally led to imprisonment.

Consider *Whitley* and *Hudson* again. The prisoner in *Whitley* was caught up in a prison disturbance.<sup>150</sup> He was shot in the knee toward the end of guards’

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<sup>146</sup> *Whitley*, 475 U.S. at 316–17

<sup>147</sup> *Hudson*, 503 U.S. at 4.

<sup>148</sup> See *Harmelin v. Michigan*, 501 U.S. 957 (1991). Seven Justices in *Harmelin* agreed that the Eighth Amendment warrants some degree of proportionality review, but they disagreed on the proper extent of that review. See also *supra* note 132 and accompanying text.

<sup>149</sup> See *id.* at 1001 (Kennedy, J., concurring) (“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.”). Justices O’Connor and Souter joined Justice Kennedy. Justices White, Blackmun, Stevens, and Marshall stuck to the test announced in *Solem v. Helm*, 463 U.S. 277 (1983), which they interpreted as requiring gross disproportionality but not direct comparison of crime and punishment. See *Harmelin*, 501 U.S. at 1020 (White, J., dissenting); *id.* at 1027 (Marshall, J., dissenting). Justices Ginsburg and Breyer have not spoken on the issue yet.

<sup>150</sup> See *Whitley v. Albers*, 475 U.S. 312, 314–17, 325–26 (1986); *id.* at 330–33 (Marshall, J., dissenting).

efforts at quelling the disturbance.<sup>151</sup> From the court opinions, we cannot tell for what or how long he was in prison,<sup>152</sup> but perhaps the shooting was part of his "punishment" for whatever that crime was. It would have to be pretty serious for a shotgun blast to the knee—on top of prison time—to be proportionate. Or perhaps the shooting was "punishment" for being caught up in a disturbance. That too would seem disproportionate. In fact, the prisoner "had not been actively involved in the riot and indeed had attempted to help matters."<sup>153</sup> And yet the Court concluded that the "punishment" did not violate the Eighth Amendment. Proportionality cannot make sense of the Court's decision.

The prisoner in *Hudson* was serving a twenty-year sentence for armed robbery<sup>154</sup> when he disturbed and argued with another prisoner in the middle of the night, argued with a prison guard, and then was beaten by the guard while being brought to a lockdown area.<sup>155</sup> Perhaps the beating was part of his "punishment" for armed robbery. That would not necessarily seem out of proportion. Imagine if the entire sentence for armed robbery was a short beating, with no imprisonment. Hudson might have jumped at the chance for such a light sentence. And if that is so, there is not much reason to think that a sentence of twenty years in prison *plus* a short beating would be disproportionate. After all, the sentence probably could have been forty years in prison with no beating.<sup>156</sup> Alternatively, perhaps the beating was "punishment" for causing a disturbance with another prisoner and arguing with a guard. In that case the punishment might have been disproportionate, although again the Court's deference regarding proportionality leaves room for doubt.<sup>157</sup>

Of course, none of this is realistic. A casual reading of the decisions shows that they were not rooted in proportionality. The Court in each case performed no proportionality calculus in determining whether the Eighth Amendment had been violated. Proportionality simply does not explain the Court's use-of-force decisions.

### 3. "Dissing" Our Government

Punishment is a solemn governmental act—among the most solemn short of

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<sup>151</sup> See *id.*

<sup>152</sup> See *supra* text accompanying note 58.

<sup>153</sup> *Whitley*, 475 U.S. at 325.

<sup>154</sup> See Margolick, *supra* note 115.

<sup>155</sup> See *Hudson v. McMillian*, 503 U.S. 1, 4 (1992).

<sup>156</sup> Cf. *Harmelin v. Michigan*, 501 U.S. 957 (1991) (upholding life imprisonment for first offense of possessing 672 grams of cocaine).

<sup>157</sup> See *id.*

war. It is a deliberately calibrated measure of pain inflicted on an individual. Yet the experiential definition implies that anything that happens to a prisoner, no matter how far beyond the government's intentions or control, constitutes punishment. The fates, fellow prisoners, and prison officials and guards all can inflict punishment extemporaneously and according to their own will. All are thus wild cards of punishment administration. This does a disservice to the institution of government-sponsored punishment.

Government holds a monopoly over the authority to punish.<sup>158</sup> That monopoly serves the due process and regularity that are essential elements of the rule of law. The institutions of government pay homage to these values through development and strict interpretation of penal codes, observance of procedural guarantees, and respect for sentencing limits. Punishment under the Eighth Amendment is the product of these controls.<sup>159</sup> Punishment is not a condition that arises by chance, and it is not vigilantism that spurns the government's controls—not even when prison officials are the vigilantes. And punishment certainly is not a random beating inflicted by a prison official for fun or personal revenge. Prison officials can no more inflict "punishment" than they can define new "crimes," hold "trials" of those who commit such crimes, and "sentence" those who are convicted.<sup>160</sup> Yet the Court continues to define punishment according to individual intent instead of institutional action.

An ironic instance of the Court's confusion is found in *Hudson v McMillian*,<sup>161</sup> where the majority castigated Justice Thomas's dissent for drawing a distinction between conditions of confinement and uses of force. According to the majority, "[t]o deny the difference between punching a prisoner in the face and serving him unappetizing food is to ignore the 'concepts of dignity, civilized standards, humanity, and decency' that animate

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<sup>158</sup> For histories of how this monopoly came to be, see Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1254–55 (1994); Governor Mario M. Cuomo, *The Crime Victim in a System of Criminal Justice*, 8 ST. JOHN'S J. LEGAL COMMENT. 1, 2–5 (1992); Jeremy D. Weinstein, *Adultery, Law, and the State: A History*, 38 HASTINGS L.J. 195, 197–99 (1986).

<sup>159</sup> Cf. Alfredo Garcia, *Toward an Integrated Vision of Criminal Procedural Rights: A Counter to Judicial and Academic Nihilism*, 77 MARQ. L. REV. 1, 12 (1993) ("[T]he Eighth Amendment's proscription against excessive fines or bail and cruel and unusual punishment represents the ultimate glorification of individual dignitary interests against the state's monopoly on the application of force.").

<sup>160</sup> This statement is true except, of course, to the extent that prison officials have authority to establish rules for the prison community, hold hearings to determine violations of those rules, and impose penalties for such violations. See *infra* text accompanying notes 270–87.

<sup>161</sup> 503 U.S. 1 (1992).

the Eighth Amendment.”<sup>162</sup> Hot rhetoric, but shallow. There is an important difference between punching and feeding, but the majority has it backwards. Punching a shackled and subdued prisoner in the face is an individual act; it is not the government’s doing. Quite the contrary, it is illegal and subject to criminal and civil sanctions. Feeding a prison population unappetizing food, however, is the government’s doing. An Eighth Amendment claim for unappetizing food might be well founded if, for example, the government served its prisoners nothing but cat food. Perhaps an understandable empathy for victimized prisoners has kept the Court from seeing this distinction. Whatever the reason, the result is a misunderstanding of punishment and its constitutional limits.

Larger facets of constitutional doctrine manage to take seriously the special and formal character of punishment under the Eighth Amendment. The Amendment obviously does not apply to accidents that occur outside of prison. And it also does not apply to force used outside of prison. Persons challenging force used in making arrests must claim under the Fourth Amendment, which prohibits unreasonable seizures.<sup>163</sup> Persons challenging force used while in detention—after arrest but before conviction—can claim under the Due Process Clause<sup>164</sup> and might also be able to claim under the Fourth Amendment, although the Supreme Court has explicitly left that undecided.<sup>165</sup> The Eighth Amendment is kept out of these equations for an obvious reason. The use of force against persons who have not been arrested, or who have been arrested but not convicted, is not punishment in the Eighth Amendment sense.<sup>166</sup> It may be many things, but it is not punishment. At a common sense level, governmentally administered punishment is understood as a penalty that follows a formal determination of responsibility for criminal behavior. It is the Rodney King “beating,” not the Rodney King “punishment,” because it was an administration of street justice, not criminal justice.

### C. *The Subjectivist Definition*

The subjectivist definition currently commands a majority of the Supreme Court in conditions-of-confinement cases and use-of-force cases. In conditions-

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<sup>162</sup> *Id.* at 11 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)).

<sup>163</sup> See *Graham v. Connor*, 490 U.S. 386, 394–95 (1989).

<sup>164</sup> See *Bell v. Wolfish*, 441 U.S. 520, 535 & n.16 (1979).

<sup>165</sup> See *Graham*, 490 U.S. at 395 n.10.

<sup>166</sup> See *Bell*, 441 U.S. at 535 & n.16 (stating that test under Due Process Clause is whether treatment “amount[s] to punishment” and that Eighth Amendment applies only after traditional criminal prosecution).

of-confinement cases, the subjectivist definition comes close to a correct understanding of punishment, although it may excessively narrow the group of people who contribute to prison conditions and for whom the government is therefore responsible. In use-of-force cases, the subjectivist definition (like the experiential definition) is too broad, leveling the Eighth Amendment, conflating the Amendment with other provisions, and failing to take text and structure seriously<sup>167</sup>

### 1. *Conditions*

The subjectivist definition as applied to conditions of confinement is expressed in the majority opinions in *Wilson v. Seiter*<sup>168</sup> and *Farmer v. Brennan*.<sup>169</sup> *Wilson* held the deliberate indifference requirement applicable in conditions cases,<sup>170</sup> and *Farmer* held that deliberate indifference meant criminal-style recklessness: disregard of a serious risk about which the officials had actual knowledge (as opposed to a risk about which the officials merely *should* have known).<sup>171</sup> The experientialists criticized the subjectivists in *Wilson* for giving “no real guidance” on “whose intent should be examined.”<sup>172</sup> But to be fair, the subjectivists did not rule anyone out. As long as the subjectivists are willing to consider the recklessness of the full range of agents whose actions add up to make prison conditions what they are,<sup>173</sup> the subjectivist definition will yield proper results in conditions-of-confinement cases. But there is reason to doubt the subjectivists’ resolve.

For example, the United States as *amicus curiae* in *Wilson* expressed concern that prison officials could defeat the intent requirement by blaming

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<sup>167</sup> See *supra* text accompanying note 99.

<sup>168</sup> 501 U.S. 294 (1991).

<sup>169</sup> 114 S. Ct. 1970 (1994).

<sup>170</sup> See *Wilson*, 501 U.S. at 303.

<sup>171</sup> See *Farmer*, 114 S. Ct. at 1979.

We hold that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.

*Id.*

<sup>172</sup> *Wilson*, 501 U.S. at 310 (White, J., concurring).

<sup>173</sup> See *supra* note 108 (criticizing experientialists’ position that the responsible actor cannot always be identified).

conditions on underfunding.<sup>174</sup> The Court replied that “the validity of a ‘cost’ defense as negating the requisite intent is not at issue in this case, since respondents have never advanced it.”<sup>175</sup> A cost defense, if ever raised, should be rejected out of hand. The *government*, not a prison administrator, punishes criminals.<sup>176</sup> And a government that inadequately funds prisons is responsible for the conditions that result.<sup>177</sup> Perhaps the Court understands that and would

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<sup>174</sup> See *Wilson*, 501 U.S. at 301.

<sup>175</sup> *Id.* at 302.

<sup>176</sup> Recent commentators have explained:

Segmenting responsibility [between prison officials and legislators] exposes a conceptual difficulty. A state legislative body that deliberately fails to fund its prisons sufficiently to ensure that conditions do not fall below constitutional standards is insulated from challenge when other state officials appointed to oversee the prisons have tried to correct these inhuman conditions. [P]risoners fortunate enough to have administrators who turn a blind eye to their daily plight may receive judicial recognition, while those concerned with the inmates' well-being may have, in fact, only hurt their charges' cause. *As state imposed punishment, the status of correctional facilities that the state legislature permits should be considered part of the punishment.* [The *Wilson* Court] attempts to extract the legislative branch from the social structure, permitting a parsed, detached neutrality regarding its role in maintaining humane prisons.

Guterman, *supra* note 88, at 400–01 (emphasis added); see also Bukowski, *supra* note 12, at 433.

[C]onditions of confinement are necessarily part of the punishment imposed by the state, and as such the state is the actor whose intent should be considered. Because the intent of the state to imprison one of its inmates is always present, the subjective component of the Eighth Amendment will always be satisfied in a conditions of confinement case.

*Id.* at 437 (“By focusing on the state’s intent to imprison, conditions of confinement can be brought under the Eighth Amendment without expanding the Amendment beyond its natural scope.”).

<sup>177</sup> The Supreme Court has never ruled on this, but there is little disagreement. See *Farmer v. Brennan*, 114 S. Ct. 1970, 1988 (1994) (Blackmun, J., concurring) (“Where a legislature refuses to fund a prison adequately, the resulting barbaric conditions should not be immune from constitutional scrutiny simply because no prison official acted culpably.”); *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986) (“Budgetary constraints . . . do not justify cruel and unusual punishment.”); *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 705 (11th Cir. 1985) (“Lack of funds for facilities cannot justify an unconstitutional lack of competent medical care and treatment for inmates.”); *Wellman v. Faulkner*, 715 F.2d 269, 274 (7th Cir. 1983) (“We understand that prison officials do not set funding levels for the prison. But, as a matter of constitutional law, a certain minimum level of medical service must be maintained to avoid the imposition of cruel and unusual punishment.”); *Smith v.*



explain it if the issue ever arose. But the *Wilson* Court stated that even if underfunding were the problem, "it is hard to understand how it could control the meaning of 'cruel and unusual punishment' in the Eighth Amendment. An intent requirement is either implicit in the word 'punishment' or is not; it cannot be alternately required and ignored as policy considerations might dictate."<sup>178</sup> This suggests a lack of resolve to hold government accountable for prison conditions.<sup>179</sup> If the subjectivists ignore the many agents whose actions contribute to prison conditions and require prisoners to find deliberate indifference among a small circle of prison officials, then their definition of punishment in conditions-of-confinement cases will prove badly cramped.

## 2. Force

The subjectivist definition's merit is less ambiguous in use-of-force cases

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Sullivan, 611 F.2d 1039, 1043-44 (5th Cir. 1980) ("It is well established that inadequate funding will not excuse the perpetuation of unconstitutional conditions of confinement."); *Battle v. Anderson*, 564 F.2d 388, 396 (10th Cir. 1977) ("Nor is the lack of financing a defense to a failure to provide minimum constitutional standards. If the State of Oklahoma wishes to hold the inmates in institutions, it must provide the funds to maintain the inmates in a constitutionally permissible manner.") (citations omitted); *Rhem v. Malcolm*, 507 F.2d 333, 341 n.20 (2d Cir. 1974) ("Inadequate resources can never be an adequate justification for the state's depriving any person of his constitutional rights.") (quoting *Hamilton v. Love*, 328 F. Supp. 1182, 1194 (E.D. Ark. 1971)); *Rozecki v. Gaughan*, 459 F.2d 6, 8 (1st Cir. 1972); *Jackson v. Bishop*, 404 F.2d 571, 580 (8th Cir. 1968) ("Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations or by the thickness of the prisoner's clothing."); cf. *Monmouth County Correctional Institutional Inmates v. Lanzaro*, 834 F.2d 326, 336 (3d Cir. 1987) (recognizing that "courts have been reluctant to consider costs to the institution a major factor in determining whether a constitutional violation exist[s]"); *Campbell v. McGruder*, 580 F.2d 521, 540 (D.C. Cir. 1978) (holding that while financial constraints "may be relevant, they can by no means be determinative"); *Woodhous v. Virginia*, 487 F.2d 889, 890 (4th Cir. 1973) (vacating district court's order, where one ground for order was that "guards were shorthanded through lack of funds" and "prison officials were doing what they could with the money at their disposal"). But see *Alberti v. Sheriff of Harris County*, 937 F.2d 984, 999 (5th Cir. 1991) (raising doubt based on intent requirement of *Wilson v. Seiter*, 501 U.S. 294 (1991), but finding that underfunding defense was unavailable because there was no "substantial evidence that the state's actions were constrained by legislative refusal to fund").

<sup>178</sup> *Wilson*, 501 U.S. at 301-02.

<sup>179</sup> Professor Melvin Gutterman reads these tea leaves as indicating a differentiation between prison administrators and the legislature, which he maintains is a "pinched view of shared constitutional responsibility." Gutterman, *supra* note 88, at 400. It seems premature to pass judgment, since the Court did not decide whether inadequate funding may serve as a defense, see *supra* text accompanying note 177, but the concern is understandable.

where it is clearly flawed. It has the same basic problems as the experiential definition. It treats interpersonal uses of force as punishment, even though they bear no logical relationship to prisoners' original crimes.<sup>180</sup> Such uses of force cannot rationally be analyzed under the Eighth Amendment.<sup>181</sup> The equation of such uses of force with governmentally designated punishment disrespects government's true authority over punishment.<sup>182</sup>

The only analytical difference between the subjectivists and the experientialists in use-of-force cases is the intent requirement; the subjectivists require that prison officials act with malicious and sadistic intent for the very purpose of causing harm.<sup>183</sup> This difference does not solve the problems identified with the experiential definition. For one thing, the "purpose of causing harm" phrase is a bit puzzling, assuming we are still talking about the Eighth Amendment. Punishment is usually painful in some respect, and such pain may properly involve physical harm (unless the Court has sub silentio invalidated corporal punishment).<sup>184</sup> More fundamentally, a purpose to cause harm cannot convert an interpersonal use of force into a governmental punishment for an antecedent crime.

The "malicious and sadistic" requirement is all that remains, and it solves no more. No amount of malice and sadism can convert an interpersonal use of force into a governmental punishment for an antecedent crime. The Court is rightly concerned about the cat-and-mouse dominion that guards may exercise over prisoners like Keith Hudson. But the nature of the event neither qualifies as punishment nor lends itself to analysis under the Eighth Amendment. And again, individuals do not punish for crimes; government does. The subjectivist definition, like the experiential definition, blurs government's exclusive authority and control over punishment and damages coherence in constitutional doctrine.

### III. A UNITARY DEFINITION OF PUNISHMENT: THE GOVERNMENTALIST DEFINITION

A new and improved definition of punishment is needed for the Eighth Amendment. Ideally, this new definition would provide a unitary rationale for conditions-of-confinement cases and use-of-force cases. Such a definition is possible, and it lies beyond the strictural and experiential definitions and beyond

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<sup>180</sup> See *supra* text accompanying notes 97–103, 114–29.

<sup>181</sup> See *supra* text accompanying notes 130–57.

<sup>182</sup> See *supra* text accompanying notes 158–66.

<sup>183</sup> See *Hudson v. McMillian*, 503 U.S. 1, 6–7 (1992); *Whitley v. Albers*, 475 U.S. 312, 320–21 (1986).

<sup>184</sup> See *supra* text accompanying notes 136–43.

the strictural-experiential compromise of the subjectivist definition.<sup>185</sup> Punishment under the Eighth Amendment is best understood as: (1) a penalty, (2) inflicted for criminal conduct, (3) pursuant to regular processes of governmental administration and thus attributable to the government in its role as monopolist over punishment. Harm meeting all three elements should be tested according to the usual Eighth Amendment benchmarks: barbarity, proportionality, and unpunishable crimes.<sup>186</sup> (And if those benchmarks cannot sensibly be applied, that is a sure sign that the Eighth Amendment should not be at play.) Harm not meeting all three elements should not be actionable under the Eighth Amendment, although it might still be actionable under the Fourth Amendment, Due Process Clauses, or state tort or criminal law.<sup>187</sup>

### A. Introduction

The Eighth Amendment explicitly protects individuals against certain forms of punishment. But it also presumes government's authority to punish. The roots of that presumption were deep even in 1791 when the Eighth Amendment was ratified.<sup>188</sup> And although elements of an old system of private redress

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<sup>185</sup> Other commentators have offered views similar in consequences to those offered in this Article, but those views have either differed in substance or lacked theoretical underpinnings. See Bukowski, *supra* note 12, at 433–37 (taking position that state should be responsible only for punishment that it intends to inflict and concluding that conditions of confinement but not unauthorized uses of force are part of punishment intended by state, but offering little explanation or theoretical justification); Phillips, *supra* note 10, at 388–93 (proposing two-part test for all prisoners' claims, excluding intent as a consideration and asking (1) whether conduct or condition was punishment, and (2) whether it was cruel and unusual); cf. Gutterman, *supra* note 88, at 395–99 (asserting that all conditions of confinement should be subject to Eighth Amendment, regardless of officials' intent); Gregory P. Taxin, Recent Developments, *The Eighth Amendment in Section 1983 Cases: Hudson v. McMillian*, 112 S. Ct. 995 (1992), 15 HARV. J.L. & PUB. POL'Y 1050, 1059 (1992) ("If entrepreneurial prison guards truly lack the authority to 'punish' on behalf of the state, the Court should focus its subjective requirement on the mental state of the senior officials who do have that authority because they are the constitutionally-relevant state actors.").

<sup>186</sup> See *supra* notes text accompanying notes 130–57.

<sup>187</sup> This would require modification of Fourth Amendment and Due Process Clause doctrine as well as Eighth Amendment doctrine. See *infra* text accompanying notes 292–311.

<sup>188</sup> See Brown, *supra* note 158, at 1254 ("Criminal law became a matter of public interest with the close of the Anglo-Saxon period in English history and the rise of feudalism."); Cuomo, *supra* note 158, at 3–4 (placing origin of state punishment in latter half of Middle Ages when kings and overlords claimed fines formerly paid to victims); Weinstein, *supra* note 158, at 199 (describing development of "king's peace" concept by which crimes were transmuted from private wrongs to wrongs against society).

remained present in Colonial America,<sup>189</sup> they quickly faded and left a governmental monopoly<sup>190</sup>

Individual protection against governmental punishment developed in the wake of government's monopolization of punishment and in conjunction with a broader recognition of individual rights.<sup>191</sup> A prohibition against cruel and unusual punishments first appeared in the English Bill of Rights of 1689.<sup>192</sup> The Enlightenment solidified this elevated relationship of individual rights to governmental power as government's monopoly in law was recognized as a threat to individual liberty.<sup>193</sup> Devices were invented to disperse and check government's power.<sup>194</sup> The United States Constitution and the Bill of Rights

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<sup>189</sup> See Brown, *supra* note 158, at 1255 ("In Colonial America, crime remained a private matter, and victims were responsible for apprehending and punishing criminals."); Cuomo, *supra* note 158, at 4.

Governmental authority was less imperial and centralized in the colonies than it was in the urban commercial centers of Europe. This resulted in the ascendance of the crime victim once again to the pivotal role in the process of identification, investigation, and prosecution of the offender. The exacting of restitution from the offender reflected the customs of Europe in the early Middle Ages.

*Id.*

<sup>190</sup> See Brown, *supra* note 158, at 1255 ("By the early 1800s imprisonment became the most prevalent form of criminal punishment and the victim's role diminished dramatically."); Cuomo, *supra* note 158, at 4-5 (attributing adoption of public monopoly over punishment to influence of Beccaria and stating that "Beccaria's ideas took root and flourished in America in the late eighteenth and early nineteenth centuries").

<sup>191</sup> See Granucci, *supra* note 131, at 844-52 (discussing early antecedents to prohibition against cruel and unusual punishments).

<sup>192</sup> See *Gregg v. Georgia*, 428 U.S. 153, 169 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); Granucci, *supra* note 131, at 852-60.

<sup>193</sup> See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 26-30 (1967) (describing pervasive influence of Enlightenment thought on revolutionary generation); HENRY F. MAY, *THE ENLIGHTENMENT IN AMERICA* 89 (1976) (explaining primary purpose of government, according to Enlightenment ideology, as protection of liberty, subject to balance of powers and limited government); Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1457 (1993) (describing classical liberal underpinnings of Bill of Rights, including fear of "power of the state and its centralized ability to coerce and repress" and "especially the state's unique rights to imprison and execute convicted felons").

<sup>194</sup> See BAILYN, *supra* note 193, at 70-79 (describing operation of separation of powers doctrine in England and its adoption in United States); FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 80-87 (1985) (describing development of separation of powers doctrine in England and its adoption in United States); DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY* 29 (1994) (stating that one of

are among the finest of those devices. They are almost entirely dedicated to defining, distributing, and limiting government's power.<sup>195</sup> The Eighth Amendment is thus a single facet of an elaborate effort at controlling government.<sup>196</sup> By the same token, the Eighth Amendment is not a check on private behavior—indeed, not even on punitive damages awarded to private litigants in the government's courts.<sup>197</sup> Private punishment occurs in the shadow<sup>198</sup> of strict legal restraints,<sup>199</sup> but the Eighth Amendment is not among

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Constitution's "strateg[ies] to reconcile democracy with liberty was to allocate power among elected officials in a way that makes it more difficult to use public power to oppress individuals").

<sup>195</sup> Only two provisions—the Thirteenth and Twenty-First Amendments—regulate private behavior. U.S. CONST. amends. XIII, XXI. See Laurence H. Tribe, *How to Violate the Constitution Without Really Trying: Lessons from the Repeal of Prohibition to the Balanced Budget Amendment*, 12 CONST. COMMENT. 217 (1995).

[T]here are two ways, and two ways only, in which an ordinary private citizen, acting under her own steam and under color of no law, can violate the United States Constitution. One is to enslave somebody, a suitably hellish act. The other is to bring a bottle of beer, wine, or bourbon into a State in violation of its beverage control laws

*Id.* at 220. The original Constitution mostly dealt with governmental structure. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 92 (1980) ("[T]he original Constitution was principally, indeed I would say overwhelmingly, dedicated to concerns of process and structure and not to the identification and preservation of specific substantive values."). The Bill of Rights obviously concerned individual liberty

<sup>196</sup> See generally Garcia, *supra* note 159 (synthesizing values underlying criminal procedure protections of Constitution).

<sup>197</sup> See *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 260 (1989) (holding Eighth Amendment's Excessive Fines Clause inapplicable to punitive damages awarded in civil case); cf. *United States v. Ursery*, 116 S. Ct. 2135, 2147–49 (1996) (holding Double Jeopardy Clause potentially applicable to in rem civil forfeiture proceedings depending on how punitive the proceedings are, but holding current federal civil forfeiture provisions to be not punitive); *Austin v. United States*, 509 U.S. 602, 604 (1993) (holding Excessive Fines Clause applicable to in rem civil forfeiture proceedings because such forfeiture amounts to punishment).

<sup>198</sup> Cf. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 997 (1979) (observing that threat of formal litigation influences out-of-court negotiations).

<sup>199</sup> See R. Kent Greenawalt, *Violence—Legal Justification and Moral Appraisal*, 32 EMORY L.J. 437, 449 (1983) ("[E]xcept for parental-child relations, the function of inflicting physical punishment is assigned exclusively to the state."); *id.* at 490–92 (explaining limited situations where punishment through illegal private violence is sometimes regarded as morally warranted).

them.

Punishment under the Eighth Amendment accordingly refers only to governmental punishment.<sup>200</sup> And it applies only to criminal matters: Punishment under the Eighth Amendment refers only to penalties inflicted after a traditional criminal prosecution.<sup>201</sup> As simple as that might seem, this Article has identified and labeled three different definitions of punishment: strictural, experiential, and subjectivist.<sup>202</sup> These definitions differ in one basic variable: the degree to which they treat what happens in prison as governmental punishment of crime. A proper definition must account for the many aspects of imprisonment without confusing individual actions and governmentally mandated punishment.

### *B. Attribution and the Governmentalist Definition*

To avoid confusing individual actions with governmental punishment, the Eighth Amendment should be applied to the acts of prison officials only to the extent that those acts are attributable to the government's system for administering punishment. Specifically, punishment should include all conditions and uses of force inflicted in response to the original crime and within the officials' statutory and regulatory authority over administration of the sentence originally prescribed.

The acts of a legislature that passes a penal code containing sentencing ranges and of a sentencer who selects a sentence from those ranges are obviously attributable to the government as punishment. Those actions are at the root of the process of punishment.<sup>203</sup> From there, things get trickier. We

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<sup>200</sup> See *Austin*, 509 U.S. at 609 ("The purpose of the Eighth Amendment, putting the Bail Clause to one side, was to limit the government's power to punish.").

<sup>201</sup> See *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977) ("[T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law."); *supra* note 31.

<sup>202</sup> See *supra* Part I. The stricturalist definition holds that punishment is the work of legislatures and sentencing judges, and does not include prison conditions or prison officials' use of force. See *supra* Part I.A. The experientialist and subjectivist definitions include prison conditions and uses of force. See *supra* Parts I.B, I.C. The experientialist definition treats as punishment all that a prisoner experiences. See *supra* Part I.B. The subjectivist definition recognizes punishment only if there is a high level of subjective intent on the part of prison officials: subjective recklessness regarding prison conditions and malicious and sadistic purpose to cause harm regarding uses of force. See *supra* Part I.C.

<sup>203</sup> See *Hudson v. McMillian*, 503 U.S. 1, 18 (1992) (Thomas, J., dissenting) (explaining that traditional view of Eighth Amendment applied to "punishments meted out by statutes or sentencing judges").

could throw up our hands right away and act as though the punishing is complete once a convict enters the prison gates. That is the strictural definition.<sup>204</sup> But it is a false notion of what has been prescribed.<sup>205</sup> It misses something essential to understanding modern punishment: the administrative-agency nature of prisons.<sup>206</sup>

A sentence of imprisonment is more than an abstract term of years. As the Supreme Court has implicitly recognized,<sup>207</sup> criminals sentenced to prison are sentenced to a complex of executive and administrative agencies within the

<sup>204</sup> See *supra* text accompanying notes 29–35.

<sup>205</sup> See *supra* text accompanying notes 87–96.

<sup>206</sup> It is ironic that Justices Scalia and Thomas, who most fervently oppose extension of the Eighth Amendment into prisons, concentrated in administrative law before their judicial careers.

<sup>207</sup> See *Turner v. Safley*, 482 U.S. 78 (1987).

Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint.

*Id.* at 84–85. The *Turner* Court established a deferential standard of review for review of prison regulations: whether a regulation is “reasonably related to legitimate penological interests.” *Id.* at 89. This, in turn, involves consideration of four factors: (1) the connection between the regulation and a legitimate governmental interest; (2) whether alternative means remain for a prisoner to exercise a burdened right; (3) the effect that exercise of the right would have on prison administration and other prisoners; and (4) ready availability of alternatives. See *id.* at 89–91.

The Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb to bb-4 (1994), which generally requires strict scrutiny of substantial governmental burdens on religious exercise, may trump the *Turner* standard with respect to prisoners’ exercise of religious rights. See *Werner v. McCotter*, 49 F.3d 1476, 1479 (10th Cir.), *cert denied*, 115 S. Ct. 2625 (1995) (applying RFRA); *Bryant v. Gomez*, 46 F.3d 948, 949 & n.2 (9th Cir. 1995) (*per curiam*) (applying RFRA); *First Assembly of God, Inc. v. Collier County*, 27 F.3d 526, 526 (11th Cir. 1994) (*per curiam*) (recognizing possible applicability of RFRA); *Brown-El v. Harris*, 26 F.3d 68, 69 (8th Cir. 1994) (recognizing possible applicability of RFRA); *Levinson-Roth v. Parries*, 872 F. Supp. 1439, 1451 (D. Md. 1995) (recognizing possible applicability of RFRA and rejecting prisoner’s claim under RFRA analysis); *Campbell v. District of Columbia*, 874 F. Supp. 403, 408 (D.D.C. 1994) (applying RFRA); *Campos v. Coughlin*, 854 F. Supp. 194, 204–07 (S.D.N.Y. 1994) (same); *Allah v. Menei*, 844 F. Supp. 1056, 1060–63 & n.18 (E.D. Pa. 1994) (same); *Lawson v. Dugger*, 844 F. Supp. 1538, 1540–43 (S.D. Fla. 1994) (same), *rev’d sub. nom.*, *Lawson v. Singletary*, 85 F.3d 502 (11th Cir. 1996).

executive branches of federal, state, and local governments.<sup>208</sup> The details of imprisonment could be set by statute,<sup>209</sup> but typically they are a product of

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<sup>208</sup> Courts and commentators occasionally characterize prisons as administrative agencies. See *United States v. Moran*, 845 F.2d 135, 138 (7th Cir. 1988) (explaining purposes of Federal Rules of Criminal Procedure 32(c)(3)(D), which provides judicial review of alleged inaccuracies in presentence investigation reports, as fairness and establishment of a clear record that aids appellate courts and "administrative agencies, such as the Bureau of Prisons and Parole Commission, that use the report[s] in their own decision-making procedures"); *Randle v. Romero*, 610 F.2d 702, 703 (10th Cir. 1979) (per curiam) (according deference to prison officials as administrative agency officials); *Spruyette v. Owens*, 475 N.W.2d 382, 386 (Mich. Ct. App. 1991) (per curiam) (rejecting prison official's claim to qualified immunity because official acted pursuant to informal administrative policy as opposed to administrative regulation properly promulgated according to state administrative procedure act); Ruth Gavison, *The Implications of Jurisprudential Theories for Judicial Election, Selection and Accountability*, 61 S. CAL. L. REV. 1617, 1625 (1988) (stating that judges need administrative skills in cases involving "a complex administrative agency structure, such as a prison system").

<sup>209</sup> Recent prison-reform bills and statutes mandate many details of imprisonment. For example, the No Frills Prison Act, H.R. 663, 104th Cong. (1995), would tie federal funds for prison construction to maintenance of prison conditions "not more luxurious than the average prisoner would have experienced" outside prison, *id.* § 2(a)(6), and would greatly change the details of prison life by requiring the elimination of a host of benefits: good-time credits, unmonitored telephone calls, in-cell television, R-rated or X-rated movies, pornographic materials, instruction or training (live or broadcast) in martial arts or boxing or wrestling, equipment for weightlifting or bodybuilding, electric or electronic musical instruments, practice on any other instruments for more than an hour per day, personally owned computers or modems, in-cell coffee pots or heating devices, living quarters private from view, food of greater quantity or quality than available in the United States Army, nonuniform dress, and publishing or broadcasting facilities used for content not previously approved by officials. See *id.* For prisoners whose crimes caused serious bodily injury, the Act would further tie funds to separate cell blocks, physical labor, and elimination of additional benefits: furloughs without physical restraints, any television, inter-prison travel, sports or exercise for more than an hour per day, and personal possessions weighing over seventy-five pounds or bigger than a duffelbag. See *id.* Finally, the Act would require the Attorney General of the United States to establish the same conditions in federal prisons. See *id.* § 2(b). Some of these provisions have at least temporarily become law by virtue of their passage as riders to appropriations bills, thus prohibiting spending on certain "frills." See, e.g., Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321.

A less detailed approach is contained in the proposed Stop Turning Out Prisoners legislation. H.R. 667, 104th Cong. §§ 401(a), 501(a) (1995) (directing federal Bureau of Prisons to eliminate activities and equipment designed to increase strength or fighting ability, and directing Attorney General to establish standards for federal prison conditions that provide the least amenities consistent with federal Constitution and with good order and



innumerable discretionary decisions made by prison officials acting pursuant to their authorizing statutes.<sup>210</sup> Officials develop regulations pursuant to those statutes and rules for their own convenience and good order.<sup>211</sup> And they

discipline).

For examples at the State level, see Assembly 1437, 207 Leg., 1st Sess. (N.J. 1996) (requiring establishment of "People's Prison" programs for all violent offenders, directing such programs to emphasize punishment rather than rehabilitation, requiring physical labor, limiting parole to those able to read, write, and do math at a sixth-grade level, and eliminating televisions, radios, tape, and compact disc players, electronic games and other entertainment devices, computers, candy bars, visitors, smoking, telephones, furloughs, and recreation for more than one-half hour per day); S. 277, 207 Leg., 1st Sess. (N.J. 1996) (same); H.B. 26, 99th Gen. Assembly, 1st Sess. (Tenn. 1995) (directing that state's prisons be constructed to resemble military barracks and meet minimum requirements of state and federal constitutions, limiting prisoners to two hours of television per day, and eliminating exercise equipment, ice cream machines, and cable television); John Marelius & Dana Wilkie, *Governor Inks Law Limiting Inmates' Rights*, SAN DIEGO UNION-TRIB., Sept. 13, 1994, at A-3 (reporting Governor Pete Wilson's signature of law repealing parts of California's 1975 Inmate Bill of Rights legislation, restricting weightlifting, and prohibiting pornographic and hate literature).

It would be very interesting to see how the structuralists would handle claims that such legislative measures violate the Eighth Amendment. Gone would be the rationale that the legislature and sentencer had not specifically prescribed the prison conditions.

<sup>210</sup> Indeed, officials have so much discretion that prisons' status as true administrative agencies has been doubted; often their "authorizing statutes provide[] no rules to bind the discretion of prison officials to the legislative purpose." Jonathan A. Willens, *Structure, Content and the Exigencies of War: American Prison Law After Twenty-Five Years, 1962-1987*, 37 AM. U. L. REV. 41, 99 (1987); cf. Melvin Gutterman, *Prison Objectives and Human Dignity: Reaching a Mutual Accommodation*, 1992 BYU L. REV. 857, 890-905 (discussing and criticizing judicial deference to administrative rules and policies that burden prisoners' rights); Philip J. Hirschkop & Michael A. Millemann, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795, 811-12 (1969) ("The central evil [in prisons] is the unreviewed administrative discretion granted to the poorly trained personnel who deal directly with prisoners."); Pamela M. Rosenblatt, Note, *The Dilemma of Overcrowding in the Nation's Prisons: What Are Constitutional Conditions and What Can Be Done?*, 8 N.Y.L. SCH. J. HUM. RTS. 489, 494-95 (1991) (associating administrative agency characterization of prisons with courts' old "hands-off" approach).

<sup>211</sup> See JAMES J. GOBERT & NEIL P. COHEN, *RIGHTS OF PRISONERS* § 8.01 (1981) (explaining nature, usage, and legal effect of written and unwritten prison rules and regulations); Bruce R. Jacob & K.M. Sharma, *Disciplinary and Punitive Transfer Decisions and Due Process Values in the American Correctional System*, 12 STETSON L. REV. 1, 8 (1982) (stating that in some jurisdictions, administrative rule-making authority "has been specifically delegated to the superintendent or warden of each correctional institution," while in other jurisdictions, "prison administrators have implied authority to develop rules"); Ira P. Robbins, *The Prisoners' Mail Box and the Evolution of Federal Inmate Rights*, 144 F.R.D. 127, 136-40, 142-43 (1993) (discussing development of federal prisons and adoption of rules

possess wide discretion to make a host of other decisions in the course of day-to-day operations.<sup>212</sup> In short, they fill the gaps left by the legislature and sentencer. This is utterly typical in the modern administrative state,<sup>213</sup> and it would be folly to deny that the acts and decisions of prison officials in this gap-filling role constitute punishment for which the state is responsible under the Eighth Amendment. The legislature and sentencer not only foresee but rely upon prison officials' completion of the task of punishment. An official's legitimate exercise of discretion is attributable to the legislature and sentencer who chose to leave those matters to the official.<sup>214</sup>

Moreover, prisons are not static institutions. Events and conditions arise after a prisoner is sentenced. These too may be attributable to the government as part of the penalty for the original crime, but only to the extent they arise pursuant to procedurally regular prison administration.<sup>215</sup> This can happen either by changes to written regulations and policies, or by unwritten decisions made by persons with authority to make those decisions. In any event, the meaning of a sentence of imprisonment partly depends on administrative decisions—written or unwritten—that officials have authority to make. These decisions and their consequences are properly attributable to the government and subject to the Eighth Amendment.<sup>216</sup>

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and regulations).

<sup>212</sup> See *Bell v. Wolfish*, 441 U.S. 520 (1979).

Prison administrators should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. [J]udicial deference is accorded not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial.

*Id.* at 547–48.

<sup>213</sup> Cf. *Mason v. Ciccone*, 531 F.2d 867, 870 (8th Cir. 1976) (requiring exhaustion of administrative remedies prior to judicial review of habeas corpus challenge to prison conditions, and noting that “[t]he prior submission of disputes to administrative agencies is common to our law”). Indeed, some think the practice is all too common. *E.g.*, SCHOENBROD, *supra* note 194, at 13–19 (advocating limitation of legislative delegation of authority to administrative agencies).

<sup>214</sup> A distinction might be drawn between formal rules and informal exercises of administrative discretion, but courts have generally rejected such a distinction. See T. Joe Snodgrass, Case Note, 17 WM. MITCHELL L. REV. 883, 899–901 (1991).

<sup>215</sup> This raises Ex Post Facto Clause concerns, which are addressed *infra* text accompanying notes 248–69.

<sup>216</sup> Cf. Gutterman, *supra* note 88, at 386 (suggesting that “judicial responsibility may

A multitude of prison conditions are determined in this discretionary, non-statutory manner: institutional infrastructure conditions such as heating, lighting, and plumbing; provision of consumables such as food, clothing, and bedding; daily lifestyle matters such as schedules, occupational opportunities, and permissible private possessions; and security policies affecting prisoners' freedoms and protection. These conditions may fluctuate from the time a convict is sentenced to the time he arrives at prison, and thereafter. Perhaps officials provide new bedding one day, then lower the heat the next. Or perhaps they decide to save money (and compromise prisoners' security) by laying off half the prison guards.<sup>217</sup> Statutes do not necessarily dictate such judgments. The meaning of imprisonment thus changes after sentencing, but it changes according to regular processes of government: decisionmakers acting within their authority.<sup>218</sup> The Eighth Amendment properly applies to these exercises of discretionary authority.

The governmentalist definition departs most from other definitions in its treatment of the actions of prison officials who exceed their authority. The attribution requirement is then lacking, and the officials' actions cannot be considered punishment for purposes of the Eighth Amendment. Officials sometimes act in violation of a statute, do not conform to administrative regulations, or otherwise exceed permissible discretion. If punishment is plainly understood as a penalty designated by government in response to criminal behavior, then actions beyond—indeed, contrary to—government's designation cannot fairly be termed punishment.

Prison conditions are generally attributable to the government because officials have discretion to administer and control the prison environment.<sup>219</sup> But merely accidental or otherwise unpredictable conditions are not attributable. Similarly, conditions resulting from an official's exceeding all authority and discretion are not attributable.<sup>220</sup> For example, if a legislature and prison

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continue into the correctional phase").

<sup>217</sup> Cf. *Farmer v. Brennan*, 114 S. Ct. 1970 (1994) (considering claim that prison officials exposed prisoner to known danger from other prisoners); *supra* text accompanying notes 68–80.

<sup>218</sup> Surely the legislature and sentencing judge prefer the approach described in the text to a requirement that they revisit every criminal conviction whenever the prison system changes. Revisitation would be logically necessary if a sentence to imprisonment did not imply acceptance of change, because otherwise the place—prison—to which criminals had been sentenced would no longer exist.

<sup>219</sup> See *supra* notes 209–12.

<sup>220</sup> Cf. *Whitley v. Albers*, 475 U.S. 312, 318 (1986) ("The Cruel and Unusual Punishments Clause 'was designed to protect those convicted of crimes,' and consequently the Clause applies 'only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.'") (quoting *Ingraham v. Wright*, 430 U.S.

bureau established detailed laws and regulations on prison administration, a renegade prison official who refused to comply with those laws and regulations surely would exceed his discretion. His actions would not be attributable to the government and could not fairly be considered punishment for purposes of the Eighth Amendment.<sup>221</sup> The prisoners might have legitimate complaints, but those complaints would rest on the detailed laws and regulations in question, not the Eighth Amendment.

Use of force is even more clearly not attributable to the government as punishment. If force is used to maintain security, it is not punishment because it is not a penalty inflicted for criminal conduct. If the use of force is just random prison-guard violence, for no reason but a sadistic cat-and-mouse brand of pleasure, then it is not punishment because it is neither a penalty inflicted for criminal conduct nor pursuant to regular processes of governmental administration. Such actions cannot fairly be attributed to the government as part of the penalty designated in response to the crime. And therefore they cannot be cruel and unusual *punishments*.

Perhaps the toughest issues for a governmentalist definition of punishment arise when it appears that those with authority to punish—legislature, executive, and sentencer—have acquiesced in otherwise unattributable inflictions. As in 42 U.S.C. § 1983 doctrine,<sup>222</sup> lawless prison conduct may deserve to be treated as the law of the land.<sup>223</sup> Thus, if prisoners or their advocates communicated the

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651, 664, 671 n.40 (1977)).

<sup>221</sup> Perhaps a legislature and prison bureau could ratify the official's actions by failing to correct them, in which case the actions would be attributable to the government. *See infra* text accompanying notes 222–28.

<sup>222</sup> 42 U.S.C. § 1983 (1994). Section 1983 cannot serve as a vehicle for a lawsuit under the governmentalist definition of punishment, *see infra* text accompanying notes 234–47, but it offers a useful doctrinal parallel.

<sup>223</sup> *See Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690–91 (1978) (stating that § 1983 authorizes suit for “constitutional deprivations visited pursuant to governmental ‘custom’ even though such a custom has not received formal approval through the body’s official decisionmaking channels”). *Id.* at 691 n.56 (quoting *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362, 369 (1940)).

‘It would be a narrow conception of jurisprudence to confine the notion of “laws” to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice can establish what is state law. . . Deeply embedded traditional ways of carrying out state policy are often tougher and truer law than the dead words of the written text.’

*Id.* Courts have variously held decisionmakers responsible for “tacit approval, acquiescence, ratification, knowledge, or encouragement” of unlawful conduct. *See G. Flint Taylor*,

facts of violence to lawmakers, the government consciously refrained from disciplining guards or otherwise securing prisoners' safety, and evidence showed the motive for inaction to be punitive,<sup>224</sup> then subsequent violence could be attributed to the government as part of the intended punishment for Eighth Amendment purposes.

But the burden of proof for such claims would have to be high. A court would be attributing unconstitutional conduct not to a local school board or police force (as in typical § 1983 cases) but to a legislature, executive, or sentencer. Courts do not lightly ascribe hidden unconstitutional motives to co-equal branches of government.<sup>225</sup> This is especially so where the focus is on the other branches' inaction,<sup>226</sup> and where the possible explanations may include a complex mixture of understandable motives (such as a sense of impossibility about eradicating all misconduct) and unreasonable ones (such as a sense that prisoners deserve a good beating now and then).<sup>227</sup> And these concerns may be heightened when federal courts review the motives of state governments.<sup>228</sup>

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*Municipal Liability Litigation in Police Misconduct Cases from Monroe to Praprotnik and Beyond*, 19 CUMB. L. REV. 447, 453 (1989).

<sup>224</sup> For example, plaintiffs could show remarks on the floor of the legislature indicating that beatings by guards were exactly what prisoners deserved. Cf. *Illinois v. Krull*, 480 U.S. 340, 352 n.8 (1987) (assuming that legislators acted faithfully to Constitution but preserving possibility of reconsideration "[i]f future empirical evidence ever should undermine that assumption").

<sup>225</sup> Adherence to this principle is uneven, see generally Louis S. Raveson, *Unmasking the Motives of Government Decisionmakers: A Subpoena for Your Thoughts?*, 63 N.C. L. REV. 879 (1985) (exploring problems with and possibilities for examining legislators' and administrators' motives in determining constitutionality), but surely it has at least some merit. See *Krull*, 480 U.S. at 352 n.8 (stating reluctance to assume a "significant problem of legislators who perform their legislative duties with indifference to the constitutionality of the statutes they enact"); cf. *Mueller v. Allen*, 463 U.S. 388, 394 (1983) (stating Court's "reluctance to attribute unconstitutional motives to the States" in an Establishment Clause case).

<sup>226</sup> See Daniel A. Farber, Book Review, 11 CONST. COMMENT. 613, 618 (1995) ("[P]roof of intent is particularly problematic when legislative inaction is involved."). Findings of unconstitutional inaction have been made primarily in cases involving racial discrimination and segregation. See generally Theodore Y. Blumoff, *Some Moral Implications of Finding No State Action*, 70 NOTRE DAME L. REV. 95, 113-27 (1994) (discussing courts' limited willingness to scrutinize legislative inaction).

<sup>227</sup> See e.g., *Mueller*, 463 U.S. at 394-95 (stating that the Court is particularly reluctant to find unconstitutional motive when there is a plausible constitutional motive). Anyone can suffer the consequences of government's inevitably limited control over law officers. Those consequences are not normally regarded as punishment but as a manifestation of the impossibility of perfect security, whether inside prison or outside prison.

<sup>228</sup> It is instructive that § 1983 applies to municipal governments but not state

The governmentalist definition of punishment therefore might permit an Eighth Amendment claim for violence inflicted by prison guards, but the inferences required to support such a claim would be appropriate only in clear cases of legislative and executive intent to permit such violence as part of the punishment of imprisonment.

The governmentalist definition is neither nitpicking nor a proposal to return to the days of a hands-off judiciary.<sup>229</sup> The meaning of punishment under the Eighth Amendment should make common sense.<sup>230</sup> It should permit rational analysis in the usual framework of Eighth Amendment doctrine.<sup>231</sup> It should also respect the public's and the government's role as the source of penal policy, and thus respect the true public intentions for criminals.<sup>232</sup> An attribution principle serves these purposes. It recognizes the legislature and sentencer as the primary actors whose conduct is subject to Eighth Amendment scrutiny.<sup>233</sup> It then treats procedurally regular events and conditions in a prison as not only the prison official's command, but the legislator's and judge's wish.

### *C. A Few Words on 42 U.S.C. § 1983*

So far, this discussion has omitted what may seem to be an all-important point of law: 42 U.S.C. § 1983.<sup>234</sup> The Constitution does not by itself provide

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governments. *See* *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989) (holding § 1983 inapplicable to state governments and state officials acting in performance of their duties); *Monell*, 436 U.S. at 690 n.54 ("Our holding today is, of course, limited to local government units which are not considered part of the State for Eleventh Amendment purposes."), Ultimately, however, § 1983 could not serve as a vehicle for a lawsuit under the governmentalist definition of punishment. *See infra* text accompanying notes 234-47

<sup>229</sup> *See* Rosenblatt, *supra* note 210, at 494-95.

<sup>230</sup> *See supra* text accompanying notes 7-11, 121-29. Professor Joseph Goldstein has urged the Supreme Court, in its opinion writing, to use simple language understandable to all and to be candid about the reasons for its decisions. *See* JOSEPH GOLDSTEIN, *THE INTELLIGIBLE CONSTITUTION: THE SUPREME COURT'S OBLIGATION TO MAINTAIN THE CONSTITUTION AS SOMETHING WE THE PEOPLE CAN UNDERSTAND* 112-16 (1992). Understandable writing, however, cannot be divorced from understandable reasoning. A common-sense interpretation is surely as important as a common-sense explanation to what Professor Goldstein says the Court "must never forget[:] that the Constitution, which they expound, emanated from Us, was meant to remain comprehensible to Us, and was established for Our posterity to endure and to be modified with Our informed consent." *Id.* at 7

<sup>231</sup> *See supra* text accompanying notes 130-57

<sup>232</sup> *See supra* text accompanying notes 158-66.

<sup>233</sup> *See supra* text accompanying notes 11, 33, 89, 209-13.

<sup>234</sup> 42 U.S.C. § 1983 (1994). Section 1983 provides in pertinent part:

a basis for a lawsuit either against government or against government officials. The doctrine of sovereign immunity bars suits against the government, and the Constitution addresses only governmental conduct and not the conduct of individual officials.<sup>235</sup> Section 1983, however, provides a statutory basis to sue for constitutional wrongs. By its terms, it applies to persons who act “under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia.”<sup>236</sup> This language is usually expressed by the shorthand “under color of law.”<sup>237</sup>

Section 1983 is part of the civil rights statutes that Congress enacted after the Civil War.<sup>238</sup> For a long time, courts narrowly interpreted the color of law provision to apply only to unconstitutional conduct that a state specifically authorized.<sup>239</sup> For example, a police officer’s unconstitutional search was ipso facto beyond his authority and therefore irremediable under § 1983.<sup>240</sup> This dramatically changed in 1961 when the Supreme Court decided *Monroe v. Pape*<sup>241</sup> and held police officers liable under § 1983 for constitutional

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

*Id.*

<sup>235</sup> For two exceptions, see *supra* note 195.

<sup>236</sup> 42 U.S.C. § 1983.

<sup>237</sup> See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970) (“[T]he plaintiff must show that the defendant deprived him of [a] constitutional right ‘under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory.’ This element requires that the plaintiff show that the defendant acted ‘under color of law.’”). In practice, “under color of law” in § 1983 actions means the same thing as in a parallel criminal statute, 18 U.S.C. § 242 (1988), see *Monroe v. Pape*, 365 U.S. 167, 185 (1961), *overruled on other grounds by* *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978), and the same thing as “state action” under the Fourteenth Amendment, see *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 929 (1982).

<sup>238</sup> See GERALD GUNTHER, *CONSTITUTIONAL LAW* 857–59 (11th ed. 1985) (summarizing Reconstruction-era civil rights statutes).

<sup>239</sup> See Perry M. Rosen, *The Bivens Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. REV. 337, 339–42 (1989) (summarizing history of Section 1983 doctrine).

<sup>240</sup> See *id.* at 339.

<sup>241</sup> 365 U.S. 167 (1961), *overruled on other grounds by* *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978).

violations.<sup>242</sup>

Attribution to government as a lodestar for Eighth Amendment doctrine might seem to resurrect the defunct, narrow view of § 1983. But the expansion of § 1983 never escaped all boundaries.<sup>243</sup> It is still true that “not . . . all constitutional provisions are susceptible of violation by government officials acting individually.”<sup>244</sup> Professor Laurence Tribe defines the distinction in terms of “norms ordinarily addressed to legal systems as a whole rather than to individual government actors.”<sup>245</sup> Systemic norms remain outside the purview of § 1983. The narrow view failed to recognize that government *can* violate the Constitution and that some violations can be effected through nothing more than individual conduct. The remaining limitations on § 1983 account for violations that *only* government can commit—violations that are always systemic and that always require the collaborative activity of multiple state officials. In short, some constitutional provisions presume the multipersonal synergy that is government.

Punishment under the Eighth Amendment is one of those collaborative activities, and the Cruel and Unusual Punishments Clause is one of those systemic norms. Punishment is one of those things that government alone does—like providing procedural due process and just compensation.<sup>246</sup> An

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<sup>242</sup> See *id.* at 168–87. Another major development came in 1978 when the Court held local governments liable as “persons” under § 1983. See *Monell*, 436 U.S. at 664–89.

<sup>243</sup> See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 18-4, at 1703 (2d ed. 1988) (“It is important, however, not to overstate the significance of the Supreme Court’s decisions that the ultra vires acts of individual government officials can amount to unconstitutional state action.”); *id.* § 18-4, at 1704 (noting the “inevitable plurality of even the ‘color of law’ cases”).

<sup>244</sup> *Id.* § 18-4, at 1705.

<sup>245</sup> *Id.* § 18-4, at 1705 n.15.

<sup>246</sup> See *id.* An interesting question is whether the Establishment Clause of the First Amendment falls within this set. The Supreme Court has decided establishment cases without questioning whether § 1983 was an appropriate vehicle. See, e.g., *Marsh v. Chambers*, 463 U.S. 783, 785 (1983) (noting that an Establishment Clause challenge to legislative prayer was brought under § 1983). The Ninth Circuit may be the only court ever to have noted the question. See *Cammack v. Waihee*, 932 F.2d 765, 767 n.3 (9th Cir. 1991) (“Because the parties have not briefed the point, we express no opinion on the efficacy of bringing an establishment clause challenge under § 1983. We note that this route has been traveled before without exciting controversy (or even comment).”). I am inclined to think that establishment of religion differs significantly from punishment or due process or just compensation. Establishment is an enterprise that is not only individually unachievable but systematically off limits. The others are enterprises in which the system is either required or presumed to engage. This difference might justify heightened § 1983 sensitivity to individual conduct that tends toward establishment. At the same time, it might explain why presidents and other



attribution principle thus is not meant to resurrect the actual-authority doctrine under Section 1983. Rather, attribution is consistent with the limits on § 1983 that remained after the demise of the actual-authority doctrine. Moreover, prisoners who suffer at the hands of state officials will have various remedial paths, including other constitutional provisions and § 1983.<sup>247</sup> They just cannot transmute individual officials' rogue conduct into punishment under the Eighth Amendment.

#### D. *Ex Post Facto* Changes in Prison Conditions

Prison conditions that change after a criminal is imprisoned<sup>248</sup>—much less after he commits his crime—raise questions about *ex post facto* punishment.<sup>249</sup> The Supreme Court arguably applied the *Ex Post Facto* Clause to conditions of confinement long ago.<sup>250</sup> But in the context of modern conditions-of-confinement litigation, the Court has not spoken; only circuit courts of appeals have addressed conditions of confinement under the Clause.<sup>251</sup>

The Supreme Court's general approach to *ex post facto* doctrine gives no clear answer. In three decisions during the period of 1937 to 1987, the Court invalidated changes in sentencing statutes that increased the prison sentence that a criminal might receive.<sup>252</sup> Each decision defined the judicial test under the *Ex*

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individual government officials are able to escape § 1983 liability when they invoke religion. Their individual conduct ordinarily does not add up to the level of systemic activity that the constitutional provision may presume.

<sup>247</sup> See *infra* text accompanying notes 288–323.

<sup>248</sup> See *supra* text accompanying notes 215–18.

<sup>249</sup> The *Ex Post Facto* Clause of the Constitution commands: "No State shall . . . pass any . . . ex post facto Law . . ." U.S. CONST. art. I, § 10, cl. 1.

<sup>250</sup> See *Rooney v. North Dakota*, 196 U.S. 319, 325–27 (1905) (finding no increase in punishment from requirement that death row prisoner be kept in close confinement in penitentiary, as opposed to confinement in county jail); *In re Medley*, 134 U.S. 160, 171–72 (1890) (finding great increase in punishment from requirement that death row prisoner be kept in solitary confinement in penitentiary and without notice of which day of week execution would occur, as opposed to ordinary confinement in county jail with notice of day of execution).

<sup>251</sup> See, e.g., *Gilbert v. Peters*, 55 F.3d 237, 238 (7th Cir. 1995) ("[T]he *Ex Post Facto* Clause does not prohibit every alteration in a prisoner's confinement that may work to his disadvantage. Only measures which are both retroactive and punitive fall within the purview of the clause.") (citation omitted); *Ewell v. Murray*, 11 F.3d 482, 485 (4th Cir. 1993) ("Reasonable prison regulations are not frozen at the time of each inmate's conduct, but rather, they may be subject to reasonable amendments as necessary for good prison administration, safety and efficiency, without implicating *ex post facto* concerns.").

<sup>252</sup> See *Miller v. Florida*, 482 U.S. 423, 432–36 (1987) (invalidating statutory increase

Post Facto Clause as whether the challenged change "disadvantaged" the criminal.<sup>253</sup> In 1990, however, the Court announced a new standard for ex post facto claims: whether a challenged change "alter[s] the definition of crimes or increase[s] the punishment for criminal acts."<sup>254</sup> The Court confirmed this new standard in a recent decision on the subject.<sup>255</sup>

For prison conditions, the relevant question under the new standard is whether changes in conditions amount to increases in punishment. As a threshold conceptual matter, the possibility should be readily accepted. Prison conditions should be treated as an aspect of punishment relevant to ex post facto analysis no less than to Eighth Amendment analysis. A categorical rule against application of the Ex Post Facto Clause to prison conditions would be intellectually indefensible. Harder questions concern how the analysis should be performed and what standards should be used.

Attribution to government should again be the key. Whether punishment is increased should be determined by comparing the meaning of prison at the time of the offense to the meaning of prison after the challenged changes.<sup>256</sup> As

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in formula used to calculate sentencing range); *Weaver v. Graham*, 450 U.S. 24, 33-36 (1981) (same); *Lindsey v. Washington*, 301 U.S. 397, 400-02 (1937) (invalidating statutory replacement of discretionary sentencing range with mandatory sentence at maximum of previous range).

<sup>253</sup> See *Miller*, 482 U.S. at 430; *Weaver*, 450 U.S. at 29; *Lindsey*, 301 U.S. at 401.

<sup>254</sup> *Collins v. Youngblood*, 497 U.S. 37, 43 (1990). *Collins* upheld a state appellate court's reformation of an improper criminal sentence where the reformation was based on a statute enacted after a state district court had recommended granting the prisoner's habeas corpus petition but before the appellate court heard the case. See *id.* at 39-40.

<sup>255</sup> See *California Dep't of Corrections v. Morales*, 115 S. Ct. 1597, 1602 n.3 (1995).

<sup>256</sup> The Ex Post Facto Clause applies to changes in the penalty that was provided at the time of the offense, not at the time of sentencing. See *Lindsey*, 301 U.S. at 401 ("The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer."); see also, e.g., U.S. GUIDELINES MANUAL § 1B1.11(b)(1) (1994):

If the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the *ex post facto* clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.

*Id.* For a collection of cases discussing this proposition and an assertion that Congress did not expect such a constraint on the guidelines' application, see William W. Wilkins, Jr. & John R. Steer, *The Role of Sentencing Guideline Amendments in Reducing Unwarranted Sentencing Disparity*, 50 WASH. & LEE L. REV. 63, 67 n.23 (1993) ("The courts of appeals have held uniformly that the guidelines in effect at the time of sentencing may not be used if they punish more severely than those in effect at the time of the defendant's offense.").

explained earlier, the legislators (and sentencers) who define prisoners' terms of years in prison do so under a particular, time-bound conception of prison.<sup>257</sup> They set the term with the then current meaning of prison in mind and thus balance the term of years against the nature of imprisonment as it is then understood. Subsequent changes to prison conditions obviously upset that balance of considerations and may be fundamentally unfair to the criminal. Concern about such unfairness lies at the heart of the Ex Post Facto Clause.<sup>258</sup>

Consider the resurrection of the chain gang.<sup>259</sup> Fifteen years at hard labor in a penitentiary is no doubt greater punishment than fifteen years at a prison farm for nonviolent offenders. Similarly, fifteen years on a chain gang—especially where the gang labors at breaking rocks<sup>260</sup>—is no doubt greater punishment than fifteen years of ordinary imprisonment.<sup>261</sup> To the extent that the resurrection of the chain gang is applied to old as well as new convicts, it raises real ex post facto concerns.<sup>262</sup>

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<sup>257</sup> See *supra* text accompanying notes 88–92.

<sup>258</sup> Cf. *TRIBE*, *supra* note 243, § 10-1, at 630–31 (locating underlying purposes of protections like the Ex Post Facto Clause in virtue of regularity and evils of arbitrariness and oppression).

<sup>259</sup> Alabama, Florida, and Arizona recently began using chain gangs again. See *Alabama Brings Back Rock-Breaking Gangs*, WASH. POST, Aug. 21, 1995, at A9 [hereinafter *Rock-Breaking Gangs*] (reporting Alabama's and Florida's reinstitution of chain gangs); Dennis Wagner, *AZ Cons Working on the Chain Gang*, PHOENIX GAZ., May 16, 1995, at A1 (reporting Arizona's reinstitution of chain gangs). Several other states are considering it. See *Rock-Breaking Gangs*, *supra*, at A9 (reporting similar efforts in Michigan and Wisconsin). Interestingly, the chain gangs are composed of medium-security nonviolent criminals, not murderers and the like. See Brent Staples, *The Chain Gang Show*, N.Y. TIMES, Sept. 17, 1995, § 6, at 62 (reporting composition of Alabama chain gangs); Wagner, *supra*, at A1 (reporting composition of Arizona chain gangs).

<sup>260</sup> See *Alabama to Make Prisoners Break Rocks*, N.Y. TIMES, July 29, 1995, § 1, at 16 [hereinafter *Prisoners Break Rocks*] (reporting resurrection of chain gangs and explaining that rocks would be trucked to prisons "so that chained inmates can break the stones into pea-sized pellets," and stating that "[t]he only goal of the program is to increase the level of punishment for prisoners, since state highway officials say they have no use for the crushed rock").

<sup>261</sup> The Alabama prison commissioner who played a part in the reinstitution of chain gangs reportedly stated that prisoners were "absolutely complaining, and I think the success of the program is proportionate to their complaints" and that the program is "punitive in and of itself." *Rock-Breaking Gangs*, *supra* note 257, at A9 (quoting Alabama Prison Commissioner Ron Jones).

<sup>262</sup> The Southern Poverty Law Center sued on behalf of the prisoners in Alabama, but the ground for the suit reportedly was that the chain gangs constitute cruel and unusual punishment in violation of the Eighth Amendment. See *Prisoners Break Rocks*, *supra* note 260, at 16. The case settled when the Alabama Department of Corrections agreed to chain inmates individually at the ankles and not together in a group. See *Alabama Chain Gang*

This is not to say that all changes in conditions violate the Ex Post Facto Clause. Circuit courts of appeals rightly have rejected the notion that conditions must not change at all for any prisoner.<sup>263</sup> Such a system would be unworkable. But by the same token, drastic changes in conditions may make prison a markedly greater punishment than contemplated when the legislature passed the underlying penal provision or when the judge pronounced sentence. Courts should recognize this simple fact in considering whether administrative or statutory changes to prison conditions violate the Ex Post Facto Clause. The result will be a doctrine that balances the competing considerations and prohibits changes in conditions—and only those changes in conditions—that truly increase the level of punishment.<sup>264</sup>

One final observation: All of these suggestions assume that the Ex Post Facto Clause applies to administrative acts. Because the Clause forbids passing any ex post facto “Law,”<sup>265</sup> it might be interpreted as inapplicable to changes in administrative rules or policies. The Supreme Court may even have had such a strict interpretation in mind in some of its opinions.<sup>266</sup> Although plausible, this is not a convincing interpretation. Other individual rights have readily been extended beyond their literal application to “laws.”<sup>267</sup> Moreover, the modern administrative state and prison system are far more complex and changeable than whatever prisons may have existed in 1787.<sup>268</sup> Limiting the Ex Post Facto

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*Program Altered*, 1 CORRECTIONS PROF. 1, 1 (1996). For other potential examples of ex post facto changes, see *supra* note 207.

<sup>263</sup> See *supra* note 249.

<sup>264</sup> The circuit courts may be on their way to doing just this. The Seventh Circuit in *Gilbert v. Peters*, 55 F.3d 237, 238 (7th Cir. 1995), stated that the Ex Post Facto Clause “does not prohibit every alteration in a prisoner’s confinement,” but only those that are “retroactive and punitive.” Similarly, the Fourth Circuit in *Ewell v. Murray*, 11 F.3d 482, 485 (4th Cir. 1993), stated that “[r]easonable prison regulations . . . may be subject to reasonable amendments as necessary for good prison administration, safety and efficiency.”

<sup>265</sup> U.S. CONST. art. I, § 10, cl. 1.

<sup>266</sup> See, e.g., *Collins v. Youngblood*, 497 U.S. 37, 41 (1990) (“Although the Latin phrase ‘*ex post facto*’ literally encompasses any law passed ‘after the fact,’ it has long been recognized by this Court that the constitutional prohibition on *ex post facto* laws applies only to penal statutes which disadvantage the offender affected by them.”) (citations omitted).

<sup>267</sup> Foremost is the First Amendment, which begins with the words “Congress shall make no law.” U.S. CONST. amend. I.

<sup>268</sup> Compare *Godinez v. Lane*, 733 F.2d 1250, 1261–62 (7th Cir. 1984) (explaining that judges must defer to prison officials who “possess a wealth of penological expertise and experience that qualifies them to supervise, discipline, and rehabilitate inmates within an ever-changing, complex prison system”) with David J. Rothman, *History of Prisons, Asylums, and Other Decaying Institutions*, in PRISONERS’ RIGHTS SOURCEBOOK 5, 6 (Michele G. Hermann & Marilyn G. Haft eds., 1973).

Clause to statutes would be unrealistic. The possibility nevertheless cannot be ignored, especially in light of the Court's recent constriction of ex post facto doctrine.<sup>269</sup>

### E. *The Special Case of Prison Discipline*

Another form of "new" punishment that prisoners encounter falls under the category of prison discipline. Rarely, if ever, can a prison official's use of force be characterized as a response to a crime,<sup>270</sup> much less as a response that is pursued according to due process.<sup>271</sup> Instead, it is spontaneous and not responsive to any crime that the prisoner committed. But a possible exception arises when prisoners violate disciplinary rules. Officials may, pursuant to a proper hearing, impose an increment of punishment above the usual course of imprisonment. If that incremental punishment was subjected to Eighth Amendment analysis, the "crime" being punished would best be regarded as the rules violation rather than the prisoner's original offense, even though the transgression would be administrative rather than criminal.<sup>272</sup>

Should the Eighth Amendment apply to such cases even though the violation is not criminal? The Supreme Court has developed tests for determining whether penalties outside the criminal context constitute punishment for purposes of the Due Process<sup>273</sup> and Double Jeopardy

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Institutionalization of "problem people" in the United States originated in the opening decades of the 19th century. [A]lmost nowhere did the colonists incarcerate the deviant or the dependent. Jails held only prisoners awaiting trial, not those convicted of a crime; and the few towns that erected almshouses used them only in exceptional cases

*Id.*

<sup>269</sup> See *California Dep't of Corrections v. Morales*, 115 S. Ct. 1597, 1602 n.3 (1995) (explaining how *Collins v. Youngblood* abandoned prior broader test for Ex Post Facto Clause violations).

<sup>270</sup> See *supra* notes 10–11 and accompanying text.

<sup>271</sup> See *supra* notes 10, 200, 221 and accompanying text.

<sup>272</sup> See *In re Ramirez*, 705 P.2d 897, 901 (Cal. 1985) ("If any aspect of prison life is unconnected to a prisoner's original crime, it would seem to be the sanctions for his misconduct while in prison."). The court in *Ramirez* denied a habeas corpus petition raising an ex post facto challenge to the state's new system for calculating good-time credits, to the extent that the system was applied to prisoners whose crimes predated the system's adoption.

<sup>273</sup> See, e.g., *Bell v. Wolfish*, 441 U.S. 520, 535–40 (1979) (evaluating due process challenge to conditions of pretrial confinement by inquiring whether conditions amount to punishment); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 163–84 (1963) (evaluating due

Clauses.<sup>274</sup> It has balked at treating noncriminal penalties as punishment under the Eighth Amendment.<sup>275</sup> Prison discipline, however, seems more like criminal punishment than a civil penalty.<sup>276</sup> For one thing, the nature of the penalty is often the kind of physical deprivation (*e.g.*, solitary confinement) associated with the criminal justice system.<sup>277</sup>

A couple of caveats are important. First, Eighth Amendment doctrine will make sense only if courts diligently link a purported punishment to a crime. In the prison discipline context, that means linking a purported punishment to the violation of prison rules that led to the disciplinary action. A glaring problem with the Court's use-of-force decisions is that they show no attempt to connect a prisoner's punishment to a crime, with the result that (1) Eighth Amendment doctrine flies in the face of the common-sense understanding of punishment;<sup>278</sup> (2) there is no chance for sensible analysis in terms of Eighth Amendment doctrine;<sup>279</sup> and (3) it mischaracterizes and thus disrespects public intentions for criminals.<sup>280</sup> The public voice might respond to *Hudson v. McMillian*<sup>281</sup> by saying: "Hey! We didn't say anything about a beating! Don't suggest that we use beating as punishment! And Hey, come to think of it, don't tell us that we can't use beating as punishment! This fellow committed armed robbery! Remember the victims!"<sup>282</sup> Courts must therefore take care to explain what they think is being punished and on what ground—barbarity,

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process challenge to forfeiture-of-citizenship provisions of immigration laws by inquiring whether forfeiture was punitive or merely regulatory in nature).

<sup>274</sup> See, *e.g.*, *Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937, 1945–48 (1994) (evaluating double jeopardy challenge to tax on marijuana possession by inquiring whether tax was punitive in nature); *United States v. Halper*, 490 U.S. 435, 446–52 (1989) (evaluating double jeopardy challenge to civil penalty for submission of false medical claims by inquiring whether civil penalty was really punitive rather than civil in nature).

<sup>275</sup> See *Ingraham v. Wright*, 430 U.S. 651, 664–71 (1977) (rejecting Eighth Amendment challenge to corporal punishment of public school student).

<sup>276</sup> See *Helling v. McKinney*, 509 U.S. 25, 41 n.2 (1993) (Thomas, J., dissenting) ("[I]t is at least arguable that whipping a prisoner who has violated a prison rule is sufficiently analogous to imposing a sentence for violation of a criminal law that the Eighth Amendment is implicated.").

<sup>277</sup> See, *e.g.*, *id.* (citing *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968) (penalty of whipping)).

<sup>278</sup> See *supra* text accompanying notes 113–29.

<sup>279</sup> See *supra* text accompanying notes 130–57.

<sup>280</sup> See *supra* text accompanying notes 158–66.

<sup>281</sup> 503 U.S. 1 (1992).

<sup>282</sup> Actually, there did not appear to be any great public reaction to the *Hudson* decision. But the case may not have gotten a full airing, and in any event it simply might not have been the right case at the right time to draw public attention. See *infra* text accompanying note 341.

disproportionality, or unpunishable crimes<sup>283</sup>—it violates the Eighth Amendment.

Second, the Eighth Amendment applies only where a regular governmental process—due process—leads to a determination of culpability and a designation of penalty.<sup>284</sup> Spontaneous use of force in retribution for violation of prison rules thus is not punishment in the Eighth Amendment sense.<sup>285</sup> It is vigilantism and may violate other legal protections,<sup>286</sup> but it is not punishment. As Justice Thomas observed in his dissent in *Hudson*, a use of force “may be tortious, it may be criminal, and it may even be remediable under other provisions of the Federal Constitution, but it is not cruel and unusual punishment.”<sup>287</sup>

#### IV. PRESERVATION OF JUSTICE

The Eighth Amendment’s reconstruction proposed in this Article is bound

<sup>283</sup> See *supra* notes 130–32 and accompanying text.

<sup>284</sup> See *supra* notes 10, 200, 221 and accompanying text.

<sup>285</sup> This idea was discussed in *Ort v. White*, 813 F.2d 318 (11th Cir. 1987):

It seems important in this type of case to consider the distinction between, on the one hand, “punishment” in the strict sense and, on the other, immediately necessary coercive measures undertaken to obtain compliance with a reasonable prison rule or regulation. Punishment in the strict sense involves a penalty which is deliberately administered after reflection and evaluation in response to conduct occurring in the past. . . . Punishment in this sense is not designed to bring an ongoing violation to a halt.

Different considerations apply, however, to an immediate coercive measure undertaken by a prison official, necessitated by a spontaneous violation of a prison rule or regulation. In this scenario the wrongful conduct is currently taking place, and the situation dictates that the prison official undertake immediate action to bring an end to the violation or disturbance.

*Id.* at 322. The *Ort* court proceeded to apply the Supreme Court’s standard Eighth Amendment use-of-force doctrine to the conduct at issue, thus treating the conduct as punishment despite recognizing that it was not punishment “in the strict sense.” See *id.* at 322–23 (quoting *Whitley v. Albers*, 475 U.S. 312, 319 (1986)).

<sup>286</sup> See *infra* text accompanying notes 292–323.

<sup>287</sup> *Hudson*, 503 U.S. at 18 (Thomas, J., dissenting). Justice Thomas’s coy reference to “other provisions” of the Constitution contributes to the impression that he has a cramped view of individual rights. He could have been much clearer about his confidence that the prisoner had other avenues of relief, see, e.g., *infra* text accompanying notes 292–323, but chose to remain relatively silent, although, he did suggest the Due Process Clause in the more limited context of a potential procedural due process claim. See *Hudson*, 503 U.S. at 28–29. That is his prerogative as an author, but it inevitably added a line of definition to his public image.

to set on edge anyone who cares about the progress of human rights under the Constitution. But the goal here is not reactionary. It is reformative. Indeed, rights are stronger if they are well grounded as a matter of legal reasoning. The rights of prisoners, in particular, could collapse under public scrutiny.<sup>288</sup> Indeed, a movement is sweeping federal and state legislatures to cut back on prison conditions<sup>289</sup> and prisoners' lawsuits.<sup>290</sup> The foundation needs shoring up.

The reconstructed Eighth Amendment would rule out claims of cruel and unusual punishment where prisoners' injuries resulted from accidental or otherwise irregular and unpredictable conditions of confinement. Some of the

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<sup>288</sup> Media reports incessantly inform the public of outrageous suits and verdicts. *See, e.g.,* Michael Hedges, *Jailhouse Lawsuits: From Gym Floor to Dove's Blood; Prisoners Will Sue for Most Anything—And Taxpayers Pick Up the Tab*, S.F. EXAMINER, Sept. 24, 1995, at A3 (reporting examples of frivolous suits and their burden and cost to the legal system); CBS *Evening News* (CBS television broadcast, Aug. 28, 1995), available in 1995 WL 3028927 (same). Such reports are bound to generate dissatisfaction whether or not they reflect doctrinal defects, and criticism of the doctrinal defects could well follow.

<sup>289</sup> In addition to the No Frills Prison Act, *see supra* note 209, the Prison Litigation Reform Act of 1995, passed as part of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, limits judicial remediation of prison conditions in several ways: (1) directing courts not to order relief beyond what federal rights minimally require, *see id.* sec. 802(a), § 3626(a)(1)(a); (2) placing conditions on court orders requiring release of prisoners, *see id.* sec. 802(a), § 3626(a)(3); and (3) capping the duration of court orders at two years, *id.* sec. 802(a), § 3626(b). States are pursuing their own changes. *See* Adam Nossiter, *Making Hard Time Harder, States Cut Jail TV and Sports*, N.Y. TIMES, Sept. 17, 1994, § 1, at 1 (reporting efforts of states "[f]rom California to Florida" to cut back on prison conditions, making prison life "harsher than it has been in years").

<sup>290</sup> The Prison Litigation Reform Act of 1995, *see supra* note 289, limits prisoners in numerous ways: (1) requiring exhaustion of administrative remedies, *see* Omnibus Consolidated Rescissions and Appropriations Act of 1996, sec. 803(d), § 7(a); (2) mandating dismissal of frivolous suits, *see id.* sec. 803(d), § 7(c); (3) requiring payment of filing fees according to the prisoner's ability to pay, *see id.* sec. 804(a), § 1915(b); (4) requiring screening of complaints before docketing, *see id.* sec. 805(a), § 1915(A); (5) barring tort claims absent physical injury, *see id.* sec. 806(a), § 1346; and (6) permitting revocation of prisoners' good-time credits for filing malicious or harassing suits, *see id.* sec. 809(a), § 1932. Numerous state attorneys general have pressed for such legislation. *See, e.g.,* *Attorneys General Call for Curbs on Prisoner Lawsuits*, N.J. LAW., Aug. 14, 1995, at 29. Various states have pursued measures of their own. *See, e.g.,* Barb Albert, *State Seeks to End Inmates' Frivolous Suits*, INDIANAPOLIS STAR, Nov. 15, 1994, at A1 (reporting plan by Indiana's attorney general to limit prisoners' suits); Ashley Dunn, *Flood of Prisoner Rights Suits Brings Effort to Limit Filings*, N.Y. TIMES, Mar. 21, 1994, at A1 (reporting growth in prisoners' suits and states' increasing efforts to limit them).



injuries might be remediable under tort laws, criminal laws, and prison disciplinary codes. Other injuries might simply be nobody's fault, or even the prisoner's own fault, so that no legal remedy is available.

The greatest gap left by the reconstructed Eighth Amendment concerns prison officials' use of force. The reconstructed Eighth Amendment would not apply. The Eighth Amendment should take a back seat to a far more pertinent constitutional provision: the Due Process Clause.

Random violence or excessive force by government agents violates the essence of due process: the fundamental constitutional right to a hearing before infliction of a penalty.<sup>291</sup> If there was no Due Process Clause, perhaps we would want to read the Eighth Amendment to apply, based on an idea that *any* punishment without procedural protections is excessive (although an argument could be made that summary punishment of a guilty person is not necessarily either barbarous per se or disproportionate). But there is a Due Process Clause, and it should be read alongside the Eighth Amendment.<sup>292</sup> When that is done, the due process problem (complete absence of the rule of law) is recognizable as prior to the Eighth Amendment's more detail-oriented values (barbarity and proportionality). Due process addresses whether *any* penalty may be inflicted, while the Eighth Amendment addresses *how* to inflict a penalty that due process permits to be inflicted.<sup>293</sup> Logically and legally, the Due Process Clause is the appropriate constitutional basis for evaluating a spontaneous infliction like that of the victimized prison guard who lashes back at a prisoner.

The Court passed up the opportunity to take this path when it decided

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<sup>291</sup> See *Hicks v. Feiock*, 485 U.S. 624, 632 (1987) ("[C]riminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings"); *Pervis v. LaMarque Indep. Sch. Dist.*, 466 F.2d 1054, 1058 (5th Cir. 1972) (stating that a "basic tenet of due process is the notion that punishment cannot be imposed before a hearing is given"); *TRIBE*, *supra* note 243, § 10-14, at 731 ("[T]he right to a fair trial before an impartial judge is a right whose violation should be deemed to be complete when punishment has been meted out by a state official without any trial, or when a trial has been held that did not meet basic standards of fairness.") (footnote omitted). Summary punishment is permissible in very limited situations. See, e.g., *International Union, United Mine Workers of Am. v. Bagwell*, 114 S. Ct. 2552, 2556-61 (1994) (discussing range of contempt proceedings, from minor proceedings in which summary findings are permitted, to serious proceedings involving indirect contempts for which due process requires fuller observance of the Constitution's criminal procedure protections). Summary use of force in prison is sometimes necessary to restore order, but never to punish.

<sup>292</sup> See *infra* text accompanying notes 328-37 (advocating emphasis on structural integrity in constitutional interpretation).

<sup>293</sup> See *supra* notes 10, 200, 221.

*Whitley v Albers*.<sup>294</sup> Prior decisions had not foreclosed application of the Due Process Clause in the prison context. For instance, in *Screws v. United States*,<sup>295</sup> the Court applied the Clause to police officers who had beaten a detainee to death.<sup>296</sup> The Court gave no hint that convicted prisoners occupied a lesser place than detainees in the realm of due process. Indeed, the Court of Appeals for the Second Circuit subsequently used the Due Process Clause to handle a prison use-of-force claim in *Johnson v Glick*.<sup>297</sup> Yet the prison context proved to make all the difference when the Supreme Court in *Whitley* finally considered use of force against a prisoner. The plaintiff in *Whitley* raised claims under both the Eighth Amendment and the Due Process Clause.<sup>298</sup> But the Court analyzed the case primarily under the Eighth Amendment<sup>299</sup> and then quickly disposed of the due process claim because the Due Process Clause "affords . . . no greater protection" than the Eighth Amendment in such cases.<sup>300</sup> That analytical conflation haunts the Court's decisions still.

The reasoning of *Albright v Oliver*<sup>301</sup> further assures that a due process claim would be rejected under current doctrine but available if the Court adopted a truer definition of punishment. The Court there rejected a due process claim for arrest without probable cause because the plaintiff could have—and according to the Court, should have—brought the claim under the Fourth Amendment.<sup>302</sup> The Court thus "reserv[ed] due process for otherwise

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<sup>294</sup> 475 U.S. 312 (1986).

<sup>295</sup> 325 U.S. 91 (1945).

<sup>296</sup> See *id.* at 107.

<sup>297</sup> 481 F.2d 1028 (2d Cir. 1973). The *Johnson* court identified factors to be considered in deciding whether a use of force violated substantive due process:

In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

*Id.* at 1033.

<sup>298</sup> See *Whitley*, 475 U.S. at 326–27.

<sup>299</sup> See *id.* at 318–26.

<sup>300</sup> *Id.* at 327.

<sup>301</sup> 114 S. Ct. 807 (1994).

<sup>302</sup> See *id.* at 813. The Court explained: "Where a particular amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.'" *Id.* (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989) (internal quotation marks omitted)).

homeless substanti[ve] claims.”<sup>303</sup> In terms of current doctrine, *Albright* gives reason to doubt the suggestion in *Whitley* that a due process claim for use of force would be on equal terms with an Eighth Amendment claim. But if the Court adopted a truer definition of punishment, any actions forced out of their Eighth Amendment home would not be homeless; *Albright* assures that the Due Process Clause would await.

The general jurisprudential principle of *Albright* is sound; courts should address legal issues using the most directly applicable legal provisions.<sup>304</sup> The problem in the Eighth Amendment context is that the Eighth Amendment is not the most directly applicable provision; it deals with punishment and should not be applied to nonpunishments. The Due Process Clause is more directly applicable; it deals with nonpunishments.<sup>305</sup>

An open question would be whether the precise basis for such claims should be procedural due process or substantive due process.<sup>306</sup> The most

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<sup>303</sup> *Id.* at 820 (Souter, J., concurring).

<sup>304</sup> For good measure, I should note that the result in *Albright* may be wrong even if the general jurisprudential principle is correct. Indeed, the application of the principle to the relationship between the Due Process Clause and the first ten amendments is fundamentally flawed and unjustly formalistic. The Bill of Rights applies to the states only through the doctrine of incorporation under the Fourteenth Amendment. *See generally* RICHARD C. CORTNER, *THE SUPREME COURT AND THE SECOND BILL OF RIGHTS* (1981) (detailing history of incorporation doctrine). As the dissent in *Albright* explained,

[T]he plurality opinion seems to rest on one fundamental misunderstanding: that the incorporation cases have somehow “substituted” the specific provisions of the Bill of Rights for the “more generalized language contained in the earlier cases construing the Fourteenth Amendment.” In fact, the incorporation cases themselves rely on the very “generalized language” the [plurality opinion] would have them displacing.

*Albright*, 114 S. Ct. at 830 (Stevens, J., dissenting) (citation & footnote omitted). In light of the incorporation doctrine, it would be most logical to require that claims be brought under the Due Process Clause rather than under particular provisions of the Bill of Rights. The essence of the doctrine is that most (but not all) of the Bill of Rights applies to the states as substantive elements of due process. By itself, the Bill of Rights remains inapplicable to the states. Why should—indeed, how *can*—a state plaintiff base an action directly on a Bill of Rights provision? Yet that is exactly what the *Albright* Court required.

<sup>305</sup> Indeed, Professor Philip Gentry, in a draft paper given at Columbia University, has taken the position that custodial care principles routed in the Due Process Clause are the best measure of not just uses of force but prison conditions generally. *See* Philip M. Gentry, *Confusing Punishment with Custodial Care: The Troublesome Legacy of Estelle v. Gamble*, 21 Vt. L. REV. (forthcoming 1996).

<sup>306</sup> For an explanation of these concepts, see THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 236–39 (Kermit L. Hall et al. eds., 1992).

sensible approach would be to hold procedural due process applicable to inflictions that purport to be punishment but lack authorization from a fair hearing and substantive due process applicable to inflictions that are not only unauthorized but do not even purport to be punishment.<sup>307</sup> Where the facts could support either characterization, a plaintiff would want to include both kinds of claims in his complaint.<sup>308</sup>

Alternatively, the Court could extend the Fourth Amendment, which applies to use of force outside prison,<sup>309</sup> to use of force inside prison. The Court's reluctance to do so is not founded on any compelling principle.<sup>310</sup>

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<sup>307</sup> Cf. *id.* at 236 ("The notion of *substantive* due process . . . place[s] substantive limits on official power, whereas procedural due process is concerned solely with the manner in which the government acts."). This is the path the Supreme Court failed to clear in *Whitley*. Recall the Court's reference to "conduct that does not purport to be punishment at all," and its conclusion that the Due Process Clause was no more pertinent than the Eighth Amendment. See *Whitley v. Albers*, 475 U.S. 312, 319, 327 (1986).

<sup>308</sup> A plaintiff might prefer the substantive due process route because of federalism-based limitations on procedural due process claims. See *infra* text accompanying note 313 (explaining Court's holdings that availability of postdeprivation remedies under state law may bar federal procedural due process claim).

<sup>309</sup> See *Graham v. Connor*, 490 U.S. 386, 394-95 (1989) ("Where, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment . . ."); *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (applying Fourth Amendment to invalidate state law authorizing use of deadly force to apprehend a nondangerous fleeing suspect). See generally R. Wilson Freyermuth, *Rethinking Excessive Force*, 1987 DUKE L.J. 692 (analyzing doctrinal developments in application of Fourth and Eighth Amendments and the Due Process Clause to excessive force claims). It is already questionable to apply the Fourth Amendment to all unjustified uses of force outside prison. A beating is not necessarily a seizure. But it is closer to a seizure than it is to a "punishment."

<sup>310</sup> Compare Freyermuth, *supra* note 309, which states:

One rightly can wonder why a prisoner should not [in addition to Eighth Amendment rights] retain a reasonable expectation of privacy in his bodily integrity and therefore enjoy fourth amendment protection from excessive physical force in cases in which prison officials have no legitimate punitive or disciplinary purpose for using force. It seems logical to treat these instances of force as seizures rather than punishment. This would make little practical difference, however, because heightened deference to prison officials is unnecessary under *Whitley* when the force has no legitimate punitive or disciplinary purpose. In such a case, an eighth amendment standard like the *Estelle* "deliberate indifference" standard is required, and in practice such a standard would be almost indistinguishable from the fourth amendment's reasonableness inquiry.

*Id.* at 704 n.74 (citations omitted). *Hudson v. McMillian*, 503 U.S. 1 (1992), disproves the assumption that a deliberate indifference standard would apply rather than a malicious-and-

Prisoners generally retain their constitutional rights, although the nature of imprisonment justifies significant curtailments.<sup>311</sup> Excessive or otherwise unauthorized uses of force would not count among the justifiable curtailments, so prisoners would have a Fourth Amendment remedy if the Court would only let the Amendment into prison.

Next, as Justice Thomas observed in his *Hudson* dissent, prisoners may have state law remedies.<sup>312</sup> This is especially relevant to the extent that prisoners' claims are understood as grounded upon procedural due process. The Court has held the availability of adequate postdeprivation state law remedies to compensate for the lack of a predeprivation hearing.<sup>313</sup>

Last but not least, the reflexive appeal to the Constitution—no matter which provision—distracts from what might be the most effective remedy of all: criminal prosecution of outlaw officials. As Professor Joseph Goldstein explained in responding to media criticism of Justice Thomas's *Hudson* dissent,

[The] guards should have been held accountable under Louisiana's Criminal Code. They should have been prosecuted for second-degree battery, which carries with it up to five years' imprisonment, with or without hard labor. Instead, the Louisiana Attorney General defended Mr. Hudson's assailants against his claim that their conduct was cruel and unusual punishment in violation of the Eighth Amendment.

Prison communities are not meant to be sanctuaries beyond the reach of the criminal law. Those responsible for the administration of criminal justice must cease treating the law as if its jurisdiction stops at the prison gate—as if those inside are not to be protected and held as accountable as those outside.<sup>314</sup>

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sadistic standard. *See id.* at 6–7. Moreover, I disagree with the notion that a “practical difference” should dictate the way we read the Constitution.

<sup>311</sup> *See Bell v. Wolfish*, 441 U.S. 520, 545–46 (1979) (“[C]onvicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison. [But t]he fact of confinement as well as the legitimate goals and policies of the penal institution limits these retained constitutional rights.”) (citations omitted).

<sup>312</sup> *See Hudson*, 503 U.S. at 18, 28–29 & n.5 (Thomas, J., dissenting).

<sup>313</sup> *See Parratt v. Taylor*, 451 U.S. 527, 538–41 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986); *see also Zinermon v. Burch*, 494 U.S. 113, 132 (1990) (“[W]here a predeprivation hearing is unduly burdensome in proportion to the liberty interest at stake, or where the State is truly unable to anticipate and prevent a random deprivation of a liberty interest, postdeprivation remedies might satisfy due process.”) (citation omitted); *TRIBE, supra* note 243, § 18–4, at 1703–05 (explaining rationale for determining whether in constitutional provision is susceptible of violation by a government official acting individually).

<sup>314</sup> Joseph Goldstein, *Thomas Wasn't Wrong in Beating Case*, N.Y. TIMES, Mar. 20,

The lawlessness of prisons is nothing new.<sup>315</sup> Yet prosecution of prison guards has a ring of novelty to it. Perhaps that is because prosecutorial solutions seem naive—putting one wolf in charge of another—much like prosecutorial solutions to police brutality.<sup>316</sup> Worse, prison crime may be in a class of its own. Prosecutors not only harbor sympathy for the perpetrators as in police brutality cases, but may harbor a categorical antagonism toward the victims that is not present outside prisons.

If true, this suggests another constitutional basis for protecting prisoners: the Equal Protection Clause. Prosecutors enjoy broad discretion.<sup>317</sup> But that discretion “is not ‘unfettered. Selectivity in the enforcement of criminal laws is . . . subject to constitutional constraints.’” In particular, the decision to prosecute may not be ‘deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.’<sup>318</sup> Prisoners may not be a suspect class for equal protection purposes,<sup>319</sup> but neither do they “forfeit all equal protection rights upon incarceration.”<sup>320</sup> It is quite possible that a categorical refusal to prosecute crimes against prisoners would deny prisoners the equal protection of the laws based on an arbitrary classification.

Numerous protections thus are available to address the use of force in prison. The Eighth Amendment is least apposite of all. Indeed, a true Eighth Amendment analysis is not even performed when the Amendment is used to resolve use-of-force claims, because the principles of barbarity and

1992, at A32.

<sup>315</sup> For a collection of incidents predating the federal courts' involvement in prison administration, see Hirschkop & Millemann, *supra* note 210, at 795–812.

<sup>316</sup> See generally Peter L. Davis, *Rodney King and the Decriminalization of Police Brutality in America: Direct and Judicial Access to the Grand Jury as Remedies for Victims of Police Brutality When the Prosecutor Declines to Prosecute*, 53 MD. L. REV. 271, 288–96 (1994) (emphasizing importance of criminal prosecution to reduction of police misconduct but explaining prosecutors' reluctance to bringing such cases).

<sup>317</sup> See *Wayte v. United States*, 470 U.S. 598, 608 (1985).

<sup>318</sup> *Id.* (quoting *United States v. Batchelder*, 442 U.S. 114, 125 (1979), and *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962))) (citations and second internal quotations marks omitted).

<sup>319</sup> See Sarah Botz & Robert C. Scherer, *Prisoners' Rights*, 84 GEO. L.J. 1465, 1494 n.2975 (1996) (collecting cases).

<sup>320</sup> *Id.* at 1494; see also Barry R. Bell, Note, *Prisoners' Rights, Institutional Needs, and the Burger Court*, 72 VA. L. REV. 161, 190 n.193 (1986) (“Prisoners are responsible for their own incarceration, and are not perceived as a ‘suspect class.’ At the same time, however, they are a peculiarly ‘discrete and insular’ minority poorly protected by the political process, and thus require a measure of judicial protection.” (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938))).

proportionality do not serve the agenda of remedying the wrong.<sup>321</sup> The Eighth Amendment's invocation thus seems result oriented rather than constitutionally founded. A strained interpretation might be more defensible if no other constitutional provisions were applicable.<sup>322</sup> Whatever the answer to that difficult question of constitutional interpretation, its converse is surely true: a strained interpretation is *undefensible* if other constitutional provisions *are* applicable.<sup>323</sup> The Eighth Amendment's extension to nonpunitive uses of force unfortunately fits that description.

#### V. DOES IT REALLY MATTER?: A FEW REMARKS ON JUDICIAL LEGITIMACY (AND A NOTE ON THE LAWS OF GRAVITY)

Do we care how courts reach decisions, as long as the results are right? Why is it important to reconstruct the Eighth Amendment and introduce the Due Process Clause when the Eighth Amendment as presently construed (or misconstrued) does the job alone? The Due Process Clause might better support Keith Hudson's claim,<sup>324</sup> but the Supreme Court's invocation of the Eighth Amendment might not do any harm.<sup>325</sup> It is not as if the Eighth Amendment bears *no* relation to the treatment of prisoners. Perhaps doctrinal revision is important only when correct results are reached in *hudeously* wrong ways (for example, if the Court held that Hudson's beating violated his Third Amendment right against quartering soldiers in peacetime<sup>326</sup>). The Eighth Amendment's application to use-of-force cases is not so blatantly off the wall. It is more a question of Ockham's Razor: Should the Court use the most directly applicable provision?<sup>327</sup>

These concerns are nothing new Professor Charles Black noted with

<sup>321</sup> See *supra* text accompanying notes 130–57, 180–84.

<sup>322</sup> See *infra* text accompanying note 337

<sup>323</sup> See *supra* text accompanying notes 304–08; *infra* text accompanying notes 330–38.

<sup>324</sup> See *Hudson v. McMillian*, 503 U.S. 1 (1992); *supra* text accompanying notes 291–308.

<sup>325</sup> See, e.g., *Hudson*, 503 U.S. at 4–12 (applying Eighth Amendment to plainly wrongful treatment of prisoner).

<sup>326</sup> See U.S. CONST. amend. III (“No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”).

<sup>327</sup> See *supra* text accompanying notes 304–05. Another possibility is that the Court's consignment of all prisoner claims to the Eighth Amendment serves a serious concern about constitutional decisionmaking: that the special conditions of prison result in weaker interpretations of individual rights, which would dilute the rights of free citizens if the same rights and doctrines applied to prisoners and free citizens alike. The flipside, of course, is that prisoners' limited rights are more easily diluted if isolated.

respect to *McCulloch v. Maryland*<sup>328</sup> that “judgment [was] reached not fundamentally on the basis of that kind of textual exegesis which we tend to regard as normal, but on the basis of reasoning from the total structure which the text has created.”<sup>329</sup> The reasoning advanced in this Article is less ambitious than that of Professor Black: closer to the text (at least in the context of Eighth Amendment doctrine) but responsive to the claims of structure.

Professor Laurence Tribe’s recent call for taking text and structure seriously is instructive.<sup>330</sup> He likens the Constitution to a map of a solid object and offers several rules for “topologically sound modes of constitutional interpretation.”<sup>331</sup> First, the absence of a limiting word—such as “only”—does not indicate that the object of description is boundless;<sup>332</sup> here, the Eighth Amendment should be understood to apply to what it says—punishment—and nothing more. Second, “constitutional topology counsels against ignoring how the surfaces or edges of a complex structure connect and intersect”;<sup>333</sup> here, the Eighth Amendment’s boundaries must be recognized and respected in a constitutional landscape that also comprises the Fourth Amendment and Due Process Clause. Finally, in all fairness, Professor Tribe limits his prescription to the architecture of the Constitution—its framework for government—rather than abstract declarations of basic rights that may deserve greater intergenerational flexibility.<sup>334</sup> But the case for topologically sound interpretation can sometimes be extended to basic rights provisions. Surely such provisions are subject to the idea that “certain interpretive moves are more analogous to tearing than to mere stretching or bending”<sup>335</sup>—like applying the Third Amendment’s right against quartering soldiers in peacetime to questions of prison violence.<sup>336</sup> This is particularly so where other provisions can protect the basic right in ways faithful to textual and structural—topological—considerations. The map of constitutional space would thus be different if there were no Fourth Amendment or Due Process Clause. Perhaps a broader understanding of punishment would be warranted to fill the gaps in that map.<sup>337</sup> In the end, the value of this Article

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<sup>328</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>329</sup> CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 15 (1969).

<sup>330</sup> See Tribe, *supra* note 99, at 1235–49.

<sup>331</sup> *Id.* at 1237.

<sup>332</sup> See *id.* at 1239–45.

<sup>333</sup> *Id.* at 1248.

<sup>334</sup> See *id.* at 1247.

<sup>335</sup> *Id.* at 1237.

<sup>336</sup> See *supra* note 326 and accompanying text.

<sup>337</sup> See Tribe, *supra* note 99, at 1239 (describing the Constitution as a governmental map that necessarily is incomplete in its representations and warning against mistaking gaps in that map for absence of constitutional meaning); cf. BLACK, *supra* note 329, at 33–66.



depends on whether we care how courts reach decisions and on whether we care that courts resolve issues using the most directly applicable provisions.

The proposals made here for Eighth Amendment doctrine are accordingly aimed at the decisionmaking process as much as at the results. Of course, the impact on results cannot be ignored; the malicious and sadistic standard now applicable in Eighth Amendment use-of-force cases may be more demanding than the standard that would apply under an alternative approach (for example, the "objective reasonableness" standard under a Fourth Amendment approach<sup>338</sup>). But even under an Eighth Amendment standard, the *Whitleys* and *Hudsons* of the world still could prove their claims in most cases. Much of the concern is therefore process oriented, and although that may seem pedantic, there are two reasons not to ignore it. The first is the old slippery slope. A poor decisionmaking process may yield the right results in some cases, but (unless we are process nihilists) must pose a threat to getting the right results in other cases. Those other cases might not even involve the Eighth Amendment; cavalier judicial decisionmaking in any area can spill over into other areas. The effects might be hard to trace, but the basic idea is simple: loose judicial reasoning can be a habit of mind rather than an isolated fall from grace. Anyone who has ever summed up a judge as "too liberal" or "too conservative" should agree.

Second, and perhaps more important, decisionmaking processes cannot so easily be dismissed as "procedural."<sup>339</sup> They enjoy the status of procedures because there is value in adhering to them. That value is substantive. It embodies a perceived regularity, trustworthiness, and legitimacy in decisionmaking. Countermajoritarian protections like the Eighth Amendment require vigilant observance, but in the long run a careless vigilance can do more harm than good. Opponents can collect a handful of anecdotes and whip up a backlash.<sup>340</sup> Maybe the Bill of Rights would not be amended, but another round of statutory limitations on prisoners' rights is not hard to imagine.

The danger of backlash against prisoners' rights is especially significant

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(inquiring whether individual liberties would be protected in absence of Due Process and Equal Protection Clauses of Fourteenth Amendment and concluding that some protection might still have been inferred from status and relationships established elsewhere in Constitution).

<sup>338</sup> See *Graham v. Connor*, 490 U.S. 386, 388 (1989); *supra* notes 309–11 and accompanying text.

<sup>339</sup> See Laurence H. Tribe, *Seven Deadly Sins of Straining the Constitution Through a Pseudo-Scientific Sieve*, 36 HASTINGS L.J. 155, 157–58 (1984) (urging respect for the substantive value of process, i.e., the "independent value of respecting personal dignity and security in the means that government uses to achieve its ends").

<sup>340</sup> See Landry, *supra* note 2, at 253–54 & n.142.

because prisoners are among the most disfavored classes of citizens (and justifiably so). Keith Hudson's victory may have passed without popular controversy,<sup>341</sup> but that might not be the case next time. For one thing, the full facts about Hudson—his arguing with guards before the beating and the details of his original crime of armed robbery—could lead observers to rethink the degree of injustice done to him. But more important, other successful plaintiffs may be far less sympathetic, and their Eighth Amendment victories could generate outrage against the system. When that day comes, the judiciary's elaboration of the Constitution had better be well reasoned.

Picture an investigative journalist's exposé on outrageous sums paid to the most despised criminals for minor injuries sustained after misbehavior in prison. Then the capper: the rules of evidence kept the juries awarding those damages from knowing what the prisoners had done to wind up in prison. The juries saw only clean-cut plaintiffs in nicely pressed suits and heard only about how the plaintiffs did a little something wrong and suffered prison guards' wild overreaction.

Maybe the journalist will talk about *Eng v. Scully*.<sup>342</sup> George Eng was convicted of murder in 1967.<sup>343</sup> He was paroled five years later and was convicted of murder again in 1977.<sup>344</sup> While in prison, Eng compiled a disciplinary record that included confrontations with corrections officers and other inmates.<sup>345</sup> In 1983, he sued several prison officials, and claimed that they used and permitted the use of excessive force against him in violation of the Eighth Amendment. Specifically, Eng alleged that while he was being moved from one prison to another, a corrections officer "struck at" and "directed profanities and epithets" at Eng.<sup>346</sup> The officers denied that but did not dispute the rest of the allegations. Eng cursed at and spit on the officer,<sup>347</sup> and the officer responded with force.<sup>348</sup> Before trial on Eng's claim, the district court ruled that the jury would not learn that Eng was a murderer (much less a repeat murderer),<sup>349</sup> or about his prison disciplinary record.<sup>350</sup> They would see only a clean-cut man in a suit. Based on the results in similar cases, the State of

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<sup>341</sup> See *Hudson v. McMillian*, 503 U.S. 1, 12 (1992); see also *supra* text accompanying note 282.

<sup>342</sup> 146 F.R.D. 74 (S.D.N.Y. 1993).

<sup>343</sup> See *id.* at 78.

<sup>344</sup> See *id.*

<sup>345</sup> See *id.* at 77.

<sup>346</sup> *Id.*

<sup>347</sup> See *id.*

<sup>348</sup> See *id.*

<sup>349</sup> See *id.* at 78-79.

<sup>350</sup> See *id.* at 77-78.

New York settled before trial, paying Eng the sum of \$60,000.

The point of recounting that case is not to criticize the court's evidentiary rulings, which were well within the rules of evidence. Nor is the point to criticize the notion that violent criminals retain certain rights and may seek legal redress.<sup>351</sup> The point is simply to emphasize the senselessness of labeling such altercations "punishment" and to suggest that the danger of public reaction—ever present when such unpopular plaintiffs are at issue—is greater when the rationale lacks a solid anchor in the text of the Constitution. The public, after all, can read. Was Eng being "punished"? If so, what was he being punished for? And is it cruel and unusual punishment for a double murderer to be struck? Such premises bait the public's common sense and its tolerance for countermajoritarian protections. Ultimately, that undermines the legitimacy of the judicial system.

So how could we have arrived at this place? Perhaps an impulse to do good explains it. But surely Justices have resolved many cases against their personal sensibilities.<sup>352</sup> And there is no reason to think that prisoners occupy an irresistible soft spot in the Justices' hearts; the Court has in other contexts energetically restricted prisoners' ability to bring claims.<sup>353</sup> The explanation seems to be a mere slackening of attention to the constitutional text.<sup>354</sup> In a

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<sup>351</sup> Eng might well have recovered the same amount if his claim was based on the Due Process Clause or some other alternative advanced in this Article.

<sup>352</sup> See, e.g., *Texas v. Johnson*, 491 U.S. 397, 420–21 (1989) (Kennedy, J., concurring) (expressing personal disagreement with flag burning but holding it to be protected speech nonetheless).

<sup>353</sup> See, e.g., *Felker v. Turpin*, 116 S. Ct. 2333, 2340 (1996) (upholding statutory restrictions on successive petitions for writ of habeas corpus); *Felker v. Turpin*, 116 S. Ct. 1588, 1588 (1996) (ordering expedited review); *McCleskey v. Zant*, 499 U.S. 467, 493–96 (1991) (holding that failure to raise a claim in first petition for writ of habeas corpus bars subsequent petitions absent cause and prejudice); Kathleen Patchel, *The New Habeas*, 42 HASTINGS L.J. 941 (1991) (analyzing limits that the Burger and Rehnquist Courts placed on habeas corpus); Martha Hallisey, Case Comment, *To Habe or Not to Habe: Curtailing the Writ of Habeas Corpus in McCleskey v. Zant*, 19 N. ENG. J. ON CRIM. & CIV. CONFINEMENT 397, 425 n.209 (1993) (collecting cases limiting habeas corpus).

<sup>354</sup> Judges do not—and should not—mechanically apply a legal text to a set of facts. They properly consider large-scale (precedent-setting) principle, small-scale (case-specific) results, and several kinds of historical context (legislative, social, and intervening). Other considerations or sets of considerations could be added to or substituted for this set if it were not to the user's satisfaction. See, e.g., PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12–13 (1991) (identifying six modalities of constitutional interpretation: historical, textual, structural, doctrinal, ethical, and prudential); R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121, 125–50 (1994) (identifying four sources of meaning—contemporaneous sources of meaning, subsequent events, noninterpretive

nation with limited tolerance for judicial creativity,<sup>355</sup> the Constitution itself commands greater respect. Don't say I didn't warn you.

## VI. CONCLUSION

The current majority definition of "punishment" under the Eighth Amendment extends to anything that transpires within prison walls, provided that individual officials acted with a requisite level of subjective intent (criminal recklessness in prison-conditions cases and malicious and sadistic harm in use-of-force cases). At extremes on either side, those who focus on prisoners' experiences argue against any intent requirement, and those who focus on the strictures of sentencing argue against any application of the Eighth Amendment to conditions or events inside prisons. None of these definitions is satisfying.

This Article recommends a new course that appreciates the independent vitality of the Eighth and Fourth Amendments, the Due Process Clause, and plain old tort and criminal laws. The Eighth Amendment should be restored as a bold peak in the constitutional range, prohibiting excessive penalties inflicted pursuant to regular governmental processes in response to specific crimes. The

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considerations, and individual bias—and identifying subcategories of each).

Judicial legitimacy depends on properly prioritizing these considerations, without at the same time oversimplifying them. The operation can be analogized to the laws of gravity. The gravitational attraction between two bodies is directly proportional to their masses and inversely proportional to the distance between them. The judicial considerations can be understood as having their own masses and distances. Text has the greatest mass; history and large-scale principle come next; and last and least come small-scale results. (Again, different sets of considerations could be plugged in here and assigned their own masses according to the set-maker or set-user's jurisprudential beliefs.) Each is a closer distance to the case to the extent it gives clear guidance. The force of each consideration's attraction depends on its mass and its distance to the facts, and the result is reached by summing the forces.

As applied to the Eighth Amendment, this model shows that the Justices have underestimated the force of text and large-scale principle and relied upon weaker forces of small-scale results. The text is close to these cases because of the meaning of punishment. Large-scale principle is also close because of the doctrinal coherence that the Court has foregone. History would be close as well, but the country's historical disuse of—and disrespect for—individual rights makes history a suspect criterion in such cases. That leaves the Court to rely on the "need" to avoid "shocking" case-specific results. But that low-mass consideration is also distant from these cases because of the availability of alternative remedies.

<sup>355</sup> See, e.g., Daniel Wise, *Kaye Warns Judiciary Is Threatened: Expresses 'Grave Concern' About Recent Criticism*, N.Y. L.J., Feb. 22, 1996, at 1 (reporting speech by Chief Judge Judith S. Kaye of New York Court of Appeals about various recent threats to judicial independence).

Fourth Amendment, the Due Process Clause, and tort and criminal laws should stand as great massifs against unreasonable or extralegal action wherever found.

Here is the prescription:

**(1) Redefinition of punishment under the Eighth Amendment to include only—and all—pains that are inflicted in response to crime and pursuant to the ordinary course of governmental and prison administration.** The ordinary course of administration includes: (a) the legislature's establishment of sentencing ranges, (b) the courts' exercise of discretion at sentencings, and (c) prison officials' exercise of permissible discretion, consistent with laws and regulations existing at the time of their actions, in administering prison sentences designated in response to crimes and in administering discipline in response to prison misconduct. The ordinary course of administration does not include prison (or other) officials' abuses of discretion, such as withholding care guaranteed by law or regulation, or condoning extralegal acts such as the use of force.

**(2) Proper Eighth Amendment analysis in those cases when use of force qualifies as punishment.** Proper analysis requires identification of the crime for which the punishment is inflicted and is limited to the three settled grounds for Eighth Amendment violation: barbarity, proportionality, and unpunishable crimes.

**(3) Application of the Ex Post Facto Clause to drastic changes in prison conditions.**

**(4) Reinterpretation of the Due Process Clause and Fourth Amendment to reach inside prison walls and protect prisoners from abuses of discretion and extralegal acts, just as the same provisions protect the general population from such abuses and acts.**

**(5) Criminal prosecution of truly lawless conduct by prison guards and application of the Equal Protection Clause if prosecutors categorically refuse to pursue cases in which prisoners are the victims.**

This prescription is a tall order, but it has one lasting virtue: it is truest to the text and structure of the Constitution. Perhaps the Justices know full well that they are playing fast and loose with Eighth Amendment doctrine to simplify the task of judging and prison administration. If so, then they should at least admit it. If so, then the public is entitled to hear the Court say: "Truly following the Eighth Amendment would be too much of a pain in the arse, so we're just going to do some rough justice here, if you don't mind." Instead, the Court

pretends to follow the requirements of the Constitution.<sup>356</sup> Don't you believe it.

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<sup>356</sup> Cf. Martin Shapiro, *Judges as Liars*, 17 HARV. J.L. & PUB. POL'Y 155, 156 (1994) (asserting irreverently that judges inevitably engage in lawmaking and just as inevitably deny doing so).