

A DEFENSE OF CORPORAL PUNISHMENT: A HUMANE ALTERNATIVE TO
INCARCERATION

by

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Abstract

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If we hold that severe punishment is sometimes justifiable, as almost all philosophers do, then we hold that it is morally permissible for the state to cause criminal offenders to experience substantial suffering. It is generally taken to be permissible to punish in ways that cause quite significant psychological suffering extended over vast amounts of time. Imprisonment, currently the most popular severe punishment, does this. However, in contemporary Western societies, causing suffering by inflicting even a moderate amount of physical pain is generally taken to be morally wrong, perhaps even beyond the pale. In many circles, seriously questioning this latter assumption is taboo, since it is taken as obvious that corporal punishment is an unfortunate relic of a less civilized past. In my view, this assumption is anything but obvious.

Punishment inevitably causes suffering, and the psychological suffering caused by currently popular methods of punishment can be, and often is, severe and devastating. Corporal punishment can be imposed in a way that does not break the skin, scar, or cause any permanent physical damage. If these conditions are met, certain forms of corporal punishment can be shown to have significant morally relevant advantages over currently popular forms of punishment, especially imprisonment. Corporal punishment is more humane than imprisonment, since the amount of pain caused can be precisely calibrated, which enables the punisher to avoid causing a disproportionate amount of suffering. With imprisonment, this cannot be done, and the amount of suffering experienced by offenders with formally equivalent sentences often varies immensely. In the dissertation, I discuss this and other advantages of corporal punishment and I defend the practice against objections that claim that it is cruel, inhumane, inhuman, and degrading. Particular attention is paid to the issue of degradation, since most philosophically-developed objections to corporal punishment claim that the practice is degrading.

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Introduction

The Decline of Corporal Punishment and the Rise of Imprisonment

At the beginning of this work, it may be good for me to say a bit about the history of corporal punishment and imprisonment over the past few hundred years. Of course, this is a work of philosophy, and I do not think that an extensive historical introduction is necessary. Many facts and dates that would be of interest to the historian are beyond the scope of this work. However, I will briefly discuss some general trends that have occurred in the West over the past few hundred years and state a few relevant facts to set the stage for what follows and demonstrate the timeliness of this inquiry.

The late 18th and early 19th century was a time of significant change in the prevalent forms and methods of punishment used in the United States, England, and Continental Europe. Very generally, before that time corporal punishment was the main form of punishment for non-capital crimes and it was often public, brutal, or both. Some popular methods of punishment were whipping, branding, mutilation, and pillorying.¹ These methods often combined physical pain and public shaming in a potent and fearful combination.

Around the turn of the 19th century, the rise of imprisonment began and it started to replace corporal punishment as the main form of punishment for non-capital crimes. In addition, more offenders who would have formerly been punished by death were being sent to prison instead. The long, slow demise of corporal punishment had begun along with the era of imprisonment.² However, this demise was non-linear, with proponents and opponents of corporal punishment frequently debating about whether or not corporal

¹ Robert Graham Caldwell, *Red Hannah: Delaware's Whipping Post* (London: Oxford University Press, 1947), 3.

² *Ibid*, 3.

punishment should be retained. Generally, though, those who sought to reduce or abolish corporal punishment won most of the battles, and the corporal punishment of criminals became increasingly rare. By the turn of the 20th century, corporal punishment was rare in England and the United States, although it was not officially abolished in England until 1948³ and the final U.S. state to abolish it was Delaware in 1972.⁴ However, while the corporal punishment of criminals is rarely practiced in contemporary Western societies, it is still practiced in certain Eastern, African, and Islamic countries.⁵

There is much debate about the causes of this gradual shift in forms of punishment and I am not prepared to take sides in contentious sociological debates. However, I can offer some observations and state a few facts that are relevant to this inquiry. While anti-corporal punishment reformers offered various reasons why the practice ought to be reduced or abolished, its supposed lack of reformatory power was mentioned quite often. Many reformers at the time had high hopes for the reformatory potential of imprisonment and they were eager to leave behind a form of punishment that was thought to lack the ability to change the moral character of offenders. In her *Campaigns Against Corporal Punishment*, Myra C. Glenn discusses movements against corporal punishment that took place in Antebellum America. She does not only discuss movements against the corporal punishment of criminals; she also discusses the campaigns against the corporal punishment of children, women, and sailors.

A major theme in all four of these campaigns was the belief that corporal punishment was an ineffective means of social discipline because it “merely” repressed an individual from wrongdoing. This punishment,

³ Geoffrey Scarre, “Corporal Punishment,” *Ethical Theory and Moral Practice* 6 (2003): 295.

⁴ Graeme Newman, *Just and Painful: A Case for the Corporal Punishment of Criminals* 2nd ed. (Albany, NY: Harrow and Heston Publishers, 1995), 158.

⁵ Colin Farrell, “World Corporal Punishment Research Website.” <http://www.corpun.com> (accessed March 23, 2010).

however, allegedly failed to accomplish the “true” aim of discipline, namely, the reformation of individual moral character. Horace Mann expressed widely shared sentiments when he declared that the fear of corporal punishment might “make an offender cease to do ill,” but it can never “make him love to do well.”⁶

So, a pervasive belief among anti-corporal punishment reformers was that punishment ought to reform the offender. Reformers also spoke of the importance of “moral suasion” in bringing about the reformation of offenders.⁷ Many of these reformers were also proponents of the penitentiary system, which involved the isolation of convicts in the hopes that they would become penitent and decide to change their deviant ways.⁸

Of course, moral reformation was not thought to be the only goal of imprisonment, and reformers recognized its potential to deter and incapacitate. But much of the drive towards imprisonment was motivated by a desire to reform criminals. Nowadays we speak more often of “rehabilitation” than “reformation,” and the goal of rehabilitating criminals during prison terms was prominent during the 19th and the majority of the 20th century.⁹ However, the tide began to turn during the 1960’s and 1970’s when certain groups began to criticize the rehabilitative aim on both moral and practical grounds. Some objected on moral grounds to the practice of attempting to rehabilitate or treat prisoners in an inherently coercive institution. Others were concerned that the rehabilitative ideology and the related indeterminate sentencing system stood in the way of retributive goals. These moral concerns were accompanied by increasing skepticism regarding the prospect of being able to successfully rehabilitate a significant

⁶ Myra Glenn, *Campaigns Against Corporal Punishment: Prisoners, Sailors, Women, and Children in Antebellum America* (Albany: State University of New York Press, 1984), 41.

⁷ *Ibid.*, 53.

⁸ *Ibid.*, 141.

⁹ Marc Mauer, *Race to Incarcerate* (New York: The New Press, 1999), 42.

number of criminals.¹⁰ Because of these sorts of concerns and others, rehabilitation began to recede into the background. Of course, there was still much concern about reducing crime, but deterrence and incapacitation were much more heavily stressed than rehabilitation. In addition, there was a revival in the use of retributive approaches to punishment and sentencing.¹¹

While there is danger in making sweeping generalizations, I think that there is a consensus among the experts that the “imprisonment experiment” to rehabilitate criminals has failed. This is not to deny that some rehabilitative programs have had a measure of success. However, the prospects for achieving widespread and significant positive change through imprisonment appear to be quite dim.¹² This alone, of course, does not suffice to illustrate that imprisonment generally has been a failure. But it does show that imprisonment as a form of punishment has lost one of its major *raison d’être* and, arguably, its major selling-point. This is one, though by no means the only, reason for the recent surge of interest in alternatives to incarceration. While discussion of the various merits and demerits of these alternatives to incarceration would take me too far afield, I will be defending a much maligned alternative that I think we ought to reconsider: corporal punishment.

¹⁰ *Ibid*, 44-47.

¹¹ Antony Duff and David Garland, “Introduction: Thinking About Punishment,” in *A Reader on Punishment*, ed. Duff and Garland (New York: Oxford University Press, 1994), 12.

¹² There has been renewed interest in rehabilitation over the past 20 years following influential research that suggests that certain programs can help to reduce recidivism. However, it does not appear that these recent studies can sustain anything approaching the level of optimism possessed by those early reformers who ushered in the imprisonment experiment. After surveying the literature, my dominant impression is in accordance with Andrew Ashworth’s: “[T]here is reason to expect some schemes to work well if properly funded, targeted and implemented. . . . This suggests that, if rehabilitationism is to continue as one of the major penal rationales, its focus will need to be scaled down so as to relate only to those sub-categories of offenders for whom its techniques can reliably be expected to be effective. In that role, it might be no more than an auxiliary penal aim, always linked to one or more of the other aims.” (“Rehabilitation,” in *Principled Sentencing: Readings on Theory and Policy*, ed. von Hirsch, Ashworth, and Roberts [Portland, Oregon: Hart Publishing, 2009], 5.)

This reconsideration is timely given the growing dissatisfaction with imprisonment and the fact that corporal punishment was abandoned under a rehabilitative ideology which is now outdated and demonstrably problematic. Proponents of imprisonment can no longer hide behind the claim that the profound suffering caused by their preferred method of punishment is justified by the positive change brought about in the offender. Shorn of that noble purpose, it becomes increasingly difficult to defend the widespread use of imprisonment.¹³ We ought to see imprisonment for what it is: a form of punishment that involves causing massive amounts of psychological suffering by depriving people of liberty and separating them from their loved ones and the projects that give their lives meaning. Corporal punishment, if practiced in accordance with the constraints advocated in this work, will also cause significant suffering, but this is inevitable with any significant punishment. Corporal punishment can be carried out without breaking the skin or scarring and without having to deprive people of much liberty or take them away from their families and other loved ones. Of course, this form of punishment will need to be defended in its own right, not just by comparing it to imprisonment, but the comparison is worth reflecting on at the outset of this work. Which of these forms of punishment is really more morally problematic? Is causing short-term physical suffering (suffering from physical pain) really worse than causing long-term psychological suffering (suffering without physical pain) through major restrictions and deprivations? Whatever the correct answers to these questions, they are not obvious, and the issues involved require and merit careful analysis and evaluation.

¹³ While I am pessimistic about the prospects of rehabilitating prisoners in so-called “correctional institutions,” I am certainly not against providing offenders with opportunities to engage in rehabilitative programs. In fact, corporal punishment may provide an enhanced opportunity to bring about rehabilitation. The punishment can be done, and then the rehabilitation can begin, rather than the “correctional institution” model which involves the attempt to punish and rehabilitate simultaneously.

Problems with (Mass) Imprisonment

The problems with imprisonment, particularly mass imprisonment, have been exhaustively discussed in the relevant literature.¹⁴ I will not attempt to summarize them here. Instead, I will confine myself to pointing out some problems that the reintroduction of corporal punishment could help us to address. In this discussion, I will remain at the level of building a prima facie case, mostly for the purpose of motivating the philosophical discussion that will follow in the body of this work. I will attempt to avoid a cardinal sin of the applied philosopher, namely venturing too far into contentious empirical debates and doing simplistic and impressionistic social science.

I will begin by citing a few statistics to give the reader an idea of the scope of imprisonment in the United States and some of its consequences. According to The Sentencing Project,

- “The number of inmates in state and federal prisons has increased nearly seven-fold from less than 200,000 in 1970 to 1,518,559 by 2008. An additional 785,556 are held in local jails, for a total of 2.3 million.”

- “The 2008 United States’ rate of incarceration of 754 inmates per 100,000 population is the highest in the world.”¹⁵

- “In 2007, 1.7 million minor children had a parent in prison, an 82% increase since 1991.”¹⁶

¹⁴ For example, see Mauer, *Race to Incarcerate*; John Irwin and James Austin, *It's About Time: America's Imprisonment Binge* (Belmont, California: Wadsworth Publishing, 2000); Todd R. Clear, “Ten Unintended Consequences of the Growth in Imprisonment,” in *Correctional Contexts: Contemporary and Classical Readings*, ed. Latessa et al. (Los Angeles: Roxbury Publishing Company, 2001), 497-505.

¹⁵ The Sentencing Project, “Facts About Prisons and Prisoners,” The Sentencing Project, 2010. <http://www.sentencingproject.org/> (accessed March 24, 2010).

¹⁶ The Sentencing Project, “Incarcerated Parents and Their Children: Trends 1991-2007,” The Sentencing Project, 2009. <http://www.sentencingproject.org/> (accessed March 24, 2010), 2.

In addition, Marc Mauer, the Executive Director of The Sentencing Project, estimated that in 2004 the annual cost of imprisonment in the United States had risen to \$57 billion annually.¹⁷ Many experts believe that the problem of mass incarceration in the United States has become quite critical, and they regularly draw our attention to many of the problems that result from it.¹⁸ These problems include substantial financial costs, overcrowding¹⁹, and a massive number of children growing up with a parent in prison. In addition, critics often cite other problems with imprisonment, such as the often-heard claim that rather than helping to reform them, imprisonment actually makes criminals worse by submerging them in an environment with many other criminals.²⁰

The above-mentioned problems are discussed often in the literature, but there are others that are not mentioned as often. As I will argue in chapter 3, the amount of suffering caused by imprisonment is very difficult to calibrate, resulting in vastly different amounts of suffering for criminals serving formally equivalent sentences. This creates problems with respect to proportionality in punishment. Also, imprisonment requires a very significant loss of liberty, autonomy, and contact with loved ones. If important punitive goals can be achieved without inflicting these quite severe losses, then it may very well be a good idea to pursue those goals by other means.

Why Consider Corporal Punishment?

There are significant morally relevant advantages to corporal punishment, and its reintroduction could help us to solve the problems mentioned above. I will not argue that

¹⁷ Marc Mauer, "Lessons of the 'Get Tough' Movement in the United States," The Sentencing Project, 2004. <http://www.sentencingproject.org/> (accessed March 25, 2010), 7.

¹⁸ See Note 14 above

¹⁹ Irwin and Austin, *It's About Time*, 93-94.

²⁰ Anthony O'Hear, "Imprisonment," in *Philosophy and Practice*, ed. A. Phillips Griffiths (New York: Cambridge University Press, 1985), 208-209.

corporal punishment should *replace* imprisonment in every case. Nor will I argue that corporal punishment is, all things considered, the best alternative to incarceration. That would require an in-depth comparative analysis and evaluation, which is beyond the scope of the present work. I will argue that corporal punishment is a morally permissible means of legal punishment and that there are good reasons for considering its reintroduction on a limited basis. In this section I will briefly advance some of the major reasons for believing that corporal punishment could help us to address some of the problems with mass imprisonment and with imprisonment generally.

Corporal punishment will not have nearly as many negative “overflow effects” on families. According to Graeme Newman, the author of *Just and Painful: A Case for the Corporal Punishment of Criminals*, using corporal punishment can minimize this overflow effect, even though it cannot completely eradicate it. It can be done quickly, without financial cost to the offender, and without removing him from his family.²¹ As we will discuss later, Newman favors electric shock as the method of infliction, and he argues that it should be carried out quickly and that the offender should be allowed to leave after the punishment is complete.²² It would be a welcome development to reduce the aforementioned number of 1.7 million children with a parent in prison.

Punishing some offenders corporally can help to relieve the problem of overcrowding in prisons and remove the need to continually build new prisons. Depending on how many offenders are corporally punished instead of being sent to jail or prison, corporal punishment may enable us to *solve* the overcrowding problem. I do not

²¹ Newman, *Just and Painful*, 98.

²² *Ibid*, Chapter 5.

favor *combining* imprisonment with corporal punishment. Rather, my view is that we should consider corporally punishing certain criminals *instead* of sending them to prison.

Corporal punishment would definitely cost much less than imprisonment. According to Irwin and Austin, taking into account both direct and indirect costs, on average it costs approximately \$30,000 per year to incarcerate a person.²³ Corporal punishment would cost a fraction of that figure. Of course, the cost would depend on a number of factors, such as the method of corporal punishment used, but we can anticipate that the costs would be much less than those of imprisonment.

Let me be explicit that I am not claiming that corporal punishment will necessarily, or even probably, lower crime rates. It is not clear to me that corporal punishment will prevent recidivism or deter better than imprisonment. Of course, these are issues to be taken up by social scientists, and a study of the literature shows that the experts are not in agreement regarding corporal punishment's prospects for deterrence.²⁴ However, I can make a few points on this topic without venturing too far outside my area of expertise. Methodologically, it is not out of turn for me to raise a few consequentialist benefits of corporal punishment in order to build a *prima facie* case and motivate a philosophical inquiry. I have not thereby "thrown my hat into the ring" and committed myself to a full consequentialist evaluation. Also, it is important to keep in mind that, given its social costs, many experts believe that imprisonment has a rather lackluster

²³ Irwin and Austin, *It's About Time*, 220-221.

²⁴ See Newman, *Just and Painful*, Ch. 14 ("Will Corporal Punishment Deter Crime?") for a lucid discussion of this issue. He argues in favor of corporal punishment's prospects for deterrence, and criticizes Caldwell and the findings of the (English) Committee on Corporal Punishment that authored a report on the subject in 1938. See Caldwell, *Red Hannah*, 90-99, and Departmental Committee on Corporal Punishment, Chairman: Honorable Edward Cardogan, *Command Paper*, 1938.

record with respect to crime reduction.²⁵ In addition, we must remember that even if imprisonment deters and prevents recidivism better than corporal punishment, it is still possible for corporal punishment to be the superior punishment on consequentialist grounds once other important factors are taken into consideration. For example, as I have stated, if we are interested in social utility, we must consider the “overflow effects” that a punishment will have on an offender’s family, as well as the cost of the punishment, since money spent on punishment is diverted from other social priorities.

There are other advantages that corporal punishment has over imprisonment. If certain criminals were corporally punished instead of being sent to prison, they would not be placed in an environment with other criminals that could negatively affect their behavior and teach them new “tricks of the trade.” In addition, as I will discuss at length in chapter 3, the amount of suffering caused can be calibrated much more accurately than with imprisonment. This should be seen as an important advantage by anyone concerned with proportionality, fairness, and humaneness. Also, as I will show in chapter 2, punishment inevitably causes suffering, and corporal punishment allows us to cause it without substantially restricting liberty and autonomy. Imprisonment, on the other hand, involves substantial restrictions on liberty and autonomy. Given the inevitability of suffering, it may be morally preferable to cause it without these unnecessary restrictions.

Throughout this work, I will argue that there are additional important advantages to corporal punishment. But, at this point, the reader may be thinking that the above-mentioned considerations are beside the point. The idea of corporally punishing criminals strikes so many intelligent and reasonable people as simply barbarous and

²⁵ For example, see The Sentencing Project’s “Incarceration and Crime: A Complex Relationship” (The Sentencing Project, 2005. <http://www.sentencingproject.org/> [accessed March 24, 2010]) and Irwin and Austin, *It’s About Time*, Ch. 10.

many of them shudder at the thought. In my experience, a large number of open-minded people who are willing to entertain a variety of non-mainstream views have been unwilling to seriously consider the possibility that corporally punishing criminals could in fact be morally permissible. Many believe that the practice is clearly cruel, inhumane, inhuman, or degrading. I will be arguing that corporal punishment does not necessarily fall into any of these categories, and addressing these concerns will take up most of this work. But, at the outset, I would like to offer an error theory in order to attempt to explain the common reaction to my proposal.

Error Theory

In this section, I would like to put forth what would probably be best referred to as an error theory. I want to offer a plausible explanation for why so many reasonable and well-intentioned people believe that corporal punishment is obviously morally wrong. Of course, I believe that the “received wisdom” on this issue is incorrect, but I will show that the mistake is understandable given certain features of our modern sensibilities. Generally speaking, when a theorist is going against the tide, he enhances the plausibility of his position if he can explain why the majority has come to hold an opposing position. Given that I am not a social scientist, I cannot do exactly that, but I can put forth an explanation from the sociology literature in order to cast doubt on received wisdom and show the contingency of beliefs that may strike many as obviously true.

In *Punishment and Modern Society*, David Garland states that corporal punishment “is not an option on the modern agenda.” He asks why corporal punishments aren’t used today and dismisses the view that the answer should be self-evident by listing

many reasons that could be offered in support of corporal punishment. Many of the reasons that he lists are the same ones that I put forth above. He then explains why corporal punishment is not considered a viable option in contemporary Western societies:

The answer of course is that our modern sensibilities – or at least those of the sectors of society which are influential in policy-making – have been attuned to abhor physical violence and bodily suffering. Gross violence, deliberate brutality, the infliction of physical pain and suffering, all these are felt by many people to be intolerably offensive in themselves and to have no legitimate place within the public policy and legal institutions of a civilized nation.²⁶

He then goes on to emphasize that the ban on inflicting pain is specific to certain kinds of pain and methods of inflicting it. Clearly, people will still tolerate the infliction of pain, but only in certain forms. Of course, imprisonment “can produce acute mental and psychological suffering.” However, it is much easier for the public to tolerate the infliction of this suffering in the context of imprisonment than it is for them to tolerate the infliction of bodily pain. Garland’s eloquent explanation of this justifies the lengthy quotation:

But because these pains are mental and emotional rather than physical, because they are corrosive over an extended period rather than immediate, because they are removed from public view, and because they are legally disguised as a simple “loss of liberty”, they do not greatly offend our sensibilities and they are permitted to form a part of public policy. In keeping with the demands of a “civilized” society, the experience of pain is ushered “behind the scenes” – whether this is behind the walls of a prison, or behind the “front” with which prisoners conceal their emotional distress.²⁷

So, Garland argues that despite the fact that corporal punishment and imprisonment can both cause substantial suffering, our sensibilities lead us to have a much stronger reaction to corporal punishment. With imprisonment, the pains are mental and emotional, and

²⁶ David Garland, *Punishment and Modern Society: A Study in Social Theory* (Chicago: The University of Chicago Press, 1990), 241-242.

²⁷ *Ibid*, 242.

they are hidden in multiple ways. The true impact of imprisonment is hidden by walls, legalistic terminology, and the “fronts” put up by prisoners. It is easier to put up a front when experiencing emotional pain than it is when experiencing physical pain. When it comes to causing physical pain,

...one always sees the immediate evidence of suffering, and the brutality involved is inescapable. The wince of pain or the scream of agony announce the fact of violence and render it visible, whereas the mental anguish and gradual deterioration of an incarcerated inmate is much more difficult to observe and much easier to overlook.²⁸

Because of the structure of our sensibilities we are able to deny and distance ourselves emotionally from the profound hurt that we cause when imprisoning someone. With corporal punishment we cannot do this. To put it colloquially, the impact of the punishment smacks us right in the face. According to Garland,

Modern sensibilities display a definite selectivity. They are highly attuned to perceive and recoil from certain forms of violence, but at the same time they have particular blind spots, or sympathetic limitations, so that other forms are less clearly registered and experienced. Consequently, routine violence and suffering can be tolerated on condition that it is discreet, disguised, or somehow removed from view.²⁹

So, because of our selective sensibilities and sympathetic limitations, we tend to have a much stronger emotional reaction to corporal punishment than to imprisonment. This, in Garland’s view, explains why the typical “civilized” Western individual is unwilling to seriously consider the possibility of corporally punishing criminals.

Now, if Garland is right about this, it presents a major problem from a policy standpoint for the proponent of corporal punishment. A reformer would have a very difficult time convincing the public that corporal punishment should be reintroduced.

²⁸ *Ibid*, 243.

²⁹ *Ibid*, 243.

However, I don't think that it would be impossible to overcome public sentiment. Of course, public sensibilities are not static. Despite their force, they can be shaped by the political process and other social forces.³⁰ Also, reformers may be able to overcome public resistance by making the public aware of the very points that Garland raises. If people could be made aware of their own "blind spots" and forced to reflect on the suffering of prisoners, this could help to overcome resistance to corporal punishment.³¹ But I am not in a position to make strong claims about the prospect of success on this front, and I don't want to engage in speculative social science.

Of course, I am not employing Garland's remarks on this subject in an effort to support the claim that the changing of sensibilities fully explains the gradual shift from corporal punishment to imprisonment. Nor am I claiming that we have been completely fooled by our sentiments and that, once we see that, we should see that corporal punishment is morally permissible. Rather, I am claiming that Garland's remarks on this subject can help us to understand why corporal punishment is seen the way that it is in modern Western society. It seems quite plausible that our selective sensibilities and sympathetic limitations and biases contribute strongly to our reactions to corporal punishment and imprisonment. If this is the case, then we should be cognizant of this, and it should at least give pause to anyone who is confident in the obvious wrongness of corporal punishment. Sympathetic limitations and biases can make it difficult to

³⁰ *Ibid*, 246.

³¹ Garland makes a similar point on p. 246: "One important way in which critics and reformers have attempted to work on the sensibilities of the public (or at least upon the governing élite) is to try to make visible the brutality and suffering which is hidden in penal institutions – to bring violence out from behind the scenes, thus allowing it to impinge upon public consciousness and disturb the public conscience."

approach an issue soberly and see everything that is morally relevant. While we cannot eliminate these limitations, it often helps to be aware of them.³²

Also, to bring the discussion back to the point with which I started this section, I think that Garland's remarks provide me with an error theory. If he is right about the features of modern sensibilities, then this explains why so many reasonable, well-intentioned people are so confident in the obvious moral wrongness of corporal punishment. To the "civilized" 21st century Westerner, corporal punishment seems so clearly brutal and barbaric. How could it not be wrong? Garland offers us an explanation that enables us to see how this could become the "received wisdom" even if it is not true. Of course, this in itself does not show that the received wisdom is wrong. Showing that will take the rest of the dissertation.

Structure of the Dissertation

Here I will briefly describe the contents and structure of the dissertation in order to give the reader an idea of what to expect.

Chapter 1 is entitled "Preliminaries" and it is mostly devoted to laying the groundwork for the philosophical argumentation that is to come in the later chapters. I offer a definition of corporal punishment, articulate my two main theses, and explain the scope and limitations of this work. This is followed by a section in which I explain my theoretical framework and articulate my major assumptions. I then describe the types and methods of corporal punishment that I will be defending, and I devote a section to addressing pragmatic concerns about a particular method that I devote a lot of attention to: electric shock. The chapter ends with a discussion of the distinctions between torture

³² Part of what I am up to in this section is rhetorical. I make no apologies for that. I think that it is permissible given the controversial nature of my theses.

and the kinds of corporal punishment that I advocate. I do not defend torture, and this section should help to make that clear.

The argumentation in Chapter 2, “Pain, Suffering, and Deprivation,” is supposed to go a long way towards reversing the presumption against corporal punishment. After exploring the distinction between pain and suffering, I examine reasons that might be offered in defense of the view that suffering ought to be the focus of punishment. I argue that these reasons are not compelling, and that in fact there are good reasons to believe that causing psychological suffering (suffering without pain) is potentially more morally problematic than causing physical suffering (suffering from pain). Then, I discuss the view that punishment ought to focus on deprivation, as opposed to the causation of suffering. I criticize this view and argue that deprivation-focused punishments (e.g. imprisonment) are often more morally problematic than those that focus on suffering, and especially those that focus on physical suffering. Finally, I consider and reject the view that double-effect reasoning could be employed in order to get around my arguments.

In Chapter 3, entitled “Cruelty and Inhumaneness,” I explore the issues of whether or not corporal punishment is cruel or inhumane. The main reason why I focus on these concepts is that, as noted in the chapter, they are often invoked in philosophical discussions of the limits of permissible punishment. I discuss them in the same chapter because, on the analysis that I offer, they share important similarities. In the first two sections, I analyze cruelty and inhumaneness respectively. While I draw on the philosophical literature on these concepts, I offer analyses that I believe are somewhat revisionist. In the third section, I argue that corporal punishment is not necessarily cruel or inhumane, and in the fourth and final section, I argue that the practice has the potential

to be especially humane. Overall, the purposes here are to put to rest certain concerns about corporal punishment and to emphasize one of its major virtues.

Chapter 4 is, I believe, the most important chapter in the dissertation. It is entitled “Degradingness and Inhumanity,” and in it my main goal is to show that corporal punishment is not necessarily degrading or inhuman. I treat these concepts in the same chapter because, just as with cruelty and inhumaneness, I believe that they share important similarities. In addition to being used often in philosophical discussions of the limits of permissible punishment, specific objections to corporal punishment often invoke the concepts of degradingness or inhumanity or raise concerns that fall under those headings. In the first section of the chapter, I analyze the concept of degradingness, and in the second, the concept of inhumanity. For reasons that I explain, I then proceed with a focus on degradingness. I raise various objections from degradingness and then show that these objections raise two general problems, those related to concerns about “address” and those related to “reduction.” In the subsequent sections, I discuss those problems in turn and argue that the objections from degradingness fail to show that corporal punishment is morally impermissible. In the final section, I raise some relevant considerations that are related to the topic of the chapter but did not come up specifically in the previous sections. Overall, I think that this is the most important chapter because in it I critically discuss the most plausible and worrisome objections to corporal punishment.

Chapter 5, the final chapter, is entitled “Some Remaining Issues.” I focus here on two areas of concern that were not explicitly discussed in the previous chapters. First, I discuss some lines of objection to corporal punishment that stem from concerns about

humiliation. While I acknowledge the large empirical dimension of this particular issue, I argue that corporal punishment as I envision it would likely be able to avoid the charge of humiliation. I then turn my attention to the ambiguous concept of bodily integrity and concerns about corporal punishment that may stem from related worries. Just as with humiliation, I argue that while some forms and methods of corporal punishment may be wrong because they violate bodily integrity, the practice as I envision it would likely be able to avoid this charge. Finally, I end the chapter and the dissertation with some closing remarks that emphasize a few of the important conclusions and wider implications of this work.

Chapter 1: Preliminaries

What is Corporal Punishment?

In his “Corporal Punishment,” Geoffrey Scarre draws a distinction between corporal punishment in the broad sense and the narrow sense:

In the broad sense, any punishment inflicted on the body meant to cause physical pain, discomfort or injury counts as “corporal”, while for the term to apply in the narrow sense, the pain or harm must be intentionally produced by an act of battery or assault.¹

Examples of corporal punishment in the narrow sense include flogging and electric shock. Examples of broad but not narrow corporal punishment include sleep deprivation and various punishments that involve placing the person in uncomfortable positions for extended periods. In this work, I am interested in corporal punishment in the broad sense. In other words, I will not only be discussing punishments that involve directly and immediately causing pain to the punished person. I will also be discussing punishments that involve putting people in various uncomfortable circumstances and “stress positions.”

So, I offer a definition of corporal punishment that is very similar to Scarre’s: Corporal punishment is punishment imposed on the body meant to cause physical pain, discomfort or injury. I prefer “imposed” to “inflicted” because “inflicted” connotes direct causation of pain. When someone is placed in a stress position, it’s not clear that pain is being inflicted on them, but they are certainly being forced to undergo an imposition that is meant to cause them physical pain and discomfort.

¹ Geoffrey Scarre, “Corporal Punishment,” *Ethical Theory and Moral Practice* 6 (2003): 297.

Theses

The topic of this work is the ethics of corporally punishing criminals. It will be about the corporal punishment of criminals in the legal system, not of children in the home or in schools. Some of what I will say is probably relevant to the debate over the corporal punishment of children, but it is not my topic.

The two main theses of this work are as follows:

1. Corporally punishing criminals is not necessarily cruel, inhumane, inhuman, or degrading. Objections on these grounds, which claim that corporal punishment is wrong *in principle*, can be shown to be problematic.
2. Certain methods of corporal punishment can be shown to have significant morally relevant advantages over other currently popular forms of punishment, especially imprisonment.

Since this is a work of philosophy, I will mainly be engaging in conceptual analysis and normative argument. Of course, a comprehensive discussion of the corporal punishment of criminals would cover much more. There is an empirical dimension to this debate, and empirical questions relevant to the moral debate, for example whether corporal punishment is an effective deterrent. There is also a legal dimension, such as whether corporally punishing criminals violates the prohibition on cruel and unusual punishments contained in the Eighth Amendment of the United States Constitution. Because this is a philosophical work, and also because I am neither a social scientist nor a legal scholar, I will mostly steer clear of contentious empirical and legal issues. I will occasionally discuss empirical issues, but only when it is necessary in order to make a philosophical point. So, this work will *not* be a comprehensive case for

corporal punishment. I will, however, argue for claims that must be supported if corporal punishment is to be shown, all things considered, to be morally permissible.

Framework and Assumptions

Like most discussions of the moral dimensions of a practice, this discussion takes place within a certain theoretical framework and incorporates underlying assumptions. It is important to articulate some of the features of our framework and some of the underlying assumptions.

With respect to justificatory theories of punishment, I accept H.L.A. Hart's side-constrained consequentialist theory, as presented in "Prolegomenon to the Principles of Punishment." Hart seeks a compromise between utilitarian and retributivist justifications of punishment by distinguishing several questions. There is the question of *general justifying aim* ("What justifies the general practice of punishment?"), *distribution: liability* ("To whom may punishment be applied?") and *distribution: amount* ("How severely may we punish?"). Hart argues that the general justifying aim of punishment is consequentialist, but that there are limitations on how we can pursue our consequentialist aims. These limitations do not flow from consequentialist considerations, nor are they reducible to them. Justice and respect for persons impose *side-constraints* on who may be punished and how we may punish them.²

While I endorse side-constrained consequentialism, I do not want to use it as *the* framework for this work. I will focus much more on the side-constraints than on consequentialist elements, and the major issues to be discussed are relevant not only

² H.L.A. Hart, "Prolegomenon to the Principles of Punishment," Chap. 1 in *Punishment and Responsibility* (New York: Oxford University Press, 1968), 1-13.

to a side-constrained consequentialist framework, but to a retributivist framework as well. It is not necessary to use a comprehensive justificatory framework for this work. The most important element is the recognition that the pursuit of our punitive aims should be limited by constraints that follow from something other than utility. Justice and respect for persons must be considered, and a utilitarian framework cannot adequately take these considerations into account. The objections to a utilitarian justification of punishment are well-known, and there is no reason to rehearse them here, so I mention only the two major objections: Utilitarianism doesn't have the theoretical resources to oppose the punishment of the innocent or the disproportionately severe punishment of the guilty *on principle*.³

So, while this work does not presuppose a comprehensive justificatory framework, it does involve certain suppositions. These suppositions are relatively minimal and are accepted by most theorists. Retributivists, of course, come in many varieties, as has been ably demonstrated by John Cottingham in "Varieties of Retribution."⁴ Whatever their particular theoretical commitments, retributivists generally place high priority on justice, rights, desert, and respect for persons. So, they clearly recognize dimensions of moral evaluation that are not reducible to consequentialist considerations, and should see the concepts of cruelty,

³ Some argue that utilitarianism doesn't justify punishing innocents because punishment is *by definition* only directed against the guilty. This issue has often been addressed in the literature (for example in Hart, "Prolegomenon to the Principles of Punishment," 5-6). Regardless of whether or not punishment of the innocent is impossible for definitional reasons, the general point stands. The objection is that the utilitarian would be committed to either punishing or doing something that looks and feels exactly like punishment to an innocent person if doing so would promote the greatest overall balance of good over evil. This, presumably, would be wrong, so it shows that the theoretical framework is flawed. No attempt at a "definitional stop" (as Hart calls it) alters this point. The utilitarian can, of course, bite the bullet and insist that such punishment (or punishment*, or whatever) would in fact be justified. There is a large literature and ongoing debate about this and similar issues (see Kevin Murtagh, "Punishment," *The Internet Encyclopedia of Philosophy*), and I cannot go into it further here. I think that what has been said is sufficient to motivate my assumptions.

⁴ John Cottingham, "Varieties of Retribution," *Philosophical Quarterly* 29 (1979): 238-246.

inhumaneness, inhumanity, and degradation as pointing to deontological side-constraints that prohibit certain kinds of punishment on principle. Side-constrained consequentialists, while they disagree with retributivists about the aim or aims of punishment, agree that there are deontological side-constraints that forbid certain kinds of punishment on principle, and they should recognize prohibitions on cruelty, inhumaneness, inhumanity, and degradation as among these constraints. So, while I favor side-constrained consequentialism, what is covered in this work should be relevant for those who agree with me about the justification of punishment as well as for retributivists of many different stripes.

Also, as is probably clear by now, I am no abolitionist. In this work, I will assume that punishment is justifiable. In fact, I will assume a bit more: that severe, or perhaps I should say significant, punishment is justifiable. What I mean by this is that punishment that goes beyond relatively mild impositions (such as probation) is justifiable. This assumption is also widely accepted.

In addition, it should be clear that I am working within a punitive justice, as opposed to a restorative justice, paradigm. Proponents of restorative justice would of course take exception to some of my main assumptions, but it is outside the scope of this work to defend those assumptions against their criticisms.⁵ I think that my basic assumptions are accepted widely enough to justify proceeding in this way.

Methods Under Consideration

While our discussion will of course be quite theoretical, it is sometimes difficult to talk about corporal punishment in the abstract. It is therefore helpful to

⁵ An interesting survey article that defends restorative justice is John Braithwaite's "Survey Article: Repentance Rituals and Restorative Justice," *The Journal of Political Philosophy* 8, no. 1 (2000):115-131.

have some particular methods in mind. While I will sometimes discuss a particular virtue of a particular method, I will for the most part refer to general types of corporal punishment when the discussion turns more concrete. For example, I will refer to “acute pain” corporal punishment, unless there is a particular reason to refer to “electric shock” corporal punishment, which is an example of acute pain corporal punishment. Since I am ultimately interested in the relevant normative issues, the pragmatics of particular methods are not very important for my purposes. For instance, if it turns out that a particular example of a type of punishment that I mention cannot be appropriately monitored or demonstrated to be safe, then my arguments will not apply to that punishment. If the reader deems a particular example to be inherently unsafe, then he may change the example.

Many once popular methods for inflicting corporal punishment are clearly morally impermissible. Some past methods left permanent injury. An obvious example is chopping off a person’s hand. Perhaps the most conspicuous reason a permanent injury is wrong is that it amounts to a lifelong punishment. Other methods tend to break the skin and leave permanent scars, for example whipping with certain kinds of implements, particularly those tipped with metal spikes or other sharp objects. These risked stigmatizing the punished person for life. Other methods, such as placing a person in the stocks in a public square, were humiliating. Then there are the methods that involved inflicting so much pain and for such a long period of time that they are to be counted as tortures. (I discuss the difference between corporal punishment and torture in a later section.) The types of corporal punishment that I

will defend are those that do not leave permanent physical injury or scars, do not humiliate the punished person, and do not count as tortures.

There are three general types of corporal punishment that I will be defending:

1. Acute pain: These are corporal punishments that involve inflicting relatively severe pain for short periods of time. The application of the stimulus that causes pain may last for only a matter of seconds. One example of this type of punishment is electric shock, which is advocated by Graeme Newman in *Just and Painful: A Case for the Corporal Punishment of Criminals*.⁶ Another example is flogging, recommended (tentatively) by Geoffrey Scarre in “Corporal Punishment.”⁷

2. Stress position: These are corporal punishments that cause the punished person to experience bodily pain by making them remain in an uncomfortable position for an extended period. These punishments cause pain that is not as severe as the acute pain corporal punishments, but they last longer. A simple example of a stress position corporal punishment is enforced standing for an extended period. Certain punishments of this sort have been carried out in public, in order to combine humiliation with physical discomfort. When I discuss these punishments, I do not advocate their being carried out in public. The pillory used to be used to humiliate, but it can also be used as a stress position corporal punishment. Another example is the bilboes, which holds a person’s legs in the air by the ankles while he lies on his back.

⁶ Graeme Newman, *Just and Painful: A Case for the Corporal Punishment of Criminals* 2nd ed. (Albany, NY: Harrow and Heston Publishers, 1995), Chap. 5.

⁷ Scarre, “Corporal Punishment,” 303 (footnote). Flogging can be carried out with a variety of implements, some of which tend to scar and some of which do not. Scarre has in mind flogging that does not break the skin or scar.

3. Exposure: These punishments involve exposing the person to an environment or stimulus in order to cause pain significantly less severe than acute corporal punishment, but for a longer period. An example is exposing a person to hot or cold air or weather. Another example is bringing them into contact with cold water.

Now, most if not all of these methods *can* be torturous if they are done intensely enough or for long enough, and some have been used to torture. But they are not *necessarily* torturous. With respect to some of these methods, this is completely obvious. In high school, I used to have to stand in late detention for a full hour. This can, and should, be considered a mild form of corporal punishment. It was certainly a punishment, and it caused leg and back pain. Obviously, it was not torture. However, making a person stand for a full day would almost definitely cause enough pain to count as torture.

All punishments of these types should be carried out and supervised by trained personnel, preferably medical personnel. Physical examinations would be required prior to punishment in order to determine whether the punishment could be carried out safely. Contemporary defenders of corporal punishment are explicit about these sorts of requirements.⁸

Regarding the potential for negative after-effects, this is surely an empirical question, but it is imperative that I make a cautionary point. Despite claims to the contrary⁹, we cannot easily generalize from data collected in interrogational contexts to likely effects in punitive contexts. Baçoğlu, Livanou, and Crnobarić have done research with victims of torture and other kinds of “ill treatment” and found that

⁸ Scarre, “Corporal Punishment,” 303; Newman, *Just and Painful*, Ch. 5.

⁹ Jessica Wolfendale, “The Myth of ‘Torture Lite’,” *Ethics & International Affairs* 23, no. 1 (2009): 59, footnote 1.

...aggressive interrogation techniques or detention procedures involving... exposure to aversive environmental conditions, forced stress positions... restriction of movement... and other psychological manipulations conducive to anxiety, fear, and helplessness in the detainee do not seem to be substantially different from physical torture in terms of the extent of mental suffering they cause, the underlying mechanisms of traumatic stress, and their long-term traumatic effects.¹⁰

If this is true, however, the results do not generalize to the kind of punitive context that we are discussing. This is not a criticism of these researchers, since I am sure that they would acknowledge this fact. It is, rather, a cautionary note directed at those who would mistakenly use these findings to argue against the kinds of corporal punishment that I am advocating. The subjects in the cited study were war survivors who had been captured and tortured and exposed to various sorts of ill treatment. Of course, they had no assurance of the kinds of safeguards and limitations that I am advocating for punitive corporal punishment. This makes quite a significant difference, given the psychological stress of not knowing how far the torturer will go, which is very likely to be a salient element in the experience of the captive during wartime.

Pragmatic Concerns about Electric Shock Punishment

Although I will focus on theoretical issues, it may be useful to give some pragmatic details about how electric shock punishment could be carried out. In addition to giving the reader a better idea of what kind of punishment I am defending, I will also address some possible concerns about safety and the association of electric shock with torture. Electric shock is the method favored by Newman in *Just and*

¹⁰ Metin Başoğlu, Maria Livanou, and Cvetana Crnobarić, "Torture vs. Other Cruel, Inhuman, and Degrading Treatment: Is the Distinction Real or Apparent?" *Archives of General Psychiatry* 64 (2007): 284.

Painful, and he goes into some detail about how the punishment could be carried out in chapter 5, "Electric Shock: The Fairest Punishment of All." I am not sure that I endorse every aspect of the scenario that he describes, but I think that most of what he says is quite reasonable. Since my explanation of the scenario would be approximately as long as his passage, I will quote it in its entirety.

Twenty-year old John Jefferson stands beside his lawyer, the public defender.

"John Jefferson," says the judge, "the court has found you guilty of burglary in the first degree.

Because this is your first offense, but the damage you did was considerable, I sentence you to..." The judge pushes a few buttons at his computer console. The average sentence for similar cases to Jefferson's flashes on the display, "...five shock units."

"You will be taken immediately to the punishment hall to receive five shock units. Next case."

The victim of this crime is sitting at the back of the court. He approaches the court clerk, who directs him to the punishment hall where he will be able to watch the administration of the punishment.

Jefferson's wife and child are ushered to the waiting room where they will await Jefferson's return after he has been punished.

Meanwhile, in the punishment hall, Jefferson is seated in a specially designed chair. As part of the arrest procedure he has already received a medical examination to establish that he was fit to receive punishment.

In addition to the victim, a few members of the press are seated on the other side of the glass screen.

The punishment technician, having settled the offender in the chair, returns to an adjoining room where he can observe the offender through a one way screen. A medic is also present.

The technician sets the machine at the appropriate pain level, turns the dial to " 5, " and presses the button.

Jefferson receives five painful jolts of electricity to his buttocks. He screams loudly, and by the time the punishment is over, he is almost crying with pain.

The technician returns and releases the offender. "Stand and walk a little," he says.

Jefferson walks around, rubbing his buttocks. A shade drops over the spectators' screen.

"Do you still feel the pain?" asks the medic.

" Goddam, I sure do! But it's getting better. Can I go now?"

"Just sign here, and you've paid your dues."

Jefferson sighs happily and asks, "Which way to the waiting room?"

"Straight down the passage and second left."

Jefferson enters the waiting room where his wife rushes into his arms, crying, "I'm so glad it's over!

Thank goodness you weren't sent to prison."¹¹

For the most part, I endorse the specifics of the procedure explained here by Newman. The intensity and duration of the punishment are standardized and determined by the seriousness of his offense. The offender is taken to a “punishment hall” where there are trained personnel and a medic present. There has been a medical examination prior to the punishment to ensure that the offender can undergo the punishment safely. The shocks are intense but brief and, after a short recovery period, the offender is allowed to leave and be with his loved ones. I am not sure that the victim and members of the press should be allowed to watch, for reasons to be discussed later on. Basically, I think that we might want to keep observers at an absolute minimum consistent with ensuring safety so that we reduce the chances that the offender would feel humiliated. Also, I am not sure that the buttocks are the best place to apply the shock, given that they are a private area. But, other than those concerns, I think that the procedure outlined by Newman is defensible and practical.

I do not mean to imply that this is exactly how the procedure should be carried out. Ultimately, in designing the procedure, experts should be consulted and care should be taken to minimize the risk of unnecessary physical and psychological suffering. Regarding the design of the procedure, Newman states that “[s]ome

¹¹ Newman, *Just and Painful*, 57.

experimentation may... be necessary as to the appropriate parts of the body to attach the electrodes, and the amount of voltage and current to apply without causing tissue damage.”¹² He states that although there isn’t much data available on the use of electricity to administer pain, there is some research on its use in order to reduce “seriously disruptive behavior among retarded individuals.” He cites a few studies and states that none of the research has shown serious negative side effects produced by electric shock.¹³ One of the papers that he cites is “Employing Electric Shock with Autistic Children: A Review of the Side Effects” by Lichstein and Schreibman. In the abstract, they state

The reported side effects of contingent electric shock were reviewed in an attempt to evaluate the validity of these fears (of negative side effects). The review indicated that the majority of reported side effects of shock were of a positive nature... The few negative side effects reported included fear of the shock apparatus, negative emotional behavior, and increases in other maladaptive behavior.¹⁴

Neither physical injury nor death was reported as a result of the shocks. Aside from the fact that they surely would have mentioned it, they report some technical information about the shocks used in the studies (4- to 5-mA [milliamperes]) and state that “[a]lthough this is subjectively experienced as painful, this is a safe level of current.” They also contrast the shocks used in these studies with electroconvulsive shock, stating that “there are no convulsions, no loss of consciousness, and no tissue damage.”¹⁵

In “Negative Reinforcement and Punishment,” Crosbie states that “shock is commonly used in psychological laboratories (a recent search found approximately

¹² *Ibid*, 65, Endnote 3.

¹³ *Ibid*, 65, Endnote 3.

¹⁴ Kenneth L. Lichstein and Laura Schreibman, “Employing Electric Shock with Autistic Children: A Review of the Side Effects,” *Journal of Autism and Childhood Schizophrenia* 6, no. 2 (1976): 163.

¹⁵ *Ibid*, 165.

100 studies that used shock in the last 5 years)” and that “there is virtually no possibility of harm to subjects” if proper safeguards are in place and precautions are taken.¹⁶ Electric shock has been used for years at the Judge Rotenberg Educational Center and no students have died as a result of it.¹⁷ They use a device there called the Graduated Electronic Decelerator as part of the treatment of some students who have severe psychological problems. For example, it is sometimes used to stop the students from engaging in self-injurious behavior. With respect to safety issues, according to Israel, von Heyn, Connolly, and Marsh,

Two consulting cardiologists, two neurologists, a psychiatrist, and a pediatrician, all of whom have examined students who have received many applications of the GED, have expressed the opinion that the GED’s stimulation parameters are within safe levels.¹⁸

So, although I am not prepared to offer recommendations about the best instrument to use, the number of volts to administer, or other sorts of technical issues, I can state that it is possible to administer painful electric shocks to human beings with minimal risk of bodily damage or death.

Given the recent controversy surrounding use of Tasers, it is important to establish that electric shock can in fact be used safely. According to Amnesty International, they have “recorded more than 290 deaths of individuals in the USA

¹⁶ John Crosbie, “Negative Reinforcement and Punishment,” in *Handbook of Research Methods in Human Operant Behavior*, ed. Lattal and Perone (New York: Plenum Press, 1998), 167.

¹⁷ “Judge Rotenberg Center Website.” <http://www.judgerc.org/> (accessed March 26, 2010). Five students have died at the Center, but the deaths were from natural causes and were not related to the use of skin shock. The Center sometimes accepts students with severe medical conditions.

¹⁸ Matthew Israel, Robert von Heyn, Daniel Connolly, and David Marsh, “A Remote-Controlled Electric Shock Device for Behavior Modification,” Judge Rotenberg Educational Center Publication No. 92-3. <http://www.effectivetreatment.org/remote.html> (accessed March 24, 2010). Section on “Safety Issues.”

and Canada struck by police Tasers.”¹⁹ They have called for thorough inquiries and research into the safety of Taser stun guns and similar devices, collectively known as “conducted energy devices.”²⁰ If it turns out that there is significant risk of serious injury or death when these devices are used, then clearly they should not be used for electric shock punishment. But it is not necessary to use these devices, since others are available that have an established track record of safe usage.

Before moving on, I will briefly discuss the problem posed by the common association of electric shock with torture. When a proposed method of punishment is commonly associated with torture, this presents a clear problem for proponents of that method from a policy standpoint. It would, of course, be quite difficult to introduce electric shock punishment without convincing a large portion of the population that it is not torture. Could people be convinced? If so, how? These are sociological questions and I am not prepared to make strong claims in response to them, but I can say a few things.

It would, of course, be necessary for political leaders and other influential people to make the case for this method of punishment and “sell” it to the public. They could make many of the same points that I have made and will make throughout this work. We will soon discuss why corporal punishment is not necessarily torture, and some of the points made there could be part of the case made to the public. However, simply making the case at the rational level would probably be insufficient, given the structure of modern sensibilities and the strong emotional reaction that

¹⁹ Amnesty International, “Amnesty International’s concerns about Taser® use: Statement to the U.S. Justice Department inquiry into deaths in custody,” Amnesty International, 2007. <http://www.amnesty.org/> (accessed March 24, 2010), 2.

²⁰ *Ibid.*, 1.

people in contemporary Western societies tend to have to the infliction of physical pain. I discussed this issue in the “Error Theory” section of the Introduction, and I have little to add here. However, it does seem to me that a major “selling point” of electric shock punishment is its relative quickness, so it could be continually stressed that it doesn’t require extended separation from loved ones. Stressing this point may help to erode some of the opposition to this form of punishment. Of course, this also requires making people care about the psychological suffering of prisoners, and this, unfortunately, is no easy task.

It seems to me that most people do not have a very clear idea of what torture is supposed to be. If they think that electric shock is torture, it’s probably because they think that it’s a really terrible, painful thing to do to a person and that it should rarely, if ever, be done. In other words, torture, for most people, probably functions mostly as an impact term that follows the antecedent judgment that a particular kind of treatment meets a requisite level of pain and is unjustifiable in all but perhaps the most extraordinary circumstances. So, if people can be convinced of the justifiability of electric shock as a method of punishment, then they can be convinced that it is not torture. As I said, emotional appeals will be necessary on this front in order to counter the common tendency to discount the intensity of the psychological suffering that results from the methods of punishment that are commonly used today.

Corporal Punishment is Not (Necessarily) Torture²¹

I should say more about the differences between torture and the kinds of corporal punishment that I am defending. I want to make it clear that I am not

²¹ The title of this section is adapted from Newman’s chapter in *Just and Painful*: “Pain is not (Necessarily) Torture” (Chap. 13).

defending torture, and I also want to put aside objections that involve attempts to dismiss what I am advocating by lumping it in with torture. This discussion will also allow me to make more explicit the kinds of corporal punishment that I have in mind. As I said above, of course there are instances of corporal punishment that are torturous, but corporal punishment isn't necessarily torturous. This is easy to see with mild corporal punishment, such as the example that I used above: standing for one hour. But it might not be so easy to see how more severe corporal punishments differ from torture. Also, as I said, some of the methods that I have mentioned can be used to torture, and this makes it important to show the differences between what I am defending and torture.

Unfortunately, there is no consensus as to the definition or best conception of torture. Nevertheless, there are certain features that characterize a large majority of the instances of torture, and some of these features are strong candidates for reasons why torture is so morally problematic. By looking at some of these features, on one hand, and at some features of the corporal punishment that I am advocating, on the other hand, we can see that the types of corporal punishment I am defending are very far from any "core" conception of torture. Because of this, any facile attempt to dismiss my defense of corporal punishment by lumping it with torture is much too quick.

Perhaps the most salient difference between torture and the kinds of corporal punishment that I am advocating has to do with the "breaking" of a person. That a central aspect of torture is the attempt to break the subject is pointed out by a number

of theorists. Seumas Miller contrasts punitive torture with non-torturous corporal punishment in his Stanford Encyclopedia of Philosophy entry on “Torture”:

And when torture — as opposed to, for example, flogging as a form of corporal punishment — is used as a form of punishment it typically has as a proximate, and in part constitutive, purpose to break the victim's will. Hence torture as punishment does not consist — as do other forms of punishment — of a determinate set of specific, pre-determined and publicly known acts administered over a definite and limited time period.²²

Michael Davis puts the point this way in his “Torture and the Inhumane”:

To decide whether someone is being tortured, we should look at the entire process, asking – among other questions – whether the purpose of the process is to use suffering to “break” its subject. Some forms of mistreatment, say, threats or caning, may be (a part of) torture in one process and not in another.²³

Now, the “breaking” aspect of torture is probably most obvious with interrogatory torture, since the goal there is to get people to a point where their resistance is broken and they will tell the torturer what he wants to know. But I think that Miller is correct to state that punitive torture also is supposed to break the victim’s will.²⁴ Even if the goal is not to get the tortured person to reveal information, the torture is still supposed to “push them to the brink” and get them to the point where they “can’t take it

²² Seumas Miller, “Torture,” *The Stanford Encyclopedia of Philosophy*, Spring 2008 Edition, Section 1.

²³ Michael Davis, “Torture and the Inhumane,” *Criminal Justice Ethics* 26, no. 2 (2007): 33.

²⁴ Perhaps there is a distinction to be made between breaking the will and breaking the person. It is arguable that the focus in punitive torture is better characterized as breaking the person than breaking the will (John Kleinig, personal communication). With interrogatory torture the torturer does want to break (or perhaps severely bend?) the will of the tortured in order to make him give up information that he wouldn’t give up otherwise. It might be thought that with punitive torture there is not this same effort to break the will. But even though efforts to direct the will may be absent in punitive torture, it still seems that punitive torture aims to overcome the *will to resist*. I think, therefore, that we can still state that punitive torture is supposed to break the victim’s will, although not in a way that is identical to what goes on in interrogatory torture. This distinction between breaking the will and breaking the person, however, is probably not very important for my purposes, since my main point is that torture characteristically involves a kind of breaking, whereas the kind of corporal punishment that I advocate is not supposed to break the person or his will.

anymore.” This is in part why the prospect of torture is met with such horror. The torturer uses his power to push “a sentient, helpless being to the limits of its ability to suffer.”²⁵ Now, we can argue over whether or not “breaking” points to a necessary condition, but there can be no doubt that it points to a salient feature in paradigm instances of torture.

The corporal punishments that I am defending are supposed to hurt the punished person, but they are not supposed to break him. Miller does a nice job of pointing out some features of non-torturous corporal punishments. These punishments are limited in both intensity and duration and they are administered according to pre-determined and publicly announced rules. A person who is about to face the kind of corporal punishment that I am advocating knows that he will not be put at the mercy of a seemingly omnipotent individual whose task is to push him to the breaking point.

Perhaps a more straightforward difference between torture and the kinds of corporal punishment that I am defending has to do directly with intensity and duration. In discussing this difference, it is difficult to be very precise, as there is really no way to draw a line that separates non-torture from torture in terms of amount of pain. But clearly the intensity and duration of pain are factors that are relevant to determining whether or not a punishment is torturous. It is probably not helpful to say that torture generally involves excruciating pain, whereas the corporal punishment that I am defending would not quite rise to that level. The distinction can be drawn a bit better by focusing on the likely mental state of a reasonable person anticipating being treated in a certain way. Generally, when we think of torture, we

²⁵ Davis, “Torture and the Inhumane,” 35.

think of the kinds of treatment that would cause a reasonable person, aware that it was to be administered, extreme anguish and terror. Given what occurs during paradigm cases of torture (for example, burning or crushing of body parts), this kind of mental state would be completely reasonable. By contrast, the kinds of corporal punishment that I am defending would involve treatment that a reasonable person would anticipate with fear and anxiety, but not extreme anguish and terror. Newman, as noted, recommends electric shock as the method of corporal punishment, and he gives as an example a punishment that involves five credibly painful electric shocks that take place during a punishment session that lasts less than a minute.²⁶ This is hardly the kind of treatment to look forward to, but it is unlikely that a person anticipating this treatment would experience the kind of anguish and terror that accompanies anticipating torture. Admittedly, this is imprecise, but I am trying to characterize the differences in intensity and duration without merely using adjectives to describe different levels of pain.

Torture denotes a kind of extreme treatment that we rightly contemplate with horror. “Torture” evokes an experience that lies at the limit of a human being’s capacity to suffer. The corporal punishment that I am advocating is simply not supposed to be that sort of thing.

While it is useful for me to say something about the differences between torture and the kinds of corporal punishment that I am advocating, it is best not to belabor the issue. As John Kleinig has said, the word torture carries a lot of moral baggage. Perhaps, rather than focusing on whether or not a certain kind of treatment counts as torture, we should focus on whether it is cruel, inhumane, inhuman, and/or

²⁶ Newman, *Just and Painful*, Ch. 5.

degrading.²⁷ If we focus on these questions, then we are closer to examining the reasons why certain people find particular kinds of conduct to be objectionable. This procedure is more productive than trying to determine the borders of a category that almost certainly lacks sharp borders.²⁸ In the coming chapters, directly confronting questions about cruelty, inhumaneness, inhumanity, and degradation will occupy a large part of the discussion.

²⁷ Kleinig, Lecture notes, Fall 2005.

²⁸ This also explains why I don't find it necessary to explore the distinctions between torture and "torture lite," and between torture lite and corporal punishment. (Kleinig discusses "torture lite" in "Ticking Bombs and Torture Warrants," *Deakin Law Review* 10, no. 2 [2005]: 620-622.) There may be interesting questions on this topic, such as "Is it possible to draw a morally relevant distinction between torture and torture lite? If so, how?" But I don't see much of importance for our discussion coming from an analysis of torture lite. It will be more productive for us to stay closer to substantive moral argument and the reasons on offer for and against corporal punishment.

Chapter 2: Pain, Suffering, and Deprivation

At the outset of this chapter, I will state two assumptions:

1. Severe punishment is sometimes justifiable.
2. Punishment involves intending to make people hurt and/or deprive them of something.

I mentioned assumption #1 in the “Framework and Assumptions” section of Chapter 1. Regarding #2, I will assume that punishment involves a sanction intended to result in at least one of the following: pain, suffering, or deprivation. Almost everyone, if not everyone, should be able to agree with this assumption. If this is not a conceptual point, it is very close to one. Notice that I am not claiming, nor do I believe, that the overall aim of punishment is to make people hurt or deprive them of something. Rather, I claim that, if we are going to punish people, we are going to do things to them intended to either make them hurt or deprive them of something, or both.

Taken together, these two assumptions entail that it is sometimes justifiable to make people hurt badly and/or visit major deprivations on them. Stated so baldly, such a claim is a bit jarring, but it should really be relatively uncontroversial. We visit major deprivations on serious offenders all of the time, and these deprivations lead to severe suffering. We should find this regrettable, but almost all theorists agree that it is sometimes justified.

In motivating my project, I have often relied on the following statement: We punish people all the time in ways that cause them immense amounts of mental pain. We tend to find this regrettable, but justifiable. However, whenever there is talk of

punishing by inflicting physical pain, most people react with outrage, and assume that such a punishment would be barbaric, uncivilized, cruel, or degrading. Why is that?

Such a statement works if the aim is motivating reflection, but it hints at certain assumptions and raises important issues that need to be explored. Is punishment “about” pain? Perhaps this is an outdated view of punishment. Maybe we have begun to see punishment as being about deprivation, as opposed to pain. If so, the physical pain/mental pain dichotomy doesn’t capture all that punishment could be about. Also, the physical/mental pain dichotomy may distort what is at issue in another way. Instead of “mental pain,” perhaps we should talk about “suffering,” and maybe suffering is a phenomenon distinct from pain, and the pain/suffering distinction might have some normative importance.

In discussing the issue of what punishment is, or should be, “about,” I will be speaking of the “object” of punishment. “Object” is to be distinguished from “aim.” The aim of punishment refers to what we are trying to achieve by punishing a person. It refers to our goal in punishing. Thus, candidates for the aim of punishment are, for example, crime reduction and retributive justice. The object of punishment, on the other hand, refers to what we are trying to do to the punished person in order to achieve the goal and reach the aim. Are we trying to make the person feel pain? Are we trying to make him suffer? Are we trying to deprive him of something that he values? These questions have to do with the object of punishment, and this is what I will be focusing on here.

The object of punishment is also to be distinguished from the “form” of punishment, which is the general type of punishment. For example, forms of

punishment include corporal punishment and imprisonment. Here is an illustration of my usage: “The aim of punishing a person ought to be to deter crime. The object of punishment ought to be the causation of physical pain, and the form of punishment that best enables us to cause physical pain is corporal punishment.”

In what follows, I will not be arguing that there is any single object of punishment. Rather, I will be focusing on what is justifiable. I will explore the distinction between pain and suffering and employ conceptions that enable us to see differences between them. I will examine certain reasons that might be put forth for thinking that causing suffering is justifiable whereas causing physical pain is not. It will be established that such a position is difficult to sustain. In fact, we will see that there are good reasons to support the claim that psychological suffering (suffering without physical pain) is potentially more morally problematic than physical suffering (suffering from physical pain).

I will also look at reasons why it might be thought that imposing deprivations is justifiable whereas intending to make people hurt is not. It will be shown that this position is also quite difficult to maintain. I will argue that deprivation-focused punishments are potentially more morally problematic than those whose object is suffering, and especially those whose object is physical suffering (suffering from physical pain). I will then show that appealing to the doctrine of double effect will not allow the deprivation theorist to get around my arguments.

Overall, the argumentation in this chapter will go a long way toward helping to establish the claim that it is justifiable to punish by inflicting physical pain. I should note that I will not be directly addressing concerns about cruelty,

inhumaneness, inhumanity, and degradation here, since such concerns will be addressed in subsequent chapters.

Pain vs. Suffering

It is difficult to draw a clear conceptual distinction between pain and suffering, and this difficulty is worsened by the frequent use of the term “mental pain.” When speaking of “pain and suffering,” does “pain” refer to physical pain whereas “suffering” refers to mental pain, such that there is some unitary phenomenon, “painfulness,” that is common to both?

In *The Problem of Pain*, C.S. Lewis distinguishes between “A” pain and “B” pain:

Pain has two senses which must now be distinguished. *a.* A particular kind of sensation, probably conveyed by specialized nerve fibers and, recognizable by the patient as that kind of sensation whether he dislikes it or not... *b.* Any experience, whether physical or mental, which the patient dislikes... Pain in the *b* sense, in fact, is synonymous with “suffering,” ...¹

There is something to be said for drawing the distinction in this way. For Lewis, there is physical pain and mental pain, and as long as the person is having an experience that he dislikes, he is suffering. This way of viewing matters has the virtue of simplicity, and it might well correspond to the way in which the terms “pain” and “suffering” are often used in ordinary language. But some thinkers have argued that the relationship between pain and suffering is more complex.

In “Human Dignity and the Ethics and Aesthetics of Pain and Suffering,” Daryl Pullman states that pain and suffering are “phenomenologically distinct.”

¹ C.S. Lewis, *The Problem of Pain* (New York: Macmillan Publishing Co., 1962), 90.

Pain does not necessarily involve suffering. A woman may experience the pain of childbirth as severe but yet “rewarding”. Hence she would not describe the pain experience as an experience of suffering. Conversely, it is possible to suffer without experiencing pain. A patient with a severed spinal cord might suffer because of the loss of bodily function even though physical pain was absent or well managed.²

The childbirth example is meant to illustrate that even extreme physical pain may not result in suffering if that physical pain is perceived as part of an overall positive experience. The severed spinal cord example is supposed to show that even without physical pain a person may suffer if he perceives himself as lacking control and feels less “intact” as a person.

Pullman’s analysis of the relationship between pain and suffering borrows heavily from Eric Cassell’s. In *The Nature of Suffering*, Cassell states that, “(m)ost generally, suffering can be defined as the state of severe distress associated with events that threaten the intactness of person.”³ Since persons are psychological as well as physical beings, suffering may result from events that threaten a person’s psychological intactness, physical intactness, or both. Being intact relates to being, in some sense, “whole,” and being secure and in control of yourself. If pain is present and a person perceives the pain as a threat to his intactness, he will suffer:

...people in pain frequently report suffering from pain when they feel out of control, when the pain is overwhelming, when the source of the pain is unknown, when the meaning of the pain is dire, or when the pain is apparently without end... That this is the relation of pain to suffering is strongly suggested by the fact that suffering can often be relieved *in the presence of continued pain*, by making the source

² Daryl Pullman, “Human Dignity and the Ethics and Aesthetics of Pain and Suffering,” *Theoretical Medicine and Bioethics* 23 (2002): 77.

³ Eric J. Cassell, *The Nature of Suffering and the Goals of Medicine* (New York: Oxford University Press, 1991), 33.

of the pain known, changing its meaning, and demonstrating that it can be controlled and that an end is in sight.⁴

So, as we can see, the Pullman/Cassell analysis of the relationship between pain and suffering is more complex and intricate than the analysis offered by Lewis. When speaking of pain, Cassell is referring to physical pain, whereas suffering, on his view, is a complex psychological phenomenon characterized by severe distress that is caused by the perception that certain events constitute a threat to a person's "wholeness," whether physical or psychological. There is much to be said for this way of distinguishing pain from suffering. Cassell's view is derived from his clinical observations (he is a physician) and is grounded in actual patient reports. Rather than merely parsing concepts philosophically, his view has the virtue of being derived from interactions with actual sufferers describing their experiences. His view also explains why pain is neither necessary nor sufficient for suffering. Pullman's examples of giving birth and the severed spinal cord are compelling, and Cassell's view can explain why this is so.

For my purposes, Cassell's view also has the virtue of explicating the relationship between pain and suffering at the phenomenological level. In his definition of suffering, he speaks of "severe distress," which has to do with how a person feels, and this distress has to do with a person's perception of an event. Because of his emphasis on the phenomenological, it is possible to contrast his definition of suffering with a working conception of pain that focuses on its

⁴ *Ibid*, 36.

phenomenological aspects. By conceiving of pain in a certain way, I am attempting to avoid a lengthy discussion of the epistemology and metaphysics of pain.⁵

So, regarding pain, I begin with the definition offered by the International Association for the Study of Pain. According to Murat Aydede, this definition has been widely accepted by the scientific community:

Pain: An unpleasant sensory and emotional experience associated with actual or potential tissue damage, or described in terms of such damage.

Note: Pain is always subjective... Many people report pain in the absence of tissue damage or any likely pathological cause; usually this happens for psychological reasons.⁶

This definition focuses on pain as particular sort of experience, and the note stresses that pain is always subjective. Of course, pain does not always result from actual or potential tissue damage, but the pain experience typically occurs under such circumstances, so it is reasonable to speak of pain as “associated” with such damage. This definition is not uncontested, and it may well not fully capture all that pain is. But, for our purposes, it is helpful and on the right track.

However, making a workable contrast between pain and suffering requires that this definition be modified to avoid aforementioned confusions about “mental pain.” In defining pain as a “sensory and emotional experience,” this definition seems to include “mental pain” as pain. That is fine, but for the purposes of our discussion, I want a clearer contrast between the two phenomena that I am concerned with: physical pain, and suffering. So, when speaking of pain, I will be speaking of physical pain, unless I specify otherwise. The emphasis will be on the sensory, as

⁵ The literature on these subjects is vast, and discussion of it would take us too far from the main subject. For a discussion of epistemological and metaphysical issues related to pain, see Murat Aydede, “Pain,” *The Stanford Encyclopedia of Philosophy*.

⁶ Aydede, “Pain,” *The Stanford Encyclopedia of Philosophy*, Winter 2007 Edition, Section 1.2.

opposed to emotional, experience. Pain, for my purposes, will be an unpleasant sensory experience associated with actual or potential tissue damage.

So, we now have reasonable working conceptions of pain and suffering that allow us to see a distinction between the two. We must now explore reasons why this distinction might be morally important, and reasons why it might be thought that suffering is a better candidate for the object of punishment than pain.

Drawing on Cassell, Pullman states that “suffering is experienced by persons, not bodies.”⁷ In order for a being to suffer, that being must have a fairly complex psychology, so that the being can recognize an event as a threat to its intactness. In fact, it must have a sense of itself as an intact being in the first place. Feeling pain, on the other hand, does not require this complex psychology. In biological organisms, it just requires a nervous system and a brain, or something like a brain. So, suffering, as a complex phenomenon that is experienced by persons, might be thought a better object of punishment for beings possessing the complex psychology required for personhood.⁸ It involves our rationality in a way that mere pain does not.

Because suffering involves our rationality, there are a few reasons why it might be thought morally preferable to pain as an object of punishment. It might be claimed that punishing people by making them suffer involves recognizing them as rational beings, whereas punishing by inflicting pain does not. Suffering, after all, requires the exercise (or at least operation) of the capacities that make us persons. It

⁷ Pullman, “Human Dignity and the Ethics and Aesthetics of Pain and Suffering,” 78.

⁸ “Persons” here is contrasted with “bodies,” not “non-human animals.” The Pullman/Cassell view is clearly an account of suffering in human beings. It may need some refining to deal with cases of suffering in non-human animals. I think that such a refinement is possible. Even if we do not want to say that certain non-human animals are persons, I think that it is fairly clear that they exhibit some of the features of persons that Cassell discusses (see next section). That is probably what is necessary in order to be able to extend his account to cover non-human animals.

might be argued that making people suffer involves engaging them in the way that human beings ought to be engaged. Despite the fact that suffering results from events that people perceive as threatening to their intactness, it might still be thought preferable given that it involves engaging them at the rational, as opposed to merely sentient, level. This issue will be discussed more fully in the chapter on degradation, but it is worth mentioning here as a possible reason for privileging suffering over pain.

Suffering might also be thought superior for expressive reasons. When people suffer, they are able to reflect and exercise their understanding. So, they may “get the message” in a way that is not possible with pain. A person suffering in prison, for instance, can experience his suffering as a meaningful consequence of his actions. That meaning can be understood while he is suffering. So, it might be argued that if expressing a message to the criminal (or communicating with him) is part of punishment (for either intrinsic or instrumental reasons), then such a goal is better accomplished by inducing suffering than inflicting pain.

In addition, it might be thought that inducing suffering is more likely to result in repentance and personal growth. In the philosophy of religion literature, a popular response to the argument from evil is the soul-making theodicy, which is sometimes referred to as the suffering-builds-character theodicy.⁹ According to this theodicy, it is justifiable for an all-good, all-powerful, all-knowing God to allow evil. This is because the evils that humans suffer serve the positive function of making their souls stronger, or building their character, allowing them to freely develop into better beings. There is probably a reason why this theodicy is referred to more often as the

⁹ Nils Ch. Rauhut, *Ultimate Questions: Thinking About Philosophy* (New York: Longman, 2004), 207.

“suffering-builds-character theodicy” than the “pain-builds-character theodicy.”

Suffering, as a complex psychological phenomenon for which cognition is required, can be a process through which a person struggles, emerging on the other side much stronger than before his ordeal. Pain, on the other hand, may not have the same transformative potential, or, if it does, perhaps it does only insofar as it also involves suffering.

So, for these reasons, it might be thought that suffering is a better object of punishment than pain. However, as I will show, these reasons are not conclusive, and there is good reason to believe that suffering is actually a worse candidate for the object of punishment than pain. Suffering can be shown to be especially morally problematic in ways that pain is not. But before I make my case for that claim, I must address the aforementioned reasons why suffering might be thought better than pain.

To begin with, I take issue with the claim that making a person suffer involves recognizing him as a rational being whereas inflicting pain does not. This kind of objection to painful punishment is an objection from degradingness, and I will discuss it more fully later. But I should say now that these kinds of objections underestimate the extent and the importance of the interference with rationality that results from making people suffer. Also, it is far from clear that painful punishment is inconsistent with recognition of and respect for persons as rational beings when the punishment is a part of a reasonably just legal system that offers people reasons for desisting from certain acts.

Regarding the view that suffering is superior for expressive reasons, I think that this claim underestimates the expressive value of painful punishment. Certainly,

if a person is experiencing a significant amount of pain, he will not be able to contemplate the expressive nature of his punishment while it is going on. But he will still be able to understand whatever message is conveyed by the sanction before and after being punished. It may turn out to be important that with painful punishment the punished person cannot (or is highly unlikely to) reflect on the nature of the punishment while being punished. But, if this is important, it is because of concerns about degradation, not expressiveness. It might be thought that it is degrading to temporarily cause a state in which a person cannot exercise his understanding or in which understanding is severely impaired. This issue will be addressed in the chapter on degradation. But, regarding expressiveness, I do not see why a temporary inability to contemplate the message expressed by the punishment should be regarded as terribly important. Perhaps the expressive value of a painful punishment might not be as great as one that focuses on causing suffering, but this difference would be a matter of degree, and it should be just one consideration among many when seeking to determine the justifiable object(s) of punishment.

Finally, there is the claim that suffering is more likely than pain to result in personal growth. This is probably true, but the distinction is blurred by the fact that pain tends to cause suffering. The relevant distinction would be between suffering from pain and suffering without pain. Perhaps suffering without pain is more likely to result in growth than suffering from pain. This can be granted without conceding that suffering without pain is better than suffering from pain. Suffering without pain, or suffering from psychological as opposed to physical causes, can of course have great transformative potential, but the change is often negative. Of course, positive

changes happen and some people's characters are strengthened by an experience with prolonged psychological suffering. But many people are destroyed by this suffering, or are left worse off than they were before. To borrow a term mentioned in the discussion of theodicy, suffering can result in "soul-making" or "soul-breaking."¹⁰ This needs to be kept in mind, especially given that religious thinkers often distort the effects of suffering by playing up its positive value. In any case, unless one is committed to a theory that places strong emphasis on punishment's potential for causing personal growth, it is difficult to see how this consideration would be terribly important.

The Depth of Psychological Suffering

Above I stated that there is good reason to believe that suffering is a worse candidate for the object of punishment than pain, and that suffering can be shown to be morally problematic in ways that pain is not. However, as I also mentioned above, the distinction between pain and suffering is not always the most helpful. We can also distinguish between suffering from pain and suffering without pain. Clearly, pain above a certain level often results in suffering, but it is of course possible to suffer quite severely without pain (Again, "pain" here means "physical pain."). So, more precisely, I want to defend the claim that there are good reasons to believe that psychological suffering (suffering without pain) is often more morally problematic than physical suffering (suffering from pain).

We can begin with a quote from Foucault, who nicely states a general point on which I want to focus. In *Discipline and Punish*, he writes of the historical transition

¹⁰ The phrase "soul-breaking" comes from Steven Cahn, "Cacodaemony," Chap. 5 in *Puzzles and Perplexities: Collected Essays* (Lanham, Maryland: Rowman & Littlefield Publishers, 2002), 36.

from bodily punishments to imprisonment. Regarding modern methods of punishment, particularly imprisonment, he writes:

If the penalty in its most severe forms no longer addresses itself to the body, on what does it lay hold? The answer of the theoreticians – those who, about 1760, opened up a new period that is not yet at an end – is simple, almost obvious. It seems to be contained in the question itself: since it is no longer the body, it must be the soul. The expiation that once rained down upon the body must be replaced by a punishment that acts in depth on the heart, the thoughts, the will, the inclinations.¹¹

The point can scarcely be put better than in this passage. Imprisonment lays hold on the soul (we should not take the term “soul” in its metaphysically loaded sense). It acts on the punished person’s heart (metaphorically), mind, will, and desires. It does all of this by inducing psychological suffering, and thereby strikes at the very core of the person. In that sense, it is *deep*.

In order to more fully investigate the nature and moral status of suffering, it will be helpful to use the “simplified description of the person” that Cassell employs in *The Nature of Suffering*. He admits that this description, or “topology,” is simple, but he believes that it is useful in thinking about suffering. The features of persons that Cassell discusses include the following:

- “Persons have personality and character.”
- “A person has a past.”
- “A person has a family.” Of course, some people may have little or no connection with their families, but people generally have families. In any case, it is worth at least pointing out and emphasizing that people have relationships.
- “A person has a cultural background.”

¹¹ Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Random House, 1977), 16.

- “A person has roles.” For example, “a father, a physician, a teacher, a husband...”
- “A person has a relationship with himself or herself.”
- “A person is a political being. A person is, in the larger sense of political, equal to other individuals, with rights, obligations, and the ability to redress injury by others and by the state.”
- “Persons do things. They act, create, make, take apart, put together, wind, unwind, cause to be, and cause to vanish.”
- “Persons have regular behaviors.”
- “Every person has a body.”
- “Everyone has a secret life.”
- “Every person has a perceived future.”
- “Everyone has a transcendent dimension – a life of the spirit, however expressed or known.”¹²

Now, Cassell does not believe that persons can strictly be reduced to their parts. However, as we will see, this simple topology is illuminating. Cassell states that all of these different aspects of personhood are vulnerable to damage, which can be expressed in the myriad of human emotions with which we are all familiar. These emotions include “sadness, anger, loneliness, depression, grief, unhappiness, melancholy, rage, withdrawal, (and) yearning.”¹³ When the damage is great enough, it tends to result in suffering.

Punishments that focus on causing psychological suffering may act on one or more of these features of persons. Suffering can result from all sorts of events that

¹² Cassell, *The Nature of Suffering*, 37-43.

¹³ *Ibid*, 43.

threaten the intactness of persons and, as Cassell shows, there are many different features of persons that are relevant to their overall wholeness or intactness.

Psychological suffering punishments might operate in many ways. They might involve separation from family and other loved ones, and disruption of other valued relationships.

People can suffer from what they have lost of themselves in relation to the world of objects, events, and relationships. Such suffering occurs because our intactness as persons, our coherence and integrity, come not only from intactness of the body but from the wholeness of the web of relationships with self and others.¹⁴

These punishments might remove people from their cultural context. They might make it impossible for them to continue to perform the roles that are important to their sense of identity. They might make it more difficult for people to have relationships with themselves. Maybe these punishments would prevent people from performing activities that are vital to their sense of self-realization, or disrupt the regular behaviors that they identify as being important to their lives. Perhaps they could give people reasons to be pessimistic about their futures.

Incidentally, imprisonment creates suffering in all of these ways. It is not necessary to make an explicit case for this. Of course, the extent of the disruptions, and hence the extent of the suffering, will vary depending on many factors. Probably the two most important factors are the fortitude of the punished person and the operation of the particular prison. But any imprisonment experience will involve the disruption of valued relationships, removal from cultural context, drastic changing of

¹⁴ *Ibid*, 39-40.

roles, and disruption of important activities and regular behaviors. Obviously, this can result in intense suffering for those imprisoned.

We can, and should, see imprisonment as a complex attack on the intactness of persons. Of course, it does not follow from this that it is unjustified. It does, however, place a heavy burden on those who wish to justify its wide use. As we have seen, there are multiple features of persons that are relevant to their intactness. The prison experience acts on many of these features, and threatens the intactness of persons in many ways and, we might say, from many angles. I don't want to shift the focus too far away from the moral status of psychological suffering itself, but it is worth mentioning the multiple ways in which imprisonment may and often does cause psychological suffering.

We can get a better idea of how psychological suffering punishments operate by looking more deeply at how they "work." Suppose that a punishment creates psychological suffering by imposing on a person in a way that severely impairs his ability to have fulfilling relationships with his family and friends (imprisonment does this). Such a punishment works by using his attachments and desires, which are central to his sense of the person that he is, against him. If a punishment is supposed to cause psychological suffering by depriving a person of an opportunity to enjoy the fulfilling relationships that are important to him, those who punish in this way are counting on the attachments being seen (or at least experienced) as valuable to the punished person. Indeed, the punishment would not make sense otherwise.

A similar sort of account can be given for the various ways in which punishments can cause psychological suffering. If a punishment severely restricts

movement and autonomy, it won't only be likely to impair a person's ability to engage in valued relationships.¹⁵ It will also probably prevent the person from occupying important roles, doing the things that are important to his self-expression, and performing important regular behaviors. Such a restrictive punishment presupposes, indeed counts on, a person having certain desires and having little control over them. In other words, the punishment counts on the fact that a person's sense of identity is bound up with, say, occupying certain roles. It counts on the fact that, when not able to occupy them, the person will want to occupy them, and when that desire is frustrated, the person will not be able to stop having it as a matter of direct choice. It should be relatively easy to tell this same sort of story for the various ways in which punishment can cause psychological suffering. But a very important thing to notice is the way in which such a punishment uses what is most constitutive of the person, the structure of his psychology, against him in order to create distress.

Now, I must admit that a punishment that relies on causing physical suffering (suffering from pain) uses the punished person's body in order to hurt him. We, of course, do not want to be Cartesian dualists, and we must admit that a person's body is at least somewhat relevant to his sense of self. We are, after all, embodied agents, and we interact with and experience the world as embodied beings. So, I don't want to denigrate the body or claim that the structure of physical suffering is entirely distinct from the structure of psychological suffering. However, I do want to claim

¹⁵ I am not using the term "autonomy" here in its Kantian sense (see Chap. 4). Rather, I am talking about a person's ability to govern his own life and live his life in accordance with his choices. Regarding the deprivation of autonomy involved in imprisonment, see Gresham Sykes, *The Society of Captives* (Princeton, N.J.: Princeton University Press, 1958), 73-76. He writes: "...the inmate suffers from what we have called a loss of autonomy in that he is subjected to a vast body of rules and commands which are designed to control his behavior in minute detail" (73).

that there is an important, and morally relevant, distinction to be drawn between psychological suffering and physical suffering. We have already seen how psychological suffering punishments use what is most constitutive of the person against him. While there is a sense in which physical suffering punishments use a feature of the person against them, these punishments do not use what is most constitutive of the person against them. While bodies are no doubt important, our mental life is much more central to who we are. I don't want to make any terribly controversial assertions about personal identity here, but I think that it is clear that our psychology is more central to determining the persons that we are than our bodies are. "Our mental life" or "our psychology" might be unpacked in different ways by different theorists of personal identity. (Is it memory that is important, or our beliefs and desires, or something else?) But something that falls under the heading "mental" or "psychological" is most important for making us the persons that we are.

So, we can accept much of what David Sussman and Elaine Scarry say about pain and still recognize the morally relevant distinction that I want to draw between psychological suffering and physical suffering. In "What's Wrong with Torture?" Sussman notes the peculiarity of physical pain:

On the one hand, we experience it as not a part of ourselves: it is something unbidden whose very nature is such that we want to expel it from ourselves, to abolish it or drive it away. In an obvious way, we are passive before physical pain; it is something that just happens to us... On the other hand, pain is also a primitive, unmediated aspect of our own agency. Pain is not something wholly alien to our wills, but something in which we find ourselves actively, if reluctantly, participating. My pain is, after all, *my* pain, an experience that in its very nature seems to demand, wheedle, or plead with me.¹⁶

¹⁶ David Sussman, "What's Wrong with Torture?" *Philosophy & Public Affairs* 33, no. 1 (2005): 19-20.

And later he quotes Scarry's *The Body in Pain*:

The ceaseless, self-announcing signal of the body in pain, at once so empty and undifferentiated and so full of blaring adversity, contains not only the feeling "my body hurts" but the feeling "my body hurts me"...¹⁷

So, as is claimed in these passages, we can acknowledge that when suffering is caused by physical pain, there is a sense in which something that is an important part of the person is being used against him. We can grant that, when experiencing pain, there is a sense of an antagonism between the flesh and the person. We need not buy into dualism in order to acknowledge that the body can seem like an enemy during bouts of pain, an enemy bent on hurting the person.

So, accepting Sussman and Scarry's claims about pain, we can still see an important difference between psychological suffering and physical suffering. Compared to our bodies, our memories, beliefs, desires, and attachments are more central and constitutive of our identity as persons. In that sense, these aspects of persons are *deeper*. They are deeper within the self, and form the core of the person. Thus, when these elements are actively involved in the punishment, the punishment strikes more deeply within the self.

Before explicitly turning to the moral relevance of the distinction that I have been focusing on, I want to further clarify my claims about the relative centrality and importance of the body and mind for our sense of personhood. Bracketing the claims of those who believe in personal immortality, our bodies are necessary for our existence, and attacking the body can threaten our intactness. However, given all of this, the claim about the magnitude of the distinction can be sustained. Perhaps a

¹⁷ Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* (New York: Oxford University Press, 1985), 47 (quoted in Sussman, "What's Wrong with Torture?" 21).

helpful way to think about this is by focusing on the kinds of situations in which we might be tempted, either in a literal or figurative sense, to say that an individual has become a different person. I do not want to assume a particular theory of personal identity, but I think that it is fairly clear that we are not tempted to say that an individual has become a different person when there has been a mere change in his body. Even if that change is substantial, such as in the case of severe physical injury, we are not tempted to say that an individual has become a different person, unless that physical injury is accompanied by psychological changes, such as substantial changes in attitudes or dispositions. On the other hand, when there are substantial changes in an individual's psychology, it is often said that the individual has "become a different person." Some theorists of personal identity might be willing to endorse that claim in its literal sense, and many people use such claims as figures of speech. Either way, there is the recognition of how important psychological/mental characteristics are to personhood. To reiterate, I do not want to make claims about what psychological characteristic(s) are decisive, but there is a wide recognition (both theoretical and pre-theoretical) that psychological/mental characteristics form the core of the person.

In spelling out the moral relevance of the distinction that I have illustrated, there are a few things to say. One way to view its moral relevance comes to me from Andrew von Hirsch's critique, in *Censure and Sanctions*, of Antony Duff's penance-based view of punishment. On Duff's view,

[w]e should understand and justify criminal punishment... as a species of secular penance. It is a burden imposed on an offender for his crime, through which, it is hoped, he will come to repent his crime, to begin to reform himself, and thus reconcile himself with those he has wronged.¹⁸

Von Hirsch criticizes Duff's view that in punishing offenders we should seek to impose a penance on them.

A penance seeks to reach deeper than mere penal censure does: in order to elicit the requisite attitudes of repentance, the sanctioner needs to inquire into the person's feelings – or at least, fashion the sanction so that it is designed to reach those feelings. Might this not be overreaching on the State's part?¹⁹

Now, this quote is embedded in a discussion of the relative merits and demerits of censure-based and penance-based views of punishment, which is not our focus here. But there is an important point in this quote that is relevant to our present discussion. Given what has been claimed and argued for above, I will use the general form of von Hirsch's claim in order to make a point about the present issue: A psychological suffering punishment seeks to reach deeper than a physical suffering punishment does: in order to cause the distress, the sanctioner must fashion the sanction so that it elicits certain emotional responses by acting on features most vital and central to the intactness of the person. Might this not be overreaching on the State's part?

We can view the distinction in terms of the level of invasiveness on the part of the State. There ought to be a presumption against deeply invasive punishments, and, other things being equal, there seems to be good reason to prefer a less invasive

¹⁸ Antony Duff, *Punishment, Communication, and Community* (New York: Oxford University Press, 2001), 106. This presentation is somewhat anachronistic, since this book came out after von Hirsch's *Censure and Sanctions*, but it doesn't make a difference for our purposes.

¹⁹ Andrew von Hirsch, *Censure and Sanctions* (New York: Oxford University Press, 1993), 74. While I am sympathetic with what von Hirsch is saying here, I do not intend, by using this quotation, to endorse the specific claim that he is making. The specific debate that von Hirsch is involved in in this passage raises issues that we do not need to discuss. I use the quotation to introduce an illuminating way of viewing our present topic.

punishment to a more invasive one. Of course, in this case, other things are not equal, which is why our discussion is quite complex. However, we can still explicate the moral relevance of the distinction that I have been fleshing out in these terms. In superficial terms, the deeper the punishment, the deeper the relationship required in order for that punishment to be justified. Von Hirsch says that in defending his penance view of punishment, Duff uses the example of an abbot imposing a penance on a monk. Whereas it might be perfectly reasonable for an abbot to do this, von Hirsch objects to using this as a model for legal punishment. He points out that the monk/abbot relationship is significantly different from the citizen/state relationship, so behavior that might be justifiable in the former case is not justifiable in the latter. As von Hirsch states, “citizens have not entrusted their moral development and spiritual welfare to the State.”²⁰

Now, von Hirsch’s discussion is not entirely analogous to ours, but we can draw an important lesson from it: Deep invasions of an individual’s psychology require special justification, and the person/entity doing the invading must have the moral standing to do so, most likely derived from a special relationship with the person whose psychology is being invaded. Causing psychological suffering is, indeed, quite deep, and we should be skeptical as to whether or not the State should “go there” when it is possible to use a less invasive means of punishing: causing physical suffering.

Hugo Adam Bedau puts forth an argument against the death penalty that picks up on a similar idea in his “The Minimal Invasion Argument Against the Death

²⁰ *Ibid*, 73.

Penalty.” He bases his argument on what he refers to as “the Minimal Invasion Principle.”

The Principle: Governmental invasions of an individual’s privacy, liberty, and autonomy (or other fundamental values) are justified only if no less invasive practice is sufficient to achieve an important social goal.²¹

According to Bedau, the lineage of this principle can be traced to Cesare Beccaria’s *An Essay on Crimes and Punishments*, and it ought to be accepted without controversy by those “who accept the basic tenets of constitutional democracy.”²² (It is important to note, however, that the principle is not supposed to be absolute. It may occasionally be overridden by other principles that are more pressing.) It should be fairly clear how Bedau deploys this principle in his argument against the death penalty, but that need not detain us. The principle makes reference to the achievement of important social goals, and I can’t get caught up here with discussion of these social goals, such as deterrence. But there is something important to be drawn from this principle.

The Minimal Invasion Principle contains a strong presumption against punishment that is unnecessarily invasive. Now, the emphasis is put on “privacy, liberty, and autonomy,” and it is not clear that Bedau had psychological invasiveness in mind when putting forth this principle. But the principle enjoys strong plausibility because of the strong values that we attach to privacy, liberty, and autonomy. If we attach strong value to what could be called “psychological integrity,” then there ought to be a strong presumption against unnecessary violations of an individual’s

²¹ Hugo Adam Bedau, “The Minimal Invasion Argument Against the Death Penalty,” *Criminal Justice Ethics* 21, no. 2 (2002): 4.

²² *Ibid*, 5.

psychology. As I have argued, psychological suffering punishments reach deeply into an individual's psychology. If we value integrity of the person, then the integrity of his mind must be given great importance. It is difficult to see how we can recognize that value while opting to punish them in a way that strikes the features of persons that are most crucial to their intactness.

Hurting vs. Depriving

At the outset of this chapter, I stated an assumption: Punishment involves intending to make people hurt and/or deprive them of something. Thus far, we have focused on hurting, and only discussed depriving in pointing out that many of the hurts that are involved in punishing result from deprivations. Now we will specifically focus on deprivation and consider the view that we ought to see the object of punishment as imposing deprivations, as opposed to making people hurt.

There are many things that people might be deprived of in order to punish them, and we can use Sykes' discussion in *The Society of Captives* in order to point out some of these. In Chapter Four, entitled "The Pains of Imprisonment," Sykes discusses five main kinds of deprivation that take place in prisons: deprivation of liberty, goods and services, heterosexual relationships, autonomy, and security.²³ Of course, these are not the only things that people can be deprived of in order to punish them. Notably, the death penalty deprives people of their lives.

In understanding what people are usually deprived of when they are punished, it is important to make reference to the concept of rights. Here is Hugo Adam

²³ Sykes, *The Society of Captives*, 65-78. Some of these deprivations (e.g. heterosexual relationships) are probably not intended as punishment, but are rather the result of pragmatic constraints.

Bedau's definition of "punishment under law" from his "Punishment" entry in the Stanford Encyclopedia of Philosophy:

...the authorized imposition of deprivations -- of freedom or privacy or other goods to which the person otherwise has a right, or the imposition of special burdens -- because the person has been found guilty of some criminal violation, typically (though not invariably) involving harm to the innocent.

And below this definition he states:

Specifying the deprivation as a deprivation of *rights*... is a helpful reminder that a crime is (among other things) a violation of the victim's rights, and the harm thus done is akin to the kind of harm a punishment does.²⁴

In imposing significant punishments on people, we generally deprive them of some of their rights, or of something that people generally have a right to and that, but for their crime, they would also have a right to.²⁵ Central deprivations inherent in imprisonment, deprivations of liberty and autonomy, certainly involve impositions that place restrictions on the punished person's ability to exercise what are normally regarded as human rights.²⁶

So, why might it be thought that imposing deprivations ought to be the object of punishment, as opposed to making people hurt? Before we look at how such a position could be argued for, I want to make a few remarks about the general methods that could be used to support the position. It seems to me that the position could be argued for in one of two ways, using a direct or indirect method. The direct method

²⁴ Hugo Adam Bedau, "Punishment," *The Stanford Encyclopedia of Philosophy*, Winter 2008 Edition, Section 2.

²⁵ There is a complex debate here surrounding issues such as whether or not criminals forfeit certain rights when they commit certain crimes, or whether we should see rights as retained but weakened, or retained but overridden. I cannot go on a tangent about this here. Suffice it to say for our present purposes that significant deprivation punishments almost invariably involve depriving people of things that are generally recognized as central rights that persons possess.

²⁶ Of course, not all deprivations involved in imprisonment should be characterized in precisely this way. With respect to heterosexual relationships and certain goods and services, we should say rather that people generally have the right to pursue these things, should they desire them.

would, of course, involve giving plausible justifying reasons for imposing deprivations on offenders. In addition to this, it would also involve showing why deprivation is *uniquely* called for by criminal wrongdoing. The indirect method would, again, involve justifying deprivation, and in addition would involve specifying all of the candidates for the object of punishment and then showing that all but one of them (deprivation) are morally impermissible. This would be a roundabout way to reach the conclusion and would involve a “process of elimination.”

In the coming paragraphs, I will be focusing on what a *direct* argument for deprivation as the unique object of punishment would have to look like. The indirect method, in my view, is not promising for multiple reasons, which will be fleshed out later on. For now, I can mention only a few reasons. One reason is that it is implausible to attempt to “separate out” deprivation in any normatively significant way from the suffering that it almost inevitably causes. Also, I do not think that pain can be ruled out as a permissible object of punishment, but a closer examination of the issues involved will have to wait for subsequent chapters.

I have not come across an argument for the specific claim that deprivation ought to be the unique object of legal punishment. However, we can make progress in our investigation by looking at the work of Richard Lippke, since he explicitly argues for a version of retributivism that focuses on justifying the imposition of restrictions and deprivations on offenders. In *Rethinking Imprisonment*, Lippke argues for a theory that he calls “censuring equalization retributivism.”

Legal punishment, on my account, is a form of public censure that operates by imposing sanctions on offenders that are roughly equal to the seriousness of their crimes... [P]art of what we should focus on in devising sanctions for crimes are the ways and extent to which crimes interfere with victims’

capacities to live decent, autonomous lives. Simply put (indeed too simply put, as we shall see), legal sanctions should impose restrictions and deprivations on offenders that limit their capacities to live decent, autonomous lives to an extent roughly equivalent to the ways in which their crimes interfered with the capacities of their victims to do so.²⁷

Now, Lippke's complete argument for his theory of punishment is complex, and I will not completely explain it here. But it is important to at least see the contours of his argument, since this is relevant to the points that I will be making.

Lippke begins by specifying certain features of the reasonably just society. In a reasonably just society, citizens must "be assured of opportunities to live decent lives shaped by their autonomous choices." In order to do so, "they must be secure in their lives, bodies, liberty, and property."²⁸ There are, of course, other features of the reasonably just society, but these will suffice for now. After laying out his conception of the reasonably just society, Lippke introduces the concept of moral rights and shows how this concept links up with his conception of the reasonably just society. He works with the interest theory of rights, "according to which moral rights are understood as designating certain interests of individuals that are the basis of obligations on the part of others."²⁹ After specifying this theory of rights, he states that we ought to view one of the roles of the state as providing for the equal realization of rights among all citizens. This links up with his conception of the reasonably just society because, in his view, we should determine the content of our basic moral rights by figuring out which vital interests must be respected by others in order for us to be able to live the kinds of lives that we ought to be able to live:

²⁷ Richard Lippke, *Rethinking Imprisonment* (New York: Oxford University Press, 2007), 23.

²⁸ *Ibid*, 16.

²⁹ *Ibid*, 19.

“decent lives shaped by (our) autonomous choices.”³⁰ Obviously, if we specify the content of our rights in this way, it is clear that we have “rights against being murdered, assaulted, unjustifiably deprived of liberty or property, and unjustified invasions of privacy.”³¹ There are other rights as well, but these will do for now. Since all citizens possess these rights, they also have duties to respect those of their fellow citizens. The state also has a duty to prohibit actions that are violative of those rights and to punish people who perform those actions anyway.

So, this is the general backdrop for Lippke’s justification of punishment. Now, for our purposes, it makes more sense to focus on the “equalization” aspect of his theory than the “censuring” aspect. On his view, punishment is a form of public censure, which means that one of the aims of punishment is to express or communicate censure or blame. But the specific line of argument that is supposed to justify the restrictions and deprivations has to do with the equalization purpose of punishment. Lippke states that “one useful way to think about the harms crimes inflict is in terms of the extent of their impact on our ability to live decent, autonomous lives.”³² With an eye towards equalization, “we should think about criminal sanctions as efforts by the state to impose losses or restrictions on offenders that mimic certain of the effects of their crimes on victims.”³³ Why should the state aim at this sort of symmetrical intrusion? On Lippke’s view, doing so ought to be regarded “as the natural extension of its role in relation to the interests designated by

³⁰ *Ibid*, 20.

³¹ *Ibid*, 20.

³² *Ibid*, 24.

³³ *Ibid*, 25.

moral rights.”³⁴ He cites and endorses what he believes to be a widely held belief: that those who commit crimes ought not be able to escape without being imposed upon in ways that affect their own abilities to live decent, autonomous lives. Such impositions, when they are proportional to the seriousness of the crime, restore equality.

Obviously, Lippke’s theory and his argumentation in support of it are more complicated than is indicated by this brief sketch, but I believe that this sketch will suffice for our purposes. Now, Lippke is not arguing directly that deprivation ought to be the object of punishment, but he does argue for deprivations and restrictions by focusing on a particular, and probably central, wrong-making feature of crimes. He focuses on the fact that many crimes impinge on the victim’s capability to live a decent, autonomous life, and, on his view, it is retributively appropriate that punishments impinge upon the criminal similarly. Whether or not Lippke is arguing that deprivation ought to be the unique object of punishment, his argument shows us what an argument for that claim would probably have to look like.

How might a claim that there ought to be a unique object of punishment be supported? It seems that the most plausible way to attempt it would be to examine the nature of criminal wrongdoing, and then try to show that a sanction of a particular character would be called for as a response. Why would this have to be the way? From a purely consequentialist perspective, the object(s) of punishment ought to be whatever would achieve the best overall consequences. So, any uniqueness claim would have to rest on highly contestable empirical claims. In any case, a purely consequentialist argument could not support an *in principle* claim that there ought to

³⁴ *Ibid*, 29.

be a unique object of punishment. An argument for the uniqueness claim would have to be embedded in a framework that incorporates some sort of backward-looking element: either a retributive or mixed framework (e.g. side-constrained consequentialism).

In retributive and mixed theories of punishment, in order to determine the justifiable (or permissible) punishment, it is necessary to look back to the crime. This is obvious when the principle is the *lex talionis*, and it is just as apparent with the principle of proportionality: the severity of the punishment ought to be proportionate to the seriousness *of the crime*. In any theory with a backward-looking element, a justifiable punishment must bear some relationship to the crime that occasions the punishment. Now, the sentencing principle that is currently most popular is the principle of proportionality, but that principle allows us to determine only the *amount* of punishment, not its *form* or *object*. How are we to determine the form or object? Just as the principle of proportionality tells us to look to the crime's seriousness in order to determine the severity of the punishment, in order to make a principled determination as to the form or object of punishment we must look backwards to the wrong-making feature(s) of the crime that occasioned the punishment. This, incidentally, is the element of truth in the *lex talionis*.

Perhaps I can clarify the reasoning of the previous few paragraphs by making the points somewhat differently. Suppose a theorist wishes to argue that the object of punishment ought to be *x*. Suppose further that she wishes to make the case on principle, not on empirical grounds. A purely consequentialist approach would not allow her to make her case, since it would hinge upon the results of empirical

research. The case would have to be made within a framework that is at least partially backwards-looking. Theoretical frameworks that incorporate a backwards-looking element emphasize punishment as a response to crime. Our theorist would have to show that punishments whose object is x are the only just responses to crime. And how would that be possible? It could be done by pointing to something about the nature of the crime itself that *calls for* a particular kind of response. If the various types of criminal wrongdoing can be shown to call for x *and only* x , then a unique object of punishment can be established. If this cannot be shown, then it will be difficult to establish a unique object of punishment.

Now, Lippke's view focuses on a particular wrong-making feature of crimes: the fact that they impinge on the victim's capability to live a decent, autonomous life. Because he focuses on this, the account that is generated is focused on deprivation and restriction: It is justifiable for punishments to deprive and restrict because such interference with autonomy imposes losses on criminals that are roughly symmetrical to the losses that they imposed on their victims. Even though Lippke isn't claiming that deprivation ought to be the unique object of punishment, the way that he arrives at his general view is instructive for us because it shows how focus on a particular wrong-making feature of crimes can lead to a particular view about the object of punishment. His view is definitely deprivation *focused*, and this is because the account he gives of the wrongfulness of crime is deprivation focused.

It seems that Lippke is correct in his view that "one useful way to think about the harms crimes inflict is in terms of the extent of their impact on our ability to live

decent, autonomous lives.”³⁵ But it is important to note that this way of thinking is only *one useful way*. There are other ways to think about the harms that crimes inflict, and with certain crimes, the way that Lippke proposes is contrived and artificial. Take assault, for example. If I walk up to someone and punch him in the face because he gave me a weird look, it is clear that I have unjustifiably harmed him. The law should and does prohibit that behavior, and I am liable to be punished for it. Now, we might think of the harm that I’ve inflicted on my victim in terms of its impact on his ability to live a decent, autonomous life. But, surely, this is somewhat contrived. It is much more direct and obvious to note that the crime is wrong because I hurt somebody for no good reason.

I am not saying that the account that Lippke gives of the harmfulness of crimes is completely wrong, but that it’s incomplete. In fact, Lippke would probably concede this, and he is probably so deprivation focused because the general account is a prelude to establishing a retributive justification of incarceration, and he wants to say that incarceration is justifiable, not that it is the only justifiable sanction for crimes. But it does seem fair to criticize Lippke on the grounds that by focusing so closely on one aspect of crime’s wrongfulness, he draws our attention away from other factors that are clearly morally relevant, and in many cases these other factors seem more directly relevant than the one on which he chooses to focus.

We ought to acknowledge that most crimes, especially the more serious ones, are wrong for multiple reasons and have multiple wrong-making features. Once we see this, it becomes clear that we ought to be pessimistic about any attempt to establish a unique object of punishment by focusing on the wrong-making features of

³⁵ *Ibid*, 24.

crimes. Since most crimes have multiple wrong-making features and these features are not fully commensurable, there does not seem to be a way to derive a unique object of punishment by focusing on what made the crime wrong. Returning to the assault example, we might focus on the impact of the assault on the victim's ability to live a decent, autonomous life, or we might focus on the hurt caused, or we might consider both factors. In any case, the decision regarding how to focus our attention will either have to be arbitrary or based on other considerations, such as crime reduction or respect for persons. If anything, an argument could be made for focusing on the hurt caused, since that seems to be the more direct and clear wrong-making feature of assault.

So, the Lippke method does not enable us to rule out pain or suffering as justifiable objects of punishment. In fact, an argument very similar to his can be run for painful punishment: Citizens in a reasonably just society must have opportunities to live decent lives based on their autonomous choices. In order to do this, they must be confident that they will generally be secure from being unjustifiably hurt by others. Recalling the interest theory of rights, moral rights designate interests of individuals that generate obligations for others. One role of the state is to provide for the protection of certain important interests that should be designated as rights, and we can determine what interests should be designated as rights by figuring out which interests are most vital for individuals seeking to live decent lives based on their own autonomous choices. On this account, we have a right not to be unjustifiably hurt by others. Others must respect this right, and the state should prohibit actions that violate it and punish people who perform those actions. Against this backdrop, we

can see that many crimes inflict harms by unjustifiably hurting others. As an equalizing sanction, that state ought to make offenders hurt in a way that is roughly symmetrical to the way in which the crime made the victim hurt. Equality is restored by hurting the offender in a way that is proportional to the seriousness of the crime.

The preceding argument seems just as plausible as Lippke's argument for his own view. I am not endorsing this argument or using it to argue for painful punishment. Rather, by showing that an argument that is just as plausible can be made for making offenders hurt, we can see that this sort of argumentative strategy will not work for justifying a deprivation focused account. By shifting the emphasis and focus onto another, and often more salient, wrong-making feature of crimes, we can see that the focus depends on the way that the justificatory story is told, and there is usually more than one way to tell the justificatory story.

The Centrality of Liberty and Autonomy and the Inevitability of Suffering

In the above section on the depth of psychological suffering, I argued that punishments that focus on psychological suffering are often more morally problematic than punishments that focus on physical suffering. Here I make a case for the claim that punishments that focus on deprivation are often more morally problematic than punishments that focus on suffering, and especially punishments that focus on physical suffering. In discussing deprivation punishments, I will be focusing on deprivation of liberty and autonomy. These are the types of deprivation that are most conspicuous in the form of severe (or significant) punishment that is currently most pervasive: imprisonment. I will be arguing that liberty and autonomy are extremely morally important, and that there should be a high presumption against

impositions that interfere significantly with them. Also, I will argue that since suffering is inevitable with significant punishment, there is good reason to believe that it is morally preferable to cause it directly rather than by unnecessarily restricting important rights. In fact, given that there is such a close causal link between the kinds of deprivation that we are considering and the suffering of the punished person, it may be problematic to “separate out” deprivation as an object of punishment in a morally significant way.

Before moving on, let me remind the reader that we are not yet considering *indirect* methods of arguing for deprivation. A major concern about corporal punishment is that causing pain involves addressing people in a way that is inconsistent with the recognition of their basic dignity. This issue will be discussed at length in chapter 4. If it turns out that corporal punishment is inconsistent with basic dignity, then many of the considerations discussed here will be beside the point. However, for reasons to be explained later, I do not believe that to be the case.

How much support is really necessary for the claim that liberty and autonomy are extremely morally important? In the section on psychological suffering, we discussed the Minimal Invasion Principle, which calls our attention to the importance, indeed the fundamental value, of privacy, liberty, and autonomy. In his brief defense of the principle, Bedau states

How much defense does the Minimal Invasion Principle require? Surely it is clear that only extreme socialists, fascists, theocrats, or totalitarians who for various reasons want to extend state power and intervention in the lives of citizens farther than is necessary will quarrel with this principle. Liberals

and conservatives alike, who accept the basic tenets of constitutional democracy, should readily embrace it.³⁶

In other words, we can assume the moral importance and value of privacy, liberty, and autonomy. Even though certain extremists might not recognize this value, the case has been made for their importance (not here, but certainly elsewhere), and the view that privacy, liberty, and autonomy are extremely important and ought generally to be respected should have very wide appeal among those debating the justifiable object(s) of punishment.

Now, given the importance of liberty and autonomy (privacy as well, but I want to focus on the other two), there ought to be a high presumption against sanctions that interfere significantly with them. This much is incorporated in the Minimal Invasion Principle: Of course, the reason why invasions of liberty and autonomy can be justified only “if no less invasive practice is sufficient to achieve an important social goal” is that persons generally possess rights to be free and engage in autonomous action.³⁷

Given how awful suffering can be, and given my previous claims regarding suffering and threats to the intactness of persons, it might seem that deprivation of rights isn't all that bad, even given that we rightly attach high value to these rights. But, of course, in imposing deprivations of liberty and autonomy, we impose suffering *de facto*. Derek R. Brookes makes this point very well in his “The Possibility of a Correctional Ethic”:

The central function of the prison is... to provide the kind of regime or social system that is required to hold and control a collection of human beings in forced captivity for extended periods of time. But

³⁶ Bedau, “The Minimal Invasion Argument Against the Death Penalty,” 5.

³⁷ *Ibid*, 4.

this objective cannot be carried out without depriving prisoners of some of the most highly valued of human goods: liberty, heterosexual relationships, autonomy, material goods and services, and security. Naturally, the forced removal of such goods will, in turn, give rise to considerable suffering or pain... One cannot have a prison without depriving the goods listed above, and one cannot deprive human beings of such goods without inducing significant pain and suffering.³⁸

Much of this really is obvious, but it is still worth pointing out. With significant punishment, suffering is inevitable. Not inevitable in the sense that each and every punished person will suffer when deprived of liberty and autonomy. But inevitable in the sense that, almost without exception, when a person undergoes a significant punishment, whether it involves direct infliction of pain, causation of suffering, or deprivation of rights, that person will suffer terribly.

Now, given that persons undergoing significant punishment will suffer, and probably suffer terribly, it seems best to cause this suffering without unnecessarily restricting central and important rights (or, if the rights must be restricted, such restrictions should be kept to a minimum). This is not to say that a deprivation punishment is never justifiable. However, it seems that there should be some special justification in place for doing something that makes people hurt *and* restricts their central rights for extended periods of time.

In this chapter, I have tried to focus more abstractly on the issue of the justifiable object or objects of punishment, rather than depicting the issue as imprisonment vs. corporal punishment. But it is relevant and illustrative here to compare these two forms of punishment. In "Corporal Punishment," Geoffrey Scarre makes some important points in responding to the charge that corporal punishment is

³⁸ Derek R. Brookes, "The Possibility of a Correctional Ethic," in *Discretion, Community, and Correctional Ethics*, ed. Kleinig and Smith (Lanham, Maryland: Rowman & Littlefield Publishers, 2001), 40.

inhuman and degrading. An entire chapter will be devoted to the issue of degradingness, but some of what he says is relevant here:

[I]t is obscure why a person's bodily integrity should be thought more significant than his freedom of action, yet corporal punishment is conventionally regarded as morally more problematic – more deeply insulting to the subject – than imprisonment. Given that imprisoning someone constrains his *body* to remain in a particular location, ensures that he will eat certain food, wear certain clothes, relinquish his regular sexual contacts, wash and bathe at set times, experience (or endure) whatever physical comforts or discomforts the prison authorities provide, it is not clear that this position is even coherent... It is, in fact, obscure why, in an age which lauds the value of personal freedom, an offender's liberty should apparently be thought so much less sacred than his body.³⁹

Obscure, indeed. Now, not all of the conditions that Scarre mentions are inevitably part of the imprisonment experience, but the deprivations of liberty and autonomy certainly are. I do not mean to suggest that prisoners have no ability to exercise their autonomy. Even in their cells they can exercise it, albeit in a trivial way. But certainly their autonomy is restricted. Their ability to shape the courses of their own lives is significantly diminished, and this must be so even in the best prisons. This quotation brings up issues that we will be returning to, such as degradation and bodily integrity. But, for the moment, we can note the oddity of the view that severe restrictions of liberty and autonomy are morally permissible while causing pain to an offender's body is impermissible. When we recall the fundamental value of liberty and autonomy and the fact that such restrictions cause immense suffering anyway, the view that is currently pervasive seems that much odder.

Before moving on, I want to clarify what I am (and am not) claiming and make some of what I have been suggesting explicit. I am not claiming that

³⁹ Geoffrey Scarre, "Corporal Punishment," *Ethical Theory and Moral Practice* 6 (2003): 313-314.

punishments that focus on the deprivation of liberty and autonomy inevitably cause pain (remember that “pain” refers to physical pain). I am also not claiming that in depriving people of liberty and autonomy, there is an intention on the part of the punishers to cause pain. I am claiming that punishments that deprive people of these important values inevitably (or almost inevitably) cause suffering, particularly psychological suffering. When we see this, we see that these punishments involve both the deprivation of central values and the causation of the kind of suffering that strikes most deeply within the self. So, building on the arguments from the earlier sections on the depth of psychological suffering, we can now understand the moral weight of deprivation punishments. While acknowledging that this is not the final word on the matter, it is important to see that punishments that focus on physical suffering (corporal punishments) do not require nearly as much deprivation of liberty or autonomy, nor do they impose suffering by striking the deepest parts of the self.

Deprivation, Suffering, and Double Effect

In the previous section, I asserted that punishments that deprive people of liberty and autonomy can be especially morally problematic, since such punishments involve both restricting central rights and causing suffering. This way of making the case assumes that in imposing deprivation punishments, the punishing agents are “on the hook” for the suffering caused. I find it obvious that they are, but I need to consider the claim that the doctrine of double effect could be appealed to in order to “disown” responsibility for the suffering caused by deprivation punishments.⁴⁰ In line with the doctrine, it might be asserted that deprivation ought to be the intended

⁴⁰ John Kleinig, personal communication.

object of punishment, and that the suffering that results from the deprivation ought to be seen as an unintended and merely foreseen side effect of the justified deprivation. If this way of viewing the matter is correct, then proponents of deprivation might be able to say something like the following: “Proponents of punishments that directly cause pain and suffering must fully justify *intending to hurt* the punished person. Proponents of deprivation punishments, on the other hand, must justify *restricting the rights* of the punished person, but they need not offer a complete account aimed at justifying *making them suffer*, since their suffering is a merely foreseen and unintended consequence of the deprivation. The deprivation can be justified, and the suffering is bad, and to state that the deprivation theorist must fully justify both the deprivation and the suffering ignores the moral significance of the distinction between intended and merely foreseen effects.”⁴¹

We need to look more closely at the doctrine of double effect in order to evaluate this line of argument. In “Doing Away with Double Effect,” Alison McIntyre states:

Proponents of the Doctrine of Double Effect make two claims: (1) it is sometimes permissible to bring about a harm as a merely foreseen side effect of an action aimed at some good end, even though it would have been impermissible to bring about the same harm as a means to that end, and (2) this is so

⁴¹ It is not unthinkable that someone might make this sort of argument. Consider the following remarks of J.D. Mabbott from “Professor Flew on Punishment” (*Philosophy* 30, no. 114 [1955]): “Most punishments nowadays are not afflictions of suffering, either physical or mental. They are the deprivation of a good... Flew’s suggestion that we have progressed by substituting mental suffering for physical pain does not go far enough. We have taken the more important step of substituting the removal of something desired for the infliction of positive suffering... The world is a worse place the more evil there is in it and perhaps the more suffering there is in it. But it does not seem to me necessarily a worse place whenever men are deprived of something they would like to retain; and this is the essence of modern punishment.” (257-258) It is plausible that someone who tries to draw a normative distinction in this way might attempt to run the kind of argument stated above.

because of the moral significance of the distinction between intending and foreseeing a harmful consequence of one's own agency.⁴²

The doctrine can be made clearer by focusing on an example that is often cited as an illustration of double effect:

It would be wrong to throw someone into the path of a runaway trolley in order to stop it and keep it from hitting five people on the track ahead; that would involve intending harm to the one as a means of saving the five. But it would be permissible to divert a runaway trolley onto a track holding one and away from a track holding five: in that case one foresees but does not intend the death of the one as a side effect of saving the five.⁴³

Through McIntyre's formulation of the doctrine and the popular example that she cites, we can see that double effect reasoning employs a distinction between intended and merely foreseen effects, and that this form of reasoning involves the view that this distinction can be of substantial moral importance. Two actions that have identical consequences might be morally permissible or impermissible depending on whether the bad effect is an unintended side effect of an action that is necessary to bring about a good effect, or whether the bad effect is used to bring about the good effect.

Different theorists provide different application conditions for double effect reasoning, but most conditions are quite similar to each other. Those offered by Joseph Mangan in "An Historical Analysis of the Principle of Double Effect" seem to be fairly representative of the literature:

A person may licitly perform an action that he foresees will produce a good effect and a bad effect provided that four conditions are verified at one and the same time:

1. that the action in itself from its very object be good or at least indifferent;

⁴² Alison McIntyre, "Doing Away with Double Effect," *Ethics* 111, no. 2 (2001): 219.

⁴³ *Ibid*, 220.

2. that the good effect and not the evil effect be intended;
3. that the good effect be not produced by means of the evil effect;
4. that there be a proportionately grave reason for permitting the evil effect.⁴⁴

This is quite clear, but I want to stress an important point. In order for the doctrine of double effect to be applicable, it must be possible to draw a sufficiently substantive distinction between the good effect and the evil effect. Otherwise, we cannot plausibly talk about them as two distinct effects, one intended and the other merely foreseen.

Now, I could proceed by criticizing the doctrine of double effect and showing it to be problematic, but that would involve entering into a very complex debate, and I don't have the space for that here. But, as I will show, rejecting the doctrine is not necessary for my purposes, since I can show that the doctrine cannot be applied to the matter at hand.

The issue is whether or not the deprivation theorist can use double effect reasoning to show that he doesn't need to provide direct justification for the suffering caused by deprivation. In order to show this, he would at least need to show that the deprivation is intended while the suffering is unintended *and* that the two are not so inextricably linked as to make the attempt to draw a distinction a mere technicality without normative substance. Can it be plausibly claimed that in using a deprivation punishment, such as imprisonment, the deprivation is intended while the suffering is unintended? In many of the clear cases used to illustrate the doctrine of double effect, the good effect and the bad effect are fairly easy to identify and "separate out" from

⁴⁴ Joseph T. Mangan, "An Historical Analysis of the Principle of Double Effect," *Theological Studies* 10 (1949): 43 (Quoted in Alison McIntyre, "Doctrine of Double Effect," *The Stanford Encyclopedia of Philosophy*, Fall 2009 Edition, Section 1).

one another. Take the trolley case. In the version where the trolley is diverted, the good effect is the saving of five lives, and the bad effect is the death of one person. Thus, the person who diverted the trolley could say “Sure, I diverted the trolley, but I didn’t intend to *kill* anyone. I intended to save the five!”

Now, consider what our hypothetical deprivation theorist would have to say. He would have to identify the good effect of imprisoning someone as the deprivation of liberty and autonomy, and the bad effect as the suffering. Maybe he would say “Sure, I advocate locking people up with the intention of depriving them of liberty and autonomy, but not with the intention that they *suffer*. The intention is merely the deprivation of these central rights.” This would surely sound odd, and it should. This is because penal deprivation and suffering are so inextricably linked that attempting to draw a distinction between the two amounts to a technicality with no (or, more cautiously, little) ethical import. Part of the reason for this is that these deprivations so reliably cause immense suffering, and not accidentally because of unique facts that obtain only in specified scenarios. The suffering is nearly inevitable, given obvious facts about human psychology.

This discussion, again, underlines the fact that focusing on “deprivation” is hopelessly abstract. It is, I think, an unfortunate trend in philosophy of punishment to refer to the progress that we have supposedly made in moving from hurting offenders to imposing deprivations on them. We have never stopped hurting offenders, and to emphasize our move to deprivations while deemphasizing the causation of suffering is disingenuous and potentially misleading. If we are to be honest, we must at least recognize and own up to the profound suffering caused by penal deprivations, and

perhaps even talk about deprivation and psychological suffering as a complex object of punishment. It is, indeed, problematic to imply that we can focus on penal deprivations in a way that allows us to bracket the suffering that they inevitably cause.

Chapter 3: Cruelty and Inhumaneness

In this chapter, I focus my attention on the concepts of cruelty and inhumaneness and argue that corporal punishment does not necessarily fall into either of these categories. In fact, as I will show, corporal punishment can be especially humane. While most objections to corporal punishment seem to focus on degradingness (the major topic of next chapter), the concepts of cruelty and inhumaneness are quite often invoked in discussions of the limits of permissible punishment. This warrants the attention paid to them here, and, in addition, the discussion allows me to demonstrate an important moral advantage of corporal punishment.

What is Cruelty?

Parsing the concepts “cruelty,” “inhumaneness,” “degradingness,” and “inhumanity” is very difficult, in part because “cruelty” is sometimes used as a catch-all concept, intended to cover all sorts of behavior, including behavior that is better described as “degrading.” Perhaps this usage stems in part from the Constitution’s ban on “cruel and unusual punishments”: The word “unusual” is notoriously nebulous and too descriptive, so the “normative load” in discussions of permissible punishment tends to be placed on the “cruelty” condition. Hence, all sorts of punishments that different people want to prohibit for different reasons get labeled as “cruel.” Nevertheless, cruelty remains a distinct concept, and I think that it points us towards a distinct set of concerns about punishments.

There is a sizable literature on cruelty, and in much of it there is considerable attention paid to motives, intentions, and other subjective factors that are thought to

be relevant.¹ In what follows, I will deemphasize these subjective factors, which I think is the right move when the context is legal punishment. When the term is used to refer to behavior between friends, for example, it is likely that the subjective elements should be much more heavily stressed than when it is used to refer to a legal punishment. An important reason for this is that when the term is used in the human rights context, the paramount concern is with the protection of the rights of the person experiencing the treatment or the punishment. When international documents, for instance, prohibit cruel punishment, their direct concern is with protecting people from a certain kind of punishment. If there is any concern with the motives or intentions of the punishing agents, those concerns are peripheral. So, in giving a conception of cruel punishment for legal (as opposed to private) contexts, the objective criteria should be stressed. It may be necessary to make reference to some criteria that could be labeled “subjective,” but where this is the case the motives and intentions of particular agents should be deemphasized. As we will see, I distinguish cruel and inhumane punishment by using the concepts “by design” and “insensitivity,” but these terms are not used to refer to the motives or intentions of the punishing agents. Thus, even if they are arguably “subjective,” they are not subjective in quite the same way as a condition that specifies that the punishing agent must have the intent to cause pain in order for a punishment to count as cruel.

There are a few more things that can be said regarding my approach. It should be noted that a full conception of “cruel punishment” would contain an account of punishment as well as of cruelty. Punishment, by its very nature, is deliberate, so a

¹ John Kleinig, “The Hardness of Hard Treatment,” in *Fundamentals of Sentencing Theory*, ed. Ashworth and Wasik (Oxford: Clarendon, 1998), 280.

subjective element is imported by virtue of the fact that we are talking about punishment. But critics of this approach may believe that this does not go far enough and that there should be further reference to the mental state of the punisher(s) in the conception of cruelty.² I think that this is somewhat problematic in the context of legal punishment. Perhaps I am being revisionist in raising the following concern, but I think that we need a conception that works at the various “levels” at which a charge of cruel punishment can be brought. Of course, it can be said that an *agent* has imposed a cruel punishment, but the charge can also be leveled at a *system* (e.g. the United States legal system), a *collective* (e.g. the United States government), or a *practice* (e.g. exemplary sentences). We need a conception that works and tracks distinctions at all of these different levels.

Perhaps there could be an attempt to somehow integrate a subjective element by making reference to the motives or intentions of judges, legislators, etc., but I would not be optimistic about such an attempt. How would such an account work in terms of attributing cruelty to a practice? Consider, for example, “Exemplary sentences are cruel.” Perhaps we could say “If exemplary sentences are handed down, such and such motives/intentions are likely to be behind them.” But that seems to be a distortion. More than likely, the practice is thought to be cruel because it involves an inappropriate amount of suffering, regardless of the motives or intentions behind the sentence.

Even if the reader is not persuaded by my argumentation in favor of emphasizing objective factors, a more practical consideration warrants at least *focusing* on the objective factors for the purposes of this project. Corporal

² John Kleinig, personal communication.

punishment can be inflicted with a variety of motives and intentions, and probing the subjective elements that can make a punishment, or an act in general, cruel will not help us to determine whether or not this type of punishment *as such* is cruel. So, in attempting to determine whether or not corporal punishment is cruel, there is a methodological justification for at least minimizing the attention paid to subjective elements.

It could be objected that I ought not to lose sight of the question of whether or not the implementation of corporal punishment encourages subjectively cruel attitudes in individuals who are charged with imposing the penalties.³ This is an empirical question that I am not prepared to weigh in on, but even if it were the case that administering corporal punishment encouraged subjectively cruel attitudes, this would not make the punishment itself cruel. The punishment ought to be viewed primarily as a state response to crime, not an interaction between individuals. Provided the objective features of the punishment observe relevant constraints, then this is what is important regarding evaluation of the punishment itself with regard to cruelty.

Of course, if “subjectively cruel attitudes” result in objectively cruel behavior, then this is something that must be considered and prevented. This would be an administrative problem, and there is no reason to think that such a scenario would be inevitable. As Michael Levin has pointed out, certain measures adopted in capital punishments could be used to address this concern about corporal punishments. For instance, the “electropunisher” could be prevented from seeing the punished person, dummy switches could be used, or the punisher could play an integral role in

³ Kleinig, personal communication.

safeguarding the well-being of the offender, so he could see himself as protecting as well as punishing the offender.⁴ Ultimately, if the imposition of corporal punishment frequently resulted in attitudes that we equate with subjective cruelty, this is a concern that would have to be addressed, but it is a problem that would be somewhat tangential to the issue that is our main focus here: whether or not corporal punishment, viewed as a state response to crime, would necessarily be cruel.

Another issue that we need to be aware of is the tendency to run “cruelty” and “degradingness” together. In “From Cruelty to Goodness,” Philip Hallie protests against the view that cruelty specifically relates to pain and bloodshed:

There is one factor that the idea of “pain” and the simpler idea of bloodshed do not touch: cruelty... involves the maiming of a person’s dignity, the crushing of a person’s self-respect. Bloodshed, the idea of pain... these are superficial ideas of cruelty. A whip, bleeding flesh, these are what the journalists of cruelty emphasize, following the etymology and dictionary meaning of the word. But the depths of an understanding of cruelty lie in the depths of an understanding of human dignity and of how you can maim it without bloodshed, and often without localizable bodily pain.⁵

Hallie’s analysis goes wrong here because he fails to recognize that we have a much better and more precise term to describe this kind of ill-treatment: degrading. We will be discussing degradingness in the next chapter, but for now I can say that to call behavior “degrading” involves claiming that it is in violation of human dignity. Degrading behavior involves treating a person as if they were “lower” than they actually are. In fact, Hallie offers an illustration which is supposed to illuminate his conception of cruelty. It is taken from Reska Weiss’ *Journey Through Hell*:

⁴ Michael Levin, personal communication.

⁵ Philip Hallie, “From Cruelty to Goodness,” *The Hastings Center Report* 11, no. 3 (1981): 23-24.

Urine and excreta poured down the prisoners' legs, and by nightfall the excrement, which had frozen to our limbs, gave off its stench... We were really no longer human beings in the accepted sense. Not even animals, but putrefying corpses moving on two legs...⁶

This illustration involves a paradigm case of *degradation*. This is clear in the author's language, which refers to the prisoners being treated in a way that, in effect, *reduced* them to something *lower*.⁷

Of course, the treatment that these prisoners endured was also cruel. But that is not because, as Hallie claims, cruelty involves maiming dignity or crushing self-respect. The conception of cruelty that Hallie puts forth essentially makes it a synonym of degradation, which it is not. Just paying attention to usage, which is of course relevant when analyzing concepts, it is clear that the two terms are used to pick out distinct kinds of wrongs. Hallie's conception can also be criticized on the grounds that by making cruelty overly broad, he defines it in a way that deprives it of distinctive content. We can resist Hallie's conception and still agree that the treatment of the prisoners was cruel. It was degrading because it was violative of their human dignity, and it was cruel because of the physical and psychological suffering that resulted from being treated so terribly.

I should perhaps devote some space to discussing the definitions that Judith Shklar gives of cruelty, since her conceptions, especially the first one offered in *Ordinary Vices*, are frequently mentioned. The first chapter of *Ordinary Vices* is entitled "Putting Cruelty First," and in it she offers definitions of cruelty and moral cruelty. Here is her definition of cruelty: "the willful inflicting of physical pain on a

⁶ Quoted in Hallie, "From Cruelty to Goodness," 23.

⁷ Of course, the prisoners were not made into mere things. They were being treated *as if* they were mere things. But we will get into all of this later. The important point, for now, is that the illustration makes vivid the notions of reduction and lowering.

weaker being in order to cause anguish and fear.”⁸ This definition is defective in many ways, as John Kekes points out in his “Cruelty and Liberalism”:

But why does the pain have to be physical? Why does the cruel person have to be stronger than the victim? Could not a weaker person torture a stronger one? Why must cruelty cause anguish and fear? Could it not cause death or insanity or amnesia without anguish and fear? And what if physical pain is willfully inflicted, not to cause anguish and fear, but in order to bring about the moral improvement of a miserable sinner, deviant, or heretic? Could that not be cruel?⁹

I think that Kekes’ questions are sufficient to show that her definition is problematic, but there are a few points that I would like to stress. Her focus on physical pain is clearly wrong. Inflicting massive amounts of psychological suffering without physical pain can quite obviously be cruel. Also, the specification that the recipient of cruel behavior must be weaker is also incorrect and potentially misleading. Of course, more often than not, the recipient of cruel behavior will be weaker, but this is not a conceptual point. Usually, if the recipient of the behavior were stronger, then he would force the individual(s) who are hurting him to stop. But it is clearly possible for a weaker person to be cruel to a stronger one.¹⁰

Many pages later in “Putting Cruelty First,” Shklar offers a definition of “moral cruelty”: “It is deliberate and persistent humiliation, so that the victim can eventually trust neither himself nor anyone else.”¹¹ How this relates to the earlier definition of cruelty offered in the same chapter is anyone’s guess. In any case, it is quite clearly problematic. Shklar makes a mistake that is similar to the one that

⁸ Judith N. Shklar, *Ordinary Vices* (Cambridge, Mass.: Harvard University Press, 1984), 8.

⁹ John Kekes, “Cruelty and Liberalism,” *Ethics* 106, no. 4 (1996): 836.

¹⁰ It could be argued that I am being uncharitable to Shklar and that a stronger person who is temporarily unable to defend himself against a weaker person is at least temporarily “weaker.” I think, however, that this would be *too* charitable, given that Shklar directly says that the recipient of cruelty must be a weaker *being*.

¹¹ Shklar, *Ordinary Vices*, 37.

Hallie makes in “From Cruelty to Goodness.” We saw how Hallie ran together notions of degradation and cruelty, and Shklar does the same thing here with humiliation and cruelty. However cruel it might be to deliberately humiliate people, we ought not to identify these concepts with each other or define one in terms of the other. Again, if we just pay attention to usage, the two concepts are used to pick out distinct kinds of wrongs. Even if Shklar is attempting to be revisionist here, I don’t see how anything is to be gained by running together two distinct concepts.

Finally, we have the definition of cruelty that Shklar offers years later in “The Liberalism of Fear”: “It is the deliberate infliction of physical, and secondarily emotional, pain upon a weaker person or group by stronger ones in order to achieve some end, tangible or intangible, of the latter.”¹² Again, we can turn to Kekes for potent criticism. He allows that this definition is superior to the first one offered in “Putting Cruelty First” on the grounds that it states that the infliction of emotional pain can be cruel. Also, the requirement of the intention to cause anguish and fear is removed. But she retains the problematic claim “that cruelty can flow only from the strong to the weak.”¹³ Also, the definition has the consequence that judges who imprison criminals are cruel and those fighting in self-defense are cruel if they are stronger than their attackers (which may not be the typical case, but it is of course possible).¹⁴ Both sets of individuals may be inflicting physical or emotional pain (to use Shklar’s terminology) in order to achieve their own ends, whether those ends are role-related (in the case of judges) or personal (in the case of self-defense). These

¹² Judith N. Shklar, “The Liberalism of Fear,” in *Liberalism and the Moral Life*, ed. N. Rosenblum (Cambridge, Mass.: Harvard University Press, 1989), 29.

¹³ Kekes, “Cruelty and Liberalism,” 836.

¹⁴ *Ibid*, 836.

counterexamples suffice to show that Shklar's definition in "The Liberalism of Fear" is also problematic.

This discussion of Shklar's definitions helps us to see some specific mistakes that must be avoided when seeking a workable conception of cruelty. But some valuable general lessons can also be learned. We need to avoid the mistake of confusing causal or pragmatic connections with conceptual ones. For instance, it will tend to be the case that victims of cruelty will be relatively weak compared to the agents or institutions that inflict cruelty. However, this is not a conceptual point. Rather, it is simply the case that usually (though not always) stronger people will be able to resist and weaker ones will not. In addition, we need to be aware of the tendency to run cruelty together with related concepts and concepts that often come up in similar discussions. This is something to generally be aware of when doing conceptual analysis, but I think that the tendency is especially common and seductive when working with "thick" moral concepts. Also, moral concepts that are used to denounce behaviors can be used as intensifiers ("...this cruel, despicable, humiliating, etc. act..."), and this can sometimes create confusion about the distinct content of the concept.

So, what makes a legal punishment cruel? It is helpful to look at the definition given in the Oxford English Dictionary:

Cruelty: 1. a. The quality of being cruel; disposition to inflict suffering; delight in or indifference to the pain or misery of others; mercilessness, hard-heartedness: *esp.* as exhibited in action... 2. Severity of pain; excessive suffering.¹⁵

¹⁵ *Oxford English Dictionary*, 2nd edition.

The subjective elements in this definition (disposition, delight, etc.), as I have argued, are not important for our purposes. What is important is the focus placed on suffering, pain, and misery, as well as the emphasis on severity and excessiveness. Cruelty is, at least primarily, about suffering. But, of course, not every instance of causing suffering is an instance of cruelty. We get into the territory of the cruel when the severity of the suffering is unjustified. Kekes stresses this in his “Cruelty and Liberalism.” He uses a definition of cruelty from an earlier edition of the Oxford English Dictionary, and of it he says:

The second omission from the dictionary definition is that as it stands it fails to specify that the pain inflicted on the victim must be unjustified or excessive. The victim does not deserve the pain, or that much of it, and there is no morally acceptable reason for its infliction. This is what leads some opponents of capital punishment, flogging, or mutilation to call the practice “cruel and unusual.” Their thought is, right or wrong, that there is no morally acceptable reason to inflict that much pain even on criminals who are guilty as charged.¹⁶

I think that Kekes is too quick to assume that opponents of these punishment practices call them “cruel and unusual” because of the pain involved. As Kleinig discusses in “The Hardness of Hard Treatment,” the phrase “cruel and unusual” points to considerations of both cruelty and degradation, and the “unusual” part probably has a lot to do with degradation.¹⁷ Nevertheless, this passage points out the connection between cruel punishment and levels of pain and suffering that are unjustified or excessive.

The emphases that I have pointed out seem to be common in the philosophical literature. In “Corporal Punishment,” Scarre states, “We normally use the word

¹⁶ Kekes, “Cruelty and Liberalism,” 837-838.

¹⁷ Kleinig, “The Hardness of Hard Treatment,” 285.

‘cruel’ to signify that an action or practice causes suffering in a way or to a degree that is morally wrong, or at least... regrettable.”¹⁸ In “Cruel and Unusual Punishments,” Murphy uses a Kantian framework to generate the following restrictions on punishment: “A punishment will be banned in principle if (1) it represents a direct assault on the dignity of persons or (2) it is radically disproportional to the seriousness... of the conduct criminalized.”¹⁹ This first restriction prohibits degrading punishments, and interpreting the second restriction as prohibiting cruel punishments harmonizes well with other analyses. Murphy isn’t so concerned to put forth separate analyses of “cruel” and “unusual,” but it seems that he wants to express the view that both cruel and degrading punishments should be banned. Kleinig, on the other hand, does separately analyze “cruel” and “unusual,” and his views on cruel punishments are very much in line with what we have seen from other authors. He draws on jurisprudential discussions and notes that “objective approaches have led to the characterization of *excessive* or *disproportionate* punishments as cruel.”²⁰ He gives moral priority to proportionality in deciding whether or not a punishment is cruel. We will get to the issue of excessiveness vs. disproportionality in a moment, but first we should see what we have so far.

Whether or not a punishment is cruel will have to do, at least primarily, with the amount of *suffering* caused, not pain. Regardless of the original content of the concept, there can be no doubt that it has evolved beyond a narrow reference to physical pain and that it is often invoked with reference to psychological suffering in

¹⁸ Geoffrey Scarre, “Corporal Punishment,” *Ethical Theory and Moral Practice* 6 (2003): 306.

¹⁹ Jeffrie Murphy, “Cruel and Unusual Punishments,” in *Law, Morality and Rights*, ed. M.A. Stewart (Boston: Reidel Publishing Company, 1979), 389.

²⁰ Kleinig, “The Hardness of Hard Treatment,” 281.

contemporary discussions. Cruelty has to do directly with suffering, and if it is related to deprivation, it will only be indirectly (insofar as deprivation causes suffering). There might be a temptation to offer an analysis that shifts the focus to general severity and then analyzes severity in terms of multiple factors, such as suffering and deprivation. But such an analysis would be misguided, and clearly out of keeping with the strong association that the concept of cruelty has with suffering.

Also, cruel punishments have to do with the *amount of* suffering caused. The amount of suffering rises to a level that is unjustifiable. Clearly, this raises the question of how to determine how much suffering is justifiable, and whether or not all punishments that involve causing unjustifiable suffering should be characterized as cruel. But, at the very least, we can see that the amount of suffering is important to determining whether a punishment is cruel. In addition, I think that Murphy is correct to use the term “radically” in his formulation of the principle banning cruel punishments. “Cruel” is a strong term, and seems to suggest a weighty departure from ethically correct standards. Thus, even if it would be wrong, it would seem odd to characterize a punishment that was only slightly disproportionately severe as “cruel.”

So, how do we determine how much suffering is too much? Recall that Kleinig states that there is a distinction between excessiveness and disproportionality: Excessiveness looks to some end that is being pursued or sought. Disproportionality looks back to the offence for which the suffering is imposed. An excessive punishment will cause more suffering than is necessary to deter, rehabilitate, or achieve whatever other socially acceptable goals are being sought.

A disproportionate penalty will be one that is out of keeping with the seriousness of the offence for which it is imposed.²¹

Kleinig holds that we should use the criterion of disproportionality in determining whether or not a punishment is cruel. In his view, excessive punishments that are proportional might be characterized as unnecessary, but they should not ipso facto be characterized as cruel.²² Murphy also holds that disproportionality is the criterion that we should use, although he interprets “excessive” as “disproportional.”²³ This, however, is only a matter of terminology, and we will be sticking with Kleinig’s definitions of the terms. Are Kleinig and Murphy correct in the view that we should use disproportionality, and not excessiveness, as our benchmark?

It may seem as though there are two possibilities here, but there are really three. A punishment might be cruel if it is: 1. disproportionately severe, 2. excessive, or 3. disproportionately severe *or* excessive.²⁴ Disproportionately severe punishments are prohibited by the principle of proportionality, whereas excessive punishments are prohibited by the principle of parsimony. Different sentencing theories employ one or both of these principles in different ways. Generally, the “purer” the retributivist theory, the more emphasis placed on the principle of proportionality. A utilitarian theory, on the other hand, would employ the principle of parsimony, and might have some use for the notion of proportionality, but only as a heuristic. There are other theories that incorporate both of these principles in a systematic way. Side-constrained consequentialist theories (or, at any rate, some of

²¹ *Ibid*, 281.

²² *Ibid*, 281.

²³ Murphy, “Cruel and Unusual Punishments,” 387-388.

²⁴ Disproportionate *and* excessive is conceptually permitted, but nobody that I know of argues that a punishment must fall into *both* categories in order to be cruel. Also, for reasons that will soon become clear, this would be a very odd position.

them) can accommodate both the principles of proportionality and parsimony. One way of doing this, which is the way I favor, involves using both principles to place limits on permissible punishment. In other words, a punishment should be *neither disproportionately severe nor excessive*. The appeal of such a view should be clear: People have a right not to be punished disproportionately, and excessive punishment just involves gratuitous suffering.

Kleinig and Murphy are retributivists, so it is clear that they would privilege proportionality. But it is at least arguable that excessive punishment also is cruel. Suppose highly convincing empirical studies found that, for some crimes, the crime-preventive difference between a six-month prison sentence and a two-year prison sentence was absolutely negligible. In my view, it would be wrong to continue to imprison people convicted of that crime for two years. The extra year-and-a-half would basically be gratuitous suffering, and this is something that should be avoided, even if a person deserves it. But, of course, this raises issues that I cannot go into here. My point is to illustrate that we may need to pay attention to these larger issues concerning sentencing theory and the justification of punishment in attempting to determine what cruel punishment is.

Still, there is reason to believe that Kleinig and Murphy are probably right to stress disproportionality, as opposed to excessiveness, as the criterion relevant to cruelty. A prohibition on cruel punishment seems to be a demand of justice, and its imposition should probably be viewed as a violation of rights. Whether or not a person has a *right* (as opposed to a reasonable complaint) against being punished in a certain way should not depend on all of the external contingencies that contribute to

the determination of whether or not a punishment is excessive. In any case, I think it should be rather clear that radically disproportionately severe punishments are cruel. Twenty years of imprisonment for a petty theft is cruel regardless of the external contingencies surrounding deterrence and the prevalence of petty thefts. It is cruel because the offender doesn't deserve nearly that much suffering for that offense.²⁵

In advancing my conception of cruel punishment, I will leave the criterion of excessiveness to the side, since I am not sure that it belongs as part of it.

Disproportionality, on the other hand, clearly does. Most of the conditions that form the conception of cruel punishment that I will be working with have been explained and argued for above, but the rationale for the inclusion of one of the conditions will not become clear until after the discussion of inhumaneness below. I will be working with the following view: With respect to legal punishment, a cruel punishment is a punishment that involves a grossly disproportionately severe amount of suffering, where such suffering results from the punishment by design. The rationale for the "by design" condition will be explained below, under the section on inhumaneness.

²⁵ The more debatable question is whether or not, in addition to disproportionality, the criterion of excessiveness should be used in order to determine whether a punishment is cruel or not. I do not have a decisive argument for or against using the excessiveness criterion. I admit having sympathy with the view that excessive punishment is gratuitous, and to cause gratuitous suffering is cruel. Or perhaps this is not quite right. If excessive punishment is cruel, perhaps it is only when the agents of the State know, or should know, that it is excessive. (Kleinig has suggested that this may also be true of disproportionality [personal communication]. It would be interesting to explore this possible epistemic question, but I do not want to go off on a tangent about this here. Either way, I do not think that it would significantly impact my later claims about corporal punishment.) Given how little is known about deterrence, and given how difficult it is to measure deterrence rates, it is to be expected that some punishments will *be* excessive, even if nobody could reasonably be expected to *know* that they are excessive. In such a case, it would seem unjustified to call an excessive punishment cruel. But if convincing empirical evidence is in, and it all points toward the view that a given sentence is excessive for a certain crime, then it does seem plausible that to impose that sentence anyway would be cruel. I may be begging the question against the retributivist here, and my comments are certainly influenced by my opposition to positive retributivism, but I think I've said enough to illustrate why this issue is certainly not cut and dried.

We will now take a look at the concept of inhumaneness, which is closely related to cruelty.

What is Inhumaneness?

As with our discussion of cruelty, we will be focused here on the concept of inhumaneness insofar as it applies to punishment. A general conceptual analysis of inhumaneness is unnecessary for my purposes and would send me off on unproductive tangents. As with cruelty, there may be subjective elements that contribute to making certain acts inhumane. We can deemphasize these subjective elements, for the same reasons mentioned in the discussion of cruelty. I argued that in the context of legal punishment where concern for human rights is paramount, it is important to seek a conception that focuses on the way that people are being treated as opposed to the motives or intentions of the people imposing the punishments. I also cited a more practical reason for focusing on objective factors. Since legal punishments can be imposed with a variety of intentions, probing the relevance of intentions to inhumaneness will not help us to determine whether a particular type of punishment as such is inhumane.

In my discussion of cruelty, I argued that it is a mistake to conflate cruelty and degradation. However, when it comes to inhumaneness, matters are not so clear. Ultimately, I will argue that we ought not to conflate inhumaneness and degradation, but I think that the conception of inhumaneness that I endorse (which is mostly borrowed from Kleinig) is somewhat revisionist. As we will see, it is important to distinguish between “inhumane” and “inhuman.” In my view, “inhuman” is very close to “degrading,” whereas “inhumane” is close to “cruel.” There is no doubt that

some of the confusion is due to the fact that only the letter “e” separates “inhumane” and “inhuman.”

I will begin my analysis by noting some of what Kleinig has to say on the concept of inhumaneness in “The Hardness of Hard Treatment.” On his view, “(p)unishment that is cruel is more generally and appropriately characterized as *inhumane*.”²⁶ In other words, the inhumane is a relatively broad category that contains the cruel.

Generally we treat people inhumanely when we disregard their sensibilities as human beings. More precisely, our inhumaneness is constituted by our failure to have an appropriate concern about the suffering that we cause them.²⁷

If we punish with disproportionate severity, we fail to show proper regard for the sensibilities of others. Proper regard entails, among other things, that we constrain the amount of suffering that we cause out of a concern for justice. Also, a disproportionately severe punishment shows lack of concern with the appropriateness of the amount of suffering inflicted, given the offender’s situation. According to the principle of proportionality, the appropriate amount of suffering is determined by the seriousness of the offense and the culpability of the offender. If the punishment is “out of keeping” with these factors, it displays a lack of appropriate concern for the level of suffering caused.

So far, though, in using Kleinig’s views as a jumping-off point, we need to be wary of the talk turning too subjective. We are looking for a more objective conception of inhumane punishment, so talk about what we “disregard” or have “concern” for should not lead us astray into considering subjective elements. (This,

²⁶ Kleinig, “The Hardness of Hard Treatment,” 285.

²⁷ *Ibid*, 285.

however, is not a criticism of Kleinig, since, in the quoted passage, he is speaking about inhumaneness *generally*.)

So, regarding the distinction between “inhumane” and “inhuman,” Kleinig says the following:

It is the focus on sensibilities that distinguishes treatment that is inhumane from that which is inhuman: inhuman treatment is treatment that is not fit for or appropriate to human beings; there is no (explicit) implication about the way in which it affects the sensibilities of those on whom it is imposed. Clearly, though, the two notions are very close.²⁸

Some seem to miss this distinction entirely, or they use “inhumane” as an umbrella term that is supposed to cover all sorts of behavior, including inhuman and degrading behavior. Here is Michael Davis:

[The U.N. Convention] understands torture to be a subcategory of (what we have been calling) “inhumane treatment” (what the Convention calls “cruel, inhuman, or degrading treatment”)... What is inhumane does not seem to depend simply on the suffering involved. The inhumane includes every sort of suffering from the severe suffering torture imposes to the relatively mild discomfort of degrading treatment...²⁹

I think that Kleinig’s conception of inhumaneness is better. One reason becomes apparent with the following quotation from Davis: “We have ‘humane societies’ to protect dogs, cats, and other pets from ‘cruel’ and ‘inhuman’ treatment.”³⁰ No, we don’t. These societies protect pets from cruel and *inhumane* treatment. Non-human animals are supposed to be treated inhumanly because they’re not human. Generally, we can say that it makes sense to complain that non-human animals are being treated

²⁸ *Ibid*, 285 (footnote). In Chapter 4, I will argue against some of what Kleinig says here about “inhuman,” but I think that he is right to claim that “inhumane” focuses on sensibilities while “inhuman” does not.

²⁹ Michael Davis, “Torture and the Inhumane,” *Criminal Justice Ethics* 26, no. 2 (2007): 37-38.

³⁰ *Ibid*, 38.

cruelly or inhumanely, but not that they are being treated inhumanly. Kleinig's distinction captures this, whereas Davis' view is just confused.

In citing the following consideration, I am being somewhat revisionist. In objecting to particular types of punishments, we have a limited and often imprecise vocabulary to use. Being clear and precise in our usage of the limited terms that we have at our disposal enables us to pick out a particular kind of wrong when we think we see it. With regard to failure to respect persons, we have the terms "inhuman" and "degrading." These concepts will be discussed at length in the following chapter, but regarding "inhuman," I should say now that concern about inhumanity goes along with concerns about dignity and degradingness. "Inhumane," on the other hand, should be used when the concern is about failure to have appropriate regard for suffering. This distinction allows for precision and clarity in usage.

If the charge of inhumaneness focuses on sensibilities and suffering, and disproportionality is an important factor, we might wonder what separates cruel punishment and inhumane punishment. Recall that, in Kleinig's view, the inhumane is a broader category that contains the cruel. He suggests that we draw the distinction between the cruel and the inhumane by focusing on whether the suffering is directly inflicted or the result of indifference or neglect. Paradigm cases of cruelty involve the direct infliction of suffering, while inhumane treatment may involve direct infliction, but may just as well involve indifference or neglectful treatment.³¹ I am sympathetic to this general way of drawing the distinction, but for reasons that I have already put forth, I favor an approach that draws the distinction in more objective

³¹ Kleinig, "The Hardness of Hard Treatment," 280, 285-286.

terms. As I will argue, there is a way to draw the distinction that is similar to Kleinig's, yet better for the purposes of evaluating legal punishments.

We can begin to see the distinction by looking at the concepts of cruelty and inhumaneness generally, and then focusing on punishment. I will temporarily consider certain subjective elements, but only because it can help us to develop more objective criteria. When people's acts are called cruel, there does seem to be an implication that the acts were deliberate, "on purpose," and "designed" to cause suffering. When a person behaves inhumanely, he may be deliberately causing suffering, but he may just as well be oblivious to the consequences of his actions. An inhumane person may just not be moved enough to pay close attention to the effects of what he is doing. Kleinig notes this contrast when he distinguishes between suffering that is deliberately inflicted and suffering resulting from indifference.³² Now, this distinction may seem fairly clear when looking at the concepts generally and including consideration of subjective elements, but how can these distinctions be brought to bear when the subject is legal punishment?

A clue is provided in Kleinig's claim that "there is some reason to think that both individuals and institutions can operate cruelly from lack of sensitivity no less than from design."³³ He thinks that suffering caused through lack of sensitivity fits better under "inhumane" than "cruel." But "lack of sensitivity" as a distinguishing feature is of little help to us unless the relevant notion can be captured in objective terms. Sensitivity is, centrally, a capacity of human agents, or perhaps sentient beings. But there is a, perhaps derivative, sense of "sensitivity" that we use when

³² *Ibid*, 285.

³³ *Ibid*, 280.

referring to measurement instruments. A thermometer is “sensitive” when it tracks small changes in temperature. This objective sense of “sensitive” can help us in distinguishing between cruel and inhumane punishment. What I want to claim is that inhumane, non-cruel punishment is punishment that is insufficiently “sensitive” to the amount of suffering caused to the punished person.

So, how is it that a punishment, in objective terms, can be “insensitive” to the amount of suffering caused? This can be the case if the punishment is non-responsive, or insufficiently responsive, to suffering. If proportionality is a concern, then amount of suffering ought to be a concern. If we should be concerned about the amount of suffering caused by a punishment, then we should either attempt to be fairly precise in the amount of suffering that we cause, or we should be responsive to the suffering that is caused so that we can moderate it if it becomes too severe. If there are not checks in place, or if they are in place but not observed, then the punitive system or institution cannot gauge suffering, and therefore cannot be responsive and attempt to control it. This is too often overlooked, and too many people concentrate on formal equivalencies, measured in months or years, and speak as though that is the whole of proportionality. It clearly is not, given that the principle focuses on the relationship between the seriousness of the offense and the *severity* of the punishment, and it is obvious that the amount of suffering experienced is highly relevant when determining the severity of the punishment.³⁴

If a method of punishment or its particular instantiation does not allow for at least loose tracking and responding to excesses in suffering, then it may well be inhumane. It may result in punishments that are disproportionately severe, perhaps

³⁴ To my mind, it should be seen as the main factor, but I will not defend that right now.

even grossly so. Another way of putting this, to use more subjective language, is to say that if the system is “indifferent” to suffering, then the amount of suffering may be out of keeping with the offense. This should worry anyone who is concerned about proportionality. Now, the comparative perspective is important to keep in mind here. If the only possible punishments, or the only possible significant punishments, were “insensitive” in this way, then maybe we would have to just deal with the pragmatic difficulty. However, if there is a punishment available that allows for more precise calibration of the amount of suffering caused, then there is good reason to believe that using such a punishment may be preferable to using an “insensitive,” less responsive option. We will return to this and bring these points to bear on our main issue, corporal punishment.

For now, though, we need a conception of inhumane punishment that can be brought to bear on our discussion. The conception that I am suggesting is this: With respect to legal punishment, an inhumane punishment is a punishment that involves a grossly disproportionately severe amount of suffering. The suffering involved can either result from what is part of the punishment by design, or from a lack of “sensitivity” or responsiveness. The last part is what marks the difference between the cruel and the inhumane but not cruel. With cruel punishment, we are concerned with grossly disproportionately severe suffering, but there is the suggestion (which may come from the subjective elements that are part of cruelty in other contexts) that the causation of suffering was “deliberate” or, in more objective terms, results from the punishment by design. With inhumane punishment, there is not that same suggestion that the suffering must result from the punishment by design. It may (in

which case it would also be cruel), but the inappropriate suffering may just as well result from a failure to track levels of suffering and/or respond appropriately.

I still need to say why I think that the focus should be on grossly disproportionate severity. The “gross” part stems from the fact that, as with cruelty, stating that a punishment is inhumane seems to suggest a rather substantial departure from ethically acceptable standards. We do not use terms like “cruel” or “inhumane” to suggest that a punishment is only a bit too harsh.³⁵ With respect to disproportionate severity, as was discussed above with reference to cruelty, there are two main ways that a punishment can be thought to cause too much suffering: by being disproportionate or by being excessive. I lean towards the disproportionality criterion for the same reasons that I indicated in the above discussion on cruelty. Being protected from inhumane punishment should be regarded as a right, and it is odd to think that whether or not a person should be protected from a given punishment as a matter of right should depend heavily on external contingencies. Disproportionately severe punishments provide much clearer and less contestable instances of injustice than do excessive punishments. It seems, at the very least, clear that we should *emphasize* concerns about proportionality if we are concerned about whether or not a particular punishment is inhumane.

Why Corporal Punishment Is Not Necessarily Cruel or Inhumane

Given that the category of inhumane punishments is a wider category that contains cruel punishments, we can speak for the most part of inhumane punishments and be aware that if a punishment is not inhumane, then it also is not cruel. So, is

³⁵ Of course, cruelty may be a matter of degree, and some punishments are crueler than others. But I think that the point holds and that to even invoke the terms suggests that the departure from proper standards is more than slight.

corporal punishment, as a form of legal punishment, necessarily inhumane? No. This should be fairly clear once we recall that an inhumane punishment is one that involves a grossly disproportionately severe amount of suffering. The proportionate amount of suffering will, of course, vary depending on the seriousness of the offense.³⁶ Given that an offender can cold-bloodedly torture multiple victims, it should be clear that even extreme corporal punishment would be proportionate to some crimes. More generally, if we assume that some offenders cause an immense amount of harm and are responsible for doing so, then we must admit that the proportionate punishments for those offenders would be quite extreme indeed. Sometimes, I think, torture is the only proportional punishment. Of course, that is not to say that we ought to engage in punitive torture. There are other reasons why we should refrain from such activity. Constraints following from the dignity of persons prevent us from engaging in certain types of behavior that are strictly proportional. But we ought to recognize that since there is no seeming upper limit to human depravity, there is no seeming upper bound beyond which a punishment is necessarily disproportionate.³⁷

In fact, the main reason why corporal punishment is not necessarily inhumane is that no punishment is *necessarily* inhumane. Plenty of people have been punished inhumanely, but to say that a punishment is *necessarily* inhumane would amount to

³⁶ I don't think that it is necessary to get into complexities regarding how to measure offense seriousness at this point, but we can note that the main factors that tend to be stressed are harm caused or threatened and the level of responsibility of the offender.

³⁷ Of course, some would claim that certain extreme punishments (e.g. gouging out eyes, skinning alive, etc.), even if proportionate, would still be cruel and inhumane (Kleinig, personal communication). I am inclined to dispute this, but I do not believe that such punishments should be inflicted. In my view, such punishments would be inhuman and degrading, and that is why they should be forbidden. Perhaps these sorts of punishments would be cruel in another sense of the term, but not in the sense that I have been discussing.

saying that it would be grossly disproportionately severe for *any possible* crime.

Given how terrible crimes can get, there doesn't appear to be any punishment that fits this criterion. This may seem to be a boring observation, but it is important, since people often speak as though certain punishments are cruel or inhumane *simpliciter*.³⁸ If the above analysis is accurate with respect to how these concepts should be used, then this is a mistake.³⁹

It seems that the only reasons that could be offered in support of the view that corporal punishment was necessarily cruel or inhumane would have to focus on its physical nature. Indeed, there are certain reasonable concerns that relate to this, but they are better seen as concerns about inhumanity and degradation. As we will see, they mostly pertain to worries about how corporal punishment addresses the punished person (at the merely animal, or sentient, level) or how it supposedly reduces that person to a lower level. But, as I've argued, cruelty and inhumaneness have to do with the amount of suffering and, as was discussed in the previous chapter, suffering can be caused in many ways. We made a distinction between physical suffering (suffering caused by physical pain) and psychological suffering (suffering without physical pain), and both of these kinds of suffering can be devastating and severe. In fact, we saw that there are good reasons to believe that causing psychological suffering may be more morally problematic than causing physical suffering. In any

³⁸ For example, Davis in "Torture and the Inhumane."

³⁹ Or, if it is not a mistake, then these critics should be more precise with their language, since there is probably a much better concept that can be used in order to convey what they are trying to get across. As I mentioned at the beginning of the chapter, "cruel" is sometimes used as a catch-all concept, and "inhumane" has been used in that way as well. But the *in principle* objections that critics have to corporal punishment cluster around concerns about inhumanity and degradation. That, however, is the topic of the next chapter, and it is more difficult than our present topic.

case, given that our focus here is on amount of suffering, there is no reason to think that the physical nature of corporal punishment causes us problems on this front.

Moving from concerns about whether or not corporal punishment is *necessarily* inhumane, there may be concerns about the specific kinds of corporal punishment that I recommend for consideration. I will argue that many kinds of acute pain corporal punishments, particularly electric shock punishment, fare quite well with respect to these concerns. Since avoiding inhumaneness is a matter of avoiding causing grossly disproportionately severe suffering, the more precisely the amount of suffering caused can be calibrated, the greater the likelihood of avoiding imposing an inhumane punishment. In fact, there is good reason to believe that acute pain corporal punishments can be especially humane, and this will be explored in depth in the next section. But, for now, I should say a few things to explain how concerns about humaneness could arise with respect to a particular method of corporal punishment.

A particular method of corporal punishment might raise concerns with respect to humaneness if the amount of suffering caused were immune to any reasonably precise measurement or there was no way to predict approximately how much the punished person would suffer. The reason for this should be clear: If we cannot predict the approximate amount of suffering to be caused using a particular method, then there is a great danger that it will be grossly disproportionately severe. Now, there is no reason to be especially worried about acute pain corporal punishment on this front. There are debates about how precisely physical pain can be measured, but it is not necessary to look at the empirical research in order to see that we have the

tools to make reasonable determinations on this issue. There are, of course, physiological responses to pain and self-report data. Even if we are pessimistic about the accuracy of our ability to measure pain, it should at least be clear that we can do well enough to avoid frequent grossly disproportionate severity.

Of course, there is a difficulty with respect to how to determine the proportionate amount of pain to be inflicted for a given offense, and it might be thought that I need to discuss in some depth the “matching problem,” the problem of matching offense with pain.⁴⁰ I do not think that this is necessary and I do not see any reason to think that corporal punishment is especially problematic on this front. This is a problem for *all* punishments, even if our sentencing principle is the *lex talionis*. Even with the *lex talionis* there is the problem of how to incorporate varying levels of culpability when determining the appropriate penalty. As we move away from the *lex talionis*, the problem is often compounded, since punishments and their corresponding offenses become less and less similar. This is not to say that the problem is intractable, and interesting work has been done in an effort to address it.⁴¹

Nonetheless, I will make a few brief remarks in an effort to show how the issue might be addressed with respect to corporal punishment. We would begin by determining the offenses that would be subject to corporal punishment. Then, we would rank those offenses in terms of seriousness. Of course, there is no widespread agreement about the proper way to do this, but, again, this is not a problem unique to corporal punishment. It would be necessary to anchor the penalty scale, and this could be done most easily by picking the offenses subject to corporal punishment that

⁴⁰ Kleinig, personal communication.

⁴¹ For example, Andrew von Hirsch, *Censure and Sanctions* (New York: Oxford University Press, 1993), Chap. 2.4, 4, 5.

are most closely focused on the causation of physical pain. Assault is an obvious candidate.⁴² The scale could be anchored by determining an equivalent (or reasonable) amount of pain to inflict for assault, and then rules of ordinal proportionality could be observed in order to set the intensity of penalties for offenses ranked above and below assault in terms of seriousness.⁴³

There may also be a related worry about victim satisfaction: Will victims who have to endure long-term suffering believe that the brief infliction of pain on those who have harmed them is a proportionate response?⁴⁴ Will they be satisfied with this type of punishment? This is an empirical question and I am not prepared to make a strong claim in response to it. But there is reason to think that victims may be somewhat satisfied with this mode of punishment. Given that corporal punishment is more visceral than imprisonment, victims might receive more satisfaction from the high-impact (if short-term) nature of corporal punishment. Newman addresses this issue in *Just and Painful*, and he refers to it as the issue of “credibility”:

In order for punishments to fulfill their role as effective punishments they must be credible as punishments. That is, the public must be able to see that they are punishments, pure and simple, not some kind of treatment. The less ambiguity in punishments, the better... [T]he unambiguous

⁴² Assault is perhaps the best example of a crime for which it seems to be easier to determine a proportionate corporal punishment than a proportionate prison sentence, given that both the crime and the punishment involve inflicting bodily pain. Of course, matters are not quite as simple as that, especially in cases involving long-term injury and, as always, matters are complicated by the necessity of taking the level of culpability into account. But, all this being the case, the matter is still more straightforward than when the punishment of choice is imprisonment.

⁴³ Of course, objectors could attack this sketch in different ways. I offer it only to show that there is no reason to think that this problem is intractable and to suggest that it is not more difficult than “matching” offenses with other types of punishments. Kinks would need to be worked out, and further work would need to be done, but there is *no reason* to think that the matching problem presents an especially difficult challenge for the proponent of corporal punishment.

⁴⁴ Kleinig, personal communication.

application of pain by acute corporal punishment makes it a highly credible punishment even though one might argue that it is actually “less severe” than say even 10 days in jail.⁴⁵

So, there is reason to believe that victims may be reasonably satisfied with corporal punishments.⁴⁶ Their “credibility” and lack of ambiguity may go a long way towards making up for their short-term nature.⁴⁷

With respect to stress position corporal punishments, such as non-public pillorying, the concern about inhumaneness is a bit more pressing, but it can ultimately be rebutted. When relying on causing pain by putting someone in a stress position, it is more difficult to calibrate the amount of pain being caused. In order to avoid causing a grossly disproportionately severe amount of suffering, it would be necessary to closely monitor such a punishment. But with such monitoring, it should be possible to keep the amount of pain caused within certain bounds. Again, of course, the measurement will not be absolutely precise, but we could do well enough to avoid inhumaneness. In fact, as we will see in the next section, whatever measurement concerns we might have should seem insignificant compared to the concerns generated by other types of punishment that are very erratic in terms of amount of suffering caused.

Why Corporal Punishment Can Be Especially Humane

In this section, rather than defending corporal punishment against objections, I want to point out one of its major advantages. I will be arguing that certain methods

⁴⁵ Graeme Newman, *Just and Painful: A Case for the Corporal Punishment of Criminals* 2nd ed. (Albany, NY: Harrow and Heston Publishers, 1995), 93-94.

⁴⁶ Although the quotation is about public satisfaction, not victim satisfaction, the relevant point is how the punishment is perceived by others.

⁴⁷ However, I’m not sure that victim satisfaction should be seen as an important goal of legal punishment, beyond the pragmatic requirement that people probably need to have some sense that something is being done in response to crime in order to prevent vigilantism. But this is a very complex issue, and I cannot go into it in any depth here.

of corporal punishment, particularly electric shock, are especially humane, primarily because it is possible to calibrate the amount of pain being inflicted. Although this cannot be done perfectly, the calibration is much more accurate than with imprisonment. Generally, I prefer to avoid the comparison with imprisonment, since it obscures the fact that corporal punishment needs to be defended in its own right and not just as a “lesser evil.” But the comparative perspective is sometimes instructive and important, as I will explain below.

Of course, I am only arguing that corporal punishment *can* be especially humane. Certain forms of it are clearly inhumane, and all forms can be if they are imposed to a certain extent. It should be fairly clear what I mean by “humane” here, given all that was said about inhumaneness. With respect to legal punishment, a humane punishment is a punishment that does not involve a disproportionately severe amount of suffering.⁴⁸ So, a humane punishment either involves a proportionate or a disproportionately lenient amount of suffering. Of a particular method of punishment, we can call it humane if it allows the punishing agents to show regard for the amount of suffering caused by taking care to avoid disproportionate severity. This is what I will mean when I call electric shock punishment humane.

I need to say something about why I will be employing a comparative perspective here. In *Just and Painful*, which I will be drawing on for this section, Newman often makes the mistake of discussing the horrors that are pervasive in some prisons, and then essentially saying, “You object to corporal punishment? Prison is so much worse.” This obscures the important issues in at least two ways. First, it

⁴⁸ I’m not sure whether or not a punishment that is only moderately disproportionately severe should be called “humane.” This need not detain us.

takes the emphasis off the fact that corporal punishment needs to be defended in its own right. Second, the comparison is often made to prison in some of its worst instantiations. While I think that there is often little sense in talking about “imprisonment *qua* imprisonment” (Nobody is imprisoned in “Prison *qua* prison”), we also need to take care not to slip into the assumption that imprisonment inevitably involves daily rape and brutality. With these cautions in mind, taking the comparative perspective reminds us that in choosing a particular method of punishing, we (as a society) are in fact *choosing* to respond to crime in a certain way. Also, comparing one method of punishment to another can present the advantages of a particular method in a more vivid way, allowing us to see a marked virtue where we might otherwise have seen a simple “check in the plus column.”

So, the main reason why corporal punishment can be especially humane is that certain forms of it can be calibrated fairly precisely, which allows us to be fairly precise in how much pain we are inflicting on the punished person.⁴⁹ As we shall see, imprisonment fares very poorly with respect to calibration, but for now let us focus on corporal punishment. Electric shock punishment is Newman’s corporal punishment of choice, and it can obviously be calibrated in terms of intensity (voltage), duration, and number of punishment “sessions.”⁵⁰ But what about the intensity of the pain? Critics have argued that because pain is subjective, it is not amenable to reasonably precise measurement and control. Newman states that the scientific research does not back up this claim, and that even though pain itself is not

⁴⁹ Of course, precise calibration is not a marked virtue if the matching problem is intractable. However, as we have seen, there is no good reason to believe that the problem is especially resistant to reasonable resolution.

⁵⁰ Newman, *Just and Painful*, 107.

directly observable to others, we have access to evidence that allows us to gauge the painfulness of various things that we are able to do to people. Individuals exhibit various types of behaviors in response to physical pain, and these have been described in detail by psychologists: “crying out, wincing, calling a halt to a painful stimulus, crying, gritting one’s teeth, and sweating.”⁵¹ This behavior is similar across many different individuals.⁵² In addition to physiological responses, both voluntary and non-voluntary, we can use self-reports to find out about the painfulness of various stimuli, and schemata have been assembled in order to enable people to be more precise in their self reports of pain.⁵³

In “The ‘Inequability’ of Incarceration,” Long also argues that we should consider corporal punishment and states that its “equability” is one of its main virtues. The term is borrowed from Bentham and is defined as “the accuracy with which a given nominal measure of punishment affects individuals with equal severity.”⁵⁴ Basically, the more precisely the amount of pain caused can be controlled, the more equable the punishment. In responding to the concern that offenders would experience acute pain differently, Long states that

[R]esearch indicates that the suffering that results from an acute pain is likely to be quantifiable and controllable. The subjective human experience of pain is involuntarily reflected in neurological and physiological indicators that can be monitored. Neurological measures have been found to closely parallel subjective measures of pain.⁵⁵

⁵¹ *Ibid*, 22.

⁵² *Ibid*, 21.

⁵³ Ronald Melzack, “The McGill Pain Questionnaire: Major Properties and Scoring Methods,” *Pain* 1, no. 3 (1975): 277-299.

⁵⁴ Hannah T.S. Long, “The ‘Inequability’ of Incarceration,” *Columbia Journal of Law and Social Problems* 31 (1998): 321.

⁵⁵ *Ibid*, 350 (footnotes omitted).

Long cites scientific research to support these claims and she also discusses the issue of potential inequability arising from emotional responses to the pain.

Emotional responses to pain depend on the subject's cognitive assessment of its implications – whether she perceives life interruption, expects the pain to persist over time, or recognizes impending or actual harm. Negative emotional responses like depression, anxiety, frustration, anger, and fear are minimized where the subject understands that pain will not be physically damaging or of long duration.⁵⁶

There is research to support these claims as well, and this should help to address possible concerns about lack of ability to control the emotional experience resulting from the pain. Measures can be taken to make corporal punishments more equitable in this respect, including informing the offender about the details of the procedure and helping him to have a reasonably precise idea about what to expect.⁵⁷

Returning to Newman, one of his objectives in chapter 5 (entitled “Electric Shock: The Fairest Punishment of All”) is to make the case that using electric shock allows us to make the pain the same for everyone. He cites scientific research, and he relies on a few distinctions that have been made. One distinction is between acute pain and chronic pain. Acute pain is felt when you cut your finger or bang your head, while chronic pain continues for a long time and is the kind of pain felt, for example, by arthritis victims.⁵⁸ Acute pain is generally more intense and lasts for a much shorter period of time than chronic pain. Another important distinction is between pain threshold and tolerance of pain. Pain threshold is the point at which a person reports that a particular stimulus is painful. Tolerance of pain, on the other hand, refers to how long a person can stand or “take” the pain. Pain threshold and tolerance

⁵⁶ *Ibid*, 350 (footnotes omitted).

⁵⁷ *Ibid*, 351.

⁵⁸ Newman, *Just and Painful*, 23.

of pain are not necessarily related to each other.⁵⁹ For example, I might report that water of a given temperature is painful to the touch while most others do not, but I might also be able to sit for two hours for a tattoo without too much difficulty, which is something that most people (probably) couldn't do.

So, people are not identical in terms of how they respond to painful stimuli. Pain thresholds vary, as do individual's abilities to tolerate pain. However, while these variations are quite relevant when dealing with pain at a low level, they are not nearly as relevant when dealing with more intense acute pain. Newman states that the pain in the experiments that test pain threshold and tolerance is almost always very low in intensity, and we should expect that people will call "stop" significantly before the pain gets to a point when they actually can't "take it."⁶⁰ This should be fairly obvious. While I might "push myself to the brink" for some sort of self-transformative purpose (or something like that), I would be much less inclined to do so when a subject in an experiment. I doubt many people differ from me in that respect. Now, Newman states that:

if one were to administer a painful stimulus which was, say, twenty times that of the lowest pain threshold, the extent to which this pain was felt differently among individuals would be "levelled." That is, it would be felt the same (very painful) by everyone. And if we used a physiological indicator we could be even more certain.⁶¹

The potential problems introduced by variations in pain threshold and tolerance are not present when we are dealing with momentary acute pain, which is the kind of pain that Newman advocates causing with electric shock. The intense acute pain would be

⁵⁹ *Ibid*, 58-59.

⁶⁰ *Ibid*, 59.

⁶¹ *Ibid*, 59.

well above everyone's pain threshold and the pain would not last long enough for tolerance of pain to become a factor. So, according to Newman, "we could be absolutely sure that the punishment really hurt every person to whom it was applied, and hurt them equally."⁶²

I think that it is a bit of an overstatement to say that we can be "absolutely sure" that the punishment would hurt everyone "equally," but the important point is clear enough. In any case, a bit later in the chapter he addresses "those purists who would insist that no matter at what level of intensity of shock, each one will feel it differently":

[O]ne may reply that even if this is so, it is demonstrably clear that in comparison with the punishment of prison, the application of physically acute pain to the body is far more equitable, and far less susceptible to variations in effects.⁶³

This is the point where we will make use of the comparative perspective. As Newman points out, imprisonment suffers from a calibration problem: It is next to impossible to determine, even approximately, the amount of pain and suffering that a term of imprisonment will inflict on an offender. Of course, prison sentences can be superficially calibrated in terms of months and years, but, as Newman explains, to focus exclusively on this is superficial indeed:

...prisons have been championed... because they are measured in terms of years and months, they can be very finely calibrated to meet the particular crime. Unfortunately this is only superficially true... the calibration stops with the pronouncement of sentence. The convicted is then passed on through many hands into the correctional system, and subject to an enormous variety of pains of imprisonment, none of which have been specifically prescribed by the judge or legislator.⁶⁴

⁶² *Ibid*, 59.

⁶³ *Ibid*, 61.

⁶⁴ *Ibid*, 95.

The amount of suffering actually experienced by the offender will depend on a large number of factors. The offender's "sensibility" and "adaptability" will of course be relevant. An offender with many close ties to friends and family will probably suffer much more than an offender who is comparatively "isolated." And, of course, we could go on and on, listing the myriad factors that determine the amount of suffering actually experienced by the imprisoned individual. In fact, in *An Introduction to the Principles of Morals and Legislation*, Bentham gives us a quite thorough list of "circumstances influencing sensibility." Basically, these different "circumstances" influence the extent to which a particular event or series of events causes an individual to experience pleasure or pain.

They seem to be as follows: 1. Health. 2. Strength. 3. Hardiness. 4. Bodily imperfection. 5. Quantity and quality of knowledge. 6. Strength of intellectual powers. 7. Firmness of mind. 8. Steadiness of mind. 9. Bent of inclination. 10. Moral sensibility. 11. Moral biases. 12. Religious sensibility. 13. Religious biases. 14. Sympathetic sensibility. 15. Sympathetic biases. 16. Antipathetic sensibility. 17. Antipathetic biases. 18. Insanity. 19. Habitual occupations. 20. Pecuniary circumstances. 21. Connexions in the way of sympathy. 22. Connexions in the way of antipathy. 23. Radical frame of body. 24. Radical frame of mind. 25. Sex. 26. Age. 27. Rank. 28. Education. 29. Climate. 30. Lineage. 31. Government. 32. Religious profession.⁶⁵

Bentham does not claim this list to be exhaustive, and it is not necessary to explain some of the "circumstances" which are not readily comprehensible. But I include this list because it nicely illustrates the great many factors that come into play and greatly affect the suffering experienced by an imprisoned individual. Because of the many "circumstances influencing sensibility," to try to calibrate the suffering caused by

⁶⁵ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, Digitized text from 1907 Oxford Edition. Classical Utilitarianism Web Site, <http://www.laits.utexas.edu/poltheory/bentham/ipml/index.html> (accessed March 25, 2010), Chapter VI.

imprisonment would be a hopeless task. Of course, we could try to do better on this front, but our progress would be limited for many reasons. One major reason would be the great epistemic difficulty of learning so much about a particular offender's psychology. Also, it would be extremely difficult to ensure that the prison environment does not cause wild variations in the level of suffering experienced.

Long criticizes imprisonment on these same grounds, although where Newman would talk about a lack of calibration, Long criticizes imprisonment for its inequability. She explicitly compares corporal punishment with imprisonment on these grounds, and her eloquence justifies the quotation:

However unappealing punishment through acute pain may seem, it would likely be an improvement over incarceration. Incarceration has never failed to disappoint those who hope to reform offenders. Nevertheless, it burgeons malignantly, contaminating our criminal justice system with the individual injustice that results from its extreme inequability. We cannot conscientiously continue to punish offenders by chance or by individual characteristics unrelated to culpability. The choice of a more equitable punishment... would reduce the immeasurable variations of suffering that we now unjustly inflict upon incarcerated offenders irrespective of their nominal sentences.⁶⁶

It is good that Long points out the sizable role played by chance in the amount of suffering experienced during a term of imprisonment. It is also important to keep in mind that so many other factors that affect the amount of suffering are completely unrelated to the seriousness of the offense or the blameworthiness of the offender. Keeping these facts in mind, the greater equability of acute pain corporal punishment seems to be a marked virtue indeed.

Recall that a major advantage of taking a comparative perspective is that it reminds us that there is a choice to be made. Of course, almost always a choice must

⁶⁶ Long, "The 'Inequability' of Incarceration," 353.

be made among imperfect options. There is no way to punish people in such a way that we can be absolutely sure that they all receive the exact amount of pain that we intend to cause. However, as Newman points out, even if there are significant variations in the effects of electric shock punishment, these variations are dwarfed by those present with imprisonment.

When Newman discusses the issue of calibration, he is focused on evaluating the different modes of punishment in terms of fairness. Fairness is, of course, very important, but we can also see that the relatively precise calibration is relevant to the issue of humaneness.⁶⁷ Recall that a humane punishment allows the punishing agents to be reasonably precise in terms of the amount of suffering caused. This makes it much more likely that they will be able to avoid disproportionate severity. As we have seen, electric shock punishment can be calibrated relatively precisely, and it offers a level of precision that would be next to impossible to achieve with imprisonment. We ought to be very concerned to avoid making people hurt more than they deserve to when punishing them. If we want to constrain the amount of pain caused out of a concern for justice, electric shock punishment seems to give us a way to do this. This makes it, as a method of punishment, especially humane.

There is an additional reason why many corporal punishments can be especially humane that is worth mentioning. Many corporal punishments, including electric shock punishment, can be supervised from beginning to end. This is quite important, considering the predatory behavior that takes place in many prisons. With a punishment that can be completely supervised, we remove a variable that

⁶⁷ While his emphasis is on fairness, Newman does mention humaneness: "I argue that corporal punishment is *the* most humane punishment we have" (*Just and Painful*, 6).

contributes to the variations present with forms of punishment that cannot (or will not) be completely supervised.

In the above discussion, I have been focusing on the ability to calibrate the pain involved in electric shock punishment, while my conceptions of humaneness and inhumaneness make explicit reference to suffering, not pain. As was covered in the last chapter, there is a distinction to be drawn between pain and suffering, and this presents some complications. However, the central point of this section remains intact. In addition to the pain being calibrated with electric shock punishment, there is good reason to believe that the suffering will be calibrated as well. The relatively intense pain will reliably cause severe distress and be perceived, in the moment, as a threat to the intactness of the person, even if the person knows that he is not in any actual danger. As we saw, intense pain does not always result in suffering, but the exceptions are cases like childbirth, where the person in pain is involved in an overall positive experience. It is unlikely that a punished person will regard his punishment as an overall positive experience, and without being able to “reinterpret” the pain in that way, it is almost certain that the pain of electric shock punishment will result in suffering. And, again, if there is a lingering concern about calibration of suffering due to psychological differences, it is important to point out the comparison with imprisonment. To use a particular method of punishment involves making a choice among imperfect options, and even if it is not quite perfect, electric shock punishment retains its value with respect to the important criterion of calibration.

Chapter 4: Degradingness and Inhumanity

In this chapter, I focus on the related concepts of degradingness and inhumanity and argue that corporal punishment does not necessarily fall into either category. I offer analyses of both concepts and then proceed with the discussion of corporal punishment while only making reference to degradingness, since on my analysis inhuman punishment is punishment that is grossly degrading. After I explain various objections from degradingness that are (or would be) made to corporal punishment, I show that they raise two general problems: the “problem of address” and the “problem of reduction.” I discuss these problems in turn and argue that the objections fail to show that corporal punishment is morally wrong. Finally, I take a broader view and argue that, taking into account multiple relevant considerations, certain forms of corporal punishment are not necessarily degrading.

***What is Degradingness?*¹**

In “Punishment, Dignity and Degradation,” R.A. Duff puts forth “four different possible modes or meanings of degradation”:

1. Performative degradation: This occurs when “some formal action by itself reduces the person on whom it is performed to a lower rank or status.” Duff offers the example of a military officer being degraded by being stripped of his rank.
2. Consequential degradation: This occurs when “the treatment that a person suffers, though not performatively degrading, has the effect of reducing him in rank or status.” In elucidating this type of degradation, Duff writes of social contexts that

¹ Although it may look awkward, “degradingness” is an accepted word. It is in the *Oxford English Dictionary* (2nd edition), John Kleinig uses it in “The Hardness of Hard Treatment” (in *Fundamentals of Sentencing Theory*, ed. Ashworth and Wasik [Oxford: Clarendon, 1998], 273-298), and Andrew von Hirsch uses it in *Censure and Sanctions* (New York: Oxford University Press, 1993) [Chapter 9: Degradingness and Intrusiveness].

recognize distinct ranks. In such contexts, a series of negative events might lead a person to be degraded from “respectable” to “vagrant.”

3. Expressive degradation: This occurs when people are treated as if they were of a lower status or grade than they actually are. In other words, it happens when a person is treated “in ways that would be appropriate, if at all, only to a person or being of lower rank.” Duff gives the example of a professor complaining about his bags being searched when leaving the campus library. This professor might think that it is legitimate that students’ bags be searched. He objects that it is degrading to search his bags because it involves treating him as if he were merely a student, as opposed to a person in a special position of respect who should be presumed to have a strong commitment to academic values.

4. Subjective or Psychological degradation: This occurs when people *feel* as though they have been degraded. For reasons to be explained, Duff does not believe this be an authentic type of degradation.²

This taxonomy is useful, for it helps me to focus more specifically on what I will be concerned with in this chapter. With respect to performative degradation, we can acknowledge this as an authentic mode of degradation. Nevertheless, discussion of this type of degradation need not detain us. Nobody claims that corporal punishment is degrading in this sense, since it is obvious that corporal punishment is not a formal action designed to demote someone to some sort of lower status.

Some forms of severe corporal punishment might be consequentially degrading, since they might result in an amount of psychological destruction that

² Antony Duff, “Punishment, Dignity and Degradation,” *Oxford Journal of Legal Studies* 25, no. 1 (2005): 149-151.

could permanently reduce a person to a lower mode of being. If severe brutality had the consequence of substantially eroding a person's rational capacities, we might want to say that this person has been degraded. I say "might" because, as Duff argues, "however terrible the destruction that can be wrought upon a person's body, mind and spirit, it is unclear whether we should say that it could destroy her as a human being, or that nothing can do so."³ In any case, we need not devote much attention to this. I think that it is fairly clear that we ought not to punish people in ways that disintegrate them psychologically by destroying the capacities that are constitutive of personhood. So, let us acknowledge that some corporal punishments are arguably consequentially degrading. I will say a bit more about consequential degradation after discussing expressive degradation, since the contrast will enable me to clarify my approach.

With respect to subjective or psychological degradation, Duff argues that this is not an authentic type of degradation, and I agree with him. He points out that ... *feeling* degraded is neither necessary nor sufficient for *being* degraded. It is clearly not necessary, since some of the worst kinds of degradation precisely involve reducing their victims to a condition in which they no longer feel degraded because they have come to think such treatment is fitting for them. It is not sufficient, since although the professor... might feel (his) treatment to be degrading, if we reject (his) complaints and insist that (he was) treated in (a way) entirely consistent with and respectful of (his) moral and social status, we will deny that (he was) degraded or treated degradingly.⁴ Duff is certainly right about this. Unfortunately, it is possible to treat a person in a way that destroys his self-image. If a person thinks of himself as worthless, he may not feel degraded by certain degrading behaviors directed toward him. Of course, it

³ *Ibid*, 154.

⁴ *Ibid*, 150-151.

does not follow that those behaviors are not degrading. Also, it is likewise an unfortunate reality that some people have over-inflated senses of self-importance. Such people sometimes feel degraded when they are being treated as equally important to others, instead of with the deference they believe to be their due. Of course, we do not want to say that such equal treatment is actually degrading.

So, this leaves us to focus on expressive degradation. If the being in question is a person, then expressive degradation will occur when a person is treated as if he were something normatively less than a person. As we will see, the main “objections from degradation” to corporal punishment involve claiming that corporal punishment is expressively degrading. We will see that there is concern that corporal punishment involves treating a person as if he were a mere animal. In any case, we must ask what it means to treat a person as if he were something less than a person. In much of the literature that discusses degradation, there is a connection drawn between degradation and dignity. Many authors have stated that treatment is degrading to persons when it is in some way violative of their dignity. For example, in “Cruel and Unusual Punishments,” Murphy states “A punishment will be unjust (and thus banned on principle) if it is of such a nature as to be degrading or dehumanizing (inconsistent with human dignity).”⁵ In “The Hardness of Hard Treatment,” Kleinig states “To degrade another is to detract from the other’s dignity as a human being.”⁶ The focus often seems to be on what Duff calls expressive degradation, and the idea is that persons possess a fundamental dignity, and they are treated in a degrading way when

⁵ Jeffrie Murphy, “Cruel and Unusual Punishments,” in *Law, Morality and Rights*, ed. M.A. Stewart (Boston: Reidel Publishing Company, 1979), 386.

⁶ Kleinig, “The Hardness of Hard Treatment,” 287.

others treat them as though they were “lower” kinds of beings, i.e. beings that do not possess that fundamental dignity.

I should now say a bit more to put to rest concerns that I have dismissed consideration of consequential degradation too quickly. Duff is explicit that, like performative degradation, consequential degradation involves treatment that actually reduces the person’s status. Perhaps Duff’s best illustration of the distinctions between performative, consequential, and expressive degradation comes in the following passage. He states that the prisoners in Nazi concentration camps were treated in a way that was expressively degrading:

An uncontroversial, horrific example is the way in which prisoners in Nazi concentration camps were treated as, i.e. as if they were, subhuman. Such treatment could not performatively degrade them (reduce them to a sub-human rank), nor should we describe the morally and psychologically destructive effects that it had on so many of them as consequentially degrading – as if people could in fact be made sub-human: but it was utterly degrading treatment, even in relation to those who managed, against all the odds, to maintain their dignity and self-respect.⁷

The distinction between consequential and expressive degradation becomes clearer here. With respect to persons, or “humans” in the moral sense, consequential degradation would involve treatment that lowered the person to a status that was less than a person, or less than human. As Duff notes, it is not even clear that this is possible, but if it is somehow possible, it should be clear that any punishment, corporal or otherwise, that actually had that effect would be wrong. So, we can leave consequential degradation to the side and focus on expressive degradation. For the remainder of this chapter, unless I state otherwise, when I refer to degradation I will be speaking of expressive degradation.

⁷ Duff, “Punishment, Dignity and Degradation,” 150.

Now, since degradation is closely connected to dignity, we need to take a closer look at the concept of dignity. We will see that the term has two distinct but related senses. On one sense of the term, it is thought that all persons have an equal basic dignity and that this basic dignity cannot be forfeited or lost, or at least not as long as the beings that possess it remain persons. On the other sense of the term, some people possess more dignity than others and a person can either gain or lose dignity, at least to a certain extent. We will also see that while the concept of dignity is most famously associated with the thought of Immanuel Kant, the concept has been used and given alternative foundations by thinkers who were not Kantians.

In his “Oration of the Dignity of Man,” Giovanni Pico della Mirandola spoke of the “pre-eminence of human nature.” He examined different reasons that were offered in support of this claim to pre-eminence, and found that many reasons offered by previous thinkers were wanting. In advancing his own claims about the source of the dignity of man, he imagines what the Supreme Maker, God, might have said to Adam, the first human:

We have given you, O Adam, no visage proper to yourself, nor endowment properly your own, in order that whatever place, whatever form, whatever gifts you may, with premeditation, select, these same you may have and possess through your own judgement and decision. The nature of all other creatures is defined and restricted within laws which We have laid down; you, by contrast, impeded by no such restrictions, may, by your own free will, to whose custody We have assigned you, trace for yourself the lineaments of your own nature... We have made you a creature neither of heaven nor of earth, neither mortal nor immortal, in order that you may, as the free and proud shaper of your own being, fashion yourself in the form you may prefer.

Clearly, there is much in this passage that illustrates the connection that is drawn between human “specialness” and being a creation of God that is popular in pre-

Enlightenment discussions of human dignity. But there is another idea here as well. Man has the capacity to use his judgment and free will in order to shape his own nature and determine the kind of being that he will become. This sets him apart from other creatures who lack these abilities. It is interesting to note that, on Pico's view, it is not only lower animals that lack the ability to engage in self-transformation: "The highest spiritual beings were, from the very moment of creation, or soon thereafter, fixed in the mode of being which would be theirs through measureless eternities." Man, by contrast, was "bestowed seeds pregnant with all possibilities," and with this in mind, Pico asks "Who then will not look with awe upon this our chameleon, or who, at least, will look with greater admiration on any other being?"⁸

So, in Pico's view, we are set apart from other beings by virtue of our ability to self-transform, which is made possible by judgment and reflection. We need not (and certainly ought not to) buy into Pico's whole worldview (we know that Adam wasn't the first human) in order to get something of value from his oration. And it is noteworthy that there are similarities between Pico and Kant. Genuine, deliberate self-transformation is not possible without reason, and, for Kant, human dignity is intimately related with our rational nature.

Regarding the Kantian view of the ground of dignity, there is a complexity surrounding whether rationality or "normativity" should be stressed. According to the "rationality view," all persons possess dignity by virtue of their practical reason and the self-governance that practical reason makes possible. Practical reason

⁸ Giovanni Pico della Mirandola, "Oration on the Dignity of Man," trans. A. Robert Caponigri (Chicago: Regnery Publishing, 1956). Digitized text from Cosma Shalizi's Home Page: <http://cscs.umich.edu/~crshalizi/> (accessed March 25, 2010).

involves setting an end, deliberating about various ways to achieve that end, and pursuing the end on the basis of those deliberations. Regarding the “normativity view,” Kleinig states that human dignity primarily consists in or derives from ...our status as normative beings whose decisions are not to be resolved simply in terms of simple means-end determinations, but as judgments of appropriateness or inappropriateness. It is our standing as moral agents, given to evaluating courses of action as a condition of determining them, that is a critical element in our dignity.⁹

Thomas Hill also ascribes this view to Kant, tying dignity to Kant’s conception of autonomy:

Autonomy is said to be the ground of dignity, and this is a property of the will of every rational being, namely, the property of legislating to oneself universal (moral) laws without the sensuous motives of fear, hope for reward, and the like.¹⁰

My inclination is to think that coming down on one side or the other on this issue is not terribly important for my purposes. I think that it is best to acknowledge the complexity and state that rationality and autonomy are traditionally thought of as very important in Kantian scholarship, and that certainly a major reason for their significance is that they are tied to morality and moral agency in an intimate way.

We learn more about Kant’s conception of dignity in the following quote:

“The respect that I have for others or that another can require from me is therefore recognition of a dignity in other human beings, that is, of a worth that has no price, no equivalent for which that object evaluated could be exchanged.”¹¹ Kant contrasted things that merely had a price with things that had dignity. Things that merely have a

⁹ John Kleinig, “Humiliation, Degradation, and Moral Capacity: A Response to Hörnle and Kremnitzer,” *Israel Law Review*, forthcoming (2010).

¹⁰ Thomas E. Hill, “Humanity as an End in Itself,” Chap. 2 in *Dignity and Practical Reason in Kant’s Moral Theory* (Ithaca, N.Y.: Cornell University Press, 1992), 47.

¹¹ Immanuel Kant, *The Metaphysics of Morals*, trans. and ed. M. Gregor (Cambridge: Cambridge University Press, 1996), 209.

price have only extrinsic value, or, in other words, they have value only because people happen to place value upon them. However, whatever has dignity has intrinsic value in addition to whatever extrinsic value it happens to have. Beings with intrinsic value possess value “in and of themselves,” not merely because other beings happen to believe that they are valuable. Here, again, we have the idea of a distinctive human “specialness” that is related to the capacities that allow us to be self-shapers and self-legislators. It is important to state that, in Kant’s view, this basic dignity cannot be lost or forfeited by performing a criminal, or morally wrong, act. A person may use his practical reason in order to deceive, coerce, and harm others, but as long as he remains an autonomous being, he retains his intrinsic value and basic dignity.

Thus far we have been concerned with what could be called basic dignity, a fundamental worth that all persons are thought to possess equally by virtue of their inherent capacities. But the term “dignity” has another sense as well. Daryl Pullman contrasts “basic dignity” with “personal dignity.” With respect to basic dignity, “this sense of dignity applies to each and every human person irrespective of rank, station, or any other contingent quality.” Personal dignity, on the other hand, is “more particular, individualistic, and transient in nature... It is a dignity that can be either enhanced or diminished depending upon a variety of circumstances.”¹² According to Kleinig,

As well as something that one possesses as a result of one’s standing as a human being, dignity may also be given behavioral expressions as a kind of manifest bearing. Those who speak of ‘dying with

¹² Daryl Pullman, “Human Dignity and the Ethics and Aesthetics of Pain and Suffering,” *Theoretical Medicine and Bioethics* 23 (2002): 76.

dignity' or of 'carrying oneself with dignity' have in mind not simply a standing but a manifest control over the terms of one's life (or death).¹³

So, different people can possess more or less personal dignity and a particular person's level of personal dignity can change over time, depending upon the person's different behaviors and evolving character.

This distinction is not explicated in exactly the same way by all commentators, but it is widely recognized. In discussing the distinction, I will adopt Pullman's terminology and speak of "basic dignity" and "personal dignity." In his essay "Dignity, Rights, and Self-Control," Michael J. Meyer contrasts *having* human dignity with *expressing* human dignity, and focuses particularly on the latter:

Expressing human dignity is a complex affair, composed of at least two components: (1) standing forth and protesting when one's oppressors threaten from without, a task for which the activity of claiming rights is particularly well suited; and (2) conducting oneself with some self-control, neither claiming one's rights out of blind and uncontrolled passion nor failing to do so for the same reason.¹⁴

Meyer's discussion of expressing human dignity has many similarities with our notion of having personal dignity. Particularly, he goes into detail in this essay discussing the connection between the expression of dignity and self-control. There can be no doubt about the importance of self-control when it comes to this sense of dignity. Persons who are unable to control their appetites give us paradigm cases of "undignified" behavior. Of course, when it is claimed that their behavior is undignified, it is not being claimed that they lack the basic dignity thought to be common to all persons. Rather, a claim is being made about a particular way in

¹³ Kleinig, "The Hardness of Hard Treatment," 287.

¹⁴ Michael J. Meyer, "Dignity, Rights, and Self-Control," *Ethics* 99, no. 3 (1989): 528.

which their behavior is deficient, and, by extension, a claim is most likely being made about their character.

The two senses of dignity correlate fairly well with the two kinds of respect that Stephen Darwall discusses, “recognition respect” and “appraisal respect”:

Persons can be the object of recognition respect. Indeed, it is just this sort of respect which is said to be owed to all persons. To say that persons as such are entitled to respect is to say that they are entitled to have other persons take seriously and weigh appropriately the fact that they are persons in deliberating about what to do... There is another attitude which differs importantly from recognition respect but which we likewise refer to by the term “respect.” Unlike recognition respect, its exclusive objects are persons or features which are held to manifest their excellence as persons or as engaged in some specific pursuit... Because this sort of respect consists in a positive appraisal of a person, or his qualities, I shall call it *appraisal respect*.¹⁵

Understanding these two prominent senses of respect helps us to understand the idea behind claims that direct us to treat even the most vile criminal with respect. When it comes to appraisal respect, it may be perfectly reasonable to have no respect for the criminal at all. However, we still owe the criminal recognition respect. That is, we still must consider the fact that he is a person when attempting to determine how to deal with him and respond to his behavior.

This is the “respect for the dignity of persons” that is often thought to be at the heart of the second formulation of Kant’s categorical imperative.¹⁶ Likewise, the necessity of recognition respect for the basic dignity of the criminal animates one of Kant’s most often quoted passages on punishment. Kant holds that justice demands that murderers be put to death.

¹⁵ Stephen L. Darwall, “Two Kinds of Respect,” *Ethics* 88, no. 1 (1977): 38-39.

¹⁶ Roger J. Sullivan, “The Formula of Respect for the Dignity of Persons,” Chap. 4 in *An Introduction to Kant’s Ethics* (New York: Cambridge University Press, 1994), 65-83.

Here there is no substitute that will satisfy justice. There is no *similarity* between life, however wretched it may be, and death, hence no likeness between the crime and the retribution unless death is judicially carried out upon the wrongdoer, although it must still be freed from any mistreatment that could make the humanity in the person suffering it into something abominable.¹⁷

This last claim is usually understood as prohibiting forms of punishment that are violative of the basic dignity of the punished person. On Kant's view, even though a murderer is to be executed, he remains a human being and retains his basic dignity up to the point of his execution, and he therefore must not be treated in ways that are inconsistent with the recognition of his basic human dignity.

As should be evident by now, the sense of dignity that will be appealed to in our discussion of degrading legal punishment is basic dignity, not personal dignity. This is not to suggest that they are unrelated. I don't think that it is important to go very deeply into the connection between basic and personal dignity here, but there is certainly a connection.¹⁸ It seems to me that personal dignity, in large measure, is present when the capacities that ground basic dignity are functioning well. In other words, when a person's behavior and self-presentation show signs of excellent autonomous regulation and control, we tend to say that the person is conducting and carrying himself with (personal) dignity.¹⁹

Generally speaking, I think that it may be reasonable to speak of certain behaviors as degrading if they are, in some sense, beneath a person's personal dignity.

¹⁷ Kant, *The Metaphysics of Morals*, 106.

¹⁸ The notion of personal dignity might be relevant later on in the discussion of the problem of reduction. The major objection dealt with there could probably be cast in a way that makes reference to personal dignity, but I do not think that it is necessary to put it in those terms. The issue can be discussed with adequate clarity and precision without invoking the concept of personal dignity, and I think that it might very well be more confusing to persist in invoking the concept unnecessarily.

¹⁹ This is similar to what Meyer claims about expressing human dignity in "Dignity, Rights, and Self-Control."

However, when the context is legal punishment, basic dignity should be the touchstone for our discussions of degradingness. There can be no doubt that this sense of dignity, or something very closely resembling it, is operative when people say that even criminals who have committed reprehensible acts should not be punished in a degrading manner. Clearly, these criminals are not thought to possess much personal dignity, but it is still widely thought that the fact that they are human beings should protect them from being treated in certain ways. Paying attention to usage, it is clear that when people (philosophers included) say that a criminal is being punished in a way that violates his dignity, basic dignity is what they are referring to. Such claims are not supported by enumerating qualities thought to be relevant to personal dignity. Rather, they are supported by arguments and proclamations about the kinds of treatment that are due to all human beings.

I can now put forth the conception of degrading punishment that I will be working with. With respect to legal punishment, a degrading punishment is a punishment that is inconsistent with the recognition of the basic dignity of the punished person. In other words, punishing a person in a degrading manner involves treating him in a way that is incompatible with recognizing that he possesses basic dignity. Working with this definition, it immediately becomes apparent that determining whether or not a given punishment is degrading will depend on determining the constraints that flow from the basic dignity of persons. When we discuss objections to corporal punishment from degradingness later in this chapter, we will return to the issue of what recognition of basic dignity requires on the part of punishers.

But, before moving on, I wish to emphasize a major point about basic dignity that has been present in the above discussion. There can be no question about the importance of the connection that has been drawn between basic dignity and rationality. It is very important in Kant's account, whether it is to be viewed as important in itself or as a condition for the possibility of normativity, and we are hard pressed to find a contemporary account of basic dignity in which rationality does not play a large role. Even in Pico's account, which is clearly far from contemporary, rationality plays a very important role as a necessary condition for judgment, reflection, and self-transformation. The emphasis on rationality by those who discuss basic dignity is not difficult to understand. Rationality (or at least our capacity for "advanced" reasoning) has traditionally been recognized as the most conspicuous (if not *the*) attribute that distinguishes human beings from other animals. Thus, it is no surprise that those who argue for a distinctively human status will tend to emphasize and assign importance to the fact that human beings characteristically (though not invariably) possess the capacity for rationality. Discussion of persons as rational beings will be a major focus of ours when we turn our attention to the objections to corporal punishment from degradingness.

What is Inhumanity?

The meaning of "inhuman" has not been discussed in the literature nearly as much as the meaning of "degrading." However, the term is used in documents and discussions that focus on the limits of permissible punishment, and it merits some attention here.²⁰

²⁰ For example, the United Nations "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," December 10, 1984, *Treaty Series* 1465 (1987): 85, and Jeremy

As we discussed in Chapter 3, I should again point out that “inhuman” and “inhumane” do not mean the same thing. Waldron notes that it is very common to confuse these two terms and suggests that it is important to avoid this confusion.²¹ To partially illustrate the distinction between the concepts, he cites the *Oxford English Dictionary*:

According to the *Oxford English Dictionary*, “inhumane” in its modern use is “a word of milder meaning than *inhuman*.” Accordingly a prohibition on “inhumane conduct” is much more demanding than a prohibition on “inhuman conduct.”²²

As I will argue, we should not accept everything that Waldron says about the proper analysis of “inhuman.” But I mention this as another instance of the recognition of the fact that these concepts are indeed distinct.

Another important point is that in the context of our discussion, “inhuman” should be used in its victim-centered, as opposed to agent-centered, sense. Waldron discusses these two senses of the term at some length. He quotes an opinion delivered by Judge Fitzmaurice in order to provide an example of an agent-centered account:

...the concept of ‘inhuman treatment’ should be confined to kinds of treatment that... no member of the human species ought to inflict on another, or could so inflict without doing grave violence to the human, as opposed to animal, element in his or her make-up.²³

Paying particular attention to the second half of this quotation, we can see that it emphasizes that we should pick out inhuman treatment by focusing on the impact that

Waldron, “Cruel, Inhuman, and Degrading Treatment: The Words Themselves,” NYU School of Law, Public Law Research Paper No. 08-36 (Nov. 2008). <http://ssrn.com/abstract=1278604> (accessed March 25, 2010).

²¹ Waldron, “Cruel, Inhuman, and Degrading Treatment,” 29.

²² *Ibid*, 30.

²³ *Ibid*, 32. Quotation from opinion in *Ireland v UK*.

such treatment would have on the agent who inflicts it or on what it reflects of that agent's psychological make-up. Particularly, there is reference to the human element of a person's make-up, and the notion that inhuman treatment is destructive of this element. Such an account focuses on the kind of treatment, but picks it out by referencing what that treatment *does to or says of the agent*. Although it may not appear to be at first, Kleinig's account of inhuman treatment is also agent-centered. He states that "inhuman treatment is treatment that is not fit for or appropriate to human beings."²⁴ I think that this emphasis on the agent is misguided, at least in the context of this discussion.

In "Torture and Philosophy," William Twining states that

...words like inhuman and degrading, and, more important, the kinds of concern that lie behind them, refer directly to the situation, and the rights, of the victim rather than to the blameworthiness of the behavior of the agent.²⁵

This is clearly an expression of the victim-centered approach. Waldron quotes this passage with approval and speaks of this "victim-centered meaning" being "involved in our best understanding of the term" in the human rights context.²⁶ The key is to notice that when it is objected that a punishment is inhuman, the objector is directly concerned with what is happening to the victim, not what the punisher is "doing to himself." The concern is that the rights *of the victim* are being violated. We may also be concerned with what is happening to the agent who inflicts the treatment, but the

²⁴ Kleinig, "The Hardness of Hard Treatment," 285. Italics are mine. The interpretation of this passage is a bit difficult, and since it appears in a footnote it is not unpacked. However, Kleinig has mentioned in personal communication that his account was intended to be agent-centered.

²⁵ William Twining and Barrie Paskins, "Torture and Philosophy," *Proceedings of the Aristotelian Society, Supplementary Volumes* 52 (1978): 155. Quoted in Waldron, "Cruel, Inhuman, and Degrading Treatment," 31 (footnote).

²⁶ Waldron, "Cruel, Inhuman, and Degrading Treatment," 31.

primary concern is clearly with what is being done to the victim and the way in which he is being wronged.

Other considerations can be invoked in support of the victim-centered understanding of the term. Vorhaus notes that a charge of inhumanity can be leveled because of objectionable overall conditions as well as because of a particular overt act. Excessively overcrowded and filthy conditions can certainly be inhuman.²⁷ The usage of the term to object to overall conditions certainly suggests a victim-centered interpretation. This is made especially clear when we note that inhuman conditions need not be the result of any particular agent intending to create them. Rather, they can result from bureaucratic problems and administrative flaws.

Another point that I must make regarding the term “inhuman” is that it does not have the same meaning as “degrading.” The terms are fairly similar in meaning, and as Waldron points out, “Degradation is obviously a dignitarian idea, and so is inhumanity, at least if it is used in a victim-oriented as opposed to an agent-oriented way.”²⁸ However, even though both terms are dignitarian, they ought not to be treated as though they have the same meaning. Vorhaus’s discussion helps us to flesh out the distinction between degrading and inhuman treatment. His discussion incorporates judicial opinions and legal interpretation as well as ethical argument, but these complications do not present a problem here. Regardless of these complexities, I think his points go through even if we are just focusing on these terms in their ethical context.

²⁷ John Vorhaus, “On Degradation. Part One: Article 3 of the European Convention on Human Rights,” *Common Law World Review* 31, no. 4 (2002): 393.

²⁸ Waldron, “Cruel, Inhuman, and Degrading Treatment,” 29.

Vorhaus states that part of the distinction to be drawn between degrading treatment and inhuman treatment has to do with the fact that there is a lower threshold for degrading treatment. I think that he is right about this, and he uses some examples to illustrate what he has in mind:

In some circumstances it is degrading for a person to be subjected to a strip search, and it is almost always degrading for a person to defecate in a confined space in the presence of strangers... [W]hat I wish to emphasize is that neither of these are obvious cases of inhuman treatment. To suggest otherwise, as Fitzmaurice has pointed out, would debase the currency of the term; if a strip search is inhuman treatment, then what words are left to describe the case of a man placed in a 'blacked-out cell in the company of a bevy of starving rats'?²⁹

My linguistic intuitions certainly conform to what Vorhaus is claiming here, both about these particular cases and about the terms generally. The charge of inhuman treatment does seem to be more serious than the charge of degrading treatment. But we need not rely solely on linguistic intuitions. As Fitzmaurice claimed, we ought to be concerned about debasing the currency of the term. A rich normative vocabulary not only enables us to pick out particular kinds of wrongs. It also enables us to distinguish between wrongs that are of different orders of magnitude. This consideration gives us reason to resist conflating terms when it seems that it would be useful to keep them apart.

Vorhaus has more to say on the distinction between inhuman treatment and degrading treatment, but it will be better to delay discussing it until we consider his positive account of inhuman treatment. So far, we have established that “inhuman” does not mean the same thing as “inhumane” or “degrading” and that, for the

²⁹ Vorhaus, “On Degradation. Part One,” 394. Fitzmaurice quote from the opinion delivered in *Ireland v UK*.

purposes of this discussion, the term should be understood in its victim-centered sense. Now we will consider a couple of possible conceptions of inhuman treatment. I will argue that neither of these conceptions is correct, but consideration of both of them will get us closer to the conception that I will argue for.

In “Cruel, Inhuman, and Degrading Treatment: The Words Themselves,” Waldron puts forth a conception of inhuman treatment:

I think that “inhuman treatment” in the victim-oriented sense refers to treatment which cannot be endured in a way that enables the person suffering it to continue the basic elements of human functioning. These are elements like self-control, rational thought, care of self, ability to speak and converse, and so on.³⁰

Clearly, the term “inhuman” references our human qualities in some way, and Waldron states that the term should point us toward considerations about “the limitations of our nature.”³¹ But the term is normative, not descriptive, so it should not merely point us toward the kind of treatment that, as a matter of fact, human beings cannot endure. Rather, it should point us toward what Waldron refers to as a “value-laden notion of human endurance.”³² This value-laden notion is operative in his conception of inhuman treatment, and it draws our attention to elements of human functioning to which we tend to ascribe high value.

Waldron is right to put forth a conception that focuses on what inhuman treatment does to the victim and to draw a connection between inhuman treatment and the capacities that are thought to ground our shared human dignity. Nonetheless, I do not think that we should accept his conception. As I will argue later in this

³⁰ Waldron, “Cruel, Inhuman, and Degrading Treatment,” 34.

³¹ *Ibid*, 34.

³² *Ibid*, 34.

chapter, whether we should ban punishments that temporarily render a person unable to engage in what Waldron refers to as “the basic elements of human functioning” is a highly contestable issue. It may be the case that, in terms of respecting human dignity, a punishment that greatly impairs rational thought for a matter of seconds is preferable to one that impairs it significantly less but for a much longer period of time. In any case, whether or not this is true should be a matter of substantive moral argument. But, on Waldron’s conception of inhuman treatment, the wrongness of the kind of punishment that I have in mind would follow directly from the conception. This seems wrong. Of course, when it comes to the issue of whether or not it is morally permissible to inflict punishments that result in temporary suspension of rational faculties, there are arguments that can be made on both sides. But, if it turns out that such punishments are wrong, that conclusion needs to be earned by ethical argument. It should not merely follow from the conception of inhuman treatment.

Perhaps I should say more about this. In part, I am relying on a general conviction that I have about the respective roles of conceptual analysis and substantive normative argument in the evaluation of social concepts and practices. I think that it is best to reserve the “heavy lifting” for the substantive normative argument. Part of my worry about the opposite approach is methodological. “Front-loading” the difficult ethical work by trying to settle controversial issues at the level of conceptual analysis can often result in a misplaced focus. Particular practices (such as modes of punishment) are complex and intricate and ought to be evaluated primarily by examining reasons for and against them. Conceptual analysis should be done with this in mind. For these reasons, I think that it is best to err on the side of

caution when attempting to determine whether these sorts of controversial conditions should be “built into” an analysis of a concept.

I turn now to Vorhaus’s account. In the first part of his “On Degradation,” he discusses at some length the distinction between inhuman treatment and degradation. His main aim is to clear the path for an explicit focus on degradation, so he is not primarily concerned with advancing a complete conception of inhuman treatment, but what he has to say on inhuman treatment is instructive. He provides two cases to illustrate the distinction between inhuman and degrading treatment. The first case involves a student sentenced to three birch strokes to be administered by a police officer in a doctor’s presence.³³ The second case, *Bouton v. Uruguay*, involved the following:

[T]he victim was “forced to stand for 35 hours, with minor interruptions; ... her wrists bound with a strip of coarse cloth which hurt her and... her eyes... continuously kept bandaged. During day and night she could hear the cries of other detainees being tortured. During interrogation she was allegedly threatened with ‘more effective ways than conventional torture to make her talk’.”³⁴

Regarding the first case, Vorhaus states that certain legal bodies found the birching to be degrading. He stops short of fully endorsing that claim, but he uses the case to point out that while it is arguable as to whether or not the birching was degrading, the case certainly did not involve inhuman treatment. However, in the second case, a legal body found the treatment involved to be inhuman and degrading. Vorhaus cites this with approval and states that the *Bouton* case clearly involved treatment that was inhuman as well as degrading.

³³ Vorhaus, “On Degradation. Part One,” 394. Case is *Tyrer v. U.K.*

³⁴ *Ibid*, 395.

After using these illustrations, Vorhaus attempts to spell out the distinction that he has in mind. Regarding the *Bouton* case:

There is no person who would not suffer greatly during and after the interrogation described. It is in this sense that we may assert that there are simply no circumstances under which any person should be expected to endure [that treatment]. The *Bouton* case therefore provides a clear example of inhuman treatment.³⁵

Vorhaus then continues to use the contrast between this case and the aforementioned birching case. He notes that three strokes of the birch do not always cause extreme suffering and that some people can actually shrug such a punishment off. Also, even if it is argued that such a punishment would have a tendency to degrade, it is not the case that it would invariably degrade all who are punished with that method. The treatment in the *Bouton* case, by contrast, “can be expected to have the effect of inflicting degradation and great suffering upon all its victims.”³⁶

So, Vorhaus does not quite give us a tidy statement of a conception of inhuman treatment to work with, but he has proposed certain conditions that we can evaluate. Inhuman treatment, we are told, is treatment that inflicts degradation and great suffering upon all its victims. In addition, it is the sort of treatment that no human being should be expected to endure. This latter claim is not very helpful, and it is doubtful that it provides us with a condition that we can apply when developing a conception of inhuman treatment. We can agree that “inhuman treatment” refers to a kind of treatment that no human being should be expected to endure, but this doesn’t help us to distinguish it from degrading treatment. Human beings shouldn’t be expected to endure degrading treatment either. In any case, it doesn’t seem that

³⁵ *Ibid*, 395.

³⁶ *Ibid*, 395.

Vorhaus intends that claim to draw a precise distinction. Rather, he seems to use it in order to underline the claim that inhuman treatment is of a greater magnitude than treatment that is merely degrading.

Let us focus on the claim that inhuman treatment is treatment that inflicts degradation and great suffering upon all its victims. Vorhaus seems to be suggesting that the infliction of degradation and great suffering are both necessary in order for a charge of inhumanity to be applicable. I do not think that we should accept this view. Of course, most inhuman treatment will cause a substantial amount of suffering, but the connection does not seem to be conceptual. Consider the following example, taken from the film *Hannibal*. Near the end of the film, Hannibal opens up a man's skull and makes the man eat parts of his own brain. During this procedure, the man is feeling no pain, since he has been heavily anesthetized. In fact, he is blissfully unaware of what is happening to him, and he actually appears to be enjoying this disgusting meal. Now, this is clearly not an everyday example, but it seems clear to me that this would be a case of inhuman treatment that did not involve suffering for the person experiencing the treatment. Certainly, if this man lived, he would suffer afterwards. But, if he was killed before the anesthesia wore off, he would not suffer afterwards, and the treatment still would qualify as inhuman.

In fact, it is probably not necessary to use such a contrived case in order to make the point that suffering is not a necessary condition for inhuman treatment. We can imagine doing all sorts of degrading things to people while they are too sedated or otherwise drugged to understand what is happening to them. We can also imagine that they do not remember what has happened to them once they return to their

normal state, since this in fact often happens when people are drugged. If they do not remember the treatment that they endured, then they will not suffer from its recollection, and we can imagine that they might remain unaware of what has happened to them. Now, it seems clear that there are things that we could do to a person in such a drugged state that would qualify as inhuman. For example, covering the person in excrement would probably qualify, but we could pick from a whole host of extremely degrading activities.

So, I do not believe that a reference to suffering should be part of our conception of inhuman treatment. Vorhaus's mistake is understandable, given that inhuman treatment will cause suffering in the large majority of cases. Nonetheless, the relationship should be viewed as causal, not conceptual.³⁷ Now we must consider the claim that inhuman treatment is treatment that inflicts degradation upon all its victims. Recall Vorhaus's claim that the threshold for inhumanity is higher than the threshold for degradation. I think that he is correct about this, and claiming that inhuman treatment has the effect of inflicting degradation upon *all* its victims is one way of setting the bar higher for inhuman treatment. But I am skeptical of his attempt to draw the distinction in this way.

One question that we have to ask is how we ought to interpret "inflicting degradation." Vorhaus claims that even if three strokes of the birch is degrading, it certainly falls short of being inhuman because it could not "be expected to have the

³⁷ It might be objected here that I am taking a problematic approach that involves wrongly assuming that social concepts can be analyzed in terms of necessary and sufficient conditions. Should these concepts, on the other hand, be analyzed by pointing out a "core and penumbra," or by enumerating a cluster of characteristics associated with them? (Kleinig, personal communication) This issue is very complex, and deep consideration of it would take me too far afield. With respect to the particular issue at hand, though, I think that I have made a strong enough case that suffering should not be part of our conception of inhuman treatment.

effect of bringing degradation upon all those who are its recipients.” He states that there are circumstances in which such a punishment would be “shrugged off with indifference by prisoners who regard their dignity as enhanced with every further act of defiance and unbending resistance.”³⁸ These comments suggest that whether or not a punishment inflicts or “brings” degradation depends upon certain subjective factors, including how the punished person views and reacts to the punishment. This view is problematic, for reasons discussed in the previous section. To mention the problem that is perhaps most severe, a good deal of degrading treatment can have a cumulative effect that puts a person into a frame of mind in which he believes that treatment to be fitting. We, of course, do not want to say that it is no longer possible to degrade a person once they have had their self-image destroyed to a severe extent. On the contrary, these are the people who are often subject to the most degrading treatment.

So, the notion of “inflicting degradation” that Vorhaus employs is too subjective. I am therefore skeptical of an account of inhumanity that relies heavily on this notion. In addition, his account can be shown to have problematic implications. Take the following example. I think that it is uncontroversial that slavery involves inhuman treatment. Now, take the cases of slaves who were “promoted” from field work to house work. Many of them probably viewed this move as something of an upgrade and recognition of a status that was relatively superior to their fellow slaves. As such, this move may very well have been *viewed* as *dignity-enhancing* by individuals who were taught to internalize an inferior role. On Vorhaus’s view, it seems that the continued treatment of these “house slaves” could not be viewed as

³⁸ Vorhaus, “On Degradation. Part One,” 395.

inhuman, since some of them would believe such treatment to be fitting or dignity-enhancing. This is clearly a problematic implication. This example shows the problems that are created when a judgment of degrading or inhuman treatment is made to depend heavily on subjective factors.

While I disagree with much of what Vorhaus has to say about inhuman treatment, there is certainly something to be gained from considering his account. He is right to draw close connections between inhuman treatment, degrading treatment, and dignity. He is also correct to note that the threshold for inhuman treatment is higher than the threshold for degrading treatment. In fact, I believe that the most reasonable conception of inhuman treatment involves viewing it essentially as treatment that is extraordinarily degrading. I propose the following conception of inhuman punishment. With respect to legal punishment, an inhuman punishment is a punishment that is grossly degrading. In this context, we should use the term “inhuman” to refer to punishments whose degradingness is an order of magnitude above those that we would refer to as merely degrading. Another way of putting this is to say that when a punishment is claimed to be inhuman, it is being asserted that the violation of basic dignity involved is more substantial and severe than when a punishment is claimed to be merely degrading. Of course, this carries the implication that all inhuman punishments are degrading, but some degrading punishments are not inhuman.

My reasons for putting forth this conception should be clear. Inhumanity and degradation are both, as Waldron claims, “dignitarian” concepts. However, as Vorhaus argues and demonstrates, they should not be regarded as having the same

meaning or being coextensive. A charge of inhuman treatment is graver than a charge of degrading treatment. Waldron's and Vorhaus's accounts both seem to be problematic, and I went to some length to show that suffering is not necessary in order for treatment to be inhuman. In the course of the discussion, I mentioned some cases or kinds of treatment that clearly seem to be inhuman: intensely overcrowded and filthy conditions of confinement, placement in a dark cell with starving rats, the treatment in the *Bouton* case, feeding an anesthetized man his own brains, covering a person in excrement, and enslaving a human being. The clearest link between these disparate kinds of treatment is that they are all grossly degrading.

With respect to our discussion of corporal punishment, we need not explicitly consider the question of inhumanity. Degradation is a ground for moral impermissibility, and if a punishment is inhuman it is also degrading. So we can proceed by focusing on the question of whether or not corporal punishment is degrading. But this discussion has still been beneficial. Inhumanity is a concept that is often invoked in discussions of the moral permissibility of different types of punishment, so it is good that we devoted some attention to analyzing this concept. This discussion was also necessary in order for me to defend my overall claim that corporal punishment is not necessarily cruel, inhumane, degrading, or inhuman.

Objections from Degradingness

There hasn't been much of a philosophical debate over corporal punishment in recent years. The practice is generally dismissed as clearly morally wrong by philosophers of punishment as well as philosophically-inclined thinkers in other disciplines. When corporal punishment is mentioned, it is often depicted as an

unfortunate relic of a less civilized past and the possibility of its moral permissibility is rarely taken seriously. Because of this, the contemporary literature does not contain many philosophically developed direct objections to corporal punishment. So, in developing objections, I will focus on some of what has been said against corporal punishment and some other claims that would be made against it by contemporary writers. In other words, in certain places I will use claims that have been made against, for example, torture, and show that the philosophers making them would almost certainly make the same claims against corporal punishment. Using this method, I can distill and develop two philosophically sophisticated and distinct (though related) lines of objection to corporal punishment that reflect concerns expressed by multiple thinkers.

In a 1905 paper, “The Ethics of Corporal Punishment,” Henry S. Salt quotes Thomas De Quincey: “As man grows more intellectual, the power of managing him by his intellect and his moral nature, in utter contempt of all appeals to his mere animal instincts of pain, must go on *pari passu*.”³⁹ Salt goes on to state: “Here, then, I think, is the true ethical objection to corporal punishment; it is the supreme negation of free thinking; the symbol of the slavery of the mind.”⁴⁰ And Salt closes his paper with the following words:

Corporal punishment, as the very antithesis of moral suasion and the compact embodiment of brute force, is an outrage on what should, above all things, be held sacred – the supremacy of the human mind and the dignity of the human body. It would be quixotic to hope that all use of physical violence, odious though it is, could be at present dispensed with, in a society which is but half emerged from

³⁹ Henry Salt, “The Ethics of Corporal Punishment,” *International Journal of Ethics* 16, no. 1 (1905): 79.

⁴⁰ *Ibid*, 79.

barbarism; but *this* form of it, at least, the most barbarous, because the grossest and most sensual, must be uprooted and abandoned, before any true measure of civilization can be attained.⁴¹

To turn to a contemporary author, Jeffrie Murphy writes about the wrongfulness of torture in “Cruel and Unusual Punishments.” He argues that torturous punishment is degrading because it treats a person like an animal and maybe even constitutes an attempt to reduce a person to an animal or an object.

Using Kantian language, one might say that torture is addressed exclusively to the sentient or heteronomous – i.e. *animal* – nature of a person. 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. He could not be expected to understand this while it goes on, have a view about it, enter into discourse about it, or conduct any other characteristically human activities during the process – a process whose very point is to reduce him to a terrified, defecating, urinating, screaming animal.⁴²

I quoted these somewhat lengthy passages because I think that they cut right to the heart of the issue of the moral permissibility of corporal punishment. Even though Murphy is specifically discussing torture, he is also presenting certain criteria that he believes can be used in order to determine whether or not a punishment is degrading. It seems clear that Murphy would object to corporal punishment, so I have no problem using his argumentation in this capacity. In fact, Lippke cites Murphy’s line of argumentation as an argument against corporal punishment. He mentions “Jeffrie Murphy’s contention that corporal punishment does not treat offenders as moral beings because, for the duration of its infliction, they are reduced to little more than suffering animals.”⁴³

⁴¹ *Ibid*, 88.

⁴² Murphy, “Cruel and Unusual Punishments,” 386-387.

⁴³ Richard Lippke, *Rethinking Imprisonment* (New York: Oxford University Press, 2007), 55.

The main lines of objection are present in the passages just discussed, but we can flesh out some of these concerns a bit more by looking at what has been said about corporal punishment and degradingness by other authors. In an essay in which his main concern is the death penalty, Jeffrey Reiman has something to say in response to

...the puzzling question of why we refrain from punishments like whipping, even when the alternative (some months in jail versus some lashes) seems more costly to the offender. Imprisonment is painful to be sure, but it is a reflective pain, one that comes with comparing what is to what might have been, and that can be temporarily ignored by thinking about other things. But physical pain has an urgency that holds body and mind in a fierce grip... Refraining from torture in particular and corporal punishment in general, we... refuse to put a fellow human being in this grip...⁴⁴

Now, this passage is part of a much larger discussion that is not focused on degradation, and it is not clear that he intends this objection as an “objection from degradation.” However, the passage raises a concern about corporal punishment that is very similar to the concern raised by Murphy. Reiman is concerned that corporal punishment puts a person into a state in which his body and mind are held in “a fierce grip,” preventing reflection and calling all attention to the pain being experienced. This is the kind of state that Murphy would refer to as a reduced state.

The kinds of concerns that we are focusing on here can perhaps be further fleshed out by considering some of what Waldron has to say in his discussion of degradation. He considers a number of different “species of degradation,” and the objections that we are focusing on seem to fall under the heading of what Waldron refers to as “bestialization.”

⁴⁴ Jeffrey Reiman, “Justice, Civilization, and the Death Penalty: Answering van den Haag,” *Philosophy and Public Affairs* 14, no. 2 (1985): 141.

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, as though he were reduced from the high equal status of human to mere animality. It can be treatment that is insufficiently sensitive to the differences between humans and animals, the differences in virtue of which humans are supposed to have special status. So for example a human is degraded by being bred like an animal, used as a beast of burden, beaten like an animal, herded like an animal, treated as though he did not have language, reason or understanding, or any power of self-control.⁴⁵

This seems to be the “species” of degradation that the above-mentioned objectors have in mind. Here, again, is the notion of reduction, which we will be discussing at some length. Also, there is the claim that a kind of treatment can be morally wrong if it somehow ignores morally relevant differences between humans and other animals. Humans are rational beings and treatment that does not take account of this capacity for reason and understanding is claimed to be degrading. So, even though Waldron does not specifically discuss corporal punishment here, his remarks provide further development of the themes that we are presently concerned with.

I think that the main concerns of the above-mentioned authors can be distilled into two related but distinct lines of objection to corporal punishment. Both of these lines of objection create a problem that I must overcome in order to defend my position, and I will dub these problems “the problem of address” and “the problem of reduction.”

The first line of objection focuses on *how the punishment addresses* the punished person. It appeals to his mere animal instincts (De Quincey). It exclusively addresses his heteronomous nature (Murphy). It is the opposite of moral suasion and

⁴⁵ Waldron, “Cruel, Inhuman, and Degrading Treatment,” 37.

embodies brute force (Salt). One might say that it ignores the fact that there are morally relevant differences between humans and other animals by appealing solely to our sensuous nature (Waldron). The concerns here are clearly dignitarian in nature, and they have a distinct Kantian flavor. The emphasis on the normative importance of rationality is clear. The view is that in relating to other people, we should make appeals to their intellect, to their rational nature. These appeals to their intellect respect their autonomy and allow them to weigh reasons and conduct their lives based on an appraisal of those reasons. When we cause people physical pain, we do not address them as rational appraisers.

I believe that the concerns raised about changing behavior through pain are essentially similar to those raised in this general line of objection that focuses on how people are being addressed. De Quincey speaks about “managing” people by their intellect instead of appealing to their animal instincts. Salt states that corporal punishment is the “antithesis of moral suasion.” Kleinig has raised the concern that corporal punishment may be too “Pavlovian,” addressing the offender as a beast to be conditioned as opposed to a person.⁴⁶ What all of these objections have in common is the assertion that there is something morally wrong in punishing a person in a way that addresses them merely at the sensuous (or animal, or heteronomous) level. They stress the supposedly problematic nature of “managing” a person or “conditioning” him through pain and assert that we should not try to secure changes in people’s behavior by addressing them at the sensuous level. If we wish to alter their future behavior, our appeals should be made in a way that addresses or engages them rationally. So, many different concerns that are expressed by different authors and

⁴⁶ Personal communication.

commentators actually crystallize around a particular central concern and claim. I will, of course, be devoting a fair amount of attention to this “problem of address.”

The second line of objection focuses on *what the punishment does* to the punished person. It negates free thinking and enslaves the mind (Salt). It reduces the punished person to an animalistic state in which he cannot exercise his understanding or engage in discourse (Murphy). Or we could say that it reduces the person to a state in which he is little more than a suffering animal (Lippke). The claims here focus on what happens to the person while he is being punished. The corporal pain prevents the exercise of rationality. It might be said that the pain “drowns out” the person’s rationality and thereby makes it impossible for him to perform those human functions that require rational thought. It is clear that this is an objection from degradation because the supposed problem that the objection focuses on is not the pain itself, but rather the effect that the pain has on the person’s rationality.

Before moving on, I should say something about Salt’s claim that corporal punishment “is an outrage on... the dignity of the human body.”⁴⁷ Despite his usage of the word “dignity,” I do not believe that this particular claim involves an objection from degradation. Rather, I think what he has in mind is what would be more often referred to nowadays as “bodily integrity.” Concerns stemming from bodily integrity are distinct from concerns about degradingness, and I will briefly discuss the issue of bodily integrity in the final chapter.

⁴⁷ Salt, “The Ethics of Corporal Punishment,” 88.

The Problem of Address

For now, we will put the problem of reduction to the side and focus on the problem of address. It is claimed that corporal punishment is degrading because it addresses the punished person at merely the animal (sentient, heteronomous) level. In responding to this objection, it will be instructive to take a detour into some of the literature on deterrence. We will see that a popular objection to deterrence derives from a similar concern. Seeing the flaws in this objection to deterrence will help us to make progress in solving this problem of address.

In *The Philosophy of Right*, Hegel states:

To base a justification of punishment on threat is to liken it to the act of a man who lifts his stick to a dog. It is to treat a man like a dog instead of with the freedom and respect due to him as a man. But a threat, which after all may rouse a man to demonstrate his freedom in spite of it, discards justice altogether.⁴⁸

We find a similar view in von Hirsch's writings. In Chapter 2 of *Censure and Sanctions*, he argues that criminal conduct

...should not be dealt with through neutral sanctions that convey no disapproval. Such sanctions – even if they were no less effective in discouraging the behavior – deny the status of the person as an agent capable of moral understanding. A neutral sanction would treat offenders or potential offenders much as tigers might be treated in a circus, as beings that have to be restrained, intimidated, or conditioned into compliance because they are incapable of understanding why biting people (or other tigers) is wrong. A condemnatory sanction treats the actor as a *person* who is capable of such understanding.⁴⁹

This objection seems to involve the claim that mere deterrence is degrading. Hegel is saying that punishment cannot be justified on deterrent grounds because deterrence is

⁴⁸ G.W.F. Hegel, *Hegel's Philosophy of Right*, trans. T.M. Knox (Oxford: Clarendon Press, 1952). Marxists Internet Archive: <http://www.marxists.org/> (accessed March 24, 2010), Section 99.

⁴⁹ Von Hirsch, *Censure and Sanctions*, 11.

grounded on threats and to threaten a person is to treat him like an animal, not a person. Von Hirsch's argument operates as part of his case for a justification of punishment. Von Hirsch offers a censure-based justification of punishment. Punishment is supposed to express censure and the hard-treatment element of punishment is supposed to provide a "prudential disincentive" to criminal activity. So, in the passage quoted above, von Hirsch argues that "neutral sanctions" (sanctions that do not convey censure) are morally illegitimate because they merely rely on threats, and, echoing Hegel, threatening a person treats him like an animal, not a person.

It is important to point out that, on von Hirsch's view, punishment has a partly crime-reductive function. Nevertheless, he thinks that *mere* deterrence is morally problematic, and on his view the preventative function of punishment "should be seen... as supplying a prudential reason that is tied to, and supplements, the normative reason conveyed by penal censure."⁵⁰ This must be pointed out in order to be clear about the objection. The idea is *not* that seeking to reduce crime by using punishment is morally wrong. Rather, the claim is that a mere reliance on threats and fear is morally illegitimate because such appeals to fear fail to respect individuals as persons. I will refer to this general objection to deterrence as the "tiger-control objection": Deterrence is a morally illegitimate aim of punishment because it involves issuing threats and seeks to influence people's behavior through fear. Relating to people in this way involves treating them merely as animals (or tigers), as opposed to rational human beings, and is therefore degrading.

⁵⁰ *Ibid*, 13.

To see exactly what the tiger-control objection aims at, it is helpful to look at Bentham's notion of deterrence. Bentham states that one way to reduce the likelihood that a particular person will commit an offense is "[b]y making him afraid of offending." If he is afraid to commit an offense, "he may still wish to commit it, but he no longer dares to do it." He refers to this effect as "intimidation or terror of the law."⁵¹ This Benthamite notion of deterrence, which might be called "pure" or "mere" deterrence, is what I will be speaking of when I use the term "deterrence." Bentham's words are helpful here because they remind us that deterrence, which is a rather technical-sounding word, is really about *intimidation* and *fear*. With this in mind, it is not so difficult to see where those who make the tiger-control objection are coming from.

The similarities between the objection from address to corporal punishment and the tiger-control objection to deterrence should be fairly clear. Both of these objections are objections from degradingness, since they both involve claiming that a particular way of relating to people is inconsistent with recognizing the fact that they are persons who possess basic dignity. Even if the term "dignity" isn't used in certain formulations of these objections, the idea is present. Both objections operate against a backdrop that conceives of persons as rational and autonomous and that these features confer upon them a certain moral status, and that failing to appeal to them at that level fails to recognize that status. With the tiger-control objection, the idea is that trying to bring about compliance with the law by appealing to a person's fear of pain involves appealing to their "baser" nature. With the objection from address to

⁵¹ Jeremy Bentham, *The Rationale of Punishment*, Digitized text from edition published by Robert Heward, London (1830). Classical Utilitarianism Web Site: <http://www.laits.utexas.edu/poltheory/bentham/rp/> (accessed March 25, 2010), Book I, Chap. III.

corporal punishment, the claim is that inflicting physical pain also appeals to this “baser” or “lower” aspect of persons.

At this point, I will offer replies to the tiger-control objection and show that it fails to establish that deterrence is morally problematic. Seeing how and why this objection fails will help us to make progress and throw light on the problem of address. First I will argue that the objection overstates the moral burden that is on the state when imposing punishments. Then I will argue that even if the state does have the moral burden that is initially assumed in the objection, it can still discharge that burden while punishing in order to deter.

It is difficult for me to see why it is strictly necessary for the punishment to convey a normative message to the punished person. I will argue below that, in any case, a rational, normative appeal is inherent in the punishment, but I want to bracket that consideration for the moment. If the offender wishes to understand the reasons why the behavior he performed is illegal, these reasons are likely to be readily available to him. In most cases, the normative reasons why his conduct is proscribed are likely to be obvious and readily available, as with the *mala in se* crimes that form the core of the criminal law. In other cases, as with certain *mala prohibita* crimes, the rationale may not be as obvious, but it can be uncovered nonetheless, and probably without much effort. The point is not that illegality always provides a decisive, normative reason to desist from a certain behavior. Rather, the point is that the offender can always seek the justification for why his particular offense is proscribed. That being the case, the ready availability of such justificatory reasons counters the claim that, in a deterrent system, the offender (or prospective offender) is merely

being threatened by the criminal justice system. Certainly, deterrence involves threats, but it is morally permissible if it operates against a backdrop in which justificatory reasons are readily available. It is asking too much of the state that it be required to bring these reasons right to the offender's doorstep.⁵²

In fact, there seem to be some cases in which making a direct normative appeal would be downright patronizing, treating the offender as a child instead of an adult. The offender who has committed an assault does not need to be appealed to normatively by the criminal justice system. This offender clearly needs to change his behavior and avoid committing more assaults. But we're all supposed to learn as children why we're not supposed to hit people. An adult who can't control his anger needs to figure out a way to do so, and the state has a clear interest in deterring him from committing future assaults. The idea that, over and above that, his punishment should somehow address him normatively and convey some sort of moral message seems to call on the state to be overly paternalistic, making up for parenting that was either inadequate or absent. The adult who is guilty of assault and *ex hypothesi* capable of understanding needs to exercise that understanding. In such a case, if a normative appeal is too explicit, the offender could rightly complain that the agents of the state were being patronizing and pedantic.

I am aware that the line of argument that I have been pursuing in the previous couple of paragraphs is controversial, so perhaps it is fortunate that I do not need to rely on it in order to show that the tiger-control objection is problematic. In fact, we

⁵² I am not denying that there is a burden on the state to justify punishments in normative terms. Nor am I denying that the state has the responsibility to justify its claim to authority in punitive matters. What I am claiming is that, when justificatory reasons are readily available, there is no moral imperative on the state to somehow convey a normative message to the offender *through the punishment*.

can make an assumption contrary to what I have been arguing and show that the objection still does not work. So, let us assume for the sake of argument that the state has a significantly stronger moral burden to satisfy in terms of the kinds of appeals necessary in order to avoid a charge of degradingness. Even under that assumption, it can be shown that, in reasonably just societies, normative appeals are in place and the charges in the tiger-control objection can be rebutted.

In responding to the tiger-control objection, it is important to remember that punishment is inherently expressive. As Joel Feinberg persuasively argues, punishment is by its very nature expressive, and its expressive character is, in large part at least, what separates a punishment from a mere penalty. Much of the contemporary discussion of punishment's expressive value is influenced by his 1970 essay, "The Expressive Function of Punishment." In this essay, Feinberg argues that many influential articles on the philosophy of punishment define punishment in a problematic way, "as the infliction of hard treatment by an authority on a person for his prior failing in some respect (usually an infraction of a rule or command)."⁵³ This way of defining punishment is problematic because it fails to mention that punishment has an expressive function:

...punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority himself or of those 'in whose name' the punishment is inflicted. Punishment, in short, has a *symbolic significance* largely missing from other kinds of penalties.⁵⁴

⁵³ Joel Feinberg, "The Expressive Function of Punishment," in *A Reader on Punishment*, ed. Duff and Garland (New York: Oxford University Press, 1994), 73.

⁵⁴ *Ibid*, 74.

So, in addition to “hard treatment” and the other elements that must be part of an acceptable definition of punishment, we must include punishment’s expressive function. Feinberg argues that certain important functions of punishment would be difficult or impossible to understand without noting its expressive value. For example, he discusses “authoritative disavowal,” whereby a nation can punish a military pilot for firing on another nation’s aircraft in international waters, and thereby *condemn* and disavow his action.⁵⁵ While Feinberg notes that it is not easy to state exactly what punishment expresses, he favors the term “condemnation,” which he characterizes “as a kind of fusing of resentment and reprobation.” “Resentment,” on his view, refers to vengeful attitudes, while “reprobation” refers to a “stern judgment of disapproval.”⁵⁶

Feinberg’s essay has been especially influential among retributivists, many of whom have focused on punishment’s expressive value in constructing a justificatory theory of punishment. (While he makes some remarks about justification, Feinberg stops short of offering his own justificatory theory in this essay.) They do not all agree on what exactly punishment is supposed to express, but they do agree that punishment conveys a message with normative content to the punished person and to society at large. Von Hirsch, for example, uses many different terms to refer to what punishment expresses, but he most often uses “censure” or “blame.”⁵⁷ In any case, the expressive value of punishment is a major theme in recent works on the philosophy of punishment and, whether or not they believe that punishment is to be justified in terms of its expressive value, it seems that most theorists accept the fact

⁵⁵ *Ibid*, 77.

⁵⁶ *Ibid*, 76-77.

⁵⁷ Von Hirsch, *Censure and Sanctions*, 9.

that punishment expresses some sort of message with *normative content* to the offender and to society.⁵⁸ It is important to stress the normative content of the message and to point out that however we characterize what punishment expresses, the message includes the claims that what the offender did was wrong and that he is blameworthy for having done it.

So, this being the case, we can say that if the offender is being punished, some sort of rational, normative appeal is inherent in the punishment. The offender is *ex hypothesi* capable of moral understanding (or else he wouldn't be a candidate for punishment in the first place). So, he is presumed capable of receiving the message that punishment expresses. This message will reach and address him at the rational level. Once we see this, we see that punishments, whether their justifying aim is deterrent, retributive, or something else, by their expressive character involve rational, normative appeals. We cannot, then, say that deterrent punishments operate solely at the sentient level, since their very character as punishments entails that there is also a rational, normative appeal.

There might be a concern over whether or not the punishment is expressive of condemnation when the justifying aim is deterrence.⁵⁹ With respect to this concern, we need to keep in mind the fact that punishment's expressive value is (at least in large part) conventional. Provided that punishment is conventionally understood as expressive of condemnation, it will retain that value regardless of its justifying aim. I think that I can see what motivates the concern, though. If punishment came to be seen by the society at large as a merely instrumental device for influencing behavior,

⁵⁸ For another example of a justificatory theory of punishment that stresses its expressive value, see John Kleinig, "Punishment and Moral Seriousness," *Israel Law Review* 25, no. 3-4 (1991): 401-421.

⁵⁹ Kleinig, personal communication.

then there may be a danger that it could lose much of its symbolic significance and expressive value. In such a case, punishment would, in a sense, cease to be “punishment” and would evolve into mere penalty. Such a development, however, is highly unlikely as long as people generally continue to believe that criminals are responsible for their behavior. Maybe this could happen if the majority of people came to believe in hard determinism, but barring such a development, I think that it is highly unlikely that punishment will lose its ability to express condemnation.⁶⁰

In addition to noting the expressive value of punishment, it is important that the wider context be kept in mind and that we remember that punishment is only part of the state response to wrongdoing. We must see that beyond considerations of how the *punishment* addresses the punished person, we must ask how the *state* addresses and relates to the punished person. In reasonably just societies, the state engages in normative, rational appeals in many different ways. For example, when behavior is made illegal, a justificatory rationale is generally present in the legislative process, and this rationale will contain reasons that should be intelligible to the members of the society. Again, this is not to say that the mere illegality of the behavior carries normative force. I believe that, in reasonably just societies, it does. But that claim is controversial and it is not what I am arguing here. Rather, I am saying that when the rules for expected behavior are made manifest and justifications are offered and available, this constitutes a rational, normative appeal and must be considered when determining how persons in the society are being addressed. In addition, if the

⁶⁰ I am not relying on the definition of punishment to do the important work here. In the argument contained in this paragraph, the important point is that the expressive value of punishment is largely conventional. I am not merely saying that deterrent punishment is punishment, and that punishment is expressive, and that therefore deterrent punishment is expressive.

punished person is addressed in normative language by the judge during the sentencing process, this is an additional normative appeal and should be considered when determining how the punished person is being addressed. This, I think, is not a small point, given the proximity and causal role of the sentencing process. In an important sense, the sentencing is very *close* to the punishment, and therefore merits special consideration when we are concerned with how the punished person is being addressed. If we keep these sorts of considerations in mind, we can see that this issue of address is much more complicated than proponents of the tiger-control objection make it sound.

I will now offer replies to the objection from address to corporal punishment. They will be along very similar lines to the replies to the tiger-control objection to deterrence, but they will be briefer, since many important claims have already been argued for. The similarity of the replies should not be surprising, given the aforementioned similarities between these two lines of objection. I will also follow a strategy similar to the strategy that I followed above. First, I will argue that the objection from address places too high a burden on the state in terms of what it is supposed to do in punishing offenders. Then I will argue that even if that higher burden is assumed, it can still be shown that the state can avoid the problem of address while punishing offenders corporally.

As I discussed above, it is important to consider the availability of justificatory reasons when seeking to determine whether or not a person is being punished in a degrading way. When the reasons that a particular behavior is proscribed are either obvious or readily available, it is difficult to see why, in the

process of punishing, the state is morally required to communicate a normative message to the offender through the punishment. The objection from address to corporal punishment involves the claim that corporal punishment is degrading because it addresses the person at the sentient level without addressing him at the rational, autonomous level. But we can quite reasonably ask why the punishment must address the person at this “higher” level when the reasons for the prohibition of his offense can be readily discovered, either by simple reflection, a conversation with someone acting in an official capacity (such as his attorney), or a bit of research.

However, as above, the objection from address can be countered even on the assumption that the state has a significantly heavier burden to satisfy. Recall that punishment is by its nature expressive and it conveys a message that the offender did wrong and is to be blamed for his wrongdoing. Now, the objection from address involves the claim that corporal punishment is wrong because it involves addressing the punished person solely at the sentient level. That, however, cannot be the case. If the person is being punished, then there is a normative, rational appeal being made. A punishment, corporal or otherwise, expresses a message with normative content, and therefore cannot be said to operate solely at the sentient level. Before it is objected that this reply proves too much, I must point out that I am not claiming that all sorts of grisly punishments are non-degrading solely because they can be characterized as punishments. Rather, I am claiming that one reason why the objection from address fails is that it overlooks an important point about the inherent character of punishments.

Above, in responding to the tiger-control objection, I stressed the importance of keeping the wider context in mind and asking how the state, as opposed to merely the punishment, addresses the punished person. When, for example, a justificatory rationale is present and made available when a kind of behavior becomes criminalized, this is relevant when determining how members of the society are addressed. Also, the language used during the sentencing process is relevant when attempting to answer the overall question of how the state addresses the punished person. The objection from address to corporal punishment myopically focuses only on the fact that causing pain to the punished person acts on their sentient, heteronomous nature. It ignores the fact that since punishments take place within a social context, that context must be taken into consideration when determining how the punished person is being addressed. In reasonably just societies, justificatory rationales are available and normative, rational appeals are in place. If corporal punishment occurred in a context in which these other factors were not present, then an objection along the lines of the objection from address might hold water. But punishment in such societies is not my concern, and I doubt whether punishment generally could be justified in a society in which justificatory rationales for criminal prohibitions were unavailable. In any case, when we keep in mind the context in which punishment takes place in reasonably just societies, we see that a person being corporally punished for a violation of the law in such a society could not complain that the state has addressed him solely at the sentient level.

Before moving on, I should probably say more about a possible problem that I briefly discussed in the previous section. I may not have said enough in response to

the concern about conditioning that has been expressed by some authors and commentators. The worry is that, in imposing corporal punishment, we would be treating human beings as animals by attempting to condition them. Kleinig posed the problem by asking whether we would be seeing human beings as “mice writ large.” Perhaps in imposing corporal punishments, we would be attempting to substitute the wrong sorts of reasons for the right ones. Would-be offenders may desist from criminal behavior not because they understand its wrongness, but because they are afraid of pain. The concern is that this resembles operant conditioning too closely to be a process that we would want to employ in relation to human beings.⁶¹

Interpreted one way, this objection is essentially the tiger-control objection, and can be responded to in the same way. If the objection is just that trying to create fear of punishment is morally illegitimate, then we have already seen why that sort of objection is problematic. Even though I do not agree with his justificatory account, von Hirsch makes an important point in this regard. He argues for a conception of human nature that we ought to have in mind when evaluating punishments. Persons are moral agents, but they are also flawed and prone to temptation. We are not brutes, but nor are we angels.⁶² Our evaluation of proposed justifications of punishment and of particular punishment practices ought to involve consideration of people so conceived. With this conception in mind, we ought to be able to see the importance and justifiability of both appeals to normative reasons and to fear.

I think that we should interpret this objection more charitably and see that it may raise a concern that is distinct from what is raised by the tiger-control objection.

⁶¹ Kleinig, personal communication.

⁶² Von Hirsch, *Censure and Sanctions*, 13.

Perhaps the idea is that, given the visceral nature of corporal punishment, and especially acute pain corporal punishment, the psychological process of a prospective offender would likely closely resemble that of a conditioned animal. Rather than a weighing of reasons, both normative and prudential, perhaps many deterred offenders would simply “recoil” and avoid performing the proscribed behavior because of its association with the corporal pain. Perhaps this makes corporal punishment, and especially acute pain corporal punishment, morally problematic and degrading.

In responding to this objection, I think that we should recognize that if a deterrent punishment works in a particular case, it is likely that the deterred individual will recall, or call to mind, the worst parts of any punishment and, in a sense, recoil. If, for example, a prospective offender is deterred by the prospect of imprisonment, it will probably be because of an association that he has between imprisonment and significant suffering. Deterrence, properly understood, is about fear, and deterrent punishment cannot work if it does not inspire fear. That being said, we should recognize that there is a difference between being deterred by the prospect of physical suffering and the prospect of psychological suffering, and the more visceral nature of physical suffering does seem to be a relevant consideration. But the difference is one of degree, not one of kind, and if we assume that corporal and non-corporal punishments can both deter in some cases, it is likely that in both kinds of cases it will be because the prospect of punishment has a fairly strong association with substantial suffering. This kind of consideration, then, seems to be at best one consideration among many, and can hardly support a decisive objection to corporal punishment.

We should acknowledge that whenever people are punished or face the prospect of punishment, their motivational structure and the way that they weigh reasons in the future will be affected. The possibility of future punishment attached to a crime creates “prudential disincentives,” to borrow a term from von Hirsch.⁶³ We want people to refrain from criminal activity, and given that we are between brutes and angels, we should use a combination of normative and prudential appeals in order to reduce the likelihood that people will commit crimes. Theorists, predictably, differ in their views of the morally permissible “mix” of reasons. Some will be willing to tolerate attempts to create quite strong prudential disincentives, while others will claim that such attempts go too far and resemble conditioning too closely. I, of course, cannot settle such debates about where to draw the line. I do not, however, think that acute pain corporal punishment need necessarily have an effect that should be referred to as “conditioning.” It may, if it rises to a level that approximates torture. But, as I argued in Chapter 1, this need not be the case, and the corporal punishments that I defend can certainly be distinguished from torture. The prospect of an acute pain corporal punishment is unlikely to be so horrifying that people will be unable to weigh and consider other reasons when deciding what to do. Anecdotal evidence should be enough to support this. People willingly do all sorts of things that cause substantial bodily pain and they are not kept awake the night before dreading the event. Examples include doctor’s visits and massage appointments. That these examples tend to be beneficial to the person is not the point. The point is that if impending substantial physical pain had the effect of cancelling out or drastically reducing the power of all other motivational variables, we would expect

⁶³ Von Hirsch, *Censure and Sanctions*, 13.

that people would experience much greater psychological disturbance before painful events than they actually do. While we should be aware of the fact that the prospect of physical pain can serve as a strong motivator, we should also be careful not to overstate its power. Taking this into consideration, and the fact that punishments co-exist alongside normative appeals in reasonably just societies, we should conclude that corporal punishment in such societies need not closely approximate a process of operant conditioning.

The Problem of Reduction

We now turn to what I call “the problem of reduction,” which was introduced in the “Objections from Degradingness” section. It is claimed that corporally punishing a person involves reducing him to a lower kind of state, or, perhaps we could say, a lower mode of being. This mode of being is lower because it is non-rational and involves the promptings of the person’s heteronomous nature being brought to the forefront. His “animal” nature takes over and his responses are driven by his immediate sensuous experience, not his rationality. The wrongness of corporal punishment, on this objection, lies in the effect that it has on the person’s ability to reason and control the promptings of his “baser” nature. I will offer a few different lines of response to this objection.

At the outset, I must point out that this objection is more limited in scope than it may seem at first. Even if it worked, it would apply to only some kinds of corporal punishment. It would apply to the kinds of acute pain corporal punishment that I am concerned with defending, but many kinds of stress position and exposure punishments would be untouched. This is because the objection claims that it is

morally wrong to put a person into an animalistic state in which his rationality is “shut down” or, at least, quite severely compromised. There are forms of corporal punishment that do not have such drastic effects. A controlled stress position or exposure corporal punishment could certainly be imposed in such a way that the physical pain would be very unlikely to rise to the level that the objectors are concerned about. While the person would be “reduced” in a sense to be discussed shortly, he would never reach the kind of state that the objectors are referring to in the objection that we are presently considering.⁶⁴

In fleshing out the next line of response, it is important to remember that the objection is focused not on the pain caused by corporal punishment, but rather on what that pain does to people’s ability to exercise their rational capacities or control their behavior by using those capacities. When we see this clearly, we can focus on the question of whether or not it is necessarily degrading to do something to people that shuts down or severely compromises their rational capacities, or brings the promptings of their sensuous nature to the forefront. Before proceeding, though, it is necessary to make a distinction. It may be that there are actually two related issues that have so far been run together. We can speak, on the one hand, of shutting down or severely impairing rationality and, on the other hand, of “animalizing” or

⁶⁴ Of course, various kinds of stress position and exposure punishments may be objectionable on other grounds, and I am not commenting on that right now. But it is important to see the limitation of this objection from reduction and note that it cannot show that all corporal punishment is degrading, even if it succeeds on its own terms. There are clearly corporal punishments that do not create sharp bursts of severe pain. Some corporal punishments function by creating less severe pain, but for somewhat longer periods of time. Because the physical pain is less severe, it does not cause the kind of reduction that the objectors have in mind. As we all know, it is possible to have a conversation, read a book, and perform all sorts of “characteristically human activities” (to borrow a phrase from Murphy) while experiencing moderate physical pain. A person will probably not perform at their highest level of functioning while they are in pain, but a certain degree of rational functioning is certainly possible while undergoing various stress position or exposure corporal punishments.

“bestializing” another person. For the most part, objectors who put forth the objection from reduction don’t seem to really stress this distinction, but it may be worth pointing out. It is possible to shut down rational functioning without “animalizing” a person. For example, if you knock a person out, he is temporarily unable to function rationally, but he is not “animalized.” Animalizing a person seems to have more to do with bringing the promptings of a person’s sensuous, heteronomous nature to the forefront of functioning and experience and putting the person into a state in which he is temporarily unable to govern his behavior autonomously because of the interference of his emotions or senses. It may be that, even though they do not explicitly say so, the objectors who press the point about reduction are more concerned with animalization than with the temporary shutting down of rationality.⁶⁵ Having said all this, I think that however we construe the emphasis of the objection, it can still be shown to be problematic.

First, let us consider the notion that it is degrading to punish in a way that temporarily shuts down rational functioning. Suppose that the mode of punishment to be evaluated involved putting a person into a “cryoprison.” This kind of punishment is used in the science-fiction film *Demolition Man* and it involves cryogenically freezing a prisoner in a state of suspended animation for an extended period of time.⁶⁶ Suppose that we were able to put an offender into a cryoprison for a year, “reanimate” him, and that he would feel fine afterwards, with no lasting mental or physical effects. This would, of course, be a rather odd punishment, but would it be *degrading*? It

⁶⁵ I owe this point to Kleinig.

⁶⁶ Synopsis for *Demolition Man*, “The Internet Movie Database”: <http://www.imdb.com/> (accessed March 24, 2010). An alternative to the cryoprison example might be a “sleep punishment,” which would involve putting an offender to sleep for an extended period of time and then waking him up at the end of his sentence.

seems that the answer is “No.” It does involve shutting down a person’s rational capacities for a much longer time than corporal punishment would. If we were to apply the “shutting down of rationality” criterion for degradingness used in the objection that we are considering, it would seem that we would have to hold that the cryoprisn punishment is degrading. This seems to be an odd implication. Whatever else we might want to say about such a punishment, it does not seem to be degrading.

Second, let us consider the notion that it is degrading to punish a person in a way that temporarily “animalizes” him. When a person is animalized, he is put into a state in which his heteronomous nature temporarily overrides his autonomy and emotional or sensuous experiences interfere with attempts to exercise autonomy. So, the question becomes whether or not it is degrading to punish a person in a way that puts him into this sort of state.

Human beings, at various points in their lives, occupy states in which they are animalized in the sense specified above. It is often the case that when a person is experiencing extreme pleasure his sensuous nature comes to the forefront and interferes with his rational functioning. Take, for example, the extreme pleasure of an orgasm. While in this state, the pleasure “drowns out” a person’s rationality and his sensuous behaviors and reactions “take over.” We need not engage in a thought experiment about “orgasm-punishment,” since it is a bit too oxymoronic to take seriously. But we can ask the following question: When a person brings his partner to orgasm, does he treat her in a degrading way? Clearly not. But he does, of course, animalize her in the sense that we are considering.

The clear objection to what I've said here is that when a person brings his partner to orgasm, he is acting consistently with her will and doing something that she has consented to. But it is difficult to see how this makes a difference. If inducing a state in which a person is animalized is degrading, then it should follow that when a person does that to another person, he is degrading her. The notion of consensually treating someone in a degrading way makes sense, so if the criterion for degradingness on offer is accurate, then it should follow that a person degrades someone whenever he brings them to orgasm.

Perhaps the general point can be made in another way. All punishments (or almost all punishments) are imposed against the punished person's will. Some punishments are degrading, and others are not. So, a punishment does not get its degradingness from whether or not it is imposed against a person's will. There must be some other feature of the punishment that gives it that particular quality. If it is held that some degrading punishments are degrading because they involve inducing states in which the person's sensuous nature comes to the forefront in the way described, then this should be because doing so is degrading. But, if we hold that, then the unacceptable implications mentioned above follow. So, there must be a problem with the criterion.

There may be a concern that, in using this orgasm example, I am not fully appreciating the differences between pleasure and pain, or perhaps I am assuming a controversial Benthamite view: that pleasure and pain ought to be seen as two sides of the same coin.⁶⁷ I acknowledge that there are many differences between pleasure and pain and that these differences may not be captured in a view that simply sees them as

⁶⁷ Kleinig, personal communication.

similar phenomena, one with a positive valence and the other with a negative. I do maintain, however, that my example works for the present purpose. Despite whatever important differences may exist between the effects of pleasurable and painful phenomena, it seems clear that they also often have similar effects. With respect to, say, the acute pain of a moderate electric shock and the extreme pleasure of an orgasm, it should be clear that both events fit the criteria that I mentioned above: they both bring the promptings of a person's sensuous, heteronomous nature to the forefront of experience and functioning and they both put people into a state in which they are temporarily unable to govern their behavior autonomously because of the interference of their emotions or senses. Whatever differences may exist between these two states, or the effects of these two states, the existence of these similarities is what is important for my line of reasoning to work.

Another line of response to the objection from reduction comes from the fact that all kinds of suffering cause a reduction of sorts. If we are going to inflict any severe (or significant) punishments at all, we will inevitably be imposing upon people in a way that causes them a significant amount of suffering, whether psychological, physical, or both. Psychological suffering and physical suffering both cause a reduction, and in both of the senses specified. Recall that it is not clear whether the emphasis in "reduction" should be on the compromising of rationality, or on the "animalization" of the person. But whichever emphasis we choose, significant psychological suffering certainly has a reductive effect.

It is useful to compare acute pain corporal punishment and imprisonment here. At this point, it should at least be clear what effects the objectors are referring to with

respect to acute pain corporal punishment. With imprisonment, on the other hand, the reductive effect is more subtle, but it is present nonetheless. As I will argue shortly, the fact that imprisonment must take a significantly longer time than acute pain corporal punishment is highly relevant. But for now I want to stress the reductive effect of imprisonment. Let us take imprisonment under “ideal” circumstances (no rapes, no brutality, etc.). As was detailed in Chapter 2, even in these circumstances imprisonment causes a great deal of psychological suffering. It is not necessary to rehash all of the ways in which this occurs. The point is that significant psychological suffering has a substantial reductive effect, however we choose to characterize the reduction. If we want to stress the compromising of rationality and autonomy, the strong negative emotions that arise while a person is imprisoned certainly have a quite significant effect on his judgment, decision making, and overall rational functioning. If we want to stress the notion of animalization, recall that that is to be cashed out in terms of the person’s heteronomous nature coming to the forefront of experience and behavior. Included under the heading of “heteronomous” are emotional influences as well as sensuous ones. A person who is being highly influenced by negative emotions is quite far from the kind of autonomous functioning that is thought to have such substantial moral importance.

An objection to this line of response may involve the claim that the notion of a threshold is important here. Perhaps what is so problematic about acute pain corporal punishment is that the punished person is being brought below a certain threshold. That threshold could be specified in various ways, and there could be different ways to “draw the line,” but most likely it would be specified in terms of a certain level of

functioning or control of behavior. It might be argued that while acute pain corporal punishment “shuts down” rational capacities and animalizes the person quite substantially, other severe punishments such as imprisonment tend to cause a level of suffering that merely interferes with rational functioning and does not animalize the person to nearly the same degree. Furthermore, it could be claimed that when imprisonment does tend to bring the person below a certain threshold (as in supermax prisons), it is in fact degrading.⁶⁸

It should be acknowledged that reduction admits of degree and this dimension of evaluation is morally important. However, I think that this objection can be successfully responded to. First I want to state that this objection probably idealizes the situation somewhat. The standard imprisonment experience will probably in most cases be punctuated with quite severe psychological suffering which will cause the person to experience at least some moments of quite substantial impairment and reduction. However we might reasonably specify a threshold, chances are that the average prisoner finds himself below it at least a few times during an average term of imprisonment. This is clearly contingent upon a number of factors, but it seems quite relevant nonetheless. In any case, I do not want to press this point further, since it is not my main reply.

I think that this objection fails because it overemphasizes one dimension of evaluation. The extent of the reduction is important, but to focus too heavily on that is myopic. The temporal factor must also be considered, and I think that it is quite important. In fact, I think that there is good reason to believe that a short-term substantial reduction may be quite preferable to a much longer-term less substantial

⁶⁸ Much of the material in this paragraph comes from Kleinig’s comments (personal communication).

reduction. We must remember that psychological suffering perverts and distorts rational functioning. With imprisonment, for example, a person is often reduced to an impaired state over a longer period of time. I am not talking here about any effects after he is released. Rather, I am talking about his experience while imprisoned. The long-term perversion and distortion of rationality puts a person into a state in which he lives his life wounded, functioning at low capacity. Acute pain corporal punishment, on the other hand, does no such thing. With this form of punishment, the reduction need only last a matter of seconds. After it is over, the punished person is able to return to effective rational, autonomous functioning in relatively short order.

I think that it should be clear at this point that setting criteria for degradingness is a difficult and complex task, and it is fair to ask why the threshold concern ought to be thought of as decisive. I simply do not see a good reason to assign that level of importance to that particular dimension of evaluation. It is worth pointing out that the chronic, partial reduction caused by many kinds of psychological suffering pervades all aspects of the punished person's life: his reflections, his decisions, his interactions with others. In short, it colors his whole existence. Thus, in a very important sense, the reduction is often more complete and thorough with psychological suffering. The effect of temporary acute physical pain is very different. Certainly, reflection and deliberation will not be going on during the punishment. But, given the alternative, it is difficult to see why we should be so focused on that. We ought to take a holistic approach to degradation and consider multiple relevant factors when evaluating a punishment. When we take this holistic approach, we can

see that short-term acute pain corporal punishment is not in fact an especially reductive form of punishment.

Corporal Punishment and the Dignity of Persons

In this section, I will raise some considerations bearing on corporal punishment, dignity, and degradingness that did not come up in responding to the objections that were considered in the earlier sections.

Determining whether or not conduct in general is degrading can be quite difficult, but there is a special difficulty involved in determining whether or not a punishment is degrading. In “Punishment and Moral Seriousness,” Kleinig states “Divorced from the context which gives punishment its character as punishment, the imposition which is constitutive of punishment would violate another human being. For it would submit one person to the will – to the ends, preferences or wishes – of another; and to that extent it would be *demeaning and degrading*.”⁶⁹

When it comes to determining whether or not a punishment is degrading, we are trying to render a verdict on conduct that would be admittedly degrading if inflicted in ordinary contexts. So, we cannot just import standards that operate in ordinary contexts and apply them directly to cases involving punishments. The evaluation will have to be more nuanced than that. In addition, some argue that part of the purpose of punishment is to bring the offender low. Kleinig states that punishment “negates or cancels the claim implicit in wrongdoing, that the interests of others are not all that important, that the wrongdoer is superior to others...”⁷⁰ Whether or not we should accept Kleinig’s particular justificatory theory, I think that we should agree that there is a sense in which punishment “lowers” a person. Degrading treatment is often

⁶⁹ Kleinig, “Punishment and Moral Seriousness,” 418 (italics mine).

⁷⁰ *Ibid*, 418.

characterized as “beneath” a person and as involving an unacceptable “lowering” of a person. So, when the topic is degrading punishment, an additional complexity is introduced by the fact that we are trying to determine what kinds of treatment are unacceptably “low” while acknowledging that punishment, by its very nature, involves lowering the punished person.

We should acknowledge that corporal punishment will mostly likely have a “lowering” effect. But, again, it is arguable that this is intrinsic to punishment, and there are acceptable and unacceptable forms of lowering. Scarre stresses that “[t]here is a difference, though it is often missed today, between a punishment that humbles an offender and one that humiliates him.” Humbling seems to be a perfectly permissible, indeed desirable, effect of punishment, whereas humiliation, presumably, is impermissible. Scarre suggests that “some of the objections that corporal punishment is degrading may stem from a simple confusion between humbling and humiliating.”⁷¹ This last statement may be a bit facile, and I don’t want to get into the topic of humiliation until next chapter. But it is worth keeping in mind that we can acknowledge that corporal punishment has a lowering effect while also holding that this lowering effect ought to be characterized as humbling, as opposed to humiliating or degrading.

So, when evaluating different forms of punishment in terms of whether or not they should be labeled “degrading,” the questions that we ask need to be posed in a way that acknowledges the complexity of the subject. For example, rather than “Does corporal punishment ‘lower’ the offender?” we must ask “Given that punishment by its nature brings the offender low, does corporal punishment involve a

⁷¹ Geoffrey Scarre, “Corporal Punishment,” *Ethical Theory and Moral Practice* 6 (2003): 314-315.

‘lowering’ of a kind or degree that warrants its prohibition on those grounds?” I have already said a fair amount in this chapter to address concerns that corporal punishment involves treating the offender in a degrading way. But more can be said, and I think that it is useful here to again take a comparative perspective. We can get a better sense of how corporal punishment ought to be evaluated by comparing it to the available options, while of course keeping in mind that corporal punishment must be justified in its own right and not merely as the lesser of two (or multiple) evils. Also, as I stated in Chapter 3, taking the comparative perspective can help to present the advantages of one method in a more vivid way, thereby making a virtue of a particular method more clear than it would have been otherwise.

In his “On Degradation,” Vorhaus details features of prison life that can contribute to degradation, and his comments reveal a holistic approach.

Just as degradation may be the effect of a rule or practice, so also it may be the product of an *environment*, though its separate parts do not have this effect, and nor is any such effect intended... A combination of constant subordination to officers, extended separation from intimates and employment, and subjection to an initially alien and later mundane routine is quite sufficient to reduce some inmates to a shadow of their former selves... The degradation... is a consequence of the totality of the environment that inmates are subjected to, with its deleterious effects upon dignity and self-respect.⁷²

One of the virtues of this passage is that Vorhaus does not make the mistake of focusing on imprisonment in its worst instantiations. Everyone should agree that prisons that contain daily brutality and rapes cannot be seriously defended. (Sadly, not everyone agrees on this point.) Vorhaus is pointing out that features that seem to be an inevitable (or almost inevitable) part of the imprisonment experience can also

⁷² Vorhaus, “On Degradation. Part One,” 390.

be degrading. Subordination to officers is definitely inevitable, as is extended separation from intimates. Certainly, there are some opportunities for employment in some prisons, and prisons vary in the extent to which inmates' time is controlled and structured. But, in general, we should agree with Vorhaus that the totality of the prison environment can be a threat to the dignity of inmates. This should not be surprising, given the connection between dignity and autonomy, and the degree to which imprisonment impinges upon the prisoner's ability to govern his own life.

Scarre contrasts corporal punishment and imprisonment on these grounds, stating that "imprisonment lasts much longer than the 'short sharp shock' of a corporal penalty and represents a far greater interference in the subject's management of his own life."⁷³ This cannot be doubted, and Scarre finds it odd that this fact is not strenuously emphasized "in an age which lauds the value of personal freedom."⁷⁴ Of course, this is not the only important factor to consider. But, clearly, if we are concerned with recognizing and considering the dignity of autonomous beings, we must be concerned with autonomy itself and the degree to which a punishment limits a person's ability to govern his own life. This is not to say that prisoners have no opportunity to exercise their autonomy. However, it cannot be denied that their ability to rationally self-govern is limited and restricted in many ways that go far beyond what ordinary citizens have to deal with. In fact, I think that one of the main ethical advantages of corporal punishment is that it involves relatively little cumulative interference with autonomy.

⁷³ Scarre, "Corporal Punishment," 313.

⁷⁴ *Ibid*, 313-314.

I have spoken of the importance of taking a holistic approach and considering multiple relevant factors when attempting to determine whether or not a punishment is degrading. I will not attempt to give an exhaustive list of the factors that ought to be considered, but some factors that I believe are very important have come up in our discussion. The way that the offender is addressed by the state throughout the punishment process ought to be taken into consideration, and we have seen that this issue is more complex than it may seem at first. The extent or severity of the reduction involved in the punishment is certainly important, but so is the length of the reduction. We ought also to consider the limitations on autonomous decision making that result from the particular form that punishment takes. This should be construed broadly to include considerations about the general extent to which the punished person is able to live a life of his own choosing and design. I think that there is no way to assign precise weights to each of these considerations, but that does not mean that we cannot make informed and considered judgments. Also, I am sure that there are other relevant considerations that we have not touched upon. At the very least, it should be clear that when evaluating a punishment in terms of degradingness, we ought to favor a holistic approach over a litmus test.

Taking multiple relevant factors into consideration, it seems evident to me that there are certain forms of corporal punishment that are not necessarily degrading. Among these forms of punishment are certain kinds of acute pain corporal punishments. We can acknowledge that they involve significant heteronomous appeals and cause temporary substantial reductions without concluding that they are thereby degrading. As argued above, there are generally also normative appeals in

place, and the fact that acute-pain corporal punishments can be carried out in a short period of time is much more important than many critics acknowledge.

Chapter 5: Some Remaining Issues

In this final chapter, I focus on some additional objections and concerns that fall under two general headings: humiliation and bodily integrity. As I will show, these lines of objection warrant some attention and discussion. However, I treat them more briefly mainly because the concepts that I focus on in chapters 3 and 4 (cruelty, inhumaneness, degradingness, and inhumanity) are the ones that are most frequently invoked in philosophical discussions of the limits of permissible punishment. I begin here with a brief discussion of the concept of humiliation, which is followed by a critical analysis and evaluation of a few objections that fall under this heading. I follow a similar pattern in my discussion of bodily integrity. Ultimately, I argue that none of these lines of objection show that corporal punishment as I envision it would be morally wrong. Finally, I conclude the chapter and the dissertation with some brief remarks about the conclusions and implications of this work.

Humiliation

It is not at all clear what humiliation involves. In the contemporary literature, it seems that the two concepts that are discussed most often in connection with humiliation are dignity and self-respect. These connections are the ones that I will discuss here. I will focus mostly on self-respect, since concerns about dignity were discussed at length when dealing with the issue of degradingness.

The most prominent contemporary discussion of humiliation is contained in Avishai Margalit's *The Decent Society*. Margalit argues that "[a] decent society is one

whose institutions do not humiliate people”¹ and that “humiliation is any sort of behavior or condition that constitutes a sound reason for a person to consider his or her self-respect injured.”² He explicitly defines humiliation in terms of self-respect and then states that his is a “normative rather than a psychological sense of humiliation.”³ However, in spite of the fact that the definition explicitly mentions self-respect, it turns out that his concerns fit much better under the heading of respect for human dignity. The definitions and distinctions contained in the book are generally problematic, more often than not seemingly stipulative or ad hoc, and it is not always easy to figure out exactly what Margalit is trying to say. But it does seem that, in general, his main concern is with what most philosophers would understand as violations of human dignity. Sometimes it seems that he just conflates self-respect and dignity, as in Chapter 2, entitled “Rights.” He asks “Which rights, if any can constitute a sufficient condition for self-respect, or for what may be called dignity?”⁴ In other places, he makes statements that seem to show that his main concern really is human dignity. In Chapter 3, “Honor,” he states that “the concept of honor that is relevant to the decent society is the concept of human dignity. This is a type of honor that people ought to have, and its violation is a reason to consider oneself humiliated.”⁵

Since Margalit is really focused on human dignity, we might expect that possible objections to corporal punishment that could arise from applications of ideas in this book have already been addressed under the heading of degradation. It turns out that this is the

¹ Avishai Margalit, *The Decent Society*, trans. Naomi Goldblum (Cambridge, Mass.: Harvard University Press, 1996), 1.

² *Ibid.*, 9.

³ *Ibid.*, 9.

⁴ *Ibid.*, 39.

⁵ *Ibid.*, 43-44.

case. In Chapter 8, “Rejection,” he offers a succinct statement that summarizes much of what he says in the book. He says that the following are

...three senses of the term ‘humiliation’: (1) treating human beings as if they were not human – as beasts, machines, or subhumans; (2) performing actions that manifest or lead to loss of basic control; and (3) rejecting a human being from the “Family of Man.”⁶

The issue of whether or not corporal punishment involves treating human beings as non-humans has been discussed at length under the heading of degradation. With respect to loss of basic control, this issue was covered when we discussed the problem of reduction. And it turns out that when Margalit speaks of rejection from the “Family of Man,” this doesn’t amount to much more than treating humans as non-human.⁷ I could not find grounds in this book for a line of objection to corporal punishment that goes beyond what we have already discussed under the heading of degradation. This should not be terribly surprising given the connection between degradation and dignity and the fact that Margalit is really focused on dignity.

There may, however, be a different line of objection that could come out of a different conception of humiliation. In “Humiliation, Dignity and Self-Respect,” Daniel Statman proposes a conception of humiliation that also ties it to self-respect, but his approach differs significantly from Margalit’s. Recall above that I quoted Margalit’s assertion that his is a normative sense of humiliation, as opposed to a psychological. Statman argues that these “objective-normative” conceptions of humiliation, which tend to connect humiliation with human dignity, “are too ‘philosophical’, and too detached

⁶ *Ibid.*, 144.

⁷ “I claim that humiliation is the rejection of a human being from the ‘Family of Man’ – that is, treating humans as nonhuman, or relating to humans as if they were not human.” (Page 108)

from psychological research and theory.”⁸ He favors what he refers to as a “subjective-psychological notion of self-respect” and asserts that “to be humiliated means to suffer an actual threat to or fall in one’s self-respect.”⁹

What, then, is the conception of self-respect that Statman endorses?

Self-respect is a subjective attitude each individual has toward him or herself, based on standards for worthiness and excellence endorsed by the individual... To connect humiliation to subjective self-respect would mean that humiliation is any behavior that makes a person think she is unworthy, or less worthy, of respect, according to her own standards.¹⁰

But even though he believes that self-respect and humiliation are subjective, Statman holds that we can still distinguish between justified and unjustified, between reasonable and unreasonable, feelings of humiliation. To clarify his position on this, he uses an interesting example related to fear. If a wild dog is charging a person, he is likely to feel fear, and we regard this fear as rational and justified. If, however, a person feels fear in the presence of a mouse, we tend to regard this fear as irrational and unjustified. This is because the wild dog poses a threat while the mouse most likely does not. Statman argues that we can make a similar distinction with respect to humiliation:

...just as we respond by fear to events that threaten our vital interests, we respond by humiliation to behaviors that injure or threaten to injure our self-respect. When the behavior of others conveys a message of subordination, rejection or exclusion, we have a perfectly good reason to feel humiliation. We not only *feel* humiliation as a matter of psychological fact, but have a sound *reason* to feel so and our emotional response is rational.¹¹

⁸ Daniel Statman, “Humiliation, Dignity and Self-Respect,” *Philosophical Psychology* 13, no. 4 (2000): 523.

⁹ *Ibid.*, 523.

¹⁰ *Ibid.*, 526-527.

¹¹ *Ibid.*, 531.

Statman realizes that it will not always be easy to tell whether or not a given emotional response is rational, and, while he doesn't attempt to fully solve this problem, he does make the following claims:

...from a moral point of view, placing too high constraints on rationality here would lead to unreasonable results. The moral rules governing the relations between humans must refer to human beings as they actually are, not to human beings as they ideally ought to be, according to some philosophical theory of rationality. And as human beings are emotional creatures, as they tend to suffer painful feelings due to other people's actions, our moral and political rules should be drawn accordingly.¹²

So, if we are trying to determine whether or not a person is justified in his feelings of humiliation, we must keep in mind that we are dealing with an actual person with human emotions and vulnerabilities, not an ideally rational philosophical construct.

Statman's account of humiliation raises concerns that we have not yet explicitly addressed. It may be the case that certain forms of punishment, though not inconsistent with basic dignity, nonetheless give rise to rational feelings of humiliation. It is somewhat difficult for me to see how this can be the case: If a person is not in fact being treated as a lesser being, then it may be the case that they *feel* humiliated, but these feelings would nonetheless be irrational and unjustified. But perhaps such a view involves, in Statman's words, "placing too high constraints on rationality." If people's self-respect is quite likely to be threatened by a certain form of punishment, then this is something that we should be concerned about, rather than dismissing their feelings with a charge of irrationality. Feelings of humiliation might be especially understandable in cases where a particular punishment has come to acquire a social meaning of subordination. A particular form of punishment may not *necessarily* be humiliating, but

¹² *Ibid*, 532.

it may give rise to justified feelings of humiliation in a particular social context by virtue of certain facts and meanings present in that context.

In “What Do Alternative Sanctions Mean?” Kahan discusses the social meanings attached to corporal punishment. While his main aim is to explain the political unacceptability of certain alternatives to incarceration, some of his claims about corporal punishment are relevant to our discussion. He states that “in light of its history, corporal punishment is freighted with social meanings that make it a manifestly inadequate substitute for imprisonment as a means of expressing appropriate moral condemnation.”¹³

In post-Revolution American society, corporal punishment

...was perceived to be distinctive of hierarchical relationships; the infliction of acute physical pain was the way that sovereigns disciplined their subjects... As such, it rankled Americans’ republican sensibilities for states to use this same mode of discipline to punish citizens...¹⁴

So, in American society, corporal punishment will most likely remain politically unacceptable in part because of what it expresses: “that offenders are the natural or social inferiors of those who discipline them.”¹⁵ These claims clearly have import beyond the domain of empirical explanation. A clear concern is that, given these social meanings, corporal punishment is likely to often give rise to justified feelings of humiliation in the punished person.¹⁶

¹³ Dan M. Kahan, “What Do Alternative Sanctions Mean?” *University of Chicago Law Review* 63 (1996): 610.

¹⁴ *Ibid*, 612.

¹⁵ *Ibid*, 617.

¹⁶ These claims could also give rise to yet another objection from degradingness. However, there are a few reasons why I did not consider it under that heading. First, the sort of objection suggested by Kahan’s comments does not seem to reflect the dominant concerns of philosophical critics of corporal punishment and other practices that resemble it in certain respects (e.g. torture). Second, the objections considered in the “Degradingness...” chapter are best understood as “in principle” objections to corporal punishment, whereas the objection suggested by Kahan’s comments is contingent upon various social facts. In fact, it could be leveled against any punishment that has acquired the social meanings that he discusses, and is therefore not a direct objection to corporal punishment *per se*. While these considerations do not render

In “Bodily Integrity, Reproductive Liberty and Legal Personhood,” Lane employs a subjective-psychological conception of humiliation in an objection to corporal punishment. She first puts forth what is essentially the objection from reduction, which we discussed in chapter 4. The following objection is in a similar vein, but is distinguishable in that it focuses on “emotional humiliation.”

A second dimension of legally “seeing” persons involves the Court’s ability to subjectively understand not only physical pain, but *feelings* associated with suffering indignity... [P]ersons are understood to be connected to others: their sense of themselves is connected to how *they appear* to others. In a Cartesian framework, this involves the ability to have *control* over what one’s body is doing. With a Cartesian person, the “mind”, the Reasoning part of personhood, is what modern persons want others to recognize. Therefore, forced intrusions or exhibitions of “body” detract from the ability of other persons to reveal the “higher” self since such exhibitions bring forth “lesser”, more animalistic tendencies.¹⁷

The similarities between this objection and the objection from reduction are apparent, but the emphasis is different. She is concerned here with the emotional impact of not being able to control how your body appears to others. People want to be able to control their self-presentation and corporal punishment compromises their ability to do so.¹⁸ The concern is that a person experiencing corporal punishment would be humiliated by being seen in a state in which his animalistic tendencies emerge and eclipse his higher self.

I think that these sorts of concerns are legitimate, but I do not think that they provide anything approaching a decisive objection to corporal punishment. We must first

this possible objection irrelevant, they go some way towards justifying my choice to focus on the other lines of objection.

¹⁷ Julie Lane, “Bodily Integrity, Reproductive Liberty and Legal Personhood,” (paper presented at the Midwest Political Science Association Annual Conference, Chicago, Illinois, April 2005). All Academic Inc. Website: <http://www.allacademic.com/> (accessed March 24, 2010), 16.

¹⁸ In *Censure and Sanctions* (New York: Oxford University Press, 1993), Andrew von Hirsch states (though not in connection with corporal punishment) that a person is entitled “*to be able to present himself to the world as an intact human being*” (83). This passage led me to cast this point in terms of self-presentation.

keep in mind the comparative perspective here and note that corporal punishment would have to be compared to other forms of significant punishment, particularly imprisonment, in terms of its impact on self-respect.¹⁹ That being said, there will still be legitimate concerns about the impact of corporal punishment on the grounds of its social meaning and its association with subordination. Now, insofar as we are trying to predict the actual effect that corporal punishment would have on self-respect, we are clearly in the domain of the empirical, and I have already stated my reluctance to engage in speculative and impressionistic social science. But I do think that there are good reasons to believe that it is far from inevitable that corporal punishment, practiced with appropriate constraints, would have a devastating impact on self-respect. Insofar as it has in other contexts²⁰, there are a few aspects of these punishments that are important to recognize. They were often carried out in public, or at least in front of spectators, and in a manner that created a spectacle.²¹ They were also often inflicted disproportionately on offenders of low social status. These factors must be relevant in terms of the impact that such punishments had on the offender's self-respect.

In terms of the social meaning of forms of punishment, these meanings are malleable. Regarding the prospect of changing the social meaning of corporal punishment, I think that Kahan is unduly pessimistic:

¹⁹ Hannah T.S. Long discusses the humiliation often caused by certain practices in prisons. In particular, routine body cavity searches often cause strong feelings of humiliation. Also, prisoners often have very little privacy and are subject to being observed by guards while naked. ("The 'Inequability' of Incarceration," *Columbia Journal of Law and Social Problems* 31 [1998]: 338-339)

²⁰ Robert Graham Caldwell, *Red Hannah: Delaware's Whipping Post* (London: Oxford University Press, 1947), 19, 89; Myra C. Glenn, *Campaigns Against Corporal Punishment: Prisoners, Sailors, Women, and Children in Antebellum America* (Albany: State University of New York Press, 1984), 44, 119.

²¹ It is notable that Statman offers the following examples of humiliation sanctions: "exposing criminals publicly, beating them up *in front of a watching crowd...*" (534, Italics mine)

...a project to reform expressive sensibilities through self-conscious engineering would be extraordinarily complicated. Our knowledge of how to create and alter social norms is relatively primitive. It's unclear how a legislature would even start to transform the understandings that make corporal punishment express inequality...²²

Given the success of various social movements, a general claim to the effect that we cannot hope to reform expressive sensibilities is too absurd to take seriously. So let us interpret Kahan charitably as claiming, more specifically, that it is unlikely that we would be able to change the social meaning of corporal punishment so that it no longer expressed inequality. Kahan's case for that claim is weak. Of course altering the social meaning of corporal punishment would be a complex process, and a legislative act would be insufficient. But it is far from clear that it would be a hopeless task. A form of punishment that has been associated with subordination can come to lose that meaning over time, or that aspect of its meaning can at least be diminished. If, for example, corporal punishment were carried out on offenders of both high and low social status, this would of course affect the extent to which it was equated with low social status.

It might be objected that in order for a punishment to be morally permissible, we must alter its problematic social meanings *before* using it so that we can avoid the charge of causing justified humiliation. Such a view, however, is problematic and ties moral permissibility much too closely to extant sensibilities. Generally, we must begin to use a punishment if we are to change its social meaning in any significant way. But, if a form of punishment has an unacceptable social meaning and that bars us from experimenting with it, there will be very little chance of altering that meaning. This would constrain experimentation with different forms of punishment to an unacceptable degree. New and

²² Kahan, "What Do Alternative Sanctions Mean?" 630.

potentially superior punishments that resembled older punishments would be blocked from consideration because of possible negative historical associations. The moral requirements must be somewhat looser, while still taking concerns about justified humiliation into consideration. It must be permissible to experiment with new forms of punishment, or revisit older forms, and see if it is possible to alter the social meanings attached. However, constraints should be in place. We should do what we can to minimize the possibility that the offender's self-respect will be significantly damaged (such as removing the punishment from a public domain) and we should seriously consider abandoning the punishment if it becomes clear after a suitable experimental period that the unacceptable social meaning in question is too resistant to change. With respect to corporal punishment, I acknowledge its connotations of subordination and inequality. However, it does not seem to me that we can determine ahead of time that it would inevitably retain those strong connotations despite efforts to remove them and changes in implementation.

Turning specifically to Lane's objection, her concerns regarding self-presentation are certainly relevant and they point to constraints that should probably be in place if criminals are to be corporally punished. I think that she is right to draw attention to the importance of being able to control one's self-presentation and to connect this to humiliation. I also think that it is plausible to assume that the number of people viewing the punishment, the duration of the punishment, and the extent to which the person appears out of control will all affect the emotional experience of the punished person. I have said before that I do not favor corporally punishing criminals in public, and this consideration raised by Lane supports that constraint. Also, this consideration points

toward minimizing those who observe the punishment and minimizing the amount of time “out of control” by making the punishment as quick as is practicable. Lane’s concern does not, however, constitute a decisive objection to corporal punishment.

Of course, if we are concerned with the impact that a punishment will have on an offender’s self-respect, this is an empirical issue to be investigated with scientific methods. But there are good reasons to be highly skeptical of the claim that a punishment that makes you appear momentarily out of control will have a devastating impact on self-respect. We can, of course, take the comparative perspective here and point to the lack of control in the prison setting and the fact that this is often observed by dozens of other people. Inmates are constantly observed following orders that they must obey on pain of disciplinary sanctions. This must often have a negative impact on self-respect. But it may not be necessary to employ the “imprisonment vs. corporal punishment” comparison here. What is necessary is to keep in mind, as I have said, that punishment inevitably causes suffering and to note the impact that suffering has on judgment and behavior.

Self-respect is, of course, affected by a great many factors. Just one of these is self-presentation in the sense of appearing to be in control of your bodily movements. Another factor is a person’s appraisal of his own behavior. Psychological stress and suffering affects our thought processes and, therefore, our behaviors, causing us to act in ways that we later feel badly about. For example, it can make people more impulsive and compromise their ability to act in accordance with their values. Because of this, and given that punishment generally causes suffering, it is likely that significant punishments will generally create circumstances that can be detrimental to self-respect. In fact,

punishments that require a lengthy period of time to carry out, such as imprisonment, create quite a number of opportunities for punished people to act inconsistently with their own values and self-image and, therefore, drop in their self-respect.

It might be objected that there is a relevant distinction between damage done to self-respect by what is done to us versus damage to self-respect as a result of our own actions.²³ We can recognize, in general, that this is a relevant distinction while denying that it has much normative importance with respect to the present issue. When punishments cause psychological suffering, which in turn causes a person to act in ways detrimental to self-respect, he performs the actions that he does, in large part, because of what is being done to him. Regardless of whether or not he still has a choice, there is no denying that the punishment creates circumstances that are highly conducive to actions that lead to damage to self-respect when reflected upon. This consideration shows that, when applied to the present issue, the above-mentioned distinction is blurry and does not carry much normative weight.

My intention here is not to try to settle an empirical question with a neat philosophical argument. Rather, I am trying to show that there is good reason to be highly skeptical of the claim that corporal punishment is likely to be especially humiliating because it can cause a person to be temporarily out of control of his body before the eyes of others. The concern raised by Lane is important and should be considered if corporal punishment is instituted, but she has not come up with anything resembling a decisive objection to the practice.

In general, I recognize the large empirical dimension of this issue and, therefore, the fact that a philosophical evaluation can go only so far. I will say, however, that

²³ Kleinig, personal communication.

though concerns about humiliation are understandable, I do not think that corporal punishment practiced as I envision it would necessarily be humiliating. Recall that, in my view, corporal punishment should not break the skin or scar, it should not be carried out in public, and (of course) it should not be an exclusively low-status punishment. If corporal punishment were practiced with these constraints, then I think that it may very well be able to avoid the charge of humiliation.

Bodily Integrity

The concept of bodily integrity does not come up very often in discourse about punishment, but I think that it is worth devoting some attention to. In *Doing Justice*, von Hirsch mentions in a footnote that there are “disturbing ethical problems” posed by corporal punishment, and asks “Might there not exist a right to the integrity of one’s own body, that not even the state’s interests in punishing may override?”²⁴ Also, in “The Ethics of Corporal Punishment,” Salt claims that corporal punishment “is an outrage on what should, above all things, be held sacred – the supremacy of the human mind and the *dignity of the human body*” (italics mine).²⁵ It is worth enquiring as to what the phrase “the dignity of the human body” might mean.

Delving into the philosophical literature on the subject, it quickly becomes apparent that there is little agreement as to what “bodily integrity” means. In “Bodily Integrity and Male and Female Circumcision,” Dekkers, Hoffer, and Wils state that it is “an ambiguous notion” and that giving content to it “effectively commits you to a

²⁴ Andrew von Hirsch, *Doing Justice: The Choice of Punishments* (New York: Hill and Wang, 1976), 111 (footnote).

²⁵ Henry S. Salt, “The Ethics of Corporal Punishment,” *International Journal of Ethics* 16, no. 1 (1905): 88.

particular moral point of view.”²⁶ In “The Integrity of the Body,” after discussing a few different accounts of bodily integrity, McKenny concludes that

...the concept is not able on its own to do much work in resolving disputed questions about uses of and interventions into the body. One reason is that there are too many conceptions of integrity to expect much agreement on its nature and normative force.²⁷

After surveying the literature on this concept, I am inclined to agree with these remarks.

But that does not mean that there is no use in discussing some of the connections that have been drawn and exploring their possible relevance.

In the literature, bodily integrity seems to be most prominently connected to three different concepts: wholeness, dignity, and inviolability. Much of this literature is about topics in medical ethics, such as circumcision²⁸ and organ transplantation and selling²⁹.

In the Dekkers article, a distinction is made between “a *person-oriented* and a *body-oriented* approach,” which “is based on the idea that the notion of bodily integrity should not be identified with the idea of personal autonomy and control over one’s body.”³⁰

Personal autonomy with respect to the body is stressed in the person-oriented approach, and is probably more precisely referred to as “bodily autonomy.” The body-oriented approach is more conducive to seeing bodily integrity as a principle in its own right, at least partially distinct from concerns related to autonomy. Miller also stresses this in *The Limits of Bodily Integrity* and points out that the demands of bodily autonomy and bodily

²⁶ Wim Dekkers, Cor Hoffer, and Jean-Pierre Wils, “Bodily Integrity and Male and Female Circumcision,” *Medicine, Health Care and Philosophy* 8 (2005): 179.

²⁷ Gerald P. McKenny, “The Integrity of the Body: Critical Remarks on a Persistent Theme in Bioethics,” in *Persons and their Bodies: Rights, Responsibilities, Relationships*, ed. M.J. Cherry (Dordrecht, Netherlands: Kluwer Academic Publishers, 1999), 358.

²⁸ Dekkers et al., “Bodily Integrity.”

²⁹ Cécile Fabre, “Justice and the Compulsory Taking of Live Body Parts,” *Utilitas* 15, no. 2 (2003): 127-150; Courtney S. Campbell, “Body, Self, and the Property Paradigm,” *The Hastings Center Report* 22, no. 5 (1992): 34-42.

³⁰ Dekkers et al., “Bodily Integrity,” 183.

integrity can contradict each other, as demonstrated by an incident that took place in Germany in 2003.³¹ It involved an individual who consented to being cannibalized. In this case, there was no violation of bodily autonomy, since he consented to his body being used in that way. There was, however, a violation of bodily integrity, which seems fairly clear however the concept is construed. In any case, I think that it is clear that there is a distinction between bodily autonomy and bodily integrity and that any analysis of the latter notion needs to avoid running the two together.

So, in the Dekkers article, they focus on the body-oriented approach, since this is the approach that stresses bodily integrity as opposed to autonomy. This is all well and good from our perspective as well, since much attention has already been devoted to issues arising from personal autonomy. So, with respect to the body-oriented approach, “the concept of bodily integrity is strongly connected to the concepts of wholeness, completeness and totality.” They distinguish between “four levels of interpretation of bodily integrity: (1) biological wholeness, (2) experiential wholeness, (3) intact wholeness, and (4) inviolable wholeness.” They state that while these “levels of interpretation” are distinct, they are not entirely separable.³²

Biological wholeness can refer to either anatomical or functional wholeness. Anatomical wholeness refers to the fact that despite being composed of various parts, the human body “is still an anatomical unity, an integrated whole which is more than the sum of its parts.” Functional wholeness, on the other hand, “refers to the proper operation of the body or of body parts.” From the ethical point of view, functional wholeness tends to

³¹ She borrows this example from Vera Bergelson, “The Right to be Hurt: Testing the Boundaries of Consent,” *George Washington Law Review* 75 (2007): 165-236.

³² Dekkers et al., “Bodily Integrity,” 183.

be emphasized.³³ So, a procedure would be deemed to compromise biological wholeness if it impaired the body or a part of the body in a way that prevented it from functioning properly.

Whereas biological wholeness is an objective notion, experiential wholeness is subjective and refers to the way in which the individual experiences his own body. Dekkers et al. emphasize the distinction by pointing out that certain individuals whose bodies are functionally impaired nonetheless experience their bodies as whole. They offer an example of a woman born without arms or legs. Conversely, some individuals whose bodies are functionally whole do not experience them as whole, such as those with Body Dysmorphic Disorder, who “feel completely uncomfortable with a healthy and well functioning body part.”³⁴ A mere dissatisfaction with one’s body does not entail a lack of experiential wholeness. The notion refers to experiencing one’s body as damaged or incomplete. Dekkers et al. offer as examples comments made by circumcised males about their bodies. Some said that they felt “psychologically and physically damaged,” “altered, not whole,” “mutilated,” “incomplete,” or “deformed.”³⁵

Although I’m not entirely sure why they use the term “intact” here, Dekkers et al. connect intact wholeness to the idea of the body as a sacred or sanctified object. This view, of course, derives from religious traditions and “implies that the body is intrinsic to the personal identity and is invested with an aura of sacrality.” Often, “[t]he metaphors of a temple, sacrament, tabernacle, and sanctuary” are used when speaking about the body.³⁶ In the Dekkers article, the concepts of perfection and imperfection are discussed

³³ *Ibid*, 184.

³⁴ *Ibid*, 184.

³⁵ *Ibid*, 185.

³⁶ *Ibid*, 185.

under this heading, and they are specifically concerned with religious perspectives on whether or not the foreskin is to be considered an imperfection. The extent to which this conception of bodily integrity can be relevant outside of the theological context is unclear, but we will return to this topic and explore the question of whether or not the important ideas here can be captured in secular terms.

The final “level of interpretation” discussed by Dekkers et al. is inviolable wholeness. In this section, they mostly discuss Kant’s views on the body and they claim that his views are tied to “a teleological view of the integrated body” and the notion of the dignity or humanity of the person. On their interpretation, which draws on McKenny’s “The Integrity of the Body,” Kant is concerned that “a loss of functional wholeness” can impede “the fulfillment of human moral and other purposes,” thus impairing the person “as a purposive organism.” Also, on Kant’s view, “[t]he integrity of the human body is a constituent of the dignity of the person, so that to violate the integrity of the body is to violate the dignity of the person.” Thus, respecting bodily integrity is part and parcel of respecting ourselves and others as rational beings.³⁷ A passage from Kant’s *Lectures on Ethics* is quoted in order to illustrate what Kant had in mind:

So nobody may therefore voluntarily mutilate himself in the *important* parts of his body, and still less so for the sake of gain, without lowering himself. For example, accepting money to have a tooth pulled, for another’s use.³⁸

Here we see that Kant is concerned with deliberately causing damage to the body that impairs its functional wholeness. But there also seems to be an objection here to treating

³⁷ *Ibid*, 186.

³⁸ *Ibid*, 187. Italics added by Dekkers et al.

the body as a mere instrument. Selling our teeth, we are told, involves treating our body without due respect.

Having laid out the most prominent notions of bodily integrity, we can now explore their relevance to corporal punishment. It should be clear that we need not concern ourselves with the issue of biological wholeness. As mentioned above, with respect to biological wholeness, functional wholeness tends to be emphasized, and this refers to the proper functioning of the body or body parts. Certainly some forms of corporal punishment can compromise functional wholeness, but I am not defending any methods that result in permanent or semi-permanent (long-term) damage that would impair the functioning of the body.

With respect to experiential wholeness, this “level of interpretation” refers to experiencing one’s body as damaged, incomplete, or otherwise not whole. Strictly speaking, I don’t think that this notion is directly relevant to our discussion, since it is unlikely that the kinds of methods that I am advocating will result in the feeling that one’s body has been damaged or altered. But this does bring us back to the related issue of suffering. On Eric Cassell’s conception, cited in Chapter 2, “[m]ost generally, suffering can be defined as the state of severe distress associated with events that threaten the intactness of person.”³⁹ Intactness, in this context, is related to “wholeness” and suffering can result from threats, or perceived threats, to physical or psychological intactness. Physical pain does not always result in suffering, such as in some cases of childbirth when the pain is “reinterpreted” as part of an overall positive experience. But generally, and probably almost invariably in a punitive context, significant pain will

³⁹ Eric J. Cassell, *The Nature of Suffering and the Goals of Medicine* (New York: Oxford University Press, 1991), 33.

result in suffering. At least in the moment, it will be perceived as a threat to the intactness, or “wholeness,” of the person.⁴⁰ In addition, as David Sussman and Elaine Scarry suggest, in cases in which suffering is caused by physical pain, there can be an experience of antagonism between the flesh and the person.

So, even though the kind of corporal punishment that I advocate is unlikely to result in the punished person feeling that his body has been damaged or altered, we can still recognize a sense in which corporal punishment disrupts experiential wholeness. But, it will be recalled that suffering generally involves threats or perceived threats to the intactness of persons, and since punishment characteristically involves causing suffering, it characteristically involves inducing a state in which a person’s subjective sense of wholeness is compromised. As I argued in chapter 2, psychological suffering (or suffering without physical pain) is deeper in a morally relevant sense and it strikes at the core of the person. We should value “psychological integrity” very highly and we must recognize the capacity that psychological suffering punishments have to undermine it.

This discussion, of course, pushes back to more fundamental considerations regarding the relationship between the person and his body, an issue also briefly discussed in chapter 2. Here I would say that while a focus on bodily integrity is helpful in that it calls our attention to the person *qua* embodied agent, the subject of moral consideration is the *person*, not the body. Indeed, as Fabre points out, “it is unclear why our interest in bodily integrity should be given importance in its own right...”⁴¹ Ultimately, in order to establish its relevance, any appeal to bodily integrity will have to be traceable back to a claim that makes reference to the person. At that point, it becomes

⁴⁰ I briefly discuss this matter at the end of chapter 3.

⁴¹ Fabre, “Justice and the Compulsory Taking of Live Body Parts,” 144.

clear that bodily integrity, especially when construed as experiential wholeness, is but one consideration among many that bear on the overall evaluation of a particular punishment.

The issue of the relationship between the person and his body is also relevant in connection with what Dekkers et al. refer to as “intact wholeness.” Recall that this notion refers to the idea of the body as a sacred or sanctified object. The extent to which this and related lines of thought can be legitimately employed outside of the theological context is debatable, and some thinkers, such as McKenny, are suspicious of the association between the concept of bodily integrity and the idea of the sacred:

Perhaps the concept has always been an unsuccessful attempt to recover or preserve a premodern approach to the body from modern attitudes and practices regarding the body. The natural law approach, and especially the older strand that identified integrity with intactness, tries to express in more modern terms an ancient sense of the body as sacred – a sense that Kant and natural law thinkers seem still to have but can no longer express in its native idiom.⁴²

Given the genesis of the concept, this is a legitimate concern. But perhaps something from this line of thought can be salvaged.

In “Body, Self, and the Property Paradigm,” after introducing the idea of the body as sacred, Campbell states

Indeed, the body is for us in a very fundamental sense an axis mundi, the center of one’s world and the space around which that world rotates. The body thus assumes the character of a “sanctuary” or a “temple,” set off or apart from other things we hold as possessions, and toward which the appropriate disposition may be more reverence and awe than respect.⁴³

This passage is interesting because it gives us a sense of how the important content of the religious concept can be translated into secular terms. We have the idea of the body as an

⁴² McKenny, “The Integrity of the Body,” 359.

⁴³ Campbell, “Body, Self, and the Property Paradigm,” Section on “Territorial Integrity.”

axis mundi and a sanctuary. Despite its religious significance, the notion of a sanctuary also suggests safety, an idea that Lane discusses in “Bodily Integrity, Reproductive Liberty and Legal Personhood”:

The relative importance of the body might lie in its function as a “shell” that houses the more substantial self. The body might therefore be conceptualized as the most important line of defense against threats to this deeper person.⁴⁴

The metaphors of a “shell” or “line of defense” make vivid the role that the body plays in protecting the “substantial self” or “deeper person.” These considerations also point towards a conception of the body as a sort of exalted entity.

With respect to corporal punishment, we can ask whether it involves treating this exalted entity in an inappropriate way. In “Corporal Punishment,” Scarre confronts this very question. He discusses it in the section devoted to inhumanity and degradation, and I will soon have something to say about how those concerns are sometimes lumped together with concerns over bodily integrity. Scarre states that there is “a principle of bodily integrity that has become deeply embedded in modern consciousness. A person’s body is seen as a quasi-sacred space to which only he can permit access.”⁴⁵ In stating the conclusion to this line of reasoning he runs together bodily integrity and autonomy, but the basic idea is that it may be objected that corporal punishment is a violation of bodily integrity. In response to this objection, Scarre first suggests that we may not want to view a right to bodily integrity as absolute. This is in line with the contention of Dekkers et al. that bodily integrity is a *prima facie* principle that “can be overridden by competing moral obligations.”⁴⁶ This should, in fact, be obvious, given that it can clearly be morally

⁴⁴ Lane, “Bodily Integrity, Reproductive Liberty and Legal Personhood,” 14.

⁴⁵ Geoffrey Scarre, “Corporal Punishment,” *Ethical Theory and Moral Practice* 6 (2003): 313.

⁴⁶ Dekkers et al., “Bodily Integrity,” 188.

permissible to violate someone's bodily integrity in cases of self-defense. The real question is how much importance to assign to bodily integrity relative to other values.

Scarre addresses this issue while raising doubts about the currently pervasive attitudes towards imprisonment and corporal punishment. He notes that it is "obscure why, in an age which lauds the value of personal freedom, an offender's liberty should apparently be thought so much less sacred than his body."⁴⁷ I quoted the passage that contains this quotation at length in chapter 2, and I don't want to rehash what I said about it there. But I think that Scarre is right to point out that given the immense importance accorded to freedom in our "age," there is something odd about seemingly placing bodily integrity above freedom. Also, given the previous discussions that have taken place in this work, we can add that it is difficult to see why bodily integrity should be placed above autonomy or psychological integrity. It is noteworthy that the passages that expound on the importance of the body refer, either explicitly or tacitly, to the self or the person in order to sustain that claim to importance. Lane explicitly mentions the "more substantial self" and the "deeper person." Campbell writes of a "sanctuary" or a "temple," which are metaphors that imply the housing of something. Even when expounding on the importance of the body, there is no getting around the notion of a deeper person or self who is more closely identified with his psychological life than his body. In addition, it is important to remember that the kinds of corporal punishments that I am defending do not involve penetrating the "inner sanctum" of the body. Electric

⁴⁷ Scarre, "Corporal Punishment," 313-314.

shock, for example, involves touching the bodily borders and applying a painful stimulus to them, not going beyond or breaking them.⁴⁸

Finally, we will take a brief look at the notion of inviolable wholeness and its possible relevance to corporal punishment. I do not think that consideration of this interpretation of bodily integrity gives us any new lines of objection to consider. As it is presented by Dekkers et al., it seems that inviolable wholeness pertains to both functional wholeness and human dignity. We already discussed functional wholeness and I stated that I am not defending corporal punishments that compromise it. We discussed dignity in connection with degradingness in chapter 4 and considered various “objections from degradingness” that focused on the bodily nature of corporal punishment. Given the tight conceptual connection between degradation and dignity, I think that concerns about violations of dignity *vis-à-vis* the body fit better under the heading of degradation than bodily integrity.

With respect to Salt’s comment about holding sacred “the dignity of the human body,” I think that what he is concerned with there is not best referred to as dignity. Rather, I think he has in mind something that more closely resembles what Dekkers et al. refer to as intact wholeness. The use of the term “sacred” supports this interpretation. “Dignity” is sometimes used in order to convey a sense of elevation or exaltedness, and I think that is how Salt meant to use it there. This connection, of course, we have already explored.

⁴⁸ There might be a concern that electric shock is quite intrusive because it courses through the body and stimulates nerves all over the body (Kleinig, personal communication). While certain devices may do this, there are devices that do not. Certain devices are capable of causing localized pain (Kenneth L. Lichstein and Laura Schreibman, “Employing Electric Shock with Autistic Children: A Review of the Side Effects,” *Journal of Autism and Childhood Schizophrenia* 6, no. 2 [1976]: 165).

Closing Remarks

Much ground has been covered in this work. My main theses, as stated in chapter 1, were as follows:

1. Corporally punishing criminals is not necessarily cruel, inhumane, inhuman, or degrading. Objections on these grounds, which claim that corporal punishment is wrong *in principle*, can be shown to be problematic.
2. Certain methods of corporal punishment can be shown to have significant morally relevant advantages over other currently popular forms of punishment, especially imprisonment.

Most of chapters 3 and 4 were devoted to defending the first thesis. After engaging in analysis of the respective concepts, I examined the issues of whether or not corporal punishment runs afoul of moral constraints prohibiting cruel, inhumane, inhuman, and degrading punishment. I also developed and responded to the objections that seemed to me most plausible and representative of concerns in the philosophical literature. The defense of the second thesis can be found throughout this work. The purpose of much of chapter 2 was to reverse the presumption against corporal punishment and to demonstrate its moral advantages by comparing it to punishments whose object is psychological suffering, deprivation, or both. In chapter 3, I argued that corporal punishment can be especially humane, and in chapter 4, I highlighted the fact that it can be imposed in a way that involves very little cumulative interference with autonomy. Other advantages, such as the reduction of the “overflow effect” on families and dependents, were discussed in the introductory chapter. All in all, I have attempted to offer a substantial and reasonably comprehensive defense of my theses.

As I stated in chapter 1, this has not been a comprehensive case for corporal punishment. However, I have argued for theses that need to be supported if corporal punishment is to be shown, all things considered, to be morally permissible. There are, of course, difficult empirical issues, such as corporal punishment's prospects for deterrence, that would need to be addressed by social scientists before rendering a judgment as to whether instituting this punishment would be wise social policy. Also, this is to say nothing of the social and political obstacles that would have to be overcome. In the introductory chapter, I quoted Garland's assertion that modern sensibilities are selective and attuned to recoil from displays involving physical pain, while they are much more tolerant of practices involving the causation of psychological suffering. Overcoming the obstacles presented by the selective sensibilities of the public would surely be a very difficult task.

However, even if this work does not pave the way for social reform, I think that it contains important insights and lines of argument. In closing, I will briefly mention two important conclusions and implications that can be drawn from my work here.

First, I think that my case casts substantial doubt on the view that we have made a large amount of progress in punitive matters over the past few hundred years. I have raised challenges for those who continue to support widespread use of imprisonment but shun corporal punishment. There appears, at the very least, to be some tensions that need to be resolved in such a view. My main intention was to defend corporal punishment against philosophical objections that I found to be weak. I did not undertake this project primarily to attack imprisonment. But my investigation of these issues has led me to

sympathize with the remarks on imprisonment made by Charles Dickens in *American Notes*:

In its intention I am well convinced that it is kind, humane, and meant for reformation; but I am persuaded that those who devised this system of Prison Discipline, and those benevolent gentlemen who carry it into execution, do not know what it is that they are doing... I hold this slow and daily tampering with the mysteries of the brain to be immeasurably worse than any torture of the body; and because its ghastly signs and tokens are not so palpable to the eye and sense of touch as scars upon the flesh; because its wounds are not upon the surface, and it extorts few cries that human ears can hear; therefore I the more denounce it, as a secret punishment which slumbering humanity is not roused up to stay.⁴⁹

There is, of course, hyperbole here (immeasurably worse than *any* torture of the body?) and these remarks were made after Dickens' visit to the Eastern Penitentiary in Philadelphia, which at the time kept prisoners in solitary confinement. But I think that much of what is said here applies to newer models of imprisonment as well, and I share Dickens' skepticism about our modern reforms. In chapter 2, for example, I argued that the psychological suffering caused by imprisonment is, in an important and morally relevant sense, deeper than the physical suffering caused by corporal punishment. This dimension of evaluation should not be overlooked, and this is but one consideration that should give us pause when contemplating the path that we have chosen.

Second, and finally, the argumentation here raises very important issues about our moral evaluations of physical and psychological suffering. The main impetus for this project was my conviction that many common ethical judgments about such matters are skewed and unjustifiable. I think that this work has gone a long way toward supporting this conviction. Psychological suffering can be extremely potent and devastating, and it

⁴⁹ Charles Dickens, "Philadelphia, and Its Solitary Prison," Chap. 7 in *American Notes* (Gloucester, Mass.: Peter Smith Publishing, 1968), 120-121.

strikes at the very core of the person. I think that our comparative moral judgments about matters relating to physical and psychological suffering are skewed by our disproportionately visceral reaction to physical suffering, which often clouds our moral judgments. If we look more closely at the relevant issues, I think that we can see that our judgments should be revised and that we must be vigilant in order to correct for the biases that can be introduced when certain phenomena cause strong emotional reactions. I have looked closely at corporal punishment and, while I share the common visceral reaction to the practice, I believe that the common ethical views about it are mistaken. If I am right about this, then we should be prepared to rethink many of our assumptions and reevaluate many of our moral judgments about matters involving physical and psychological suffering.

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