

LONG-TERM INCARCERATION AND THE MORAL LIMITS OF PUNISHMENT

Jacob Bronsther[†]

Hundreds of thousands of Americans are serving decades-long prison sentences. While scholars have established that these sentences are both economically inefficient and destructive of minority communities, a fundamental question remains: Is long-term incarceration ever morally permissible? Understandably, the economists and sociologists of prison have not addressed this moral question. But neither have the philosophers of criminal law, who rarely consider sentencing issues. This Article seeks to fill this lacuna. It does so by reviving the moral and legal prohibition on degrading punishment. The Article argues that long-term incarceration is impermissibly degrading, on a par with the death penalty and penal torture.

This Article maintains that punishment is impermissibly degrading, regardless of its proportionality or social utility otherwise, when it denies an offender's status as a human. Punishment reaches this threshold by denying the presence or worth of an offender's essentially human capacity to stitch moments together through time to construct a good life as a whole. While incarceration takes many forms, as this Article

[†] Climenko Fellow & Lecturer on Law, Harvard Law School. For incisive comments, I am grateful to my Ph.D. supervisors, Nicola Lacey and Peter Ramsay, my examiners, Lindsay Farmer and Victor Tadros, as well as to Andrea Armstrong, Susanna Blumenthal, Vincent Chiao, Andrew Crespo, Anne Dailey, Mihailis Diamantis, Stephen Galoob, John Goldberg, Nan Goodman, Ariela Gross, Jonathan Grossberg, Charles Fried, Erin Kelly, Josh Kleinfeld, Christopher Lewis, Ben Levin, Naomi Mezey, Hiroshi Motomura, Erin Murphy, Liam Murphy, Justin Murray, Carmel Nemirovsky, Diana Newmark, Shalev Roisman, Teemu Ruskola, Paul Saint-Amour, Blaine Saito, Amy Sepinwall, Clyde Spillenger, Carol Steiker, Nomi Stolzenberg, Rebecca Sutton, Will Thomas, Susannah Barton Tobin, Martha Umphrey, Jeremy Waldron, Robin West, and participants at presentations at Harvard Law School, NYU Law School, Richmond Law School, the Law Department of the London School of Economics and Political Science, the 2019 Law & Humanities Junior Scholars Workshop at the University of Pennsylvania, and the 2019 Law and Society Annual Meeting in Washington, D.C. I am also indebted to the editors of the *Cardozo Law Review* for their careful work.

demonstrates, all prisons deprive inmates of the ability to associate freely with other people in society. This limitation gravely interferes with an offender's life project as the years pass by. More particularly, long-term confinement away from society inhibits the realization of certain associational goods, like having a family and a meaningful career, that one can develop only over time and which are foundational to almost all conceptions of the good life. The Article thus concludes that long-term incarceration treats an offender as a non-human—as a creature whose life-building capacity either does not exist or does not matter—and is therefore impermissibly degrading.

TABLE OF CONTENTS

INTRODUCTION	2371
I. DEGRADATION LIMITATIONS	2376
A. <i>Respect and Human Value</i>	2379
B. <i>Disrespect and Degradation</i>	2381
II. THE DEPRIVATIONS OF LONG-TERM INCARCERATION.....	2385
A. <i>Capability and Deprivation</i>	2385
B. <i>Carceral Deprivation</i>	2387
1. <i>Other People</i>	2388
2. <i>Medium Security</i>	2390
3. <i>Minimum Security</i>	2393
4. <i>Norwegian Island</i>	2397
5. <i>The Freedom of General Association</i>	2399
C. <i>Long-Term Carceral Deprivation</i>	2405
1. <i>Temporal Goods</i>	2406
2. <i>A Mortal Injury</i>	2410
3. <i>Happiness and Prison</i>	2416
4. <i>Post-Carceral Deprivations</i>	2417
5. <i>A Quiet Injury</i>	2419
III. INHUMAN INCARCERATION.....	2423
A. <i>Intentional Injuries</i>	2426
B. <i>Exculpatory Ignorance</i>	2428
C. <i>Desperate Offender</i>	2429
D. <i>Dangerous Offender</i>	2430
CONCLUSION.....	2432

INTRODUCTION

When inmates die in Texas state prison, and their families are unable or unwilling to claim their remains, they are buried on “Peckerwood Hill” in Walker County.¹ Officially known as Joe Byrd Cemetery, it has been in operation since the 1850s. Many of the tombstones have only prison identification numbers, and some are completely blank. Jack Washman, from Corpus Christi, is in his mid 50s. Clad in his white uniform, in the Texas summer heat, under the gaze of his crew boss, he worked to place tombstones over seven new graves. “I can’t judge them. Only God can do that,” he said of the recently deceased. “You can’t work out here and not recognize your own mortality.”² Washman is serving thirty-eight years for heroin possession.

This Article assesses the moral legitimacy of decades-long prison sentences, like those imposed on Washman and many of the individuals buried at Joe Byrd Cemetery. Does long-term incarceration inflict an impermissible amount or type of penal harm? The criminal law theory literature, with its traditional neglect of sentencing issues, has not addressed this question.³ Nor is the literature especially helpful in discerning an answer. For it assumes that the general justification of punishment—the pursuit of retribution, deterrence, or whatever it may be—will completely regulate the criminal sentence. That is, it assumes that we ought to inflict penal harm to the extent, and only to the extent, that it is a “proportionate” or “parsimonious” means of realizing our penal aims.⁴ This Article rejects that assumption. There are moral limits

¹ Allan Turner, *Eternity’s Gate Slowly Closing at Peckerwood Hill*, HOUS. CHRON. (Aug. 3, 2012, 9:50 PM), <https://www.chron.com/news/houston-texas/article/Eternity-s-gate-slowly-closing-at-Peckerwood-Hill-3761731.php> [<https://perma.cc/Y7XY-ATA7>].

² *Id.*

³ See ANDREW VON HIRSCH, *CENSURE AND SANCTIONS* 6 (1993) (“Philosophical writing has chiefly confined itself to the general justification of punishment, why the criminal sanction should exist at all. Seldom addressed, however, has been what bearing the justification for punishment’s existence has on the question of how much offenders should be penalized.”).

⁴ See, e.g., R.A. DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY* 143–45 (2001) (opposing the “rape the rapist” sentencing proposal not because penal rape is degrading, but because it would fail to qualify as the rationally communicated censure that Duff believes offenders deserve when they commit “public” wrongs); JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* chs. XIV, XV (W. Harrison ed., Basil Blackwell 1948) (1789) (presenting thirteen rules for determining proportional utilitarian sentences, including a

to punishment that are external to the justification of punishment itself. There are ways of treating people that are illegitimate, regardless of what they have done, or how useful it might be to treat them in that manner. Why *not* rape the rapist, kill the killer, or torture the torturer? Whether or not such punishments are retributively proportionate or efficient means of deterrence—as they very well may be⁵—we ought not treat people in that manner. To make sense of this conviction we need to move beyond the traditional debates in punishment theory. We need to appeal to the moral prohibition on *degrading* punishment.

Penal theorists and reformers have abandoned the prohibition on degrading punishment, even though the prohibition is recognized in numerous treaties and constitutions.⁶ Perhaps this is not surprising. The Middle Ages are over. We no longer draw and quarter offenders in the town square.⁷ Nonetheless, this Article argues that we still degrade offenders. And not simply the dozens of individuals executed each year in the United States.⁸ This Article argues that we impermissibly degrade the *hundreds of thousands* of Americans serving decades-long prison sentences. We do so not by pulling apart their bodies, or reducing them to animals, or making them howl in agony. We do so by limiting their access to valuable forms of association, like families, friendships, and meaningful careers. Long-term incarceration does not explode a person, like torture does. It erodes a person, and severely risks ruining his life.

Part I of this Article develops a theory of penal degradation. It argues that punishment is impermissibly degrading, regardless of its proportionality or social utility otherwise, when it denies an offender's status as a human. Punishment reaches this threshold by denying the presence or worth of an offender's *essentially human* capacity for practical reason, which enables him to stitch moments together through

prohibition on “unfrugal” punishments, which would fail to maximize utility overall, taking into account the offender's pain as a result of the punishment).

⁵ See *infra* note 23 and accompanying text.

⁶ See *infra* note 24.

⁷ For a critical explication of historic public tortures, in particular that of Robert-François Damiens in 1757, see MICHEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON 3–72 (Alan Sheridan trans., 1977).

⁸ DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2019: YEAR END REPORT (2020), <https://files.deathpenaltyinfo.org/reports/year-end/YearEndReport2019.pdf> [https://perma.cc/8AV9-3938].

time to construct a good life as a whole. To so thoroughly reject someone's value, even someone who has committed a heinous crime, violates our most basic liberal commitments.

Part II presents a novel conception of incarceration. To determine whether long-term incarceration is a permissible form of punishment, we first need to understand what it means to incarcerate someone. If a punishment, by definition, deprives an offender of something, what does prison deprive of an offender?⁹ Curiously, scholars have disregarded this question. The standard view that incarceration is "the deprivation of liberty" will not suffice.¹⁰ For instance, a fine deprives someone of the liberty to spend his money as he wishes, but a fine is not incarceration. "Liberty" is a slippery concept¹¹ and rather than trying to "sharpen"¹² the term in the prison context, Part II argues that we ought to consider a more direct question derived from Martha Nussbaum and Amartya Sen's "capabilities approach."¹³ What valuable activities or states of being does incarceration limit one's access to, and to what degree?

Prison takes many forms. Part II considers five penal institutions in descending order of severity, from a prison where thousands of inmates are packed in against one another without space even to sit down¹⁴ to a quiet penal island with beaches, bicycles, and flocks of sheep.¹⁵ This institutional diversity means that incarceration for any amount of time can entail a wide array of deprivations. There is, however, one deprivation

⁹ See Hugo Adam Bedau & Erin Kelly, *Punishment*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2017), <https://plato.stanford.edu/archives/win2017/entries/punishment> [<https://perma.cc/PZ9F-HXLU>] ("Punishment . . . is the authorized imposition of deprivations . . .").

¹⁰ See, e.g., Victor L. Shammass, *Pains of Imprisonment*, in *THE ENCYCLOPEDIA OF CORRECTIONS 1–2* (Kent R. Kerley ed., 2017) ("The fundamental premise of prisons is to remove or restrict liberty.").

¹¹ See generally LIBERTY (David Miller ed., 1991).

¹² On the process of "sharpening" vague terms, see Kit Fine, *Vagueness, Truth and Logic*, 30 *SYNTHESE* 265 (1975).

¹³ See *infra* notes 47–51 and accompanying text.

¹⁴ David Orr, *Hutus Held in 'Worst Prison in World'*, *INDEP.* (July 16, 1995, 12:02 AM), <http://www.independent.co.uk/news/world/hutus-held-in-worst-prison-in-world-1591700.html> [<https://perma.cc/VRN8-DYFL>].

¹⁵ Erwin James, *The Norwegian Prison Where Inmates Are Treated like People*, *GUARDIAN* (Feb. 25, 2013, 3:00 PM), <https://www.theguardian.com/society/2013/feb/25/norwegian-prison-inmates-treated-like-people> [<https://perma.cc/GU8F-BXN5>]; John D. Sutter, *Welcome to the World's Nicest Prison*, *CNN* (May 24, 2012), <http://edition.cnn.com/2012/05/24/world/europe/norway-prison-bastoy-nicest/index.html> [<https://perma.cc/7WQH-WGWQ>].

inherent to all carceral institutions: inmates will be unable to associate freely with other people in society. This denial of the “freedom of general association,” I argue, is the deprivational core of prison. What unites the five institutions is their remove from the broader community. By severely limiting inmates’ ability to associate with other individuals, they each represent a form of quarantine.

Part II then adds the variable of sentence length to the analysis. Regardless of the quality of a prison, the denial of the freedom of general association becomes a grave injury with the passage of time. Long-term confinement away from society inhibits the realization of certain associational goods that one can develop only over time. These goods are foundationally important to almost all conceptions of the good life. Some of them, like a romantic partnership, family, or friendship, are *intrinsically* associational; that is, the good itself just is a long-term form of association. Others are *instrumentally* associational, in the sense that associating with other people is the means by which one realizes the good, as with the development of most forms of professional expertise. By making it exceedingly difficult for an inmate to realize either type of good, long-term incarceration is thus a slow-forming injury to one’s life project. Indeed, as suggested above, we can say that long-term incarceration severely risks ruining an individual’s life as a whole.

Part II continues that long-term sentences are qualitatively different from short-term sentences. A thirty-year-year prison sentence is not simply sixty times worse than a six-month sentence. It represents a distinct form of injury by depriving an inmate of access to a much broader set of associational goods. Federal and state sentencing guidelines have failed to appreciate this distinction.

Part III concludes that long-term incarceration treats an offender as a *non-human*—as a creature whose life-building capacity either does not exist or does not matter—and is therefore an impermissibly degrading form of punishment. When the state inflicts punishment, it intends to harm an offender. As such, when the state long-term incarcerates someone, it intentionally harms him in a manner that foreseeably and severely risks ruining his life as a whole. In so doing, the state denies his status as a life-builder, that is, as a human. Such a punishment has no place in a liberal society. Given that a liberal society upholds the inviolability of each individual, and given that each individual’s worth is grounded on his life-building capacity, a liberal state cannot intentionally

ruin an offender's life, nor can it intentionally create a severe risk of ruining his life, regardless of how heinous his offense or how useful it might be to do so, just as it cannot sentence him to death or torture. Finally, outside the realm of criminal punishment, Part III considers the very limited role for non-punitive incapacitation in a liberal society.

Mass incarceration—and long-term incarceration to a much lesser degree—has received a considerable amount of scholarly and political attention in the last decade. With few exceptions, however, the criticisms have been pitched at the *societal* level, explaining, for instance, that the system is an economically inefficient means of crime prevention,¹⁶ destructive of minority and especially African-American communities,¹⁷ and a threat to social solidarity.¹⁸ This Article brings a novel perspective to the debate. It is pitched at the *individual* level. It considers not whether putting so many offenders in prison for decades is prudent social policy, but whether putting a *single offender* in prison for decades is consistent with the basic respect owed to him as a human being. There *are* moral limits on punishment. This Article seeks to excavate one such limit and explain what it means for one of the dominant forms of sentencing in the United States.

¹⁶ See generally RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION (2019); Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both be Reduced?* 10 CRIMINOLOGY & PUB. POL'Y 13 (2011); Franklin E. Zimring et al., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA (2001); MARK A.R. KLEIMAN, WHEN BRUTE FORCE FAILS: HOW TO HAVE LESS CRIME AND LESS PUNISHMENT (2009); DAVID M. KENNEDY, DETERRENCE AND CRIME PREVENTION: RECONSIDERING THE PROSPECT OF SANCTION (2009); OLIVER ROEDER ET AL., BRENNAN CTR. FOR JUSTICE, WHAT CAUSED THE CRIME DECLINE? (2015).

¹⁷ See generally Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); Desmond S. King & Rogers M. Smith, *Racial Orders in American Political Development*, 99 AM. POL. SCI. REV. 75 (2005).

¹⁸ See Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1494–96 (2016).

I. DEGRADATION LIMITATIONS

Certain punishments are impermissible because they are degrading.¹⁹ Beyond “degrading,” other relevant adjectives include “cruel,” “inhuman,” “inhumane,”²⁰ “barbaric,” and “brutal.” Nevertheless, these terms overlap considerably and we ought to conceive of the reasons that oppose such punishments as a general category.²¹ Let us refer to this category of sentencing principles as “degradation limitations.” “*You cannot do that to a human being*” expresses the ideal in broad brush. Degradation limitations constrain the pursuit of our positive penal objectives, like retribution or deterrence, in parallel to Robert Nozick’s conception of rights as “side constraints” on the pursuit of consequentialist policies generally.²² That is, a punishment might be a

¹⁹ See Jacob Bronsther, *Torture and Respect*, 100 J. CRIM. L. & CRIMINOLOGY 423, 430–33 (2019).

²⁰ See Jeremy Waldron, *Inhuman and Degrading Treatment: The Words Themselves*, 23 CANADIAN J.L. & JURIS. 269, 278–79 (2010) (arguing that “inhumane” treatment is distinct from and milder than “inhuman” treatment).

²¹ For attempts to parse the meanings of the various terms, see *id.* See also John Vorhaus, *On Degradation. Part One: Article 3 of the European Convention on Human Rights*, 31 COMMON L. WORLD REV. 374 (2002). *But see* Tomasi v. France, 241 Eur. Ct. H.R. (ser. A) (1992) (making a finding of “inhuman and degrading” treatment without distinguishing between the two terms); Ribitsch v. Austria, 21 Eur. Ct. H.R. 573 (1995) (same).

²² ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 28–33 (1974); see also Jeffrie G. Murphy, *Cruel and Unusual Punishments*, in RETRIBUTION, JUSTICE, AND THERAPY: ESSAYS IN THE PHILOSOPHY OF LAW 223, 236 (“Even when proportionality is satisfied, however, we shall not use a certain punishment if it is intrinsically degrading to the humanity of the criminal—e.g. we shall not torture the torturer.”); Alec Walen, *Retributive Justice*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2016), <https://plato.stanford.edu/entries/justice-retributive> [<https://perma.cc/JN8F-QM6Q>] (“[P]roportionality should rule out certain punishments on the ground that they are disproportionately large. But there is no reason for retributivists not to look to other criteria, such as respect for human dignity, to prohibit those forms of punishment that seem cruel or degrading.”); Youngjae Lee, *Desert and the Eighth Amendment*, 11 U. PA. J. CONST. L. 101, 102 (2008) (distinguishing between a “desert model” of Eighth Amendment jurisprudence, which is concerned to prevent retributively disproportionate sentences, and a “dignity model,” which is concerned to guarantee to offenders “a minimum standard of decency and humanity”); Chad Flanders, *The Case Against the Case Against the Death Penalty*, 16 NEW CRIM. L. REV. 595, 617 (2013) (“[W]hether or not a respect for human dignity entails abolishing the death penalty is not something that can be answered from within any theory of punishment, even retribution.”).

proportional and parsimonious means of realizing our penal aims, while nonetheless being impermissibly degrading.²³

Degradation limitations have broad intuitive appeal and, as indicated above, they are widely recognized in the law,²⁴ but with few

²³ The contending theories of punishment may indeed license extreme punishments. Strict retributivists, like Michael Moore, endorse the unadorned conviction that wrongdoers deserve to suffer. See MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 104–52 (1997). If an offender has done something absolutely heinous, would he not deserve, following strict retributivist proportionality, to have something absolutely heinous done to him? See Murphy, *supra* note 22, at 223–24, 236 (arguing that retributivism licenses “cruel and unusual” punishments). R.A. Duff’s “censuring” retributivism is similarly vulnerable. See DUFF, *supra* note 4. Duff writes of the communicative nature of hard treatment on his theory:

It is a way of trying to focus [the offender’s] attention on his crime. It provides a structure within which, we hope, he will be able to think about the nature and implication of his crime, face up to it more adequately than he might otherwise (being human) do, and so arrive at a more authentic repentance.

Id. at 108. But what better way to focus an offender’s attention on his crime than to make him suffer the same offense? Why not, then, rape the rapist? The act of penal rape in and of itself does not constitute the contemplative experience that Duff has in mind, but penal rape followed by the offender’s inevitable reflection on what the state has done to him (and therefore what he has done to his victim) might indeed qualify. Cf. DUFF, *supra* note 4, at 143–54. Meanwhile, Benthamite deterrence theories would license any degree of harm, no matter how vicious, so long as it were a “frugal” means of reducing pain and increasing pleasure overall in society. See BENTHAM, *supra* note 4. Some empirical studies have suggested that this utilitarian logic would justify extreme punishments. See Lawrence Katz et al., *Prisons Conditions, Capital Punishment, and Deterrence*, 5 AM. L. & ECON. REV. 318 (2003) (arguing that penal severity, as revealed through prisoner death rates, correlates robustly with decreasing crime rates); Hashem Dezhbakhsh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 AM. L. & ECON. REV. 344 (2003) (suggesting that each execution prevents eighteen murders on average); H. Naci Mocan & R. Kaj Gittings, *Getting off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J.L. & ECON. 453 (2003) (finding that each execution decreases homicides by about five, while each commutation increases homicides by about five). *But see* John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791 (2005).

²⁴ See G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) (prohibiting torture and “cruel, inhuman, or degrading” treatment or punishment); European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 221 (same); International Covenant on Civil and Political Rights art. 7, Dec. 19, 1966, 999 U.N.T.S. 171 (same); American Convention on Human Rights art. 5(2), Nov. 22, 1969, 1144 U.N.T.S. 143 (same); S. AFR. CONST., 1996, ch. 2, § 12(1)(d)-(e) (same); BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 10, para. 3 (Switz.) (same); U.S. CONST. amend. VIII (prohibiting “cruel and unusual” punishment); N.Y. CONST. art. 1, § 5 (same); Canadian Charter of Rights and Freedoms, s 12, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act 1982, c 11 (U.K.) (same); TEX. CONST. art. 1, § 13 (prohibiting “cruel or unusual” punishment)

exceptions, scholars and judges have failed to consider their normative foundations or practical implications beyond vague assertion. The conviction that certain punishments are beyond the pale is accompanied by only the haziest sense of the pale's borderline. This Part aims to make some progress on this issue through the following deduction: If degradation limitations stand for the principle that offenders do not forfeit their humanity when they commit offenses, then impermissibly degrading punishment must constitute a denial of an offender's humanity. Justice Brennan expressed this idea in his *Furman v. Georgia* concurrence, writing that the "true significance" of punishments that violate the Eighth Amendment "is that they treat members of the human race as *nonhumans*, as objects to be toyed with and discarded."²⁵ This narrows our inquiry. What does it mean to deny an offender's humanity or, following Justice Brennan, to treat an offender as a *non-human*?²⁶ We can unpack this question, in turn, by considering what it means to *respect* and *disrespect* a human being—with the broader hypothesis being that

(emphasis added); CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5 (III) (Braz.) (prohibiting torture and "inhuman or degrading" treatment); New Zealand Bill of Rights Act 1990, s 9 (N.Z.) (prohibiting torture and "cruel, degrading, or disproportionately severe" treatment or punishment); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 16, § 1, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85 ("Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined . . .").

²⁵ *Furman v. Georgia*, 408 U.S. 238, 272–73 (1972) (Brennan, J., concurring) (emphasis added); see also *Brown v. Plata*, 563 U.S. 493, 510 (2011) ("Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment."); Richard A. Posner, *Social Norms, Social Meaning, and Economic Analysis of Law: A Comment*, 27 J. LEGAL STUD. 553, 557 (1998) (arguing that offenders remain "members of the community" who must not be treated "as children or animals"); AVISHAI MARGALIT, *THE DECENT SOCIETY* 143 (1996) ("Rejecting a human being by humiliating her means rejecting the way she expresses herself as a human. It is precisely this fact that gives content to the abstract concept of humiliation as the rejection of human beings as human."); Murphy, *supra* note 22, at 233 ("Sending painful voltage through a man's testicles to which electrodes have been attached, or boiling him in oil, or eviscerating him, or gouging out his eyes—these are not *human* ways of relating to another person.").

²⁶ The dictionary definition of "degrade" illuminates: "To reduce from a higher to a lower rank, to depose from . . . a position of honour or estimation." *Degrade*, OED ONLINE (Apr. 4, 2018), www.oed.com/view/Entry/49100 [<https://perma.cc/94T9-WTHZ>]. Impermissibly degrading treatment lowers someone from the "grade" (or rank) of human to the "grade" of some lesser, non-human creature or thing.

impermissible degradation constitutes a humanity-denying form of disrespect.²⁷

A. *Respect and Human Value*

Joseph Raz explains that “respect” constitutes the appropriate response to the presence of value.²⁸ To respect something involves aiding or at least not interfering with the possibility of that thing’s exhibition of value, as well as potentially expressing or honoring its value in a symbolic manner.²⁹ Following Raz, we can appreciate how pouring water on a beautiful sandcastle *disrespects* the sandcastle’s value, while pouring water on a plant, generally, *respects* the plant’s value (with the understanding that such things have value insofar as people might engage with them meaningfully). In this way, the central demands of respect depend on what the object does to exhibit value, on the “mechanism” of its value generation, and the ways in which our actions help or hinder the working of that mechanism. To apply this logic to human beings—and thus to appreciate what respecting or disrespecting a person means—we need to understand what humans do, exactly, to generate value, and which capacities enable them to do this.³⁰

Human beings generate value through their meta-capacity for practical reason—the combination of their capacities for autonomy, value recognition, memory, and imagination—which enables them to stitch

²⁷ See Bronsther, *supra* note 19 (arguing that torture constitutes an egregious form of disrespect, and considering what this teaches us about the meaning of degradation). Rather than “disrespect,” the concept of “human dignity” is often invoked in this setting: degrading punishment is wrong because it violates the victim’s human dignity. Respect, however, is more basic than dignity, and more capable of elucidating the machinery of moral reasons at work in our revulsion to certain forms of treatment. Many things deserve respect, but do not bear dignity. We might respect someone’s skills as a driver without thinking that her skills have dignity or that she has dignity as a result of this ability. But when something or someone bears dignity—like the dignity of a judge—that dignity will be grounded in our respect for that thing or person. And, indeed, the duty to uphold human dignity is often understood to derive from or to be synonymous with having “respect for persons,” and so the following analysis might be understood as an attempt to understand certain aspects of human dignity.

²⁸ JOSEPH RAZ, VALUE, RESPECT, AND ATTACHMENT 160–76 (2001).

²⁹ *Id.*

³⁰ Bronsther, *supra* note 19, at 428.

moments together through time to construct a good life as a whole.³¹ Humans are not merely free choosers,³² nor merely vessels of pain and pleasure;³³ they are life builders. Beyond Aristotle, a diverse and distinguished array of theorists have endorsed this life-as-a-whole conception of the human good.³⁴ They recognize that humans are *diachronic* creatures with pasts and futures of their own construction to a significant degree. Humans live through (*dia*) time (*chronos*), as

³¹ *Id.* at 465–73.

³² The bare fact that someone has exercised her autonomy and freely chosen an option does not render that option valuable. See Donald H. Regan, *The Value of Rational Nature*, 112 ETHICS 267 (2002) (arguing that rational nature cannot have value where there are no self-standing principles about good states of affairs and activities); Donald H. Regan, *How to Be a Moorean*, 113 ETHICS 651 (2003) (arguing that agents necessarily take a critical stance in relation to their desires and that they can only do so by relying on a conception of the good that is not itself reducible to their desires); David Enoch, *Agency, Schmagency: Why Normativity Won't Come from What Is Constitutive of Action*, 115 PHIL. REV. 169 (2006) (arguing that a complete account of action and agency is not a complete account of normativity).

³³ See NOZICK, *supra* note 22, at 42–45 (introducing the concept of the pleasure machine as a counterexample to hedonism, since hedonism entails that we would have an overriding reason to give up “real” life and to hook ourselves up to the machine).

³⁴ See ARISTOTLE, *NICOMACHEAN ETHICS* bk. I, at 3–22 (Roger Crisp trans. & ed., 2000) (arguing that a person flourishes “over a complete life,” such that it is premature to judge the quality of one’s life until it is finished); CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 50–51 (1989) (“We want our lives to have meaning, or weight, or substance, or to grow toward some fulness, or however the concern is formulated But this means our *whole* lives. If necessary, we want the future to ‘redeem’ the past, to make it part of a life story which has sense or purpose, to take it up in a meaningful unity.”); Connie S. Rosati, *The Story of a Life*, 30 SOC. PHIL. & POL’Y 21, 27 (2013) (“[P]ersons not only attend to their lives from moment to moment; they also take up a view of their lives as a whole, reflecting on themselves and their existence over time.”); ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 216–19 (2d ed. 1984) (arguing that man is “essentially a story-telling animal,” such that the good life is one that unfolds through time with “narrative unity”); JOHN RAWLS, *A THEORY OF JUSTICE* 62, 92–93, 399–416 (1971) (maintaining that a good life consists in the approximate realization of a “rational life plan”—the pursuit of one’s foundational aims, which are grounded in one’s reflective desires, and with the plan’s details filled in over time, in the context of one’s evolving circumstances); JEFF MCMAHAN, *THE ETHICS OF KILLING: PROBLEMS AT THE MARGINS OF LIFE* 179–80 (2002) (“[W]e must also recognize that well-being is multidimensional and that some of its dimensions are relational—in particular those concerned with the meaning that a state or event has within a person’s life.”); MICHAEL STOCKER, *PLURAL AND CONFLICTING VALUES* 300–02, 323 (1990) (arguing that the value of a life is a Moorean “organic whole”); CLARENCE IRVING LEWIS, *AN ANALYSIS OF KNOWLEDGE AND VALUATION* 498 (1946) (“The characteristic good of willing and achieving is not one found in this or that passing instant merely, nor in an aggregation of the goods thus momentarily and separately disclosed, but in the temporal and relational patterns of a whole of experience whose progression is cumulative and consummatory.”).

discussed further in Part II. They are capable not only of enjoying “momentary goods,” like ice cream cones, but also of achieving “temporal goods,” which must be cultivated through time to be realized—things like families, friendships, and careers.³⁵ While suffering, in the bare sense of an aversive or unpleasant experience, may be involved in the production of temporal goods, as with the arduous work involved with forms of professional training, humans retain the capacity to generate *disvalue*, which results from merely *wanton* suffering.

Consider the methamphetamine addict who has destroyed her life, rejecting her personal obligations and descending into depravity. It is only with an appreciation of her as a being that constructs value through time, in the context of her life as a whole, that we can appreciate the immense disvalue of her smoking her meth pipe, her temporary euphoria notwithstanding.³⁶ If viewed as a moment standing alone, her euphoria would be of great value, since pleasure abstractly conceived has value. But that is not how human beings conceive of, or ought to conceive of, their existences, as if they had no memories and were like goldfish, untethered to the past and future, born in each moment anew.

B. *Disrespect and Degradation*

What does it mean to disrespect such a diachronic creature? Given that respect involves the process of recognizing something’s value and then responding accordingly in one’s attitudes and actions, disrespect for a person will always deny her value to some degree. But there are many types of value that people purport to exhibit and various modes of disrespect. One might just symbolically disrespect someone’s value as an artist by saying “your painting is not very good.” But when delivered in a certain manner and degree, disrespect can register at a more fundamental level. It can express a rejection of someone’s value and standing as a *human*. Treatment reaches this threshold when it embodies the conviction that the individual’s life-building capacity—the very basis of

³⁵ See *infra* pp. 2406–10.

³⁶ Bronsther, *supra* note 19, at 468–70.

her humanity—is completely absent or fundamentally worthless.³⁷ Such treatment manifests the judgment that the individual does not matter, at least not like a person does, such that we can treat it as if it were an animal or perhaps a mere thing or tool.

This theory helps to explain why torture is the exemplar of degrading punishment.³⁸ By examining firsthand accounts of victims, I have established in recent work that torture is *the intentional infliction of a suffusive panic*.³⁹ Torture, by inflicting a *make it stop right now* panic: (1) maximizes the victim's capacity for disvalue, with her consciousness saturated with suffering; and thereby (2) ceases her value-generating capacities, as she is forced into a maximally terrible present and loses the thread of her diachronic identity.⁴⁰ Torture is thus perverse with regard to respecting human value. It seeks to overwhelm—and risks the destruction of—an individual's distinctly human practical reasoning capacities (autonomy, memory, and so forth). It takes a being capable of

³⁷ See *id.* at 473–79. To be sure, I make this argument with the aim of stoking a conversation about the meaning of penal degradation, and without prejudice toward the possibility of other means of treating or demarcating someone as a non-human or non-person.

³⁸ See *Wilkerson v. Utah*, 99 U.S. 130, 135–36 (1878) (noting the difficulty of defining “cruel and unusual punishments,” but concluding that “it is safe to affirm that punishments of torture” qualify); *Furman v. Georgia*, 408 U.S. 238, 281–82 (Brennan, J., concurring) (finding “torturous punishment” to be the “paradigm violation” of the Eighth Amendment); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1738 (2005) (“[T]he prohibition on torture is a point of reference to which we return over and over again in articulating legally what is wrong with cruel punishment or distinguishing a punishment that is cruel from one that is not: We do not equate cruelty with torture, but we use torture to illuminate our rejection of cruelty.”).

³⁹ Bronsther, *supra* note 19, at 447–56. Henri Alleg, describing the first time he was waterboarded by French Algerian agents, expressed the stampeding panic of torture:

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

HENRI ALLEG, *THE QUESTION* 34 (John Calder trans., 1958).

⁴⁰ Bronsther, *supra* note 19, at 428.

living broadly and purposefully through time and, via the infliction of a suffusive panic, converts her into a “shrilly squealing piglet at slaughter,”⁴¹ in the words of torture survivor Jean Améry, as her “flesh becomes a total reality.”⁴² Torture is not merely “harmful” in Joel Feinberg’s sense of being a “setback to interest.”⁴³ It also effectively denies one’s standing as a *bearer* of interests, or at least of distinctly human interests.⁴⁴

Severe degradation like this will usually take the form of a physical interference with someone’s value-generating capacities—running electricity through her body until she becomes a “shrilly squealing piglet” or, more straightforwardly yet, injecting her with potassium chloride so that her heart stops beating. What better way for a punishment to affirmatively deny an offender’s humanity than for it to ruin or waste his capacity to realize diachronic, human value as a non-symbolic matter of physics? But we should remain aware of the possibility that more *symbolic* forms of disrespect can be so outrageous as to qualify as a denial of one’s humanity. Consider “Derby’s Dose,” a horrible punishment by which a slave overseer forced runaway slaves to eat human excrement, among other atrocities.⁴⁵

⁴¹ JEAN AMÉRY, *AT THE MIND’S LIMIT: CONTEMPLATIONS BY A SURVIVOR ON AUSCHWITZ AND ITS REALITIES* 35 (Sidney Rosenfeld & Stella P. Rosenfeld trans., 1980).

⁴² *Id.* at 33.

⁴³ 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 31 (1987).

⁴⁴ Bronsther, *supra* note 19, at 481.

⁴⁵ Thomas Thistlewood invented the punishment in the mid-eighteenth century. MALCOLM GLADWELL, *OUTLIERS: THE STORY OF SUCCESS* 282 (2009). In addition to beating the runaway and rubbing salt pickle, bird pepper, and lime juice into their wounds, what made it “Derby’s Dose” was that another slave would defecate into the runaway’s mouth, after which they would be gagged for four or five hours. *Id.* Let us examine just the process of forcing someone to eat human excrement, ignoring the beatings and the gagging. This need not, as a matter of physics, vitiate her ability to realize value, but it seems to be based on the same type of reasoning and to embody the same fundamental message as something that does.

The concept of “disgust” seems to be involved with such extreme symbolic degradation. Martha Nussbaum argues that “disgust embodies a shrinking from contamination that is associated with the human desire to be nonanimal . . .” MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* 74 (2006); *see also* VALERIE CURTIS, *DON’T LOOK, DON’T TOUCH, DON’T EAT: THE SCIENCE BEHIND REVULSION* (2013). By forcing the runaway to do something utterly disgusting and to thereby “contaminate” herself like an animal, Thistlewood acts to reject her standing as a non-animal person. This connects with the position that people’s life-building capacities are their “essentially human” capacities. *As far as we know*, animals do not purposefully

While Part III considers the issue further, we can move forward with a basic understanding of penal degradation. Degradation limitations, standing for the principle that offenders do not forfeit their humanity when they commit offenses, constrain the pursuit of our positive penal aims, like retribution and deterrence. Punishment is impermissibly degrading when it denies an offender's standing as a human; and punishment denies an offender's standing as a human when it rejects the presence or worth of his capacity for practical reason, that is, when it treats him as if his essentially human capacity to construct a good life through time does not exist or does not matter.⁴⁶

construct good lives; in our social imaginary, at least, they are *synchronic* creatures that live moment-to-moment. See J. David Velleman, *Well-Being and Time*, 72 PAC. PHIL. Q. 48, 67 (1991) (arguing that a cow's life considered as a holistic achievement does not matter, given that the cow, unlike a person, is incapable of understanding itself as a diachronic, life-building being). To force a person to symbolically become *what society conceives of* as an animal is thus to reject the presence or worth of her capacity for practical reason. It is to express the conviction that she *is* a synchronic animal and therefore *not* a diachronic person with the capacity and right to construct a life of her own. See Waldron, *supra* note 20, at 282 ("The 'higher than the animals' sense of human dignity gives us a natural sense of 'degrading treatment': it is treatment that is more fit for an animal than for a human, treatment of a person as though he were an animal."); Murphy, *supra* note 22, at 233 (arguing that a punishment is "in itself" degrading when it "treats the prisoner as an animal instead of a human being" or "perhaps even is an attempt to *reduce* him to an animal or a mere thing").

⁴⁶ While I am concerned with punishments above a "dispositive" line of disrespect—those that affirmatively deny an offender's humanity and thereby are absolutely impermissible as a form of state punishment—not all forms of degradation are so extreme. Bronshter, *supra* note 19, at 481. Imagine sentencing someone to a dirty, but otherwise decent prison for a week. That the prison is dirty is degrading. It treats the individual as a non-human in part because of the symbolic disrespect of forcing him to live like an unclean animal. But sentencing someone to such a prison for a week, in and of itself, does not represent an affirmative denial of his humanity on a par with penal torture or rape. Degradation-limiting reasons compete with reasons of offense-punishment proportionality and social utility, as indicated above. In this competition, the reasons that oppose penal torture and rape are an order of magnitude stronger than those that oppose dirty prisons, even though they all reside within the same category of penal considerations. I can imagine situations where a judge permissibly sends someone to a dirty prison for a week, say, the offender is a demonstrable security risk and the cleaning staff is on strike. I cannot imagine a situation where a judge permissibly sentences someone to be tortured or raped as punishment for a crime. The concept of "inhuman" may be useful in this context: dirty prisons are degrading; penal torture and rape are so degrading that they are inhuman. See Vorhaus, *supra* note 21, at 394 (arguing that a strip search may be "degrading" but doubtfully "inhuman"); *Ireland v. United Kingdom*, 2 Eur. Ct. H.R. (ser. A) at 25 (1978) (separate opinion by Fitzmaurice, J.) ("[I]f standing someone against a wall in a strained position . . . amounts to 'inhuman' treatment, what language should be used to describe . . . placing him in a blacked-out cell in the company of a bevy of starving rats?").

II. THE DEPRIVATIONS OF LONG-TERM INCARCERATION

Where on the spectrum of disrespect does long-term incarceration reside? Is it so disrespectful that, like penal torture or Derby's Dose, it embodies a denial of the offender's standing as a human? To answer this question, we need to understand what long-term incarceration *is*—or more to the point, what long-term incarceration *does* to an offender. To apply a normative framework to a social practice, we need a clear understanding of the practice itself.

To determine what *long-term* incarceration does to an offender, however, we must first examine what *incarceration* does to an offender irrespective of sentence length. Section II.A argues that, in examining these questions, we ought to consider what valuable activities or states of being incarceration limits an inmate's access to, and to what degree. Section II.B then investigates the meaning of incarceration on this metric (irrespective of sentence length). What are the day-to-day deprivations of prison? By examining daily life in a number of prisons, Section II.B argues that while incarceration entails a wide array of possible deprivations, its deprivational core is a limitation on the freedom of association. Section II.C then adds the variable of time to the analysis. What are the *decade-to-decade* deprivations of prison? Section II.C demonstrates that long-term incarceration is not merely "a lot" of incarceration or "a lot" of associational deprivation. The injury of long-term incarceration is qualitatively different than the injury of short-term incarceration, insofar as long-term incarceration deprives an offender of access to forms of association that he can develop only over time, like a family and meaningful career.

A. *Capability and Deprivation*

When we hear that John has been sentenced to a one-week term of imprisonment, what has the state done to him? If a punishment, by definition, deprives an offender of something, what has John been deprived of? As suggested above, Martha Nussbaum and Amartya Sen's

“capabilities approach” provides a useful framework for considering this issue.⁴⁷

In accord with Aristotle and Marx, Sen and Nussbaum argue that we ought to assess political arrangements by examining people’s “real opportunity” *to do* or *to be* certain valuable things (e.g., to fly a kite, to get married, to watch television, to go to college, to be healthy, to be enthusiastic, etc.), as opposed to their level of desire fulfillment, happiness, or resources.⁴⁸ One’s circumstances, they explain, will to a significant degree govern what she wants, and what will make her happy.⁴⁹ That a poor, disabled person has adapted to her situation, and feels happy and satisfied with her life, does not mean that society should not worry about her inability to do or to be certain things—her inability to realize certain “functionings,” in the language of Sen and Nussbaum—like her inability to, say, ride public transportation. While the ability *to be* happy is a crucially important “capability,” Sen explains, it is only one of many such capabilities, and to pursue it monomaniacally warps public policy.⁵⁰ Meanwhile, resources are of merely instrumental worth on this view, relevant only insofar as one can convert them into valuable functionings. That is, two people with the same amount of resources do

⁴⁷ See generally MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* (2000) [hereinafter NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT*]; MARTHA C. NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* (2011) [hereinafter NUSSBAUM, *CREATING CAPABILITIES*]; Martha C. Nussbaum, *Human Functioning and Social Justice: In Defense of Aristotelian Essentialism*, 20 *POL. THEORY* 202 (1992); Martha C. Nussbaum, *Capabilities as Fundamental Entitlements: Sen and Social Justice*, 9 *FEMINIST ECON.* 33 (2003); AMARTYA SEN, *INEQUALITY RE-EXAMINED* (1992) [hereinafter SEN, *INEQUALITY RE-EXAMINED*]; Amartya Sen, *Equality of What?*, in 1 *THE TANNER LECTURES ON HUMAN VALUES* (Sterling M. McMurrin ed., 1980); AMARTYA SEN, *COMMODITIES AND CAPABILITIES* (1985); Amartya Sen, *Capability and Well-Being*, in *THE QUALITY OF LIFE* 30 (Martha Nussbaum and Amartya Sen eds., 1993); Amartya Sen, *Capabilities, Lists, and Public Reasons: Continuing the Conversation*, 10 *FEMINIST ECON.* 77 (2004); Amartya Sen, *Elements of a Theory of Human Rights*, 32 *PHIL. & PUB. AFF.* 315 (2004).

⁴⁸ NUSSBAUM, *CREATING CAPABILITIES*, *supra* note 47, at x (“Known as the ‘Human Development’ approach, and also as the ‘Capability Approach’ or ‘Capabilities Approach,’ it begins with a very simple question: What are people actually able to do and to be? What real opportunities are available to them?”); SEN, *INEQUALITY RE-EXAMINED*, *supra* note 47, at 31 (explaining that our set of capabilities will determine “the *real opportunity* that we have to accomplish what we value”).

⁴⁹ See AMARTYA SEN, *THE STANDARD OF LIVING* 11 (1988).

⁵⁰ Amartya Sen, *Well-Being, Agency and Freedom: The Dewey Lectures*, 82 *J. PHIL.* 169, 200 (1985).

not have the same standard of living, if one has a greater capacity to convert her resources into valuable functionings.⁵¹

While Sen and Nussbaum employ the “capabilities approach” in the realms of distributive justice, development economics, and constitutional design, it is useful as well in the realm of sentencing theory, as I hope will become clear, given its insight into the nature of injuries and deprivations. For the purposes of sentencing theory, however, we can leave behind the question of what qualifies as a “real opportunity” to realize a certain functioning, of how easy or costless it must be for someone to do or to be something before we can say with confidence that she has the “capability” to do or to be that thing.⁵² With such a flattened capabilities approach in mind, we can ask to what degree incarceration makes it *more difficult* for an inmate to realize certain valuable functionings, that is, to what degree incarceration makes it more difficult to engage in valuable activities or states of being.

The emphasis on the degree of deprivation is important. Prison makes it harder, but not impossible, for an inmate to realize a number of functionings, such as speaking to his family members. Though, of course, sometimes the limitation will be complete or nearly complete, as with an inmate’s ability to, say, take a ride on an airplane. Finally, the deprivations of incarceration could also be a matter of risk, in that incarceration risks limiting an inmate’s access to certain functionings.⁵³

B. *Carceral Deprivation*

At this stage, the inquiry is semantic and sociological. There is a term—“incarceration” (or “imprisonment”)—and we are looking out to the world to see what it deprives an inmate of, in terms of his access to valuable functionings. As indicated above, prison takes many forms. While this Article is focused on the impact of putatively “normal” prisons

⁵¹ SEN, *INEQUALITY RE-EXAMINED*, *supra* note 47, at 26–28, 36–38.

⁵² See Bernard Williams, *The Standard of Living: Interests and Capabilities*, in AMARTYA SEN, *THE STANDARD OF LIVING* 94, 99 (Geoffrey Hawthorne ed., 1987) (discussing the difficulty of determining when someone has a full-fledged “capability”).

⁵³ See Adam J. Kolber, *Unintentional Punishment*, 18 *LEGAL THEORY* 1, 18 (2012) (arguing that the state needs to justify the risks of harm created by a punishment, in addition to those harms that are certain to befall an offender).

over time, for the purpose of isolating variables let us begin the investigation by considering two extreme institutions.

1. Other People

In 1994, approximately 7000 Hutus charged with genocide were held in the Gitarama Prison, a walled space half the size of a soccer field.⁵⁴ The complex was built for 400 inmates.⁵⁵ There were only twenty latrines.⁵⁶ Packed in against one another, most of the inmates had no option but to stand, constantly, in the open courtyard.⁵⁷ Those too weak to stand squatted in filth.⁵⁸ Foot sores became gangrenous.⁵⁹ At the end of the courtyard, a concrete block housed the longest-serving prisoners, a dark cellar filled with hundreds of men.⁶⁰ One meager meal a day was passed throughout the prison.⁶¹ One in eight inmates died over a nine-month period.⁶²

If the Gitarama Prison inflicted the extreme absence of privacy, the Federal Administrative Maximum Facility (ADX) facility located in the mountains near Florence, Colorado inflicts its extreme presence.⁶³ Inmates are isolated in their seven-feet by twelve-feet concrete cells for twenty to twenty-three hours a day.⁶⁴ They routinely go days without any

⁵⁴ Orr, *supra* note 14.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² MÉDECINS SANS FRONTIÈRES, DIAGNOSING THE STATE OF PRISONER HEALTH: THE GITARAMA EXAMPLE (1995) (on file with the Cardozo Law Review).

⁶³ Mark Binelli, *Inside America's Toughest Federal Prison*, N.Y. TIMES (Mar. 26, 2015), <https://www.nytimes.com/2015/03/29/magazine/inside-americas-toughest-federal-prison.html> [<https://perma.cc/N3X6-ZNVP>].

⁶⁴ *Id.* For a first-hand account of life inside ADX Florence, see Eli Hager, *My Life in the Supermax*, MARSHALL PROJECT (Jan. 8, 2016, 7:15 AM), <https://www.themarshallproject.org/2016/01/08/my-life-in-the-supermax#.8fzdz2Yje> [<https://perma.cc/3N9Y-TE56>]. See also U.S. PENITENTIARY ADMIN. MAXIMUM FACILITY, FLORENCE, COLO., U.S. DEP'T OF JUSTICE, ADMISSION AND ORIENTATION HANDBOOK (2008); SHARON SHALEV, SUPERMAX: CONTROLLING RISK THROUGH SOLITARY CONFINEMENT (2009); ARTHUR LIMAN PUB. INTEREST PROGRAM & ASS'N OF

conversation.⁶⁵ And they are unable to see the sky from their four-inch by three-foot cell windows.⁶⁶ In California's Pelican Bay State Prison, solitary inmates live without windows entirely, sometimes for decades.⁶⁷ Stuart Grassian, a psychiatrist on the faculty of the Harvard Medical School, evaluated over 200 prisoners in solitary confinement in various state and federal penitentiaries.⁶⁸ Among other symptoms, he found that more than half of the prisoners "reported a progressive inability to tolerate ordinary stimuli," like the clanking of a cell door; almost a third experienced auditory hallucinations, often in whispers and saying frightening things; over half experienced severe panic attacks; almost half reported the emergence of entirely unwelcome and uncontrollable revenge fantasies with regard to prison guards; and almost half reported paranoid and persecutory fears.⁶⁹ He concludes that solitary confinement causes a discrete syndrome with characteristic symptoms, one "strikingly unique" by comparison to other psychiatric illnesses.⁷⁰

In the "doings" and "beings" language of the capabilities approach, it would be very difficult, if not entirely impossible, to do or be *anything* of value in the Gitarama Prison or ADX Florence (e.g., to be healthy, to make art, to be happy, etc.), let alone maintain a sense of calm and composure. For those who accept the existence of degradation limitations—that is, for those who believe that inmates do not forfeit their humanity, such that their capacities to generate human value and disvalue still matter—it is clear that such forms of incarceration are impermissible for nearly any period of time, let alone for many years.

STATE CORR. ADM'RS, TIME-IN-CELL: THE ASCA-LIMAN 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON (2015), http://www.law.yale.edu/system/files/area/center/liman/document/asca-liman_administrativesegregationreport.pdf [<https://perma.cc/RB66-KZWK>].

⁶⁵ AMNESTY INT'L, ENTOMBED: ISOLATION IN THE U.S. FEDERAL PRISON SYSTEM 15 (2004), <https://www.amnesty.org/download/Documents/4000/amr510402014en.pdf> [<https://perma.cc/GZ8X-UX2S>].

⁶⁶ Binelli, *supra* note 63.

⁶⁷ Erica Goode, *Solitary Confinement: Punished for Life*, N.Y. TIMES (Aug. 3, 2015), <https://www.nytimes.com/2015/08/04/health/solitary-confinement-mental-illness.html> [<https://perma.cc/66NJ-CBHP>].

⁶⁸ Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325 (2006).

⁶⁹ *Id.* at 335–36.

⁷⁰ *Id.* at 337.

Keeping the possibility of such extreme carceral deprivation in mind, let us consider in more depth two “normal” prisons and then one extraordinarily mild prison on the other end of the spectrum. What do they deprive an offender of in his day-to-day life? This examination will set the stage for Part III’s conclusion that the degrading aspects of prison are not only a matter of the conditions of confinement, and that long-term incarceration in even the gentlest prison is an impermissibly degrading, potentially life-ruining injury.

2. Medium Security

Michael Romero was convicted of five bank robberies in the San Diego area.⁷¹ In November 2012, he described his daily life in the medium-security general population in San Quentin State Prison in Marin County, California, on the north side of the San Francisco Bay.⁷² Romero is confined to a cellblock of 120 prisoners. From his cellblock, he can move to the courtyard, the mess hall, work areas, and the visitor center. Movements from one area to another are only allowed hourly in ten-minute intervals. Except for meals, anyone leaving the cellblock must get a pass signed by a guard. Romero’s cell is approximately six-feet by twelve-feet. It was built for one person, but, given the overcrowding in California’s state prison system, he has a cellmate (who was also convicted of bank robbery, in Los Angeles).⁷³ At the time of Romero’s writing, the prison had 3943 inmates, but a design capacity of 3082.⁷⁴ In his cell there is a wooden double bunk, a large, barred window looking outside, and a metal door with a narrow three-inch by eighteen-inch window. Breakfast is at 6:00 AM, lunch at 12:00 PM, and supper at 5:00 PM.⁷⁵

⁷¹ Michael Romero, *A Day in the Life of a Prisoner*, PEN AM. (Nov. 16, 2012), <https://pen.org/a-day-in-the-life-of-a-prisoner> [<https://perma.cc/K4QS-AB4F>].

⁷² *Id.*

⁷³ *Brown v. Plata*, 563 U.S. 493 (2011) (holding that overcrowding in California state prisons constituted “cruel and unusual” punishment).

⁷⁴ This was down from 5984 inmates in January 2003. DATA ANALYSIS UNIT, CAL. DEP’T OF CORR. & REHAB., WEEKLY REPORT OF POPULATION AS OF MIDNIGHT JANUARY 22, 2003 (2003), https://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/WeeklyWed/TPOP1A/TPOP1Ad030122.pdf [<https://perma.cc/E6KX-VF9M>].

⁷⁵ Romero, *supra* note 71.

Everyone who is able to work must, with payment topping out at \$3.10 per hour.⁷⁶ There is some choice in terms of one's employment. Romero usually skips breakfast, rising around 7:00 AM. He works for about an hour and a half tending to the grounds outside his cellblock, raking out footprints and caring for the sparse foliage. By comparison, James "JC" Cavitt, another San Quentin inmate, works from 8:00 AM to 2:00 PM in the prison's general maintenance shop as a metal fabricator and welder (at \$0.32 per hour).⁷⁷

Romero describes the scene before lunch, hinting at the threat of violence inside the prison:⁷⁸

Some twenty cons are gathered in the dayroom now, waiting for lunch. The talk is of two recent stabbings here and other assorted mayhem. Boredom seems to breed talk of violence. Our dialogs continually drift toward violent acts and monstrous deeds. So much so that the talk becomes a form of monotony in itself. Many convicts become steeped in that way of thinking and completely lose their sense of humor. When they attempt to smile, their mouths are as rigid as the coin return on the Coke machine. Many guards suffer from that syndrome, too.⁷⁹

Lunch in the mess hall is crowded and noisy, and food quality has improved somewhat after a one-meal strike, Romero explains.⁸⁰ Romero eats quickly. Guards watch him eat. They are close by throughout

⁷⁶ *Id.* According to available data, the average minimum wage for work in state prisons in the United States is \$0.86 per hour and the average maximum is \$3.45 per hour. Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POLY INITIATIVE (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages> [<https://perma.cc/49V4-BW6R>]. With few exceptions, regular prison jobs are unpaid in Alabama, Arkansas, Florida, Georgia, and Texas. *Id.*

⁷⁷ James "JC" Cavitt, *What Is a Typical Inmate Day like in San Quentin? What's the Schedule?*, HUFFINGTON POST (Mar. 2, 2012, 11:50 AM), https://www.huffingtonpost.com/quora/what-is-a-typical-inmate_b_1315012.html [<https://perma.cc/WNJ3-GMAS>].

⁷⁸ See Nancy Wolff & Jingh Shi, *Contextualization of Physical and Sexual Assault in Male Prisons: Incidents and Their Aftermath*, 15 J. CORR. HEALTH CARE 58 (2009) (reporting, based on a random sample of 6964 male inmates in U.S. prisons, that twenty-one percent of them were physically assaulted during a six-month period and estimating the prevalence of sexual assault at two to five percent).

⁷⁹ Romero, *supra* note 71.

⁸⁰ *Id.*

Romero's day, and though they are usually within earshot of inmates' conversations, they rarely participate.

After lunch, Romero heads out to the courtyard, where various athletic activities are available. "It's the place where we play," Romero writes, "shaking off the dust, disease, and gloom of the cage."⁸¹ The yard is regularly closed, though, for security during deliveries, for instance, and sometimes without explanation. Assuming they are let outside, inmates are recalled to their cells at 3:45 PM for a "standing" count at 4:00 PM. They then wait about an hour for supper. Inmates are allowed one fifteen-minute collect call per evening, though they must make an appointment a day in advance. Romero is locked in his cell with his cellmate at 10:00 PM. Recreational drugs are available—" [n]ot enough for a habit, but enough to take the edge off a bit."⁸² While Romero does not mention rehabilitative programs, Cavitt spends two hours before and after supper in self-help groups and college classes.⁸³ Inmates in the general population may receive "contact visits" on Saturday and Sunday from 7:30 AM to 2:30 PM.⁸⁴ That means that they may sit with their visitors, embrace and kiss at the beginning and end of the visit, and hold hands during the visit.⁸⁵

The medium-security section at San Quentin represents a significant reduction in the level of deprivation by comparison to the Gitarama Prison and ADX Florence. San Quentin does not in short order force a person to the extreme of human misery. Nor does it represent any immediate risk to an inmate's bodily health or basic mental stability. Romero does imply that living there tends to harden one's mentality.⁸⁶ We might say, at a minimum, that being placed inside San Quentin makes being *happy* or *light-hearted* or *contented* or *joyful* extremely challenging.

⁸¹ *Id.*

⁸² *Id.*

⁸³ Cavitt, *supra* note 77.

⁸⁴ *Adult Inmate Visiting Guidelines*, CAL. DEP'T CORRECTIONS & REHABILITATION, <https://www.cdcr.ca.gov/visitors/inmate-visiting-guidelines> [<https://perma.cc/W925-PCG7>].

⁸⁵ *Id.*

⁸⁶ For discussion on the mental health aspects of incarceration, see generally Seena Fazel et al., *The Mental Health of Prisoners: A Review of Prevalence, Adverse Outcomes and Interventions*, 9 LANCET PSYCHIATRY 871 (2016); Cherie Armour, *Mental Health in Prison: A Trauma Perspective on Importation and Deprivation*, 5 INT'L J. CRIMINOLOGY & SOC. THEORY 886 (2012).

By comparison to inmates in those two extreme facilities, Romero and Cavitt have greater access to space and to other people. They have some freedom to move around the facility—around their cellblock, the yard, the mess hall, and their work areas—though only for specific reasons, and within limited periods. There is the possibility of at least some work. There are a number of individuals to interact with in a potentially meaningful manner. We can assume, for instance, that the possibility of forming and maintaining a genuine friendship exists to some significant degree. Romero mentions having long conversations with his cellmate.⁸⁷ Of course, with the exception of visiting hours, San Quentin inmates only have the opportunity to interact with other San Quentin inmates—and usually only a small subset of them—and to some artificial degree with the guards. These interactions are further constrained by the fact that they occur generally under human and video surveillance.

What does a term of imprisonment in a particular facility deprive an inmate of? Of course, the most relevant comparison is not how his access to valuable goods and activities compares to that of inmates at the most extreme prisons, but rather how it compares to his prior access *outside* of prison. As we sentence him to a punishment, we might ask ourselves: What does he have now, in terms of access to valuable goods or activities, that we are taking away from him? When considering the medium-security San Quentin facility from this perspective, the list of day-to-day deprivations is limited only by one's imagination (e.g., one cannot eat in a restaurant, go to a movie theater, start a business, talk with people not on the approved visitor list, etc.). Nonetheless, the comparison with "extreme" prisons illuminates. Whereas extreme prisons are places of *suffering*, perhaps in every moment of confinement, the injury of a sentence to a "normal" prison is subtler and less aversive, as I discuss further in Section II.C.

3. Minimum Security

Matthew Kluger, a lawyer convicted in federal court of insider trading in 2012, described his life inside Federal Correctional Institution

⁸⁷ Romero, *supra* note 71.

(FCI) Morgantown, a minimum-security federal prison in West Virginia.⁸⁸ It is an all-male facility built for approximately 1,300 inmates.⁸⁹ While each inmate is required to work, more people are assigned to each task than necessary, Kluger explains. Kluger works in the dining room. He wakes at 5:30 AM to help with breakfast, but his duties entail at most twenty minutes of wiping down a counter before returning to his cell. Lunch requires about an hour of work. He is free for the day starting at 11:30 AM.⁹⁰

Options for spending his free time include a library, where he often helps people with legal work for an hour or two, a track, a form of paddle tennis, a gym with scheduled activities like spin classes, religious services, television in communal rooms, musical instruments, cards, and board games.⁹¹ There are also group athletic activities, including a softball league. “The daily life is not that bad,” Kluger says.⁹²

Kluger needs to be by his cell bunk at 4:00 PM and 9:00 PM for counts. There is no fence around the facility and no guards posted outside. Inmates sometimes sneak away to a local store to purchase cigarettes to resell for profit inside. Once a week, inmates can purchase goods from a store, including hygiene items, packaged foods, and clothes to wear inside the prison (though they must wear the prison uniform when interacting with visitors). The main form of currency inside the facility, Kluger explains, is canned mackerel purchased from the store. Inmates can also purchase unlimited email access and up to 300 minutes of phone calls a month. However, they are limited to \$300 for all purchases each month.⁹³

Bathrooms are communal, with private showers that are curtained off. Kluger remarks, though, on the general lack of private spaces in the prison. New admissions usually live in open dormitory-style areas or

⁸⁸ Daniel Roberts, *Life Behind Bars: Matthew Kluger Reveals All*, FORTUNE (July 7, 2014, 9:50 AM), <http://fortune.com/2014/07/07/matthew-kluger-talks> [<https://perma.cc/CX4E-W6YW>].

⁸⁹ FED. CORR. INST. MORGANTOWN, W. VA., ADMISSION AND ORIENTATION HANDBOOK (2016), https://www.bop.gov/locations/institutions/mrg/MRG_aohandbook.pdf [<https://perma.cc/28VD-NMNT>].

⁹⁰ Roberts, *supra* note 88.

⁹¹ *Id.*; see also FED. CORR. INST. MORGANTOWN, W. VA., *supra* note 89, at 19.

⁹² Roberts, *supra* note 88.

⁹³ *Id.*

semi-private cubicles before private double rooms become available.⁹⁴ Kluger states that the mattresses are thin, with no springs. He says that he does not worry about physical or sexual violence.⁹⁵

Emails are monitored and Kluger was sent to the Special Housing Unit (SHU) for eight weeks as punishment for emailing a corrections officer he had befriended at the medium-security facility the Federal Bureau of Prisons (BOP) had placed him at initially. Such communication between inmates and officers is against BOP rules, which the prior facility enforced less rigorously, according to Kluger. Kluger was locked in a cold, small room with another inmate, and given food through a slot. The bathroom was in the room and he was let out to shower three days a week; whether he was let out otherwise is unclear.

Visiting hours are on Friday, Saturday, Sunday, and federal holidays.⁹⁶ Members of an inmate's immediate family may be placed on the visiting list, but others will be included only pending investigation.⁹⁷ Contact, according to the prison manual, is limited to one hug and kiss at the start and end of a visit.⁹⁸ Any limitations on monthly visitor hours is unclear from Kluger's interview and the prison's visitor manual. BOP policy is that federal inmates are entitled to at least four hours of visitation a month, with the possibility of more based on the warden's discretion.⁹⁹ Conjugal visits are not allowed for federal prisoners.¹⁰⁰

The level of deprivation at FCI Morgantown is yet less severe than that experienced by Romero and Cavitt at San Quentin, to say nothing of the Gitarama Prison and ADX Florence. Kluger has free rein of almost

⁹⁴ FED. CORR. INST. MORGANTOWN, W. VA., *supra* note 89, at 11.

⁹⁵ Inmates are selected for minimum security facilities in large part due to their low risk of violence. See FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, PROGRAM STATEMENT P5100.08: INMATE SECURITY DESIGNATION AND CUSTODY CLASSIFICATION (2006), https://www.ca1.uscourts.gov/sites/ca1/files/citations/ProgramStatement5100_008.pdf [<https://perma.cc/A77E-QLH9>] (setting forth procedures for determining whether to send offenders to minimum, low, medium, or high security facilities).

⁹⁶ FED. CORR. INST. MORGANTOWN, W. VA., *supra* note 89, at 52.

⁹⁷ *Id.* at 51.

⁹⁸ *Id.* at 52.

⁹⁹ FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, PROGRAM STATEMENT 5267.08: VISITING REGULATIONS 5 (2006), https://www.bop.gov/policy/progstat/5267_008.pdf [<https://perma.cc/EW74-8MK3>].

¹⁰⁰ A handful of states permit conjugal visits for certain prisoners. See Christopher Hensley, Sandra Rutland & Phyllis Gray-Ray, *Conjugal Visitation Programs: The Logical Conclusion*, in PRISON SEX: PRACTICE AND POLICY 143 (Christopher Hensley ed., 2002).

the entire facility during the day. Unlike Romero and Cavitt, he need not wait for special ten-minute intervals, or a signed pass from a guard, to move between approved areas. Related, Kluger has access to significantly more recreational activities than Romero and Cavitt do. He does not have to share a cell built for one. He has greater daily access to more people, and with less of a threat of violence than is present within San Quentin, consistent with the facility's minimum-security status. Though, for Kluger as well, the population that he might interact with—again, with the exception of visiting hours—consists of other inmates and to a limited degree the guards. Kluger highlights this limitation:

[Y]ou know what, if this were filled with 1100 people that you want to hang out with, this would be a fine place to be. Unfortunately it's not. So the biggest problem is other people. It's being with this diverse crowd of people who are generally angry, somewhat antisocial, not the kinds of people that you want to spend your time with in the outside world. So that makes it hard.¹⁰¹

Kluger also discusses what we might call the “dignitarian” deprivations of prison, where one is denied the symbolic forms of respect¹⁰² that he might expect to receive on the outside:

[W]hat I would say is probably the hardest thing to get used to is that you're just going to be a number. And that, by virtue of the fact that he got a federal job, someone who you probably don't have a whole lot of respect for is going to tell you to mop the floor. You just have to shut up and mop the floor.¹⁰³

Other “dignitarian” deprivations relate to the fact that inmates are treated to a significant degree like children, closely monitored and presented with an artificial array of choices for activities.¹⁰⁴ The human dignity ideal—of an adult *standing tall*, freely and confidently determining their own existence, and *looking other people in the eye* as a

¹⁰¹ Roberts, *supra* note 88.

¹⁰² See Bronsther, *supra* note 19, at 462–64 (distinguishing “symbolic” and “non-symbolic” respect).

¹⁰³ Roberts, *supra* note 88.

¹⁰⁴ See Waldron, *supra* note 20, at 282 (arguing that “infantilization,” the process of treating an adult like an infant, is one of the four species of indignity and degradation).

social equal—is surely difficult to realize within any prison.¹⁰⁵ With that said, this consideration is a matter of degree as well, and the dignity ideal is likely further difficult to realize in San Quentin, where inmates are presumed to have less self-control than those in FCI Morgantown, as evidenced by San Quentin’s external walls and the greater presence of guards.

4. Norwegian Island

Finally, on the far end of the spectrum of conditions of confinement is Norway’s minimum-security Bastøy Prison. The prison is on the Bastøy Island, a few miles off the coast in the Oslo Fjord.¹⁰⁶ One inmate described life there as follows: “It’s like living in a village, a community. Everybody has to work. But we have free time so we can do some fishing, or in summer we can swim off the beach. We know we are prisoners, but here we feel like people.”¹⁰⁷

The prison hosts approximately 115 inmates at a time, many of whom have been convicted of serious and violent crimes. Inmates are selected for the Bastøy based on their commitment to and capacity for rehabilitation.¹⁰⁸ Each inmate holds the keys to his own room in either a dormitory or a house of up to six people.¹⁰⁹ Each house has a “house father.”¹¹⁰ There are no uniforms.¹¹¹ One meal a day is provided in the dining hall. Inmates are expected to cook their other meals together in communal kitchens with food that they have grown on the island or

¹⁰⁵ See JEREMY WALDRON, *DIGNITY, RANK, AND RIGHTS* 21–22 (Meir Dan-Cohen ed., 2012) (discussing the “moral orthopedics of human dignity,” the connection between having dignity and “uprightness of bearing”); Philip Pettit, *Two Republican Traditions*, in *REPUBLICAN DEMOCRACY: LIBERTY, LAW, AND POLITICS* 169, 173 (Andreas Niederberger & Philipp Schink eds., 2013) (“[U]nder the republican vision, a citizen would be a *liber* or a free-man insofar as he enjoyed sufficient power and protection in the sphere of the basic liberties—and a corresponding normative status—to be able to walk tall among others and look any in the eye, without reason for fear or deference.”).

¹⁰⁶ James, *supra* note 15; Sutter, *supra* note 15.

¹⁰⁷ James, *supra* note 15.

¹⁰⁸ *Id.*

¹⁰⁹ Sutter, *supra* note 15.

¹¹⁰ James, *supra* note 15.

¹¹¹ Sutter, *supra* note 15.

purchased from the island's mini-supermarket.¹¹² In addition to a food stipend of around ninety dollars a month, the men earn approximately eight dollars a day.¹¹³

The working day begins at 8:30 AM and ends at 3:30 PM.¹¹⁴ Jobs include tending to sheep, cows, and chickens, looking after fruit and vegetable gardens, doing laundry, caring for the horses that pull the island's carts, repairing bicycles that many prisoners purchase with their own money, and working ground maintenance.¹¹⁵ Only three or four guards remain on the island after 4:00 PM.¹¹⁶ There is a large building where weekly visits take place, in private family rooms.¹¹⁷ Conjugal relations are allowed.¹¹⁸ There is a church, a school, and a library.¹¹⁹ The "Bastøy Blues Band" was given permission to attend a music festival in support of the rock group, ZZ Top.¹²⁰ A guard on the island who had worked there for seventeen years said: "Let me tell you something. You know, on this island I feel safer than when I walk on the streets in Oslo."¹²¹

In what ways does the Bastøy prison represent a place of less deprivation than FCI Morgantown? What valuable goods, activities, or states of being do inmates in the Bastøy have greater access to than inmates in FCI Morgantown? It is a matter of interpretation, of course, but there are at least six considerations worth highlighting.

First, it appears that Bastøy inmates have greater access to at least somewhat enjoyable or meaningful work, by comparison to Kluger's description of wiping down counters in FCI Morgantown's dining hall. However, it is easy to romanticize this issue, and it depends ultimately on the extent to which one finds seven hours of manual labor and farming

¹¹² James, *supra* note 15.

¹¹³ Sutter, *supra* note 15.

¹¹⁴ *Id.*

¹¹⁵ James, *supra* note 15.

¹¹⁶ Sutter, *supra* note 15.

¹¹⁷ James, *supra* note 15.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* For an examination of the history and sociology of penal mildness within Scandinavia, see generally JOHN PRATT & ANNA ERIKSSON, *CONTRASTS IN PUNISHMENT: AN EXPLANATION OF ANGLOPHONE EXCESS AND NORDIC EXCEPTIONALISM* (2013).

activities more enjoyable or meaningful than an hour or two of low-impact dining hall work.

Second, it appears that Bastøy inmates have greater access to natural beauty, including a beach. Nussbaum argues that “[b]eing able to live with concern for and in relation to animals, plants, and the world of nature” is one of the ten “central human capabilities” essential to living a “truly human” existence.¹²² Aside from FCI Morgantown, compare this to inmates at ADX Florence who cannot see the sky from their cell windows, or to the solitary inmates in Pelican Bay who live without windows entirely.

Third is the issue of privacy. A relative deprivation of privacy is inherent to any prison; but at the Bastøy it appears to be of a much lesser degree, both with regard to the official gazing of prison guards and to the possible intrusions of other inmates, as evidenced by the fact that only a handful of guards remain on the island after 4:00 PM and by the existence of private rooms with personal locks.¹²³

Fourth, and related, inmates have more privacy with their visitors, including the possibility of conjugal visits. Visits at FCI Morgantown, by comparison, occur in a large public room.

Fifth, it appears that inmates are treated with more symbolic respect by guards at the Bastøy. The possibility of being told to “shut up and mop the floor” seems remote.¹²⁴ Whether this is because of legal rules constraining guards or because of the prison’s culture is unclear.

Sixth, inmates have at least some opportunity to leave the prison during their sentence, as seen with the Bastøy Blues Band playing at the musical festival, though the extent to which this opportunity remains severely limited is important, as I discuss below.

5. The Freedom of General Association

Robert Hood, the former warden at ADX Florence, described the facility as “a clean version of hell.”¹²⁵ If that is the case, then the Gitarama

¹²² NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT, *supra* note 47, at 71–72, 80.

¹²³ Sutter, *supra* note 15.

¹²⁴ Roberts, *supra* note 88.

¹²⁵ Scott Pelley, *Supermax: A Clean Version of Hell*, CBS NEWS (Oct. 11, 2007), <https://www.cbsnews.com/news/supermax-a-clean-version-of-hell> [https://perma.cc/PTP6-BMGZ].

Prison was something like the “normal” version. Indeed, prison can sometimes inflict extraordinary levels of deprivation, even during relatively short sentences. It can represent a very severe risk of death, and of insanity. It can cause overwhelming physical and mental agony. But, as the other examples have demonstrated, prison need not be so extreme. It’s a rather variable form of punishment. Prison is not always hell. Sometimes prison means playing softball in the hills of West Virginia, or swimming after a day of tending to a flock of sheep on a pleasant Norwegian island.

i. Deprivational Essence—What, then, *is* the punishment of imprisonment? What is the deprivation, or set of deprivations, that unite the institutions considered above, such that each inflicts a punishment within the same linguistic or sociological category? The array of deprivations inherent to a given carceral institution will always be a matter of creative list making to a degree, but, as indicated above, I believe that one deprivation is *essential* to a term of incarceration, meaning that it must be included on all such lists. That is, a punishment that failed to entail this deprivation would not qualify as incarceration as a linguistic or sociological matter. This deprivation is the denial of the “freedom of general association.” What unites the institutions is their remove from the broader society. Whatever else they do, they each represent a form of quarantine, by severely depriving inmates of the ability to associate with people.

The degree to which prisons deprive inmates of the freedom of association will nonetheless vary, as we have seen, with the variables being how much access inmates have to: (1) other inmates; (2) guards; (3) visitors; and (4) non-visitors. Access to non-visitors would involve emails and other forms of internet communication, letters, and phone calls. While solitary confinement at ADX Florence scores much lower than the Bastøy by reference to all four variables, inmates in the Bastøy are still profoundly deprived of meaningful access to other people in society, limited to the 115 men on the island, the limited number of guards, and their visitors, with whom they can only interact with once a week for short periods. There is also the very occasional opportunity to meet other people on field trips; though we should suspect that members of the Bastøy Blues Band were not given free rein at the music festival.

As discussed above, when we sentence someone to a punishment, to understand what exactly we are doing we should ask ourselves: What does

he have now, in terms of access to valuable functionings, that we are taking away from him? Imprisonment, in terms of its deprivational essence and minimum, severely constrains one's ability to associate with a great percentage of people in society, including every person he interacts with regularly outside of prison.¹²⁶ In so doing, it severely deprives him of access to those functionings that he can realize only by associating freely with those people.

Amy Gutmann expresses the importance—and the breadth—of the freedom of association. It enables people “to create and maintain intimate relationships of love and friendship, which are valuable for their own sake,” she writes, “as well as for the pleasures that they offer.”¹²⁷ She continues:

Freedom of association is increasingly essential as a means of engaging in charity, commerce, industry, education, health care, residential life, religious practice, professional life, music and art, and recreation and sports. . . . By associating with one another, we engage in camaraderie, cooperation, dialogue, deliberation, negotiation, competition, creativity, and the kinds of self-expression and self-sacrifice that are possible only in association with others.¹²⁸

George Kateb concurs as to the intrinsically valuable nature of association:

There is . . . a basic truth about almost all associative life and activity, a truth not confined to love and friendship. People find in association a value in itself. The point is obvious, but it has not received enough judicial attention or protection. In pursuing their ends, and needing to associate in order to do so,

¹²⁶ This separation is further exacerbated by the common practice of placing prisons far from urban areas where prisoners' families are most likely to live. See Tracy Huling, *Building a Prison Economy in Rural Areas*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 197 (Marc Mauer & Meda Chesney-Lind eds., 2002); Donald Braman, *Families and Incarceration*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 117, *supra*, at 117–18.

¹²⁷ Amy Gutmann, *Freedom of Association: An Introductory Essay*, in *FREEDOM OF ASSOCIATION* 3, 3–4 (Amy Gutmann ed., 1998).

¹²⁸ *Id.* at 4.

people discover numerous sources of pleasure apart from the pleasure of success in their specific pursuits.¹²⁹

Further, Nussbaum writes that of her list of ten “central human capabilities,” those capabilities that are constitutive of “fully human” living, the capability of *affiliation* (as well as that of *practical reason*) stands out as being of “special importance,” since it “organize[s] and suffuse[s] all the others.”¹³⁰ She writes: “To plan for one’s own life without being able to do so in complex forms of discourse, concern, and reciprocity with other human beings is . . . to behave in an incompletely human way.”¹³¹

By separating an inmate from people in free society, prison limits his ability to engage in a wide variety of valuable activities and modes of being for as long as his prison term lasts. It limits his ability to realize the associational functionings that, as Gutmann, Kateb, and Nussbaum argue, are not merely instrumentally but also intrinsically valuable, in the sense that their realization just is what it means to live well or to flourish. While I am mostly concerned with inherently “personal” associational functionings, like maintaining a marriage, we must remember, as Peter Ramsay argues, that prison also limits one’s access to more “political” associational functionings, like taking part in public debate, which are central to democratic citizenship.¹³² Aristotle, for one, understood political engagement to be the prime instance of virtuous practical activity and therefore to be constitutive of the good life—at least on some interpretations.¹³³

Beyond *the particular*—husbands and wives, parents and children, friends, fellow party members or parishioners, and so forth—prison also limits an inmate’s ability to interact and associate with *the general*—strangers and near-strangers. Consider the immense number and

¹²⁹ George Kateb, *The Value of Association*, in FREEDOM OF ASSOCIATION, *supra* note 127, at 35, 37.

¹³⁰ NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT, *supra* note 47, at 82.

¹³¹ *Id.*

¹³² Peter Ramsay, *A Democratic Theory of Imprisonment*, in DEMOCRATIC THEORY AND MASS INCARCERATION 84, 91 (Albert W. Dzur, Ian Loaders & Richard Sparks eds., 2016); Peter Ramsay, *Voters Should Not Be in Prison! The Rights of Prisoners in a Democracy*, 16 CRITICAL REV. INT’L SOC. & POL. PHIL. 421 (2013).

¹³³ See RICHARD KRAUT, ARISTOTLE ON THE HUMAN GOOD 5 (1989).

diversity of *new people* that we come into contact with on a regular basis in modern society, on the street, in a coffee shop, in a work setting, friends-of-friends, and so forth. The opportunity to mix with new people is hugely valuable, most importantly as a potential source of close associates—*new* friends or colleagues or interlocuters or group members or lovers—but also for the sense of community and camaraderie that comes with “everyday” interactions, as well as being a great fount of entertainment and fascination. Life without a regular supply of strangers is impoverished, in part because it is more boring.¹³⁴

Once more, these associational deprivations—the personal and the political, the particular and the general—will not be absolute. Depending on the facility, it will be possible, to some degree, to engage in some of the associational activities and exhibit some of the associational virtues that Gutmann mentions. The qualitative variation within prisons in terms of access to the internet and to phones¹³⁵ will make a significant difference, to be sure, especially given the increasing importance of online relationships.¹³⁶ Further, as suggested by the above examples, and as

¹³⁴ There is concerted engagement in the sociological literature regarding chance interactions with the unfamiliar in society, including encounters between strangers. See generally LYN H. LOFLAND, *A WORLD OF STRANGERS: ORDER AND ACTION IN URBAN PUBLIC SPACE* (1973); ERVING GOFFMAN, *RELATIONS IN PUBLIC: MICROSTUDIES OF THE PUBLIC ORDER* (1971); Georg Simmel, *The Stranger*, in *ON INDIVIDUALITY AND SOCIAL FORMS* 143 (Donald Levine ed., 1971); Patricia Simões Aelbrecht, ‘Fourth Places’: *The Contemporary Public Settings for Informal Social Interaction Among Strangers*, 21 *J. URB. DESIGN* 124 (2016).

¹³⁵ Many U.S. prisons charge extortionate rates for phone calls, sometimes more than one dollar per minute, further constraining inmates’ ability to speak to family members and friends. In 2015, the Federal Communications Commission (FCC) voted to cap intra- and inter-state call rates for state and federal inmates at eleven cents per minute. Telecommunications firms profiting from the high rates sued. The D.C. Circuit overturned the intra-state regulation on the grounds that the FCC lacked legal authority to regulate intrastate rates; as to interstate rates, the court remanded the case to the FCC on a technical issue related to determining ancillary fees. *Rates for Interstate Inmate Calling Services (“Order”)*, 30 *FCC Rcd.* 12763, 12775–76, 12838–62 (Nov. 5, 2015); *Rates for Interstate Inmate Calling Services*, 80 *Fed. Reg.* 79136-01 (Dec. 18, 2015); *Global Tel*Link v. FCC*, 866 *F.3d* 397, 402 (D.C. Cir. 2017).

¹³⁶ Thanks to Nicola Lacey for raising this point. Were we somehow to reach the stage where “online” society provided the immediacy, depth, and opportunities for advantage of the present-day “real world” society—and were prisoners afforded generally unmitigated and unmonitored access to such a society—then that would dramatically alter our conclusions regarding the injury of prison.

revealed by prison ethnographies,¹³⁷ prisons contain complex internal societies and cultures. As such, unless an inmate is placed in solitary confinement, he will certainly interact with people in prison—people who become familiar over time and “new people” as well—but generally in an environment that is far less conducive to meaningful interaction compared to life outside of prison, as Sharon Dolovich has demonstrated.¹³⁸ Remember Romero waiting to be called for lunch with others on his cellblock, tensely discussing acts of violence in the prison, with guards either listening to their conversation or waiting nearby. Relatedly, as Kluger emphasizes, an inmate will not be able to choose which sort of “new people” he might meet, as individuals can in free society by congregating in certain areas or places.¹³⁹

ii. The Freedom of Movement—What about the freedom of movement? Is the limitation on the freedom of movement not also an essential deprivational component of prison, in addition to the denial of the freedom of general association?¹⁴⁰ While it undoubtedly is, we should be careful not to fetishize the bare ability to move. Imagine that an offender was banished, with basic provisions for shelter and sustenance, to a vast, empty planet for the duration of his sentence, a planet many times bigger than Earth. Imagine, as well, that there were no legal restrictions on his movement on the planet, while the presence of non-

¹³⁷ See DONALD CLEMMER, *THE PRISON COMMUNITY* (1940) (theorizing the process by which individuals are socialized into inmate values); GRESHAM M. SYKES, *THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON* (1958) (examining the system of values and norms that guide prisoner behavior and define typical social roles across diverse prison populations); G.M. Sykes & S.L. Messinger, *The Inmate Social System*, in *THEORETICAL STUDIES IN SOCIAL ORGANIZATION OF THE PRISON* 5 (Richard A. Cloward et al. eds., 1960) (theorizing prison culture as a collective means of coping with the deprivations of prison); John Irwin & Donald R. Cressey, *Thieves, Convicts and the Inmate Culture*, 10 *SOC. PROBS.* 142 (1962) (arguing that inmate society is not an independent cultural creation, but rather is formed through the importation of “external” subcultures); BEN CREWE, *THE PRISONER SOCIETY: POWER, ADAPTATION, AND SOCIAL LIFE IN AN ENGLISH PRISON* (2009); JOEL HARVEY, *YOUNG MEN IN PRISON: SURVIVING AND ADAPTING TO LIFE INSIDE* (2007); REBECCA TRAMMELL, *ENFORCING THE CONVICT CODE: VIOLENCE AND PRISON CULTURE* (2012).

¹³⁸ See Sharon Dolovich, *Two Models of the Prison: Accidental Humanity and Hypermasculinity in the L.A. County Jail*, 102 *J. CRIM. L. & CRIMINOLOGY* 965, 1002–07 (2012) (arguing that general population units in the L.A. County Jail have an inmate culture that requires “hypermasculine” posturing, which in turn suppresses qualities associated with “femininity,” such as emotional expression, sensitivity, and kindness).

¹³⁹ Roberts, *supra* note 88.

¹⁴⁰ Thanks to Nicola Lacey for pressing me to clarify this point.

inmates on the planet was illegal. In that scenario, where he loses the legal right to move around Earth but *gains* the legal right to move around the larger penal planet, he would in fact be a net winner when it comes to the legal freedom of movement, having much more area in which, legally, he could roam. Nonetheless, such freedom would not be worth very much to him.

The limitation on movement inherent to prison is not a deprivation primarily because it limits the size of the area in which one can move. It is a deprivation primarily because it limits one's access to the sources of value and flourishing—most importantly, the other people—that reside within the prohibited areas. Nonetheless, beyond the associational deprivation, the limitation on movement also entails a lack of environmental diversity—with “environment” very broadly defined—as life is limited to a few yards and buildings at San Quentin or wherever it may be. Even if an inmate somehow had normal access to people in prison—including to “new people” he might meet in public places or elsewhere—and in a way that was somehow equivalent to his access outside of prison in terms of the security of the interactions, his social status, the opportunities for advantage, and so forth, the fact that he could not leave the complex and experience other environments would surely represent an important deprivation in and of itself. While I will continue to focus on the associational deprivations of prison, we ought to remain aware of what we might call *the deprivation of environmental diversity*.

C. Long-Term Carceral Deprivation

What does it mean to incorporate the variable of time into our analysis, so as to understand the decade-to-decade deprivations of prison, rather than the day-to-day deprivations? Why is time an interesting or complicated variable? Why does the argument not work as follows? (1) Each day in prison entails a certain set of deprivations, the exact content of which will vary considerably from prison to prison, but that will always involve a severe deprivation of the freedom of association (and environmental diversity); (2) That set of deprivations will generate a Daily Disutility Level or Daily Disvalue Level (DDL), which will incorporate not only the experience of boredom, loneliness, lack of satisfying work, anxiety, etc., within prison, but also the opportunity costs of prison. That is, it will account for the loss of the opportunities for utility

or value that one would have had outside of prison; and thus (3) To determine the severity of a term of imprisonment, we multiply DDL by the total days of confinement. So, a 100-day sentence is worth 100 DDLs and a 10,000-day sentence (27.4 years) is worth 10,000 DDLs, with latter being 100 times worse than the former. This argument, in one form or another, grounds the administration of ordinarily “proportional” sentences in the United States, such that—all else equal—an offender whose crime was ten times “worse” than another offender’s ought to have a sentence ten times as long.¹⁴¹ To understand what this gets wrong, and to understand what *long-term* incarceration does to people, we need to return to the discussion of human value.

1. Temporal Goods

Humans construct and exhibit value *diachronically*, as suggested above, stitching moments together through time via the combined exercise of their capacities for, at least, autonomy, value recognition, memory, and imagination. The concept of human flourishing is wrapped up with this diachronic project. One flourishes, on this Aristotelian view,

¹⁴¹ The U.S. Federal Sentencing Guidelines includes a “Sentencing Table,” which is arranged along two axes: forty-three “Offense Levels,” from one at the top to forty-three at the bottom, which measure the culpability of the offense, and six “Criminal History Categories,” from Category I at the left to Category VI at the right, which measure the offender’s degree of recidivism. U.S. SENTENCING COMM’N, U.S. SENTENCING GUIDELINES MANUAL § 5A, at 420 (2016). Within the resulting 258 boxes, the range of recommended months of incarceration increases gradually as one moves downward, increasing the Offense Level, or rightward, increasing the Criminal History Category. *Id.*

For instance, the “Base Offense Level” for “Burglary of a Residence” is seventeen, which for a first- or second-time offender (Criminal History Category I) means a recommendation of twenty-four to thirty months. *Id.* § 2B2.1. However, the Offense Level for residential burglary can increase up to eight levels, depending on the value of the property taken, damaged, or destroyed. *Id.* “More than \$5,000” adds one level, “More than \$20,000” adds another level, and so forth, with “More than \$9,500,000” adding the full eight levels. *Id.* If the burglary involves “more than minimal planning” that will add two levels. *Id.* If it involves the taking of a “firearm, destructive device, or controlled substance” that will add one level. *Id.* And if the burglar possessed a “dangerous weapon (including a firearm)” that will add two levels. *Id.* That means a possible thirteen additional levels on top of the Base Offense Level of seventeen. The resulting maximum Offense Level 30, at Criminal History Category I, entails a recommendation of 97–121 months; at Criminal History Category VI, it is 168–210 months. Thus, the recommended range for residential burglary begins at twenty-four months (two years) and then increases gradually to 210 months (17.5 years). *Id.* § 5A.

in the context of her good life *as a whole*. As Aristotle argues, since the human good is realized “over a complete life,” it is premature to say that a child has led a “blessed” life.¹⁴² Alluding to the migratory return of swallows, which indicates the beginning of summer, Aristotle writes: “For one swallow does not make a summer, nor one day. Neither does one day or a short time make someone blessed and happy.”¹⁴³ Ronald Dworkin makes a similar point in the context of euthanasia, writing about a person who has become “permanently unconscious or incompetent:”¹⁴⁴ “We worry about the effect of his life’s last stage on the character of his life as a whole, as we might worry about the effect of a play’s last scene or a poem’s last stanza on the entire creative work.”¹⁴⁵

The point is not that a flourishing person will be singularly obsessed with “her life.” Her internal monologue need not be that of a fastidious “life planner.” The idea, rather, is that, unlike goldfish, we know that our past shapes our present and that our present shapes our future. We are not reborn each moment, or day, or year. We have the capacity, furthermore, to purposively act in the present to build a more valuable future, with a personal identity that retains sufficient integrity over time, such that “we” will still be there in the future, to some very significant degree, to reap the costs or benefits of our present decisions.¹⁴⁶ Finally, and crucially, the idea is that our most valuable functionings depend upon this knowledge and this capacity. That is, unlike goldfish, we have the ability to work on projects, broadly conceived, that require cultivation over time. We can develop our personalities. We can build families. We can develop expertise. We can maintain friendships.

As indicated above, let us refer to such functionings as *temporal goods*.¹⁴⁷ The phrase “goods” should not distract us from our focus on functionings; temporal goods are valuable activities and states of beings that require cultivation over time to be realized. Let us contrast them with

¹⁴² ARISTOTLE, *supra* note 34, at 16.

¹⁴³ *Id.* at 12.

¹⁴⁴ RONALD DWORKIN, LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 199 (1993).

¹⁴⁵ *Id.*

¹⁴⁶ See Bronsther, *supra* note 19, at 470 n.210 (considering a metaphysical objection to the diachronic conception of the human good).

¹⁴⁷ *Id.* at 469–70.

momentary goods, like enjoying an ice-cream cone.¹⁴⁸ These are functionings that do not require cultivation over time to be realized. To be clear, no good is entirely “momentary.” It will require some amount of time to be realized. And it will be realized within the context of our overall diachronic lives. We choose an ice-cream flavor, for instance, based upon years of careful experimentation. And, as indicated above, the value of enjoying a momentary good depends on its connection to the pursuit of a good life over time.¹⁴⁹ That is, a momentary good only qualifies as such insofar as it constitutes part of one’s broader good life; a putative momentary good, like the experience of pleasure, would not qualify if it acts to drain rather than infuse one’s life *considered as a whole* with value, as might be the case with an addict’s temporary ecstasy.

But isn’t a temporal good, like maintaining a friendship or family, simply a number of momentary goods strung together? I think not. The ice-cream cones I have enjoyed have no meaningful relationship to each other. They each stand alone as a momentary good. By comparison, the moments I have enjoyed with a close friend are connected. They are stitched together, with the past moments governing the present ones, and the present ones governing the future ones. There is a set of jokes, memories, and stories that make sense and have meaning only in the context of a relationship that exists through time. That is, the enjoyment that we might experience during an engagement with an old friend is not in fact a momentary good; it is a complex achievement that is connected with past and future engagements. While temporal goods tend to enable the realization of momentary goods, they can have value even when they do not do this, and even when they provide no “phenomenological” benefit at all.¹⁵⁰ That is, they can have value even when their realization does not *feel good*. We can still value an old friendship, for instance, and aim to maintain it or honor it, even when we stop enjoying the friend’s company. Along the same lines, caring for an aging parent is generally not a phenomenologically satisfying experience, but nonetheless we tend to see great value in doing so (and even if we knew that we would not

¹⁴⁸ *Id.* at 470–71; *see also* Velleman, *supra* note 45 (distinguishing between synchronic and diachronic well-being).

¹⁴⁹ *See supra* notes 31–36 and accompanying text.

¹⁵⁰ By “phenomenological,” I mean that which is consciously experienced. *See generally* DERMOT MORAN, INTRODUCTION TO PHENOMENOLOGY (2000).

ourselves reap the benefits of this social practice as we aged ourselves).¹⁵¹ The concept of a temporal good helps to make sense of these convictions.¹⁵²

Nussbaum expresses the centrality of temporal goods to human flourishing on the Aristotelian view. On this view, a life organized around the pursuit of “nutrition and growth” or “sense-perception” would be “merely an animal life.”¹⁵³ “The truly human life, by contrast, is a life organized by the activity of practical reasoning (1098a3-4: *praktike tis tou logon echontos*), in which it is that activity that gives the life as a whole its distinctive shape and tone.”¹⁵⁴ Aristotelian practical reason—the human life-building capacity—aims beyond the animalistic pursuit of “nutrition or growth” or pleasing “sense-perception.” It aims, rather, at temporal goods: activities and relationships that are long-term achievements rather than momentary enjoyments, those achievements which can infuse one’s “life as a whole” with value. We can conclude, on

¹⁵¹ See KAREN I. FREDRIKSEN-GOLDSSEN & ANDREW E. SCHARLACH, *FAMILIES AND WORK: NEW DIRECTIONS IN THE TWENTY-FIRST CENTURY* 3 (2000) (reporting that more than one in seven adults in the United States is involved in caring for ill or disabled friends or relatives, and that eighty-five percent of the care provided to the disabled elderly is provided informally and without pay by family members and other unpaid helpers).

¹⁵² This distinction between temporal and momentary goods dovetails closely, though not perfectly, with Ronald Dworkin’s distinction between “experiential” and “critical” interests. DWORKIN, *supra* note 144, at 199–208. According to Dworkin, “experiential interests” are interests in having pleasurable sensory experiences and positive emotional states. *Id.* “Critical interests,” by comparison, are not essentially phenomenological. *Id.* They are interests in realizing one’s personal values and commitments, such as one’s interest in completing a work project or seeing a loved one succeed. To realize a critical interest would certainly qualify as a temporal good; it would represent a personal “achievement.” And while realizing an experiential interest would normally qualify as a momentary good, realizing certain refined experiential interests would likely qualify as a temporal good. Consider someone enjoying herself as she plays a complicated concerto on a violin; or someone quietly meditating after years of training. In both cases, it would seem that one realizes a critical and an experiential interest at the same time. It represents a diachronic achievement—a successful investment of one’s time, and an expression of her ethical values—that she can have that phenomenological experience. The meditation example reveals how even the Buddhist, who aims to “live in the moment” (if we might radically oversimplify that belief system), pursues temporal rather than merely momentary goods. Rejecting her instinctual set of desires as entirely misguided from the perspective of building and honoring value, she must work diligently for years to reshape her moment-to-moment mentality.

¹⁵³ Martha C. Nussbaum, *Nature, Function, and Capability: Aristotle on Political Distribution*, 6 *OXFORD STUD. ANCIENT PHIL.: SUPPLEMENTARY VOLUME* 145, 170 (1988).

¹⁵⁴ *Id.* (citing Aristotle’s *Nicomachean Ethics*).

the Aristotelian view at least, that a “truly human life,” in contrast to an “animal life,” involves the pursuit of temporal goods. A life with only momentary goods—hooked up to a pleasure machine¹⁵⁵—is not a good human life overall.¹⁵⁶

2. A Mortal Injury

We now have this concept of a temporal good, as well as an understanding that temporal goods are fundamental to the successful pursuit of a good life considered as a diachronic whole. The next step is to point out that many of these temporal goods are also *associational* goods. That is, we can realize these valuable forms of functioning only by associating with other people over time. As mentioned above, the temporal good could be *intrinsically* associational; such goods just are long-term forms of association. Consider a marriage, family, or friendship. Or the temporal good could be *instrumentally* associational; associating with other people over time is the *means* by which one realizes these functionings. Most forms of professional expertise will fall into this category. The instrumental value of association relates to Nussbaum’s idea that associational functionings “organize and suffuse” all the other “central human capabilities.”¹⁵⁷ Even when capabilities are not themselves forms of association, often we can realize them only in concert with or with the help of other people.

Let us now reconnect this discussion to our inquiry into the deprivations of incarceration and long-term incarceration. What is missing in the conclusion—so foundational to the Federal Sentencing Guidelines¹⁵⁸—that a 100-day sentence is worth 100 DDLs and a 10,000-day sentence (27.4 years) is worth 10,000 DDLs? What is missing is an understanding that the set of functionings of which one is deprived during 100 days of incarceration in San Quentin, FCI Morgantown, or the Bastøy is very different from the set of which one is deprived during

¹⁵⁵ See NOZICK, *supra* note 22, at 42–44.

¹⁵⁶ There is little worry here, I think, of an overly Western bias, given that the pursuit of temporal goods—families, friendships, careers, artistic and intellectual endeavors—seems central to every culture. For thoughtful discussion on objectivity and Western bias within the capabilities approach, see NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT, *supra* note 47, at 34–69.

¹⁵⁷ *Id.* at 70, 82.

¹⁵⁸ See *supra* note 141.

10,000 days of incarceration in one of those facilities. In analyzing the deprivations of a 10,000-day sentence we cannot merely break it down into blocks of 100 days. Given the severe limitation on the freedom of association inherent to any prison *and* the fact that most temporal goods are also associational goods, we can understand that twenty-seven years of incarceration in any prison makes it profoundly more difficult, if not impossible, to realize a wide array of the most important temporal goods: maintaining a family, a marriage, a home, long-term friendships, or a career; developing professional expertise; participating meaningfully in a political movement; and so forth. It generates this deprivation, as suggested above, both by limiting one's access to people he associated with before his confinement, as well as by limiting his access to "new people" in an environment conducive to forming meaningful associations.

Long-term incarceration, by depriving one of access to such functionings, represents a distinct form of punishment. If the Singaporean practice of "caning" entails bodily pain and public humiliation,¹⁵⁹ the practice of long-term incarceration entails making it extremely difficult to realize a number of associational, temporal functionings, which are central to all or nearly all conceptions of a good life. One hundred days in prison may complicate the realization of such functionings, to be sure, but in a manner and a degree qualitatively different than 10,000 days in prison, as I discuss further below.¹⁶⁰

Given (a) the close relationship between the realization of associational, temporal goods and the realization of a good life in the Aristotelian, diachronic sense and (b) the fact that we are embracing a

¹⁵⁹ See *Yong Vui Kong v. Public Prosecutor* [2015] SGCA 11 (Sing.) (interpreting the international legal prohibition on torture very narrowly and upholding the legality of Singapore's practice of caning).

¹⁶⁰ Furthermore, the pursuit of associational, temporal goods tends to be challenging and to demand our full attention and therefore to be stimulating. We use our powers, as it were, when we attempt to maintain and realize such goods. There is a sense, along these lines, that long-term incarceration can be relatively monotonous and boring, given the limited opportunities to pursue such goods. The lack of environmental diversity will also contribute to this outcome, undoubtedly, as one looks at the same walls and courtyard every day for years. So will the lack of "chance encounters" with people that one experiences outside of prison. See *supra* note 134. We can say, then, that long-term incarceration makes it considerably more challenging for inmates to realize the functionings of *being interested* or *being stimulated*, functionings which themselves are constitutive of flourishing.

“flattened” capabilities approach focused on the *degree* to which punishments threaten particular functionings, we can conclude as follows regarding the deprivations of long-term incarceration. Long-term incarceration *represents a severe risk of ruining an inmate’s life, just in virtue of the amount of time that he has to spend inside prison.*¹⁶¹ Or, more precisely: long-term incarceration *represents a severe risk of ruining an inmate’s life, just in virtue of the amount of time that he is denied the freedom of general association.* We could use more modest language, arguing that long-term incarceration makes it much more difficult for an inmate to infuse his life considered as a whole with value, just in virtue of the amount of time that he is denied the freedom of general association. Nonetheless, the “life-ruining” idea underscores what is at stake for offenders, and I will continue with that terminology below.

There are three issues to clarify.

First, that it is matter of degree and risk is important. The point is not that it is *impossible* for the long-term incarcerated to construct a good life as a whole. And we must remain aware of the many offenders who have, against odds, rebuilt their lives after very long sentences.

Second, the argument is that long-term incarceration, by severely limiting an inmate’s access to associational, temporal goods, endangers his pursuit of his *own* conception of a good life. We can say, along these lines, that long-term incarceration gravely violates an individual’s right to autonomy.¹⁶² It does so by severely limiting his ability to craft and pursue those long-term projects that represent the foundation of a self-determined life as a whole.¹⁶³

Third, the potentially “life-ruining” nature of long-term incarceration holds even if the individual lead an utterly desperate

¹⁶¹ To “ruin” something involves destroying to some very significant degree its capacity to realize or exhibit value, for instance, ruining a painting by spray painting over on it. Thanks to Peter Ramsay for helpful discussion on this point.

¹⁶² Thanks to Erin Murphy for helpful discussion on the autonomy-limiting aspects of long-term incarceration.

¹⁶³ Sen distinguishes between “well-being freedom” and “agency freedom.” See Sen, *supra* note 50, at 200–10. The distinction is between having access to valuable functionings, and having the power and control to choose which particular functionings one will pursue in light of her ethical and moral values. *Id.* A long sentence, then, will not only deprive an offender of “well-being freedom,” as he loses access to valuable functionings. He will also be also deprived of “agency freedom,” given that his day-to-day and decade-to-decade existence will not reflect his personal aims, values, loyalties, and obligations.

existence before he entered prison, such that the prospect of human flourishing at any level was already remote. For there is an important difference between his life in the decades before prison and the decades during prison. Before prison, his life bore the mark of extreme governmental neglect, presumably. During prison, however, his life bears the mark of extreme governmental intervention. The state has positively imposed itself upon him, presenting huge official hurdles to his construction of a good life as a whole. As such, the state bears special causal and moral responsibility for the ultimate state of his existence. Much more importantly, though—as I discuss in Part III—the ultimate moral question is not whether long-term incarceration itself causes someone’s life to be ruined, but whether the state treats the individual as a human being, that is, as someone with the capacity and right to build a good life as a whole. That someone lead a desperate existence before prison does not change the fact that decades in prison is not treatment appropriate for a life-builder, as I argue below.

How many years, then? These considerations do not generate a specific number of years that qualify as “long-term incarceration.” There will be a vague middle ground between those sentences that severely risk ruining an inmate’s life and those that do not. We can conclude that the longer the sentence, the greater the relevance of these concerns, while nonetheless rejecting the idea that a 10,000-day sentence merely represents 10,000 DDLs, and thus while maintaining that there is a qualitative difference between long-term and non-long-term incarceration in terms of its impact on one’s life project. For the sake of clarity, however, let us continue the discussion with a sentence that I think is clearly above the zone of vagueness: twenty years.

How does the diversity of incarceration fit into this story, with its focus on the variable of sentence length? The other variables discussed above do not fade away. The point has been to bring attention to the variable of time due to its immense importance—an importance that is nonetheless easy to miss, as I discuss below. We should not, however, diminish the degree to which the conditions of confinement determine the severity of a prison term.¹⁶⁴ Twenty years in the Gitarama would

¹⁶⁴ On the relevance of confinement conditions for determining a proportional sentence, see Lisa Kerr, *How the Prison Is a Black Box in Punishment Theory*, 69 U. TORONTO L.J. 85 (2019);

almost certainly mean death.¹⁶⁵ Twenty years in ADX Florence would represent a significant risk of insanity.¹⁶⁶ And twenty years in San Quentin is worse than twenty years in FCI Morgantown, which is worse than twenty years in the Bastøy.¹⁶⁷ Indeed, as indicated above, sometimes we do not need the variable of time at all. The *day-to-day* conditions in many American prisons are inhumane and unconstitutional, as demonstrated by cases like *Madrid v. Gomez*,¹⁶⁸ *LaMarca v. Turner*,¹⁶⁹ and *Brown v. Plata*;¹⁷⁰ the Department of Justice investigation into Alabama state prisons;¹⁷¹ and recent scholarship.¹⁷²

The point, however, is that even if we built only the finest, safest prisons on Earth—even if all American prisons were Bastøys—they would *still* degrade inmates over time. For twenty years in the Bastøy is a profound, potentially *life-ruining* punishment. The variable of time converts the mundane and perhaps even the pleasant into the cruel and the dehumanizing. Richard Lovelace expressed his famously Romantic view of prison from inside the Gatehouse Prison in London in 1642:

Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 409–19 (2004); RICHARD L. LIPPKE, RETHINKING IMPRISONMENT 104–28 (2007).

¹⁶⁵ See *supra* pp. 2390–91.

¹⁶⁶ *Id.*

¹⁶⁷ See *supra* pp. 2391–99.

¹⁶⁸ *Madrid v. Gomez*, 889 F. Supp 1146 (N.D. Cal. 1995) (holding that supermax confinement of the seriously mentally ill is unconstitutional).

¹⁶⁹ *LaMarca v. Turner*, 995 F.2d 1526, 1535 (11th Cir. 1993) (holding that “evidence presented at trial of an unjustified constant and unreasonable exposure to violence” in a prison “inflicted unnecessary pain or suffering” under the Eighth Amendment standard).

¹⁷⁰ *Brown v. Plata*, 563 U.S. 493 (2011) (upholding order to decrease California prison population on grounds that overcrowding is the primary cause of continuing violations of prisoners’ constitutional rights to adequate health care).

¹⁷¹ CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF ALABAMA’S STATE PRISONS FOR MEN (2019) (finding that the Alabama Department of Corrections violated and is continuing to violate the Eighth Amendment rights of prisoners by failing to protect them from violence and sexual abuse, and by failing to provide safe conditions).

¹⁷² See JONATHAN SIMON, MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA (2014); Sharon Dolovich, *Prison Conditions*, in 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 261 (Erik Luna ed., 2017); Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357 (2018).

Stone walls do not a Prison make,
 Nor Iron bars a Cage;
 Mindes innocent and quiet take
 That for an Hermitage;
 If I have freedome in my Love
 And in my soule am free,
 Angels alone that soar above,
 Enjoy such Libertie.¹⁷³

Lovelace, however, was only incarcerated in the Gatehouse from April 30 to June 21, 1642.¹⁷⁴

In the background of all of this is our mortality. We only have so much time to realize temporal goods en route to realizing a conception of the good life. And given our limited time, twenty years in the Bastøy would, I believe, represent a severe risk of ruining one's life project, as he is forced to farm day after day, month after month, year after year on a small, isolated island, in the presence of "generally angry, somewhat antisocial" men,¹⁷⁵ let us assume, sleeping alone in his little private room, with only a few hours each week with his gradually aging family, assuming they still go to the trouble of taking the ferry to the island to visit as the years pass on. Even if one is comfortable in the Bastøy during his twenty years—and thus can realize certain *momentary* goods—his ability to realize certain foundational *temporal* goods, like the functionings of *being a good father* or *being a good husband* is very limited. And when he returns to society, much older, without much of any professional experience, he will have to "start over," as it were.¹⁷⁶ It will, of course, depend on the particular offender. Twenty years in the Bastøy might mesh with the rare person's conception of the good life, or at least might not particularly endanger its realization.

¹⁷³ Richard Lovelace, *To Althea, From Prison*, in *THE POEMS OF RICHARD LOVELACE* 78–79 (C.H. Wilkinson ed., 1953).

¹⁷⁴ *THE CAVALIER POETS: AN ANTHOLOGY* 68 (Thomas Crofts ed., 1995).

¹⁷⁵ Roberts, *supra* note 88.

¹⁷⁶ See BRUCE WESTERN, *HOMEWARD: LIFE IN THE YEAR AFTER PRISON* (2018) (examining the tumultuous first year after release from state prison experienced by individuals in Massachusetts).

Regardless, to return to the diversity point: just because one has difficulty in prison realizing certain functionings that are foundational to his life as a whole does not mean that he is indifferent as to the quality of his everyday life. How much disvalue—wanton suffering¹⁷⁷—does confinement in a facility generate? What functionings does one have the opportunity to realize within the prison during his sentence? Even if he cannot, say, build a family or a career, it will still matter very much to him what else he can do with his time, let alone whether he is safe and comfortable. These are distinct and crucial questions when considering what we are doing to somebody, exactly, when we confine him to a facility for a long period of time.¹⁷⁸

3. Happiness and Prison

Let us consider two objections to Part II's conclusions on the severity of long-term incarceration and the resulting qualitative difference between long- and short-term incarceration.

First, in *Happiness and Punishment*, John Bronsteen, Christopher Buccafusco, and Jonathan Masur argue that inmates adapt to prison life over time, in terms of their reported happiness levels (though, the reported happiness levels of long-term inmates are still much lower than those people living outside of prison).¹⁷⁹ They conclude that the marginal harm of incarceration actually decreases over time and then consider the

¹⁷⁷ See *supra* p. 111.

¹⁷⁸ Liora Lazarus is right, along such lines, to emphasize the differences between inmates' rights inside Germany's more rehabilitative prisons and England's more retributive prisons. However, by largely ignoring the variable of sentence length, she fails to capture arguably the most important difference between the two regimes: that the average sentence length is much higher in England than in Germany. See MINISTRY OF JUSTICE, STORY OF THE PRISON POPULATION: 1993–2012, ENGLAND AND WALES (2013), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/218185/story-prison-population.pdf [https://perma.cc/R2SM-GR4E]; RICHARD S. FRASE, SENTENCING IN GERMANY AND THE UNITED STATES: COMPARING APFEL WITH APPLES (2001). However, this point only strengthens her broader argument that German criminal and sentencing law contains valuable lessons for the Anglophone world. See LIORA LAZARUS, CONTRASTING PRISONERS' RIGHTS: A COMPARATIVE EXAMINATION OF GERMANY AND ENGLAND (2004); Liora Lazarus, *Conceptions of Liberty Deprivation*, 69 MOD. L. REV. 738 (2006).

¹⁷⁹ John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Happiness and Punishment*, 76 U. CHI. L. REV. 1037 (2009).

implications for setting proportionate retributivist and deterrent sentences.

That hedonistic philosophies entail (or might entail) such conclusions is in large part what motivated Nussbaum and Sen to develop the capabilities approach. The relevant issue for assessing penal harm is not the offender's happiness level, but rather his level of deprivation, understood in terms of the valuable functionings—valuable activities and modes of being—that his punishment forecloses or makes more difficult to realize. In parallel, as Nussbaum and Sen explain, that a woman in a deeply patriarchal and illiberal society has adapted to her situation, and is happy, does not mean that she has no complaint. John Vorhaus writes succinctly on this issue:

Familiarity and adjusted expectations may go some way towards alleviating levels of fear, anguish and humiliation, but the degrading status of ill-treatment cannot be said to grow or diminish according to the extent to which prisoners successfully accommodate themselves to the brutality of the regime.¹⁸⁰

4. Post-Carceral Deprivations

The second objection relates to the variable of *post-carceral deprivations*. What deprivations are offenders subjected to after their release from prison? Examples include the presence of an intrusive and threatening probation officer; inability to access public housing; loss of the job one held before prison; difficulty finding work due to gaps on one's CV, as well as employers' right to check one's ex-convict status; placement on a sex offender registry; and losing one's rights to vote and sit on juries.¹⁸¹ What if these post-carceral deprivations, collectively,

¹⁸⁰ John Vorhaus, *On Degradation Part Two: Degrading Treatment and Punishment*, 32 COMMON L. WORLD REV. 65, 69 (2003); see also R.A. Duff, *Punishment, Dignity and Degradation*, 25 OXFORD J. LEGAL STUD. 141, 150–51 (2005).

¹⁸¹ See generally JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* (2015); ALICE GOFFMAN, *ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY* (2014); AMY E. LERMAN & VESLA M. WEAVER, *ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL* (2014); Christopher Uggen et al., *The Edge of Stigma: An Experimental Audit of the Effects of Low-Level Criminal Records on Employment*, 52 CRIMINOLOGY 627 (2014); Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012).

severely risk ruining an offender's life, even after short-term incarceration? If they do—if (a) short-term incarceration plus (b) post-carceral deprivation is not qualitatively different in terms of its impact on one's pursuit of a good life than (c) long-term incarceration—then there would be no difference between short- and long-term incarceration in terms of their degradingness.

We should keep in mind, however, at least three issues. First, at an absolute minimum, people outside of prison have ready access to friends and family.¹⁸² Second, they have much more control over their daily existences—including factors such as what to eat and when to turn off the lights—as well as the content of their long-term plans. These are huge differences.

Third, many post-carceral deprivations are legal in nature and, as such, could be remedied (at least as a matter of law, if perhaps not of politics). Not every country presents enormous official obstacles to offenders' reintegration into society.¹⁸³ And, indeed, the moral building blocks of the argument presented here—that individuals are life-builders; that they do not forfeit their status as life-builders when they commit offenses; and thus that the state must respect and not destroy the life-building capacities of offenders—loudly condemn the legally imposed collateral consequences of conviction in America. That is a crucial standalone conclusion, which ought to be considered at length elsewhere. As it relates to the comparison with long-term incarceration, however, the point is that there is no possible legal remedy for the deprivations of long-term incarceration. The denial of access to temporal and associational goods is connected to the experience as an *analytical* matter.

But what about non-legal forms of post-carceral deprivation? Any term of incarceration, even without legal obstacles upon release, will radically disrupt one's personal and professional projects. It will be, at a minimum, "life-altering," and thereby injure the offender in a fundamental manner.¹⁸⁴ Even if we managed to erase the legally imposed

¹⁸² An important caveat: To regain full custody of their children, newly released parents may have to attend parenting classes, complete drug treatment programs, and provide stable residences, among other requirements. Sharon Dolovich, *Creating the Permanent Prisoner*, in *LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY?* 96, 116 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012).

¹⁸³ See *PROBATION ROUND THE WORLD: A COMPARATIVE STUDY* (Koichi Hamai et al. eds., 1995).

¹⁸⁴ I am grateful to Lindsay Farmer and Victor Tadros for suggesting the term "life-altering."

post-carceral deprivations, this is a critical point and it ought to dramatically curtail the imposition of even short prison sentences. Nonetheless, the qualitative difference between short- and long-term incarceration with regard to the degradation question very likely remains intact. If an individual serves one month in prison, but then has his civil and social rights completely restored—with employers lacking the right to look into his convict status and so forth—the notion that such a punishment represents a severe risk of ruining his life, akin to living in prison for twenty years, is hyperbolic.

5. A Quiet Injury

It is surprisingly easy to underestimate the injury of long-term incarceration. For the concepts of “temporal good,” “associational, temporal good,” and “the pursuit of a good life” are abstract. We cannot point to an associational, temporal good like an old friendship as easily as we can point to an apple or a car. If we see two old friends discussing a film over coffee, it requires an exercise of our imagination to distinguish it from two strangers who happen to sit next to each other in a coffee shop and have the exact same dialogue. The two old friends, we can assume, are committed to maintaining that old friendship qua temporal good. That is, consistent with the discussion above, the friendship is not just a source of momentary goods for them, and they would (to some degree) sacrifice the realization of momentary goods to maintain their relationship. And yet, as they sit there chatting about the film, the fact that they are realizing the momentary good of *enjoying a cup of coffee* is likely conscious, while the fact that they are realizing the temporal good of *maintaining an old friendship* is likely unconscious or at least backgrounded in their awareness.

Temporal goods are somehow both loud and quiet, demanding all and none of our attention at the same time. They are loud in that their pursuit takes up most of our day. We are impelled toward their realization, sometimes to the point of exhaustion, especially when it comes to family relationships and careers. And yet they are quiet in their abstraction, and also their gradualism. They take shape only over time, while we are constantly living in the present moment, as it were. They appear as somehow distinct from our *real* lives, which we live day to day—and yet our day-to-day existences only make sense in the context of

their pursuit. This “quiet” aspect of temporal goods, I believe, makes it possible to overlook the amount of deprivation the state inflicts on offenders by diminishing their access to such goods.

The injury of long-term incarceration, as discussed above, is not essentially “phenomenological.” It need not hurt. One need not cry out in pain. Given that our awareness of our pursuit of temporal goods tends to be unconscious or backgrounded, the incarcerated individual *himself* may lack a precise awareness of what exactly the state has done to him by long-term incarcerating him, as he goes about his daily life inside the facility.¹⁸⁵ Of course, there are many inmates, like Kevin Ott, who can articulate the injury with precision:

My name is Kevin Ott. My number’s 2030903. I’m in here for trafficking methamphetamine. I start my fourteenth year in just a couple of months, and I will be here until I die. Yeah, I have life without parole for three ounces of methamphetamine. Yep. I fucked up, but I don’t think I should die for it. I have life without parole, which means I’ll stay in prison until I die. That’s a death sentence in my opinion, a slow death sentence. I have to wait until I die.¹⁸⁶

While it seems impossible to witness someone being repeatedly shocked with electricity or waterboarded and not perceive his pain and his panic, it is very possible to visit a relatively clean and safe prison, chat with an inmate sentenced to a twenty-year term, and then walk away without a clear awareness of his level of deprivation. There will not always

¹⁸⁵ Bernard Williams explains that people can be degraded without feeling degraded:

There are forms of exploiting men or degrading them which . . . cannot be excluded merely by considering how the exploited or degraded men see the situation. For it is precisely a mark of extreme exploitation or degradation that those who suffer it do *not* see themselves differently from the way they are seen by the exploiters; either they do not see themselves as anything at all, or they acquiesce passively in the role for which they have been cast.

BERNARD WILLIAMS, *The Idea of Equality*, in PROBLEMS OF THE SELF 230, 237 (1973).

¹⁸⁶ From the documentary, *THE HOUSE I LIVE IN* (Charlotte Street Films 2012), directed by Eugene Jarecki. See also J.T. Kirksey, *I’m on Death Row for Punching a Man*, MARSHALL PROJECT (Sept. 27, 2018, 10:00 PM), <https://www.themarshallproject.org/2018/09/27/i-m-on-death-row-for-punching-a-man> [<https://perma.cc/ZP5U-5BQL>] (“After three decades, I now feel like I’m dying a slow death.”).

be someone like Ott to articulate what is happening. And even when he's there it requires a level of focus and imagination to understand his point, and to keep it in mind. It is not as automatic as understanding and worrying about the cries of the torture victim. As Carol Steiker writes, explaining the historical and intuitive link between extreme physical pain and the "cruelty" prohibited by the Eighth Amendment: "We can see visceral human pain; it makes us flinch and turn away (or stare in disgusted fascination)." ¹⁸⁷

This helps to explain, in part, how a punishment as extreme as long-term incarceration—a punishment that may *ruin your life*—could become so commonplace and uncontroversial in a supposedly thoughtful, liberal society like the United States, as well as the United Kingdom. There are many political, economic, and sociological variables at play in understanding how we have reached this moment of mass incarceration.¹⁸⁸ But the difficulty of perceiving and communicating the injury of long-term incarceration—due to the abstract and gradual nature of temporal goods—is, I think, an important piece of the story. If the

¹⁸⁷ Carol S. Steiker, "To See a World in a Grain of Sand": Dignity and Indignity in American Criminal Justice, in *THE PUNITIVE IMAGINATION: LAW, JUSTICE, AND RESPONSIBILITY* 19, 30 (Austin Sarat ed., 2014).

¹⁸⁸ See generally NICOLA LACEY, *THE PRISONERS' DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES* (2008) (examining political, economic, institutional, and cultural determinants of penal severity); John Pratt, *Scandinavian Exceptionalism in an Era of Penal Excess, Part I: The Nature and Roots of Scandinavian Exceptionalism*, 48 *BRIT. J. CRIMINOLOGY* 119 (2008) (arguing that high levels of social trust and solidarity have grounded Scandinavian criminal justice systems and considering demographic and economic factors conducive to those high levels); John Pratt, *Scandinavian Exceptionalism in an Era of Penal Excess, Part II: Does Scandinavian Exceptionalism Have a Future?*, 48 *BRIT. J. CRIMINOLOGY* 275 (2008) (same); JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003) (arguing that cultural and ideological differences explain the difference between the American penal regime, on the one hand, and French and German regimes, on the other); Nicola Lacey, David Soskice & David Hope, *Understanding the Determinants of Penal Policy: Crime, Culture, and Comparative Political Economy*, 1 *ANN. REV. CRIMINOLOGY* 195–217 (2018) (analyzing four paradigmatic determinants of penal policy—crime rates, cultural dynamics, economic structures and interests, and institutional differences—and considering the impact of race as an independent determinant of U.S. penal policies); Nicola Lacey & David Soskice, *Crime, Punishment and Segregation in the United States: The Paradox of Local Democracy*, 17 *PUNISHMENT & SOC'Y* 454 (2015) (arguing that local government autonomy in the United States, and the resulting fact that criminal justice policies are filtered through local electoral politics, presents unique challenges for garnering political support for integrative criminal justice policies).

policy at the height of the crack epidemic in the United States in the 1980s was to literally torture crack dealers, there would have been outrage. It would have been impossible to look away from *that*. And yet, as I argue in Part III, we need to understand that long-term incarceration of a crack dealer is not qualitatively different from penal torture with regard to the level of disrespect it demonstrates toward the offender, the most basic consideration for understanding and comparing injuries, and assessing the degree of degradation.¹⁸⁹

¹⁸⁹ Long-term incarceration thus proves a point that Elaine Scarry intended to make about torture. Scarry argues that pain is “inexpressible,” given its presence *inside* someone. ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* 3–11 (1985). Language occurs by reference to objects in the external world, she argues, and pain cannot—or cannot easily—be expressed by reference to such objects. She argues that for the person whose pain it is, it is “effortlessly” grasped, while for anyone else, what is “effortless” is *not* grasping it. *Id.* at 4. Scarry continues that pain’s lack of *verbal* representation leads to its lack of *political* representation. *Id.* at 12. She writes that “given any two phenomena, the one that is more visible will receive more attention.” *Id.* She concludes that pain’s inexpressibility has enabled society to neglect torture as an issue of political concern.

Scarry elides two distinct issues here: (1) articulating the nature of an injury in detail and with precision; and (2) communicating the very existence or severity of an injury. That the difficulty of communicating the very existence or severity of an injury may diminish the political attention on that injury seems both true and important. We should take this to be Scarry’s central insight. But that a type of injury is difficult to articulate in detail and with precision need not vitiate the process of communicating its very existence or severity—and thus it need not have the implications with regard to political attention. Torture, along these lines, is not a good example for her central insight. That is, I doubt that the lack of a complex vocabulary to describe the experience of overwhelming pain limits one’s ability to communicate its presence or urgency. We howl, groan, or scream in agony, and people understand. Indeed, the soundtrack of torture illuminates in its very *lack* of vocabulary, as a creature with the capacity for complex speech becomes a “shrilly squealing piglet.” See AMÉRY, *supra* note 41, at 35.

Furthermore, I think the natural *communicability* of agonizing pain has played a role in the level of empathy people have for torture victims—even for those victims who seek to murder innocent civilians as a means of installing totalitarian political regimes—and in the enormous political attention and moral condemnation brought to bear upon the practice of torture. Scarry must be wrong—and must have been wrong at the time of her writing, given that she wrote during Amnesty International’s ultimately successful drive to pass the Convention Against Torture—that torture has been neglected as an issue of political concern. See Samuel Moyn, *Torture and Taboo: On Elaine Scarry*, NATION (Feb. 5, 2013), <https://www.thenation.com/article/torture-and-taboo-elaine-scarry> [<https://perma.cc/K4KW-LF6K>].

In sum, torture proves Scarry’s broader point about the communicability of a type of injury impacting the amount of attention it receives, but in the exactly opposite manner that she intended. Long-term incarceration, however, proves her point in the intended direction. Given the abstract and gradual nature of temporal goods, the injury of limiting one’s access to such goods is

III. INHUMAN INCARCERATION

We now have the pieces to conclude that long-term incarceration is an impermissibly degrading punishment. Part I argued that punishment is impermissibly degrading, regardless of its proportionality or social utility otherwise, when it rejects an offender's standing as a human. Punishment reaches this threshold when it denies the value or presence of an offender's *essentially human* capacity for practical reason, which enables him to stitch moments together through time to construct a valuable life as a whole. When examining whether A has impermissibly degraded B—whether A has treated B with *inhumanity*—we must consider both: (1) what A caused to happen to B; and (2) A's mental state in bringing about that outcome.

Mens rea does matter when considering the degree of disrespect evinced by an action. Did A injure B purposefully, knowingly, recklessly, negligently, etc.? Most cases of impermissible degradation—like penal torture or Derby's Dose—will involve A purposefully treating B in a grievous manner. By contrast, completely accidental and non-negligent injuries would not qualify. Nonetheless, one could affirmatively deny another's humanity with a degree of mens rea lesser than full-blown purpose. If A, charged with B's care, lets B starve to death, we could determine that A affirmatively denies B's humanity without intentionally harming B. A's actions—or rather inaction—manifest the judgment that B's value-generating capacities simply do not matter.

With regard to long-term incarceration, Part II unraveled the first component of degradation analysis: What does long-term incarceration *do* to an offender? Part II argued that while incarceration deprives an offender of many goods, its deprivational core is a limitation on the freedom of association. Part II continued by demonstrating that *long-term* incarceration deprives an inmate of foundationally important associational goods that one can realize only over time, such that long-term incarceration severely risks ruining his life as a whole. Part III now completes the discussion by examining the state's intentions when it long-term incarcerates, and then by considering four objections to the

comparatively difficult to communicate in terms of its existence and severity. And I think this explains in part how such a severe injury could become so commonplace and receive such little political attention.

conclusion that long-term incarceration is an impermissibly degrading punishment.

State punishment—delivered for reasons of retribution, deterrence, or whatever it may be—is intentionally harmful, using a broad understanding of “harm” as anything that is aversive or that negatively affects one’s interests.¹⁹⁰ Generally, retributivists understand this harm to be an end in itself, as the *intrinsic* good of deserved suffering or censure, though Antony Duff, for one, sees retributive penal harm as having instrumental value, as well, insofar as it enables the offender’s reformation and social reintegration.¹⁹¹ Deterrence theorists, meanwhile, understand penal harm to be a thoroughly *instrumental* good—a tool for threatening would-be future offenders. Punishment would fail as a deterrent if it were not harmful.

Thus, when the state long-term incarcerates an offender, it purposefully harms him, and in a manner that foreseeably and severely risks ruining his life as a whole.¹⁹² Even if the state does not strictly intend to ruin the offender’s life,¹⁹³ as I discuss further below, its actions manifest an extraordinary, humanity-denying disregard for his life-building capacities. In sum, long-term incarceration is not treatment appropriate for a life-builder; and the state denies an offender’s status as a life-builder (that is, as a human) when it imposes such punishment.

Compare a twenty-year sentence in even a mild prison to twenty waterboarding sessions. They act in different ways. Whereas torture is immediate and urgent, turning the victim into a howling animal,¹⁹⁴ long-term incarceration is gradual and subtle. Torture explodes, as indicated above, and long-term incarceration erodes. In the end, though, the question is the same: To what degree does the treatment *disrespect* the individual’s capacity to exhibit and construct human value, by interfering with or possibly dishonoring that capacity?¹⁹⁵ Long-term incarceration,

¹⁹⁰ See FEINBERG, *supra* note 43, at 31 (defining a “harm” as a “setback to interest”).

¹⁹¹ See DUFF, *supra* note 4.

¹⁹² See Bronsther, *supra* note 19, at 487.

¹⁹³ I am grateful to Amy Sepinwall for helpful discussion on this point.

¹⁹⁴ See AMÉRY, *supra* note 41, at 35; JACOBO TIMERMAN, PRISONER WITHOUT A NAME, CELL WITHOUT A NUMBER 33 (Tolby Talbot trans., 1981) (“When electric shocks are applied, all that a man feels is that they’re ripping apart his flesh. And he howls.”).

¹⁹⁵ See Bronsther, *supra* note 19, at 487.

by severely limiting an offender's access to temporal goods, which are fundamental to the pursuit of a good human life as a whole, interferes with his value-generating capacity in a direct and profoundly damaging manner. If torture removes someone from his diachronic process of value generation, long-term incarceration acts to ensure—or at least to severely risk—that this process fails. Both effectively reject one's standing as a being with the capacity for practical reason—that is, as a person who builds value through time—and both are thereby impermissibly degrading.¹⁹⁶

Respect involves *seeing* the objective value in something and then responding appropriately in one's attitudes and actions, as suggested by the Latin source of "respect," *respicere*, which means "to look back at" or "to look again."¹⁹⁷ As indicated above, respect concerns our process of valuation, and then our non-symbolic and symbolic responses to that appraisal. One of these steps has gone awry for the state when it sentences an offender to a decades-long prison term. Either it fails to *see* or *behold* his value as a human being, understanding him to have the value of a merely disposable thing or animal, or it *sees* his value but then fails to respond appropriately.¹⁹⁸ More to the point, purposefully injuring someone—seeing his injury as a *reason for action*—when that injury destroys or wastes his capacity to generate human value constitutes a clear rejection of that individual's own value and standing as a human.¹⁹⁹

¹⁹⁶ The comparison between the death penalty and long-term incarceration on this front—on the disrespect the practices demonstrate toward an offender's life-building capacity—is also apt.

¹⁹⁷ See Bronshter, *supra* note 19, at 465. Latin source provided in Robin S. Dillon, *Respect*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2016), <https://plato.stanford.edu/archives/win2016/entries/respect> [<https://perma.cc/BLT6-NLMC>].

¹⁹⁸ But can the state—a corporate entity—have awareness of facts and have related intentions or attitudes that evince respect or disrespect? For a careful argument that it can, see Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1514–27 (2000); see also MICHAEL E. BRATMAN, *SHARED AGENCY: A PLANNING THEORY OF ACTING TOGETHER* (2014); Michael E. Bratman, *Shared Intention*, 104 ETHICS 97 (1993); Scott J. Shapiro, *Massively Shared Agency*, in RATIONAL AND SOCIAL AGENCY: THE PHILOSOPHY OF MICHAEL BRATMAN 257 (Manuel Vargas & Gideon Yaffe eds., 2014); cf. David Enoch, *Intending, Foreseeing, and the State*, 13 LEGAL THEORY 69, 84–91 (2007).

¹⁹⁹ Joshua Kleinfeld explains that severe American punishments *devalue* offenders:

Implicit in American punishment is the idea that serious or repeat offenses mark the offenders as morally deformed people rather than ordinary people who have committed crimes. Offenders' criminality is thus both immutable and devaluing: it is a feature of the

Whatever the thing is—a sandcastle, plant, person, etc.—it is impossible to recognize and appreciate its value while being motivated to injure it in a ruinous manner, while seeing such an injury as an instrumental or intrinsic *good*.²⁰⁰

A. *Intentional Injuries*

To bolster this argument, let us consider four objections.

actor, rather than merely the act, and, as such, it diminishes offenders' claim to membership in the community and loosens offenders' grip on certain basic rights.

Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 941 (2016); *see also* Dolovich, *supra* note 182, at 104 (“In the new punitive climate . . . to commit a criminal act is to reveal oneself as essentially and uniformly bad and thus not entitled to the consideration or respect otherwise due fellow human beings.”).

²⁰⁰ The prohibition on long-term incarceration presented here is stronger than the “right to hope” guaranteed by a recent line of cases in the European Court of Human Rights (ECtHR). Those cases provide that life sentences without the possibility for parole are “inhuman or degrading” in violation of article 3 of the European Convention on Human Rights. *Vinter and Others v. United Kingdom*, 2013-III Eur. Ct. H.R. 317; *Trabelsi v. Belgium*, 2014-V Eur. Ct. H.R. 257. The judges were concerned, mainly, to prevent terms of incarceration that, given an offender's rehabilitation, were no longer justifiable by reference to a member state's penal rationale (deterrence, retribution, etc.). *Vinter*, 2013-III Eur. Ct. H.R. 317, ¶ 111. However, the court also gestured toward a more robust “external” stop on the pursuit of penal rationales—akin to a degradation limitation—which would guarantee offenders the opportunity for release as a matter of their “human dignity.” *See id.* ¶ 113; *see also id.* at 54 (Power-Forde, J., concurring) (introducing the concept of “the right to hope”). For thoughtful discussion of *Vinter*, *see* Kleinfeld, *supra* note 199, at 952–55.

However, the most recent case, *Hutchinson v. United Kingdom*, limited the “right to hope” dramatically. *Hutchinson v. United Kingdom* (App no. 57592/08) [2017] ECHR 65. The ECtHR provided that a life term would be legal, so long as there was some chance, even a very remote chance, of releasing an offender upon his rehabilitation, as set out in advance by relatively clear procedures. The court found that Hutchinson's life term was acceptable, given the U.K. Secretary of State's power to release him as set out in the Crime (Sentences) Act: “The Secretary of State may at any time release a life prisoner on licence if he is satisfied that exceptional circumstances exist which justify the prisoner's release on compassionate grounds.” The Crime (Sentences) Act 1997, § 30(1). The ECtHR accepted the (England and Wales) Court of Appeal's judgment that the “exceptional circumstances” and “compassionate grounds” language did not unduly limit the Secretary of State to the current practice of releasing offenders only when they were terminally ill, bedridden, or similarly limited. *R v. McLoughlin* [2014] EWCA Crim 188. Such a thoroughly discretionary regime (“The Secretary of State *may* at any time release a life prisoner,” *id.* (emphasis added)), with a customarily if not necessarily legally constrained standard for release (“exceptional circumstances exist which justify the prisoner's release on compassionate grounds,” *id.*) would violate the principles outlined above—as it allows for the current English practice of effectively warehousing prisoners for decades.

First, supporters of retributivist or deterrent long-term incarceration might object that they do not intend to “ruin” offenders’ lives, or to severely risk that outcome. All they want is for offenders to experience a certain amount of suffering, consistent with their retributive desert or efficient crime deterrence. Perhaps they do not want twenty years in prison to be like living in Xanadu, they might continue, but that does not mean that they deny the value of offenders’ lives. They might insist, indeed, that they would much prefer that offenders’ lives *not* be ruined. This is akin, however, to someone (say, Francis) arguing that all she wanted to do was to inflict physical pain on another (say, George) by repeatedly punching him in the face; she did not want to *give him a black eye*, and she would have much preferred it if she could have caused George pain consistent with repeatedly punching him in the face without giving him a black eye.

We cannot guarantee the result of any of our actions; we cast risks of good and bad outcomes with everything we do. And the pertinent question, I believe, is whether we intend to harm, in the sense that we see the infliction of harm as an intrinsic or instrumental reason for action. If one indeed intends to inflict harm in this way, then we should understand her to aim at the full range of harms that her actions at least severely risk bringing about. Francis intended to harm George and she succeeded; she could not have been sure which of the array of specific harms that she severely risked bringing about would emerge.²⁰¹ In parallel, if the state intends to harm an offender by restricting his access to free society for twenty years, it aims at an array of harms that includes: (1) limiting his access to associational, temporal goods; and thereby (2) ruining his life as a whole.²⁰² In short, the state cannot honestly maintain that it upholds the

²⁰¹ If one is *not* motivated to harm, however, the analysis must be different. Consider a mother who drops her baby from the roof of a burning building, hoping that the baby survives, but knowing that it is extremely likely—indeed, a practical or virtual certainty—that the baby will die from the fall. Given that she was never motivated to cause harm to her baby, we cannot say that she aimed at the array of harms that her actions might cause. As such, if the baby dies, we ought not deem her a willful or intentional killer. Cf. MODEL PENAL CODE § 2.02(2)(b)(ii) (AM. LAW INST. 1962) (providing that a defendant’s awareness that her conduct is “practically certain” to bring about a result constitutes bringing about that result “knowingly,” unless otherwise specified); Regina v. Woollin [1999] A.C. 82 (Eng.) (providing that a jury can declare a defendant an intentional killer when he was aware of the fact that death was “virtually certain” to result from his actions).

²⁰² Adam Kolber argues insightfully that retributivist theorists must account for all the harmful impacts of the prison experience. Kolber, *supra* note 53, at 3. They cannot maintain that only

value of an offender's capacity to build a good life when, for the very purpose of harming him, it imprisons him for twenty years—hitting him right where his life-building capability is most fragile.

B. *Exculpatory Ignorance*

But what if the state—or the collection of people charged with determining sentences—is not even aware that long-term incarceration represents a severe risk of ruining an offender's life? How, in those cases, could long-term incarceration represent a purposeful life-ruining injury? Indeed, I argued *supra* that the deprivation of associational, temporal functionings is a “quiet” injury that is easy to overlook.²⁰³ Is long-term incarceration for the purposes of retribution or deterrence impermissibly degrading only when the state is aware of these deprivations and therefore of the life-ruining component? We can assume that Francis was aware that she was risking a black eye for George when she punched him repeatedly. But what if the retributivist or deterrent state is not aware of the life-ruining risk of long-term incarceration?

This objection is not worrisome. The state has a positive duty to know what it is doing to people when it inflicts penal harm on them, lest it inflict a disproportionate and undeserved amount or type of harm. The very failure to look into the matter would evince the lack of respect for the offender's capacity to build a good life that we have deemed impermissibly degrading. One can deny another's standing as a person with a mental state lesser than purpose, as discussed above, and in this

“purposeful” deprivations count as punishment or retribution. He asks us to consider two equally blameworthy offenders, Purp and Fore:

They are alike in all pertinent respects and receive identical sentences in identical prisons. The only difference between them is that different aspects of their sentences are imposed intentionally. Purp is purposely limited in his liberty to move about, see family, have sex, express himself, possess personal property, vote, and so on. By contrast, Fore is purposely limited in moving about, but all of his other hardships are merely foreseen accoutrements of prison.

Id. Kolber explains that, if only “purposeful” deprivations count as punishment or retribution, it would require the absurd conclusion that Fore was punished to a lesser degree than Purp, given that fewer harms were inflicted on him purposively. This would entail the yet more absurd conclusion that Fore deserves a longer sentence than Purp to account for his less severe punishment.

²⁰³ See *supra* pp. 2420–24.

case the state's extreme negligence with regard to the long-term impact of a decades-long sentence would surely qualify.

C. *Desperate Offender*

As briefly considered above, what about the individual who leads an utterly desperate existence, where he is merely trying to survive day to day, *before* his long-term incarceration? Have his diachronic capacities not already been “erased,” by his own choices or by the neglect of a callous society? By purposefully harming him in a way that ensures that he does not turn his life around, as it were, the state demonstrates the same disrespect for his diachronic capacities as it does for the offender who was positively flourishing before incarceration. The conviction expressed by the state is the same: your essentially human capacity to build a good life does not matter.

To be clear, this conclusion applies even if the individual's standard of living inside prison is higher than it was outside—even if the promise of “three hots and a cot” is for him a great relief. For the individual is not merely an animal or a very young child with no capacity to realize temporal goods, and for whom our only hope is that his bodily needs and comforts are met (assuming that they are indeed met in prison). He is entitled to more by virtue of his human capacities, and to place him in an environment for decades where those capacities atrophy—or continue to atrophy—is to treat him as a non-human.

Moreover, if we accept that the state has to some degree failed him given his pre-carceral hopelessness, then respect for his humanity entails that the state has a *positive duty* to invest in his long-term well-being and to help him to repair his life—a duty that it fails to uphold by imprisoning him for decades. The state cannot with one hand allow someone to reach a condition of desperation and then with the other claim that prison does not especially harm him because his life on the outside was so miserable.²⁰⁴

²⁰⁴ If the state has a duty to respect an individual's life-building capacity, what this duty demands outside of prison is hugely contentious. For instance, libertarians would argue that the state upholds this duty by leaving individuals alone to intermingle and contract with each other as they see fit. However, even if one held that view, it would not be especially relevant in the punishment context. That is because punishment involves the purposeful intrusion by the state into an offender's affairs.

D. *Dangerous Offender*

How does the dangerous offender fit into this scheme? If the maximum available penal sentence is, say, fifteen years, would a liberal society be powerless to protect itself against extremely violent individuals beyond that point? Given that the vast majority of people “age out” of violent crime, this issue is not especially pressing.²⁰⁵ Regardless, I would venture that continued confinement in a preventative facility could be consistent with liberal values, so long as three demanding conditions were met. These conditions ensure that the state does not *punish* the individual moving forward—that it does not see harming him as an intrinsic or instrumental reason for action—and acts only out of a concern with proportionate social defense in parallel to a quarantining authority.

First, the state must establish that the individual poses a threat of very serious future crime, such that confinement is indeed a proportional means of social defense. Determining this threat level depends on the most challenging evidentiary questions.²⁰⁶ Which types of evidence ought to be admissible? Surely, to have any hope of legitimacy, the central form of evidence must be past instances of offending. But what is the role, if any, for actuarial statistics? How high should the state’s burden of proof be in establishing that the offender will commit future crimes? Presumably, “beyond a reasonable doubt?”²⁰⁷ Who ought to be

Thus, even if one believed that the state had respected the desperate offender’s life-building capacity outside of prison simply by leaving him alone, that would not prevent a different conclusion with regard to the highly coercive and intrusive carceral experience.

²⁰⁵ See Jeffery T. Ulmer & Darrell Steffensmeier, *The Age and Crime Relationship: Social Variation, Social Explanations*, in *THE NURTURE VERSUS BIOSOCIAL DEBATE IN CRIMINOLOGY: ON THE ORIGINS OF CRIMINAL BEHAVIOR AND CRIMINALITY* 377 (Kevin M. Beaver, J.C. Barnes & Brian B. Boutwell eds., 2014).

²⁰⁶ See MIKE REDMAYNE, *CHARACTER IN THE CRIMINAL TRIAL* 65–66 (2015).

²⁰⁷ Cf. Carol S. Steiker, *Proportionality as a Limit on Preventive Justice: Promises and Pitfalls*, in *PREVENTION AND THE LIMITS OF THE CRIMINAL LAW* 194, 202 (Andrew Ashworth, Lucia Zedner & Patrick Tomlin eds., 2013) (“The degree of procedural reliability that is required increases with the intrusiveness of the preventive intervention at issue, with long-term confinement requiring the greatest assurances of reliability.”); Michael Louis Corrado, *Punishment and the Wild Beast of Prey*, 86 J. CRIM. L. & CRIMINOLOGY 778, 793–94 (1996) (arguing that the burden of proof ought to be lower for preventive detention than for backwards-looking punishment, because inaccuracy in the former case has greater costs, in the form of people harmed by those we ought to have detained).

empowered to make such factual determinations? This is a small subset of the many complex questions that we must answer in order to justify any form of preventive treatment.²⁰⁸ Of course, all of this is rife with the possibility of error for even well-meaning fact-finders,²⁰⁹ as well as the possibility of naked abuse of the presumption of innocence.²¹⁰ Imagine, say, that the state could appeal only to actuarial statistics (e.g., people from certain postal codes, in certain income brackets, who pray at certain mosques), with the defendant bearing the burden of proof. Nonetheless, it seems likely that on very rare occasions the state will be able to answer these evidentiary questions sufficiently well. Consider, at the extreme, a serial killer who himself insists that he will try to kill again.²¹¹

Second, assuming the state meets its evidentiary burden, it must provide the individual with extensive rehabilitative and therapeutic resources, with the facility featuring a non-punitive ethic of care.²¹²

Third, the state must provide the individual with regular opportunities to demonstrate his rehabilitation,²¹³ say, every six to twelve

²⁰⁸ For further discussion, see, e.g., Norval Morris, *Keynote Address: Predators and Politics*, 15 PUGET SOUND L. REV. 517 (1992); PAUL H. ROBINSON, *DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH?* 109–134 (2008); David J. Cooke & Christine Michie, *Limitations of Diagnostic Precision and Predictive Utility in the Individual Case: A Challenge for Forensic Practice*, 34 LAW & HUM. BEHAV. 259 (2010).

²⁰⁹ See Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. REV. 113, 126 (1996) (concluding that even in the closely monitored environment of a mental health institution, “the ability of mental health professionals to predict future violence among mental patients may be better than chance, but it is still highly inaccurate, especially if these professionals are attempting to use clinical methods to predict serious violence”).

²¹⁰ See generally PETER RAMSAY, *THE INSECURITY STATE: VULNERABLE AUTONOMY AND THE RIGHT TO SECURITY IN THE CRIMINAL LAW* (2012); BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* (2007).

²¹¹ For real-world examples rather close to this, see Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. L. REV. 1, 1 (2003).

²¹² Compare *Case of M. v Germany* (App no. 19359/04) IHLR 3709 (ECHR 2009), ¶ 129 (“[P]ersons subject to preventive detention orders must be afforded such support and care as part of a genuine attempt to reduce the risk that they will reoffend, thus serving the purpose of crime prevention and making their release possible.”), with *Kansas v. Hendricks*, 521 U.S. 346 (1997) (approving Hendrick’s confinement under Kansas’s “Sexually Violent Predator” law, even though the State had failed to provide him with therapeutic resources). See also Slobogin, *supra* note 211, at 16.

²¹³ See Steiker, *supra* note 187, at 198; Rinat Kitai-Sangero, *The Limits of Preventive Detention*, 40 MCGEORGE L. REV. 903, 928 (2016); Paul Robinson, *Life Without Parole Under Modern Theories of Punishment*, in *LIFE WITHOUT PAROLE*, *supra* note 182, at 138, 144 (arguing that a rational system

months, with the state bearing the burden on each occasion to prove that he is sufficiently likely to commit very serious offenses in the future.²¹⁴ As Andrew Ashworth and Lucia Zedner write, “the absence of periodic review and impossibility of release suggests that the preventive element is subsidiary to the punitive.”²¹⁵ We can understand the quarantine analogy here as the quarantining authority’s duty to regularly test the person confined to ensure that she no longer has the disease, or is no longer contagious, as well as to provide medical care, so as to bring her back to health sooner.

If, against odds, the state can meet these three requirements, then preventative confinement can meet the demands of liberalism in very rare cases. In those cases, the state would not be throwing away an individual’s life. Rather, it would be proportionally and non-punitively defending people in free society from a demonstrably dangerous person, while at the same time working earnestly to rehabilitate and treat him so that he can rejoin those same people and lead a decent life as a whole.

CONCLUSION

This Article has attempted to clarify certain *liberal* sentencing principles. The underlying question has been this: How much and what sort of harm may the state inflict on an offender, given that, consistent with our liberal ideals, he is inviolable? While the ideal of human inviolability shapes the reasons that we inflict penal harm in the first place,²¹⁶ it also constrains the amount and type of penal harm that we can

of prevention would operate like current civil commitment systems and periodically revisit the underlying determination of present dangerousness).

²¹⁴ California’s “Sexually Violent Predator” law used to require an application for extension every two years, at which point it would have to be determined at trial beyond a reasonable doubt that the offender fulfilled the criteria for confinement. However, after Proposition 83 (“Jessica’s Law”) passed in 2006, the statute now leads to an indefinite term of confinement. Cal. Proposition 83 § 27 (2006); see CAL. WELF. & INST. CODE § 6604 (West Supp. 2007) (“If the court or jury determines that the person is a sexually violent predator, the person shall be committed for an indeterminate term to the custody of the State Department of State Hospitals for appropriate treatment and confinement in a secure facility designated by the Director of State Hospitals.”); see also James Vess, *Preventive Detention Versus Civil Confinement: Alternative Policies for Protection in New Zealand and California*, 12 PSYCHIATRY, PSYCHOL. & L. 357, 360–62 (2005).

²¹⁵ ANDREW ASHWORTH & LUCIA ZEDNER, PREVENTIVE JUSTICE 156 (2014).

²¹⁶ See Jacob Bronsther, *Vagueness and Proportional Sentencing*, 25 LEGAL THEORY 26, 47–48 (2019).

inflict in pursuit of those penal aims. This Article aimed to revive one such “external” sentencing limit: the prohibition on degrading punishment. It argued that punishment violates this prohibition when it denies an offender’s standing as a human being; and punishment reaches this threshold by rejecting the presence or worth of an offender’s essentially human capacity to construct a good life through time.

The Article then assessed the permissibility of long-term incarceration by reference to the prohibition on degrading punishment. It examined the wide array of possible deprivations inherent to incarceration before arguing that the deprivational core of prison is the denial of the freedom of general association. It then argued that, regardless of prison quality, denying an offender the freedom of general association for a long enough period of time makes it extremely difficult for him to realize certain temporal and associational goods which are constitutive of a good life as a whole. Long-term incarceration, in this way, rejects the existence or value of an offender’s life-building capacity, and is therefore an impermissibly degrading form of punishment.

