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Cruelty in Criminal Law: Four Conceptions

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ABSTRACT

This Article defines four distinct conceptions of cruelty found in underdeveloped form in domestic and international criminal law sources. The definition is analytical, focusing on the types of agency, victimization, causality, and values in each conception of cruelty. But no definition of cruelty will do justice to its object until complemented by the kind of understanding practical reason provides of the implications of the phenomenon of cruelty.

No one should be neutral in relation to cruelty. Eminently, cruelty in criminal law, a human-created phenomenon, vigorously calls for responses in the form of preventive and corrective action on the part of private and public actors. It is in this sense that cruelty is a problem of practical reason, one of action preoccupied with its legal or moral obligations, rational grounds, value commitments, and actual consequences.

However, the connection between conceptions of cruelty and the implications practical reason can draw from the correct application of a conception of cruelty to phenomena in the world remains too detached to be able to capture and explain people's actual experiences both of seeing cruelty in the world and of confronting the question of what to do about cruelty and how to address its cultural and institutional aspects. Something is missing.

What is missing is the integration of conceptions of cruelty and the practical reason implications of detecting cruelty in the world into normative models which operate as meaning matrixes for cognition, meaning, and action. This Article undertakes this explanatory task through an exercise of reconstructing seminal philosophical ideas about cruelty. The result is that the four conceptions of cruelty are placed within three distinct normative models, which ultimately render intelligible legal conceptions of cruelty and legal reactions to it.

I. INTRODUCTION: THE NATURE OF THE ARGUMENT

Criminal law inflicts and is complicit in, but also combats, cruelty. It combats cruelty, for example, by more severely punishing hideous crimes of violence such as torture and by prohibiting torturous and

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degrading punishments. Naturally, to combat cruelty criminal law cannot avoid adopting — even if it has done so only in underdeveloped and underarticulated ways — some conception of cruelty.¹ This is also a reminder that “the concepts we have settle for us the form of experience we have of the world,” as Peter Winch once wrote in good Wittgensteinian style.² In this Article I identify and discuss in analytical, explanatory, and normative terms the conceptions of cruelty that emerge in domestic and international criminal law sources.³

I argue that the study of those sources reveals four distinct conceptions of cruelty which, for convenience of reference, I have named *agent-objective*, *agent-subjective*, *victim-subjective*, and *victim-objective/agent-independent* respectively.⁴ The differences between these conceptions of cruelty rest on the types of agency, victimization, causality, and values that they employ.⁵

¹Cruelty is, of course, an “essentially contested concept” as its semantic frontiers are permanently in dispute in the various contexts in which a claim of cruelty is presented. The locus classicus for the analyses of the nature of essentially contestable concepts is W.B. Gallie, *Essentially Contested Concepts*, 56 *Proceedings of the Aristotelian Society* 167, 167-78 (1956).

²Peter Winch, *The Idea of a Social Science and Its Relation to Philosophy* 10-15 (Routledge, 2011) (1958). See also Kant’s idea that the conceptions of understanding although unempirical in origin, “are developed on occasions preseted by experience.” Immanuel Kant, *Critique of Pure Reason* 53 (J.M.D. Meiklejohn trans., Prometheus 1990).

³Throughout I adopt the soft distinction between concept and conception, where conceptions are instantiations of a concept.

⁴I developed and previously used this conceptual framework in *Punishing Cruelly: Punishment, Cruelty and Mercy*, 2 *Crim. L. & Phil.* 67 (2008) [hereinafter *Punishing Cruelly*], and *Reconstructing Constitutional Punishment*, 6 *Wash. U. Jurisprudence Rev.* 175 (2014) [hereinafter *Reconstructing*]. The current Article — the third installment of the trilogy — emphasizes the practical reason implications of conceptions of cruelty and places them within the broader meaning frameworks of what I call normative models.

⁵These four conceptions of cruelty in criminal law mirror ubiquitous conceptions of suffering, victimization, agency, and causality. This point cannot be argued within the confines of this Article. I only call attention here to how commitments to mercy, human dignity, general solidarity, individual empowerment, positive and negative structural justice, etc., discussed in this Article contribute to the normative foundation of the extensive juridical *corpus* regulating central aspects of welfare, equality, liberty, and solidarity. Of course, the cultural presence of a concern with cruelty extrapolates the territory of law as well. My soap bar label reads, “cruelty-free, biodegradable, natural, no artificial colors.” It is clear that the intensity of the rejection of cruelty grows in inverted proportion to its spread. Indeed, there is a point where the concern is purely mimetic, lacking the sort of reflective mediation which accompanies normative development of the kind studied in this essay. That my soap bar label has anything to say about cruelty confirms the plausibility of theories of mimetic evolution (see Richard Dawkins’s *The Selfish Gene* (Oxford Univ. Press 2006), and Jack M. Balkin’s *Cultural Software: A Theory of Ideology* (Yale Univ. Press 1998), while the push of reflectivity discussed below proves clearly the existence of a normative territory

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Beyond conceptual analysis, it is important to recognize that the phenomenon of cruelty in criminal law is a human-made problem that calls for preventive and corrective responses in the form of commissive and omissive action on the part of private (for instance, “do not add torture to crimes of violence”) and public actors (for instance, “do not punish torturously”). Cruelty is therefore a problem of practical reason, one of action preoccupied with the agent’s legal and moral obligations, with the rational grounds of choice and action, with value commitments, and with the concrete consequences of actions.

Built into the idea of practical reasoning is intentionality of action oriented toward effecting the world in some way. “In the investigation of rationality,” writes Searle, “we should concentrate our attention on reasoning as an activity that actual selves engage in rather than focusing on rationality as an abstract set of logical properties. If we do, then it seems we find in any activity of reasoning a collection of intentional phenomena and a self that tries to organize them so as to produce another intentional state as the end product.”⁶ Ordinarily, concepts seek to capture and name phenomena and ideas. Some legal and moral concepts such as cruelty or, say, human dignity do more than that, though. They are intentionality tools. These normative concepts are tools for identifying and solving problems of practical reason rather than mere descriptors of juridical or moral facts. To call something cruel is to single it out as a problem to be addressed — “[t]he concepts of moral and political philosophy are the names of those problems”⁷ This way of posing the question of cruelty follows the tradition of legal and moral constructivism. In this tradition, to see phenomena such as cruelty or ideas such as human dignity through the lenses of legal and moral concepts is to be called upon to reason one’s way into choosing and acting in order to solve the normative problems they raise.

Legal and moral concepts such as cruelty or dignity do not emerge in a discursive vacuum, though.⁸ Were that the case, they would either not imply a practical reason call to action or they would require that

guarded by reflectivity and in which mimetic contamination is not the name of the game, at least not any more or not yet.

⁶ John R. Searle, *Rationality in Action* 135 (MIT Press 2003).

⁷ Chritine M. Korsgaard, *The Constitution of Agency: Essays on Practical reason and Moral Psychology* (Oxford Univ. Press 2008).

⁸ Robert Cover, Quentin Skinner, and Richard Tuckhave taught this best. See Cover’s essays collected in Skinner’s *Narrative, Violence, and the Law: The Essays of Robert Cover* (Martha Minow et al. eds., Univ. of Michigan Press 2010); Quentin Skinner, *Language and Political Change*, in *Political Innovation and Conceptual Change* 6 (Terence Ball et al. eds., Cambridge Univ. Press 1989); Richard Tuck, *Philosophy and Government: 1572-1651* (Cambridge Univ. Press 1993). For the “micro” aspects of argumentative embedment see Michael J. Shapiro, *The Micropolitics of Justice: Language, Sense and Space*, 8 *Law, Culture & Human.* 466 (2012).

complete reasons be provided (that is, we would have to articulate the complete set of reasons why one ought to act one way or another) before a call to action becomes intelligible.⁹ Concepts such as cruelty or dignity entail a call to reason our way to intentionally resolving the problems they raise precisely because they are embedded in broader normative paradigms or models.

The role of normative models is therefore that of filling the discursive space around concepts by providing a meaning matrix that illuminates in various degrees the historical significance, cultural meaning, institutional embodiment, normative ambition, and rational status of normative concepts.¹⁰ In the case of conceptions of cruelty, and again for ease of reference, I name the broad normative models they inhabit *cruelty as agency*, *cruelty as sentience*, and *cruelty as predicament*. I argue that these normative models ultimately render intelligible norms and attitudes about cruelty based on each of the four conceptions of cruelty.

In other words, conceptions and practical reason orientations to solving the problem of cruelty are sufficiently intelligible only when considered within their embedding normative models. It is that embedding that explains the historical significance, cultural meaning, institutional embodiment, normative ambition, and rational status of the conceptions. Unsurprisingly, that is also why each of the three normative models informs a corresponding conception of mercy and of the requirements of a just and decent criminal law system as part of a solution to the problem of cruelty.¹¹

I undertake these analytical and explanatory tasks in the form of a reconstruction of seminal conceptions of cruelty in the history of legal, political and moral thought — “[i]t is when different insights from dif-

⁹On “complete reasons” see Joseph Raz, *Practical Reason and Norms* 23-25 (Oxford Univ. Press 1990).

¹⁰In one of her earliest works, Christine Korsgaard provided an interpretation of Kant that correctly recognized the centrality of human meaning-giving to the foundations of his practical reason philosophy. She wrote: “Goodness is not a property already belonging to certain kinds of things in the world, which is to be ascertained and then sought out. A thing is good because a free rational being who brings value into the world chooses it as good. Good and evil, right and wrong, are features of the world that we bring into it through the manner of our choices and actions. When we look at the world theoretically, we can find no basis for objective judgments of moral value. The moral truth is perspicuous to us only from the standpoint of practical reason.” Christine M. Korsgaard, *The Standpoint of Practical Reason* 301 (Garland 1990).

¹¹See on the topic of mercy Linda Ross Meyer, *The Justice of Mercy* (2013); Claudia Card, *On Mercy*, 81 *Phil. Rev.* 182 (Univ. of Michigan Press 1972); Ross Harrison, *The Equality of Mercy*, in *Jurisprudence: Cambridge Essays* 107 (Hyman Gross & Ross Harrison eds., Oxford Univ. Press 1992); Martha Nussbaum, *Equity and Mercy*, 22 *Phil. & Pub. Aff.* 83 (1993); Dan Markel, *Against Mercy*, 88 *Minn. L. Rev.* 1421 (2004), and Austin Sarat & Nasser Hussain, *Forgiveness, Mercy and Clemency* (Stanford Univ. Press 2006).

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ferent sources are connected with each other that philosophy truly educates us.”¹² In mobilizing seminal insights on the problem of cruelty by Seneca, Thomas Aquinas, Michel de Montaigne, Immanuel Kant, Karl Marx, and John Stuart Mill, I show the construction of definitional boundaries as well as the types of arguments that place those boundaries within encompassing normative vistas that include proposed solutions to the problem of cruelty.¹³

Although I present each of the four conceptions of cruelty in the chronological order of its appearance in the history of ideas, I ultimately argue that they are all now subsumable under the third normative

¹²Hilary Putnam, *The Fact/Value Dichotomy and Its Critics*, reprinted in *Philosophy in an Age of Science: Physics, Mathematics, and Skepticism* 283, 298 (Mario De Caro & David MacArthur eds., Harvard Univ. Press, 2012). As Charles Taylor once wrote, “To understand ourselves today, we are pushed into the past for paradigm statements of our formative articulations. We are forced back to the last full disclosure of what we have been about, or what our practice has been woven about.” Charles Taylor, *Philosophy and Its History*, in *Philosophy in History* 17, 26 (Richard Rorty et al. eds., Cambridge Univ. Press 1993). I presuppose throughout the centrality of meaning in human experience. Max Weber more than any other has brought this centrality to the attention of the modern social scientist. I think Diderot captured it well when he wrote in the *Encyclopédie* that “If mankind, or the thinking and contemplative beings which comprise it, were banished from the surface of the earth, the moving and sublime spectacle of nature would be nothing more than a scene of desolation and silence. The universe would be mute; stillness and night would take possession of it. Everything would be transformed into a vast emptiness where unremarked phenomena would occur, dimly and unheard.” Denis Diderot’s *Political Writings* 25 (Cambridge Univ. Press 2001).

¹³The sources used here are Seneca’s *De Clementia*, written by AD 55 or 56 and addressed to his pupil, the then young emperor Nero; Aquinas’ *Summa Theologiae*, published from 1265-1272, in particular Questions 2a2ae 157 and 159, dedicated to *De Clementia et Mansuetudine* and *De Crudelitate*, respectively, as part of his writings on the virtue of temperance; Montaigne’s essay “On Cruelty,” appearing in Book II of his *Essays*, which had various modified editions until his death in 1592; Kant’s *Groundwork of the Metaphysics of Morals* of 1785; Marx’s “On the Jewish Question” of 1843, “For a Ruthless Criticism of Everything Existing” of 1844, “Preface to ‘A Contribution to the Critique of Political Economy’” of 1859, and the first volume of *Capital*, written in 1866 and 1867 and published in 1867; and, finally, Mill’s *The Subjection of Women*, written in 1861 but not published until 1869. See Lucius Seneca, *Moral Essays* (John W. Basore trans., Harvard Univ. Press 2003); Thomas Aquinas, *Summa Theologiae* (Thomas Gilby trans., Blackfriars 1972); Michel de Montaigne, *The Complete Essays* (M.A. Screech trans., Penguin 1991); Kant, *supra* note 13; Karl Marx, *On the Jewish Question*, in *Marx: Early Political Writings* 28 (Joseph O’Malley & Richard A. Davis trans., Cambridge Univ. Press 1994); Karl Marx, *For a Ruthless Criticism of Everything Existing*, in *The Marx-Engels Reader* 15 (Robert C. Tucker ed., Norton 1978) [hereinafter *Ruthless Criticism*]; Karl Marx, *Preface to ‘A Contribution to the Critique of Political Economy’* used in conjunction with his *The German Ideology: Part I* in *The Marx-Engels Reader*, *supra* note 13. *The German Ideology* was written in 1845-1846 but only published in 1932, and *Capital: A Critique of Political Economy Vol. I* (Ben Fowkes trans., Vintage 1977) [hereinafter *Capital*]; and John Stuart Mill, *The Subjection of Women*, in *John Stuart Mill: On Liberty and Other Essays* 469 (John Gray ed., Oxford Univ. Press 1991).

model, namely *cruelty as predicament*. This claim can only be redeemed by the whole argument of the Article itself. For now, I only mention what is implicated in the claim, namely, the role and operation of reflectivity in normative arguments and models and the companion understanding of the connection between reason and history.

The general thesis here is that each conception of cruelty leads to the others under the pressure of reflectivity, or of what I call “the push of reflectivity,” to which I return in a moment. Again for convenience of exposition, I present *infra* the push of reflectivity in linear chronological order, but it can certainly operate in circular fashion, getting us to the four conceptions of cruelty no matter where one starts in the conceptual circle. That is, whatever conception of cruelty and corresponding normative model one starts with, the push of reflectivity triggered by its limitations vis-à-vis the legal and moral problem at hand will force the careful thinker onward to dimensions of the problem of cruelty which have escaped the initial conception.¹⁴

In all this, there is no need to inflate the notion of reflectivity or to appeal to arcane conceptions of it. By reflectivity I mean quite simply something inspired by the ancient sense of the word *ennoia*: intense, careful, self-conscious, and self-critical thinking. In this sense, reflectivity informs a type of reasoning mindful of, and yet not reducible to, instrumental, context-bound, or self-interested reasoning. This irreducibility comes from the fact that reflectivity implicates the faculty of judgment, practical rationality, attention to context accompanied by the capacity to transcend it in principled ways, and constant critical pressure. Obviously, these virtues of reflectivity are conspicuously absent or at best insufficiently present in the rather flat rationality of predominantly empirical or instrumental types of reasoning.¹⁵

At any rate, this deflated conception of reflectivity requires ac-

¹⁴On the nature of the argument developed here, see Thomas Kuhn, *The Structure of Scientific Revolutions* (Univ. of Chicago Press 1996); Alasdair MacIntyre, *The Relationship of Philosophy to Its Past*, in *Philosophy in History: Essays in the Historiography of Philosophy* (Richard Rorty et al. eds., Cambridge Univ. Press 1984); and, naturally, George W. F. Hegel, *Elements of the Philosophy of Right* (Cambridge Univ. Press 2000).

¹⁵Friedrich Nietzsche, *The Pre-Platonic Philosophers* 5-6 (Univ. of Illinois Press 2006) (speaks of “an excess of intellect that [a people or an individual] no longer directs [. . .] only for personal, individual purposes but rather arrives at a pure intuition with it.”). Although an extensive treatment of the question of reflectivity cannot be accommodated in this essay, I am convinced that some form of rational and intellectual exuberance of this sort is inextricably involved in reflectivity as a weighty causal factor in social processes. The pages below will show that the development of the ideas about cruelty corroborates this thesis, for if we begin from an agent-based conception of cruelty, at some point down the road of serious reflection we will tend to arrive at a victim-objective/agent-independent conception. In such cases reflectivity operates as a virus inoculated into normative models which from within — as Socrates tried to teach Thrasymachus — pushes their development in discernible directions. See Plato’s *Republic* (Harvard Univ. Press 1999-2000) and the reading of the dialogue

ceptance of only two, I hope uncontroversial, points about the form of reflectivity. First, that rationally defensible normative worldviews are built upon, and are expressed as, clusters of converging and cohering normative arguments. That is, they are built with normative models. Second, that normative models carry logical and deontological entailments as well as practical requirements, cognitive access to which is gained by thinking thoroughly, clearly, critically, and constructively about them — that is, by reflectivity.

Now, reflectivity matters both biographically and sociologically. An important consequence of reflectivity for individuals is that once they embark on sustained reflection about something, they stop before the end of the reflection only at the price of personal intellectual sacrifice. The same can be said to be true of societies. Once there is a sufficient critical mass of members of society devoted to being reflective about aspects of social life and its arrangements or when culture in that society evolves the attributes of irony¹⁶ and self-criticism, social change consistent with reflective conclusions is only prevented at the cost of society's overall legitimacy and appeal. Above I referred to the "push of reflectivity" as the way reflectivity operates to bring changes within ideational or cultural domains and beyond into social practices and institutions. Implicit in the causal strength of the push of reflectivity is a conception of the connection between the history of human civilization and reason whereby reason is, in the words of Axel Honneth, history's "guiding thread."¹⁷

In the end, the changes in normative models studied in this Article favor interpretations of modernity that give prominence to the content-creation capabilities of reflective forces over the operation of normatively-blind strategizing or managerial or merely participatory social and even democratic mechanisms. The understanding of reflective evolution in criminal law ultimately provides the most elegant, historically informative, and critically constructive standpoint from which to understand the ways, good and bad, of criminal justice. If I am right, the operation of reflectivity in the evolution of notions of cruelty and their respective normative models may serve as a model of legal reasoning to be emulated beyond criminal law.

. . .

Analysis and explanation *infra* of notions of cruelty, of the implica-

between Socrates and Thrasymachus in Hanna Pitkin, *Wittgenstein and Justice: On the Significance of Ludwig Wittgenstein for Social and Political Thought* (Univ. of California Press 1972). For a defense of "Socratic citizenship" as a form of reflective agency, see Dana R. Villa's *Socratic Citizenship* (Princeton Univ. Press 2001).

¹⁶Irony in the sense used by Richard Rorty in *Contingency, Irony, and Solidarity* (Cambridge Univ. Press 1989).

¹⁷Axel Honneth, *Pathologies of Reason: On the Legacy of Critical Theory* 20 (Columbia Univ. Press 2009).

tions practical reason can draw from them, and of their embedment in normative models will necessarily push contemporary criminal law back into its larger background in legal, moral and political theory. But, before criminal law sources dissolve into fuller normativity, and as an exercise in temporary definitions, consider the following examples of how the four conception of cruelty have appeared in criminal law cases. The reason why I name them *agent-objective*, *agent-subjective*, *victim-subjective*, and *victim-objective/agent-independent*, respectively, will not become fully clear until later in the Article. That much said, I trust the reader will already see here the logic behind my nomenclature.

1. *Agent-objective*

“It is . . . within the historic process of constitutional adjudication to challenge the imposition of the death penalty in some barbaric manner or as a penalty wholly disproportionate to a particular criminal act. And in making such a judgment . . . a court may consider contemporary standards to the extent they are relevant.”¹⁸

“Feelings of ‘fear, anguish and inferiority’ are the common lot of mankind constantly experienced by everyone in the course of ordinary everyday life: that is ‘*la condition humaine*’. Yet no one would consider himself, or regard others, as humiliated and debased because of experiencing such feelings, even though some experience them very easily and others only for greater cause. Thus it is not the subjective feelings aroused in the individual that humiliate or debase but the objective character of the act or treatment that gives rise to those feelings — if it does — and even if it does not, — for it is possible for fanatics at one end of the scale, and saints, martyrs and heroes at the other to undergo the most degrading treatment and feel neither humiliated nor debased, but even uplifted. Yet the treatment itself remains none the less degrading.”¹⁹

2. *Agent-subjective*

“The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot . . . add an element of cruelty to a subsequent execution. There is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution.”²⁰

¹⁸*Furman v. Georgia*, 408 U.S. 238, 420, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (Powell, J., dissenting).

¹⁹*Ireland v. United Kingdom*, 2 E.H.R.R. 25 (Jan. 18, 1978) (Fitzmaurice, J.), available at <http://www.bailii.org/eu/cases/ECHR/1978/1.html>.

²⁰*State of La. ex rel. Francis v. Resweber*, 329 U.S. 459, 464, 67 S. Ct. 374, 91 L. Ed. 422 (1947).

“This Court’s cases ‘mandate inquiry into a prison official’s state of mind,’ [. . .] and it is no accident that the Court has repeatedly said that the Eighth Amendment has a ‘subjective component.’ ”²¹

“The five [sensory deprivation] techniques were applied in combination with premeditation . . .”²²

3. Victim-subjective

“Pain, certainly, may be a factor in the judgment. The infliction of an extremely severe punishment will often entail physical suffering. Yet the Framers also knew that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation. Even though there may be involved no physical mistreatment, no primitive torture, severe mental pain may be inherent in the infliction of a particular punishment.”²³

“Death is [. . .] an unusually severe punishment, unusual in its pain, in its finality, and in its enormity.”²⁴

“[I]ll-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 [of the European Convention on Human Rights]. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.”²⁵

4. Victim-objective & agent-independent

“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.”²⁶

“The barbaric punishments condemned by history . . . are, of course, attended with acute pain and suffering. When we consider why they have been condemned, however, we realize that the pain involved is not the only reason. The true significance of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the [Cruel and Unusual Punishment]

²¹*Farmer v. Brennan*, 511 U.S. 825, 826, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994).

²²*Ireland*, 2 E.H.R.R. 25.

²³*Furman*, 408 U.S. at 271 (internal quotation marks and citations omitted).

²⁴*Gregg v. Georgia*, 428 U.S. 153, 229, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (Brennan, J., dissenting).

²⁵*Ireland*, 2 E.H.R.R. 25.

²⁶*Trop v. Dulles*, 356 U.S. 86, 100, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958).

Clause that even the vilest criminal remains a human being possessed of common human dignity.”²⁷

“The words ‘cruel and unusual’ certainly include penalties that are barbaric. But the words . . . suggest that it is ‘cruel and unusual’ to apply the death penalty — or any other penalty — selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board.”²⁸

“[T]he burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society. [. . .] Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape. So long as the capital sanction is used only against the forlorn, easily forgotten members of society, legislators are content to maintain the status quo, because change would draw attention to the problem and concern might develop. Ignorance is perpetuated and apathy soon becomes its mate, and we have today’s situation.”²⁹

“The atmosphere and environment of incommunicado interrogation . . . is inherently intimidating . . . This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity.”³⁰

“[T]he Court is of the opinion that the prison conditions complained of diminished the applicant’s human dignity and aroused in him feelings of anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical or moral resistance.”³¹

“The Court would further emphasize that the essence of such violation does not so much lie in the fact of the ‘disappearance’ of the family member but rather concerns the authorities’ reactions and attitudes to the situation when it is brought to their attention.”³²

These conceptions of cruelty, taken from American and European criminal law, are representative of the notions of cruelty that appear in the criminal law sources of many other criminal jurisdictions over time and space.³³ They are distinguishable along three axes; the resulting three-dimensional matrix captures all four conceptions of cruelty. On

²⁷*Furman*, 408 U.S. at 272-73 (internal quotation marks and citations omitted).

²⁸*Furman*, 408 U.S. at 244-45.

²⁹*Furman*, 408 U.S. at 365-66.

³⁰*Miranda v. Arizona*, 384 U.S. 436, 457, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966).

³¹*Peers v. Greece*, 33 E.H.R.R. 51 (Apr. 19, 2001).

³²*Cakici v. Turkey*, 31 E.H.R.R. 5 (July 7, 1999).

³³In some cases the prohibition appears under more inclusive language, thus setting higher the bar of protection. See, for example, the German Basic Law of 1949,

the first axis, the definitional element of cruelty runs from focus on agency to focus on victimization in the perpetrator-victim relationship. This dimension of distinctions is obvious enough.

The second axis of distinction tracks emphasis on objective or subjective definitional elements. Objective conceptions emphasize the objective impact of cruelty on its victims or the behavior of agents of cruelty in relation to objective norms of conduct. Subjective conceptions require on the part of victims a minimum level of actual feeling or awareness, whereas on the part of agents of cruelty they require some degree of *mens rea* or hedonistic gratification vis-à-vis the subjective suffering or objective condition of victims.

Adding a third dimension to the model, consider further the aspects of time and causation that are relevant under each conception of cruelty. While the first three conceptions of cruelty direct the focus to units of action and harm concentrated in time, the fourth conception invites attention to protracted causality and long-term and cumulative effects. This last, more continuous, role of temporal considerations in law is clearly manifest, for example, in the search for solutions to problems of social vulnerability and unequal protection by the law.

Definitional purity aside, in contemporary criminal law the four conceptions of cruelty have proved not to be mutually exclusive. Rather, they relate to one another through a semantic and normative process of foregrounding and backgrounding the various definitional elements. Again, the definitional regimes that emerge from this process will only be fully intelligible in light of the normative models that integrate notions of cruelty and the implications practical reason can draw from them.

II. CRUELTY AS AGENCY: AGENT-OBJECTIVE CONCEPTION & AGENT-SUBJECTIVE CONCEPTION

A. Agent-Objective Conception

In criminal law, agent-objective cruelty is exemplified by punitive agency that goes above in degree and beyond in type the punishment allowed by applicable norms. We owe to Seneca, the author of what is, as far as I know, the earliest surviving sustained discussion of cruelty, the seminal explanation of the agent-objective concept of cruelty.³⁴ Because his conception presupposes a suffering victim, cruelty is defined by the anomic behavior of the agent who causes

Article 104 [Legal guarantees in the event of detention], “[. . .] *Detainees may not be subjected to mental or physical ill-treatment*” (emphasis added). The Brazilian Constitution of 1988, after proclaiming that no punishment shall be “cruel” (Article 5, XLVII, e) further asserts that respect of their physical and moral integrity is guaranteed to all prisoners (Article 5, XLIX).

³⁴Seneca, *De Clementia*, supra note 13.

that suffering. However, it is Seneca's emphasis on agency and objective norms of behavior that renders his conception agent-objective.³⁵

Consistent with his Stoic philosophy, Seneca's conception of cruelty places it in the context of a broader normative model anchored in natural law and virtue ethics theories. Specifically, cruelty is a point on a continuum of vices and virtues, with the vices on each end: *pity* — *mercy* — *strictness* — *cruelty*. On this continuum, pity is a vicious degeneration of the virtue of mercy in punishment, and cruelty is a vicious degeneration of the virtue of strictness. While excessive mercy turns into pity, excessive strictness descends into cruelty. Cruelty thus obtains when excessive suffering is caused by agents whose behavior deviates from statutory, customary, religious or moral norms of strictness. It is important to note that in Seneca's scheme, pity is opposed to strictness and cruelty to mercy. An excessively soft punitive system³⁶ can be rehabilitated by increased strictness, and a cruel one by increased mercy.

Seneca thus writes:

"But," you say, "there are some who do not exact punishment and yet are cruel, such as those who kill the strangers they meet, not for the sake of gain, but for the sake of killing, and, not content with killing, they torture. [. . .]" This indeed is cruelty; but because it does not result from vengeance — for no injury was suffered — and no sin stirs its wrath — for no crime preceded it — it falls outside of our definition; for by the definition the mental excess was limited to the exaction of punishment. That which finds pleasure in torture we may say is not cruelty, but savagery—we may even call it madness; for there are various kinds of madness, and none is more unmistakable than that which reaches the point of murdering and mutilating men. Those, then, that I shall call cruel are those who have a reason for punishment, but do not have moderation in it, like Phalaris, who, they say, tortured men, even though they were not innocent, in a manner that was inhuman and incredible. Avoiding sophistry we may define cruelty to be the inclination of the mind toward the side of harshness. This quality mercy repels and bids it stand ajar from her; with strictness she is in harmony.³⁷

This passage orients the scheme of vices and virtues in the context of punishment. It offers a conception of cruelty as excess in punishment, where excess is measured by the yardstick of natural criminal

³⁵The reconstruction of Seneca's ideas follows, with some modifications, my reading of him in Barrozo, Punishing Cruelly, supra note 4.

³⁶On ancient punishment, see David Luban, Some Greek Trials: Order and Justice in Homer, Hesiod, Aeschylus, and Plato, 54 Tenn. L. Rev. 279 (1987) and Adriaan Lanni, Verdict Most Just: The Modes of Classical Athenian Justice, 16 Yale J.L. & Human. 277 (2004).

³⁷Seneca, Moral Essays, supra note 13, at 435-37.

law. In his effort to persuade his pupil Nero to abandon the ways of cruelty, Seneca reminded him that the only virtue that could truly rival great power was that of self-control. This self-control of sovereign punitive power takes the form of mercy. Commanded by natural criminal law, punitive mercy is also favored for consequentialist reasons, “Mercy [. . .] makes rulers not only more honored, but safer, and is at the same time the glory of sovereign power and its surest protection.”³⁸ Mercy is, furthermore, an unconditional virtue. No matter how atrocious the deed to be punished, its agent is to be treated mercifully by the punitive powers. Nothing can excuse the sovereign from this duty. The unconditionality of mercy helps explain why the character and behavior of the victim cannot excuse any withholding of mercy on the agent-objective conception of cruelty.

However, according to Seneca, mercy should not be unlimited, lest it degenerate into pity. Augustine, influenced by Seneca, stresses the importance of submitting “compassion” to reason lest it decay from virtue to vice. He writes: “And what is compassion but a kind of fellow feeling in our hearts for the misery of another which compels us to help him if we can? This impulse is the servant of right reason when compassion is displayed in such a way as to preserve righteousness [. . .].”³⁹

Punishment, which has an important social function to meet, according to Seneca, cannot succeed if it fails to express the distinction between vice and virtue. Mercy, therefore, must not operate to blur the distinction between good and bad.⁴⁰ Its role is that of tempering punishment, the type and severity of which must be sufficient to demarcate

³⁸Seneca, *Moral Essays*, supra note 13, at 391.

³⁹Augustine, *The City of God against the Pagans* 365 (Cambridge Univ. Press 2006). For a learned study of the Stoic (and Platonic) influences on Augustine’s moral philosophy, see Sarah Catherine Byers, *Perception, Sensibility, and Moral Motivation in Augustine* (Cambridge Univ. Press 2013). On the theological conundra involved in the idea of divine mercy, see Anselm of Canterbury, *The Major Works* (Gill Evans & Brian Davies eds., 2008). Martha Nussbaum thus defines compassion: “By ‘compassion’ I mean a painful emotion directed at the serious suffering of another creature or creatures . . . According to my account . . . ; compassion has three thoughts as necessary parts . . . First, there is a thought of *seriousness*; in experiencing compassion, the person who feels the emotion thinks that someone else is suffering in some way that is important and nontrivial . . . Second is the thought of *nonfault*: we typically don’t feel compassion if we think the person’s predicament chosen or self-inflicted . . . Finally” adds Nussbaum, “it is what I call the *eudaimonistic thought*. This is the judgment or thought that places the suffering person or persons among the important parts of the life of the person who feels the emotion.” Martha Nussbaum, *Political Emotions: Why Love Matters for Justice* 142-44 (Cambridge: The Belknap Press of Harvard Univ. Press 2013). Augustine’s definition includes a practical reason call to action which Nussbaum’s account of the structure of compassion leaves out for sound analytical reasons. She does not fail however to draw profound political implications from the emotion of compassion.

⁴⁰See Seneca, *Moral Essays*, supra note 13, at 363-95.

virtue from vice without indulging in the imposition of the maximum punishment power is capable of. In short, the gap between sufficient and possible punishment is not to be crossed, for only cruelty can bridge it.

Seneca placed cruelty in a normative model made possible by an absolute and immutable natural law system. This system was able to guide action toward virtue — thus collapsing the distance between concept and action — because, as Seneca believed, it offered objective norms to assess behavior independently of mentalist considerations. In contemporary criminal law, the normative benchmark of cruelty is no longer found in natural law, but rather in punitive traditions, communal standards, fables of original legislative meaning, or in specific laws or individual sentences.⁴¹ But even on the narrow grounds of the objective social or legal norms available to us, it would be very hard to argue that existing criminal justice systems are not cruel.⁴² Even in what is usually seen as mainstream and legitimate punishment, the gap between minimally necessary punishment and the maximum punishment power has the resources to impose is constantly bridged. In crossing this gap, the state necessarily employs a form of violence that meets the definitional requirements of the agent-objective conception of cruelty.

Seneca's conception of cruelty was made intelligible in its complex of assumptions and implications as part of a normative model anchored in natural law and informed by a Stoic outlook. Though his normative model has since lost its appeal and authority, the resulting condemnation of cruelty has an enduring and pervasive influence in criminal law, as the sources quoted in the introduction illustrate. Furthermore, Seneca will always be right in his observation that “cruelty's greatest curse — [is] that one must persist in it, and no return to better things is open; for crime must be safeguarded by crime. But what creature is more unhappy than the man who now cannot help being wicked?”⁴³ Culturally speaking, criminal law theory can benefit from the learned, agonistic reflections on cruelty found in the pages of *De Clementia*, which explain cruelty in one of its fundamental, and thus far enduring, forms.

B. Agent-Subjective Conception

Thomas Aquinas orchestrated a subjectivist turn in the conception of cruelty inherited from Seneca, while at the same time sharing with Seneca the main contours of a normative model centered on natural law as a framework for a (now Aristotelian) ethics of virtue. In Aquinas'

⁴¹For a detailed discussion of the objective norms that now operate as functional equivalents of natural law, see Barrozo, *Reconstructing*, supra note 4.

⁴²Barrozo, *Punishing Cruelly*, supra note 4.

⁴³Seneca, *Moral Essays*, supra note 13, at 397.

formulation, and consistent with Seneca's definition, the concept of cruelty still presupposes a suffering victim, takes the agent end of the perpetrator-victim axis, and requires that the agent's suffering-causing commission or omission be in violation of an objectively ascertainable normative standard of behavior. However, Aquinas adds a subjective element: cruelty obtains only when the agent's deviant behavior is accompanied by the fault of character consisting in deriving personal delight from causing and witnessing suffering.

For Aquinas, cruelty is at one end of the continuum *softness — mercy — clemency — cruelty*. The righteous middle of the continuum is to be found in the virtues of mercy and clemency. On this continuum, softness is the vice of laxity in punishment, and cruelty the vice, on the part of the agent of excessive punishment, of delight in the torments he inflicts on his victims. Mercy in this scheme is a rational decision to relieve suffering caused by punishment, and clemency is the disposition of temper prompting to mercy. In the context of punishment, cruelty obtains when suffering is caused by a punitive agency that delights in the hardships that punishment brings upon those subject to it. It is worth noticing that, whereas for Aquinas the subjective element of cruelty was hedonistic in nature, in contemporary criminal law this element is usually judged by traditional mens rea standards.

Aquinas's subjectivist turn is best understood in the context of his natural law theory. More complex and developed than Seneca's, Aquinas's natural law theory speaks of a divinely ordered universe, the balance and symmetry of which is maintained first and foremost in the inner spaces of reason and passions.⁴⁴ Both Seneca and Aquinas conceive of a cosmic order permanently vulnerable to violation, in action or intention, by free-willing agents. On this worldview, punishment is a means to restore, via retribution and the expressive function of punishment, a violated cosmic order, bringing it back to its *ex ante* perfection. To punish is to nullify⁴⁵ the aggression free-willing agents have inflicted on the natural order of the universe. Hence, and importantly, both Seneca and Aquinas insist that punishment does not violate, objectively or subjectively, the order it seeks to repair.

The idea of a cosmic order in Thomist jurisprudence is created and guaranteed by an interlocking normative system. His philosophy of law distinguishes four types of law: eternal, natural, human, and divine. These four different kinds of law are distinguished by their lawgivers, their jurisdiction or scope, and the strength of their binding authority.

⁴⁴The modern natural law jurisprudence of Grotius and Hobbes intensifies the mentalist element of Aquinas' natural law, rather than completely breaking with it. See Hugo Grotius, *The Rights of War and Peace* ch. 1 (Richard Tuck ed., Liberty Fund 2005) and Thomas Hobbes, *Leviathan* (Richard Tuck ed., Cambridge Univ. Press 1992).

⁴⁵The same assertion is made by Kant's and Hegel's legal rationalism.

Aquinas defines eternal law as the government, by God's reason, of everything existing in the universe.⁴⁶ In the jurisdiction of eternal law, Aquinas places the whole realm of *physis*, which comprises, for instance, the laws of nature in biology, chemistry, and physics; that is, laws which govern "the whole community of the universe . . . by Divine Reason."⁴⁷ Eternal law has, moreover, absolute binding power. The absoluteness of its power is faultlessly evinced in blind observance of its decrees by nature; a nature which, in its passivity and unconsciousness, displays the prescriptions of God's reason. Eternal law is, therefore, the normative dimension of the great order of things.

Natural law applies solely to humankind. It is, in a sense, a section of eternal law, with specialized jurisdiction over beings that partake, to a limited but fundamental extent, in God's rational attributes: "the rational creature is subject to divine providence in the most excellent way [. . .]. [w]herefore it has a share of the eternal reason."⁴⁸ Analogous to and derived from God's, human reasoning is able, asserts Aquinas, to guide choices and deeds toward the common good, "and this participation of the eternal law in the rational creature is called the natural law."⁴⁹ It is, thus, the "imprint" on people of a "divine light" that entrusts them, as the rational segment of God's creation, with co-responsibility for the government of the cosmos according to the good. In their possession and use of this natural reason, individuals join God as active participants in the government of the universe, specifically in the government of *society*.

In the natural association of individuals into societies, humanity indeed lives as a ruled species; ruled, however, by itself, for humanity is co-author, with God who endowed it with a share of his reason, of the law under which it lives. It is important to note that although natural law binds in conscience, human conscience is not perfect. Thus, though universally cogent, the natural law makes room for a certain degree of anomie. Aquinas explains the failure to comply perfectly with the precepts of natural law as the result of the operation of two factors. The first is the generality and universality of the precepts of natural law, which require determination and particularization, respectively. Between the imprecise/general and the precise/particular lies the operation of the fallible human mind. The second reason for incomplete compliance with natural law is the disturbing influence of the passions, this ever-present reminder of humankind's second, animal, nature.

⁴⁶ Aquinas, *supra* note 13, at Q. 91, Art. 1.

⁴⁷ Aquinas, *supra* note 13, at Q. 91, Art. 1.

⁴⁸ Aquinas, *supra* note 13, at Q. 91, Art. 1.

⁴⁹ Aquinas, *supra* note 13, at Q. 91, Art. 1.

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For Aquinas, human law (positive law)⁵⁰ is the human way of addressing, through the exercise of what amounts to only a hint of God's perfect reason, the problems of generalization, universalization, and anomie. In this jurisprudential framework, human law must be derived from natural law as a logical "conclusion from premises" or as a "determination of certain generalities."⁵¹ The problem of anomie is explained as the product of an imperfectly honed virtue which fails to shield itself from the influence of untamed passions. In order to perfect virtues, Aquinas recommends a "training, which compels through fear of punishment," that is, "the discipline of laws."⁵² Human law is thus a human-made artifact in the service of natural law enforcement.

As a product of human reason for the purposes established by natural law, human law is, of course, bound to suffer from imperfections of conception and application. Because human law, as a product of practical reason, is by definition preoccupied with practical affairs, it will certainly fail to achieve the infallibility of science. Mistakes, Aquinas contends, are thus to be expected in matters of practical reason. Consequently, human law is not expected to achieve immaculate perfection, but only constant improvement — a form of perfectibility that "is possible in its own particular genus."⁵³

Moreover, Aquinas submits, human law cannot and should not cover the entire immense and sorrowful catalogue of human vices, but only those carrying grave social consequences.⁵⁴ The vices to be repressed by human law are those affecting the common good, that is, those with a public implication. All vices with private consequences only (or primarily) are to be left alone by positive law. These fall into the proper domain of divine law, the fourth kind of law in Aquinas's jurisprudence.

Aquinas's anthropology maintains that humankind is naturally committed to the common good, "ordained" as it is to the end of eternal happiness, which can only be achieved by following God's direct guidance through the medium of law. In addition to providing firm guidance to souls struggling to earn salvation in the form of a heavenly afterlife, divine law has yet a second role in Thomistic jurisprudence. It assists in the correction of problems created by the fallibility and natural idiosyncrasies of human judgment as it tries to determine the content of natural law and to cope with the duty to posit a human law in accordance with natural law. Because divine laws were revealed by God through prophets and enshrined in sacred scripture, they cannot possibly err. Therefore, divine law, which is universal in reach, can offer

⁵⁰ Aquinas, *supra* note 13, at Q. 91, Art. 3.

⁵¹ Aquinas, *supra* note 13, at Q. 95, Art. 2.

⁵² Aquinas, *supra* note 13, at Q. 95, Art. 1.

⁵³ Aquinas, *supra* note 13, at Q. 91, Art. 3.

⁵⁴ Aquinas, *supra* note 13, at Q. 96, Art. 2.

untainted insight into the nature of goodness and unimpeachable certainty about which practices and intentions have redeeming value.

There is yet another problem to be addressed by divine law. Let us call this the problem of the double requirement of virtue:⁵⁵ “man is not competent to judge of interior movements, that are hidden, but only of exterior acts which appear: and yet for the perfection of virtue it is necessary for man to conduct himself aright in both kinds of acts.”⁵⁶ Divine law, whose perfection reflects the perfection of its lawgiver, is able to provide a trusted path to redemption and ultimate salvation via virtuous behavior.

Finally, as noted above, it would be neither possible nor desirable for human laws to punish all evils. Such a comprehensive punitive system would, unavoidably, have to work against the common good in many circumstances.⁵⁷ However, in order that no vice remain unpunished, divine law makes whole the cosmic order by decreeing every sin forbidden.⁵⁸ There is no doubt that sinful anomie also threatens divine law, but the punishment it carries never fails; as, Aquinas reassures us, God’s judgment never fails.

The integrative and systemic nature of the four types of law in Aquinas’s jurisprudence sets the stage for his subjectivist turn on the concept of cruelty. Aquinas’ classical natural law represents a sustained legal-philosophical effort to conceive of a system that, in its kaleidoscopic normativity, could claim to be the only correct and complete ordering of things and beings by practical reason and binding in human conscience. Nothing less than such a superimposing and gapless legal apparatus is required by the predicament of beings whose understanding of God is only deep enough to develop a conscious awareness of their own imperfections. What place do the virtues opposed to cruelty occupy in such a system? How does that place help explain the subjectivist turn of the first normative models in the rejection of cruelty?

In a first approximation, Aquinas raises the problem of cruelty as a deviation from the natural ordering of human affairs. He does this in two Questions (dedicated to the virtue of temperance) in the *Summa*

⁵⁵It is interesting to note the similarity here to Kant’s practical philosophy in which morality, binding in conscience as it is supposed to be, receives the complement of law, which binds deeds only. See his three “Introductions,” the general one to the work and the two specific ones to the part on law and the part on virtues, respectively, in his *The Metaphysics of Morals* in Immanuel Kant *Practical Philosophy*. Trans. and ed. Mary J. Gregor (Cambridge: Cambridge Univ. Press 1999). About the dependence of morals on laws see Tony Honoré (citation).

⁵⁶Aquinas, *supra* note 13, at Q. 91, Art. 4.

⁵⁷Here the similarity is, interestingly enough, to John Stuart Mill’s liberalism. See, on this point, his *On Liberty*, in *John Stuart Mill: On Liberty and Other Essays* 5 (John Gray ed., Oxford Univ. Press 1998).

⁵⁸Aquinas, *supra* note 13, at Q. 91, Art. 3.

Theologiae — Question 157, entitled *De Clementia et Mansuetudine*, and Question 159, entitled *De Crudelitate* — in which he directly interrogates Seneca's ideas on cruelty (treating them sometimes almost as a *medium* for Aristotle). A fundamental difference that emerges concerns the requirements of virtue. Whereas, as discussed above, Seneca sets requirements of compliance both in mind and in outcome-oriented action for a deed to be considered virtuous, Aquinas relaxes, for specific virtues including temperance, the outcome requirement. As an anti-consequentialist, he dispenses with the results of courses of action when assessing their moral value and the virtue of their agents. Hence, Aquinas's jurisprudence does not require that deeds intended to relieve suffering achieve palpable success. Its only requirements are a righteous intention and sincere attempt.

Another distinction between Seneca and Aquinas is related to the first and is equally important. It bears on the problem of the motivation to act virtuously. In the architecture of Aquinas's conception of cruelty, although the virtues of mercy, piety, and clemency⁵⁹ express an inclination toward the relief of suffering, they originate from different motives. While piety is motivated by reverence for God, and mercy by compassion (that is, by the capacity to empathize with the suffering of others), clemency is motivated by judgment, where judgment is a sense of proportion and moderation of the mind operating under the tutelage of natural reason. It is through a judgment of proportion and moderation that clement relief of suffering is provided. Since proportion is a measure taken in light of a general standard (natural law in this case), relief of suffering is by definition motivated by a consideration alien to the passive experience of the agony of pain. Therefore, relief of torment is required by clemency, independent of the intention — even if righteous, of the agent who inflicts it. Herein lies the objectivist element in the conception of Aquinas, who, like Seneca, sees the world through the lens of an objective normative order.

Aquinas begins the Question on *De Crudelitate* with two guiding queries. The first is “whether [cruelty] is the opposite of clemency”⁶⁰ and the second is “how [cruelty] compares with ferocity and savagery.”⁶¹ His answers to these questions further reveal the subjective element in his concept of cruelty. As I show, Aquinas opposes cruelty to both clemency and mercy.

Aquinas begins with clemency. Since cruelty is a problem of punitive excess, as it was for Seneca, it would seem that cruelty is the counterpart not of clemency but of mercy. However, Aquinas argues

⁵⁹There would be a point to be made on the Latin words translated into “mercy,” “pardon,” and “clemency” in Aquinas and Seneca. I will excuse myself from making it here.

⁶⁰Aquinas, *supra* note 13, at Q. 159, Art. 1.

⁶¹Aquinas, *supra* note 13, at Q. 159, Art. 2.

that clemency, as part of the virtue of temperance and not that of justice, has to do not with equity, as mercy does, but with a mild disposition of the spirit — a state of mind. However, this conclusion is only one part of the general structure of Aquinas's argument. His objective is to show that cruelty is not only an injustice, but also a vice contrary to temperance, contrary to a balanced disposition of temperament. The reason why Aquinas places cruelty under temperance rather than justice is the foregrounding of the agent's mental disposition in the definition of cruelty. Whereas for Seneca conflict with public good is a sufficient condition for a finding of vice, for Aquinas a special state of mind must obtain. It is in the intersection of what phenomenologically occurs with that which takes place invisibly in the inner citadel of the conscience that the cruelty of a deed is determined. It is precisely in this subjective requirement⁶² that the agent-subjective conception of cruelty finds both its semantic and its normative cores.

Aquinas illustrates the mentalist element he brings to cruelty with an etymological argument. Here, again, the natural lawyer's appreciation of proportion is in operation. However, instead of using geometrical analogies to describe the social order, Aquinas appeals to a sensory analogy — tasting. The analogy with tasting is deployed as a way to overcome the difficulty that arises from making cruelty the direct opposite of both clemency and mercy, as Seneca does. The point of the analogy depends on the etymological derivation of the word cruelty from "*cruditas*," that is, rawness. In this analogy, clemency "denotes a certain smoothness or sweetness of soul," which inspires the moderating of the punitive mind, whereas cruelty reflects a sourness and bitterness of taste similar to that of unprepared food,⁶³ a bitterness that upsets the balance of reason and passions, allowing savage passions to prevail.

However, Aquinas argues that both clemency and mercy oppose cruelty. His argument is familiar territory to jurists: he distinguishes cases and divides competencies. The structure of the argument here rests upon several categories: just or unjust punishment, internally excessive or externally excessive punishment, mercy, clemency, and cruelty. Just punishment is that which is legal and rational. To mitigate this type of punishment prospectively, in accordance with sound reason, is equity proper, and to do so in a particular case is to act mercifully. As unjust punishment fails the test of rationality and legality, among its defects are the problems of internal and external excess in punishing.

Moreover, the rectification of unjust punishment is a matter of equity, hence of mercy. Cruelty in this conceptual scheme refers to the state

⁶²Aquinas, *supra* note 13, at Q. 157, Art. 3.

⁶³Aquinas, *supra* note 13, at Q. 159, Art. 1.

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of mind that, contrary to the prescriptions of mercy, delights in “excess in punishing” and, contrary to clemency’s commands to the conscience, yields to a “hardness of heart, which makes one ready to increase punishment.”⁶⁴ Cruelty is, then, the intemperate mental disposition that seeks injustice in punishment. As with Seneca’s conception of cruelty, Aquinas’s clearly restricts it to the domain of punishment — a situation that would start to change only in the eighteenth century.⁶⁵

On the second question, as to whether cruelty and savagery differ, Aquinas gives a provisional no — hence, cruelty is the same as savagery. This provisional answer is in line with most ancient virtue philosophies, including Seneca’s: for each virtue there is only one contrasting vice. Indeed, if cruelty and savagery are opposed to clemency, as Aquinas affirms they are, they will necessarily appear the same.⁶⁶ However, Aquinas is a philosopher concerned with human fault and redemption. Animal inclinations such as savagery are neither vices nor virtues. They constitute an indelible stain on God’s rational creation, reminding humanity of its decayed condition. No matter how honorable the human condition is in comparison with that of other creatures, humanity’s membership in the animal kingdom condemns it to experience, in the fragile and transitory existences of individuals, animal drives as well as God’s enlightenment. This predicament renders each person susceptible to salvation solely in relation to that which is godlike in him — the rest is his fate. Fate rules, though, only until God intervenes. To the inhuman character of savagery, only another equally inhuman virtue can be opposed, a virtue that is a gift of God: piety. Hence, savagery and piety are, respectively, the attributes of two categories of non-human beings: beasts and saints.⁶⁷

To summarize, Aquinas agrees with Seneca that punishment is the proper domain of application of the concept of cruelty and that natural

⁶⁴Aquinas, *supra* note 13, at Q. 159, Art. 1.

⁶⁵See Michel Foucault’s *Discipline and Punish: The Birth of the Prison* (Vintage Books 1995) for the history of this change.

⁶⁶Aquinas, *supra* note 13, at Q. 159, Art. 2.

⁶⁷“Clemency is a human virtue; wherefore directly opposed to it is cruelty which is a form of human wickedness. But savagery or brutality is comprised under bestiality, wherefore it is directly opposed not to clemency, but to a more excellent virtue, which the Philosopher [Aristotle in *The Nicomachean Ethics*, VII, 5] calls heroic or god-like, which according to us, would seem to pertain to the gifts of the Holy Ghost. Consequently we may say that savagery is directly opposed to the gift of piety.” Aquinas, *supra* note 13, at Q. 159, Art. 2. Also, “Properly speaking, brutality or savagery applies to those who in inflicting punishment have not in view a default of the person punished, but merely the pleasure they derive from a man’s torture. Consequently it is evident that it is comprised under bestiality: but suchlike pleasure is not human but bestial. [. . .] On the other hand, cruelty not only regards the default of the person punished, but exceeds in the mode of punishing: wherefore cruelty differs from savagery or brutality, as human wickedness differs from bestiality.” Aquinas, *supra* note 13, at Q. 159, Art. 2.

law guides practical reason in matters of vice and virtue. On the axis *softness — mercy — clemency — cruelty*, the virtuous middle is found in mercy and clemency. The vice of cruelty obtains when the agent of excessive punishment derives pleasure from the torments he inflicts on his victims. Mercy is a rational decision to relieve suffering caused by punishment, and clemency the disposition of temper leading to mercy. Finally, because natural law binds in conscience, an adequate concept of cruelty has to incorporate a subjective element.

Aquinas's agent-subjectivism narrows the agent-based conception of cruelty. Where Seneca relied upon behavior in violation of an objective norm for a finding of cruelty, Aquinas saw the compliance requirements of natural law as internal. According to agent-subjectivism, unless and until the conscience missteps, no cruelty can be found, even if otherwise cruel outcomes are present. Although Aquinas's mentalism emerged in the context of specific ancient and medieval philosophical problems, it anticipated a broader movement in modern crime doctrine, which foregrounds *mens rea vis-à-vis* behavioral models of criminal responsibility. But cruelty and the acts that are culpable under the criminal law are not the same. They speak to different moral and legal intuitions and principles. Hence, whereas subjectivism expanded the overlap between modern crime theory and theories of justice, subjectivism reduces the scope of the concept of cruelty. It is thus unsurprising that whenever courts decide to narrow the basis for findings of cruelty, they seek refuge in the agent-subjective conception.⁶⁸

The elegance of Aquinas's jurisprudence is to be admired. However, a normative model in criminal law premising agent-based conceptions of cruelty on the existence of an objective normative order that tells vice and virtues apart is inadequate for multicultural societies living under liberal democratic systems of criminal and constitutional law. This is increasingly true for international criminal law and human rights systems. Indeed, such a model has considerable theological, metaphysical, and jurisprudential problems to resolve before it can get off the ground.

Furthermore, on the cultural front, agent-objective and agent-subjective conceptions of cruelty cannot capture all instances of cruelty that our moral and legal sensibilities can now detect. Case law as exemplified in the Introduction shows that courts on both sides of the Atlantic have discovered this shortcoming.⁶⁹ A normative model is certain to fail if it seeks to resolve all problems of personal predicament that impinge on human dignity by focusing on the agent side of the agent-victim relation. Focusing instead on the victim side of this

⁶⁸See Barrozo, *Reconstructing*, supra note 4.

⁶⁹For detailed analysis of relevant case law in the United States see Barrozo, *Reconstructing*, supra note 4.

relation is an expected reaction to the perception that the previous normative models has been exhausted. But how would cruelty look from the victim side of this relation — from a perspective that relies comparatively less on the legality and morality of cruel agency, with its intricate economy of vices and virtues, and more on insight into what it must feel like to suffer cruelly, no matter at whose hands?

III. CRUELTY AS SENTIENCE: VICTIM-SUBJECTIVE CONCEPTION

The victim-subjective conception of cruelty, which we owe to Montaigne, turned the table on agent-based conceptions. Victim subjectivism presupposes cruel agency, thus also remaining an agent-dependent conception. However, the definitional element of cruelty rests in the victim's intense experience of suffering. Cognitively, compassion is the key impulse in the identification of instances of cruelty. The normative model associated with victim subjectivism stipulates that sensibility counts more than reason. Consequently, the perspective from which to understand cruelty is that of the suffering subject. In the context of punishment, cruelty obtains when someone experiences severe suffering as a result of being subject to punitive agency. In recent applications of the victim-subjective conception, that agency need no longer specifically intend to cause suffering for cruelty to obtain.⁷⁰

Montaigne's essay on cruelty is shorter than Seneca's or Aquinas's.⁷¹ His intellectual style is less assertive, his prose less pompous, and his analyses, at points, less coherent⁷² than theirs. His essay is, nonetheless, astonishing. Much of the current understanding of cruelty is a cultural heir of the perspective on cruelty that Montaigne helped bring to the center of modern culture, particularly the sense of guilt for the suffering of others.⁷³

While I focus on the conception of cruelty Montaigne contributed, it is important to keep in mind that he was one of the first modern thinkers to put forward a completely non-metaphysical conception of law

⁷⁰See *Brown v. Plata*, 563 U.S. 493, 131 S. Ct. 1910, 179 L. Ed. 2d 969 (2011). I discuss the mens rea requirement of cruelty in Barrozo, *Reconstructing*, supra note 4.

⁷¹An analysis of Montaigne's ideas on law, customs, natural and social orders, etc., would be of course helpful in the contextualization of his innovation on the theme of cruelty. It cannot, unfortunately, be done within the bounds of this essay.

⁷²Montaigne, it should not be forgotten, is a self-proclaimed champion of contradictions in thought, if thought is to better reflect life as it is.

⁷³Speaking about the origins and nature of our civilization, Freud sought to "represent the sense of guilt as the most important problem" in its development. The price paid by the cultural availability of the sense of guilt was, according to Freud, very high indeed: "for our advance in civilization is a loss of happiness through the heightening of the sense of guilt." Sigmund Freud, *Civilization and Its Discontents* 97 (James Strachey trans., Norton 1989). For insight into this sense of guilt see Friedrich Nietzsche, *On The Genealogy of Morality* (Cambridge Univ. Press 2000).

and a contextualizing and demystifying conception of legal authority.⁷⁴ This matters because when law and customary norms are contextual and their authority culture-specific, focus tends naturally to be directed to the differences that tangibly matter, such as, in the case of Montaigne, suffering. Rather than adopt a theologically and metaphysically charged normative model like those of Seneca and Aquinas, Montaigne embraces a lighter, expressionist approach to “morals.” In his moral outlook, Montaigne relies more on the cultivation of sensibilities and on the heightening of the sense of guilt than on engaging in the sometimes too-arid philosophical debates about norms, behavior, and intentions. Montaigne knew that, as Smith came to articulate it in the eighteenth-century, “no action can be properly called virtuous, which is not accompanied with the sentiment of self-approbation.”⁷⁵ It is precisely this sentiment of self-approbation that a sense of guilt in relation to cruelty would encumber. Ultimately, this encumbrance makes cruelty incompatible with virtue — a frugal argument, for certain, but one that is so by design.

Montaigne was a skeptical philosopher. For him, the prevailing conditions of moral relativism and sensory illusion were inescapable. He was also conservative in politics. Whereas moral relativism and liberty of thought are to be enjoyed privately, actual conduct must comply with customary norms. It is beside the point to speculate, in the present context, about whether Montaigne’s conservatism followed from his skepticism or his skepticism from his conservatism. The fact is that, for Montaigne, the routinized experience of privacy and the uniqueness of each person engender radically idiosyncratic worldviews. The resulting moral pluralism in turn gives rise to a profound mistrust of any form of universalism.

Montaigne’s skepticism found refuge and consolation in abiding by what Hume used to call “the common affairs of life”⁷⁶ and in the cultivation of compassion, both common themes in early modern humanism.

⁷⁴As is well known, Montaigne has much to say about laws and customs in his peculiar form of legal historicism. However, the new normative vista opened by his take on cruelty does not require explication of his legal thought the same way Aquinas’ did.

⁷⁵Adam Smith, *The Theory of Moral Sentiments* 179 (Liberty Fund 1982).

⁷⁶“But what have I here said, that reflections very refin’d and metaphysical have little or no influence upon us? This opinion I can scarce forbear retracting, and condemning from my present feeling and experience. The intense view of these manifold contradictions and imperfections in human reason has so wrought upon me, and heated my brain, that I am ready to reject all belief and reasoning, and can look upon no opinion even as more probable or likely than another. Where am I, or what? From what causes do I derive my existence, and to what condition shall I return? Whose favour shall I court, and whose anger must I dread? What beings surround me? And on whom have I any influence, or who have any influence on me? I am confounded with all these questions, and begin to fancy myself in the most deplorable condition imaginable, environ’d with the deepest darkness, and utterly depriv’d of the

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The inclination toward ordinary life brought along, in Montaigne's case, a relentless defense of the actual normative structure of society: customs, which included the laws, long established habits and social manners, and morality in general. Naturally, this defense of the actual social arrangement goes well with a skepticism that is phobic of social invention, as is Montaigne's.

Montaigne would only moderate his defense of the social status quo under the recommendation of compassion. Even if, from a cognitive point of view, universalism is impossible, it is still not a priori impossible to experience the feelings of fellow beings. It was in the capacity to represent the feelings — *co-passio* — of other creatures, not in the impossibility of importing and internalizing their worldviews, that Montaigne would find inspiration to favor efforts to mitigate the horrors of existing social arrangement, despite his conservatism. It is in this context that Montaigne's thought on cruelty and the accompanying normative models is to be understood.

Like Aquinas, Montaigne studied Seneca. In fact, he begins his essay on cruelty by copying directly from Seneca's style in *De Clementia*. As Seneca's style was determined by the urge both to educate Nero and sensitize him to the pain of others, Montaigne's style was designed to sensitize an audience that could hardly care less about the jurisprudential intricacies of a notion of cruelty. But while Seneca's audience was constituted in the first place by Nero, a person placed in a very special circumstance, Montaigne's audience was the ordinary person, the person who, in his or her mundane existence, was neither philosopher nor saint. Indeed, the ordinary person finds alien the thought that "it is more beautiful to prevent the birth of temptations by a sublime and god-like resolve."⁷⁷ Also uncommon is the possession of an "affable nature," a personality "which of itself finds indulgence and vice distasteful"⁷⁸ and is therefore naturally unsuited for it. Montaigne, in his effort to befriend his audience, placed himself among those of affable nature, for, as he confessed, he would find "in many

use of every member and faculty.[. . .] Most fortunately it happens, that since reason is incapable of dispelling these clouds, nature herself suffices to that purpose, and cures me of this philosophical melancholy and delirium, either by relaxing this bent of mind, or by some avocation, and lively impression of my senses, which obliterate all these chimeras. I dine, I play a game of backgammon, I converse, and am merry with my friends; and when after three or four hour's amusement, I wou'd return to these speculations, they appear so cold, and strain'd, and ridiculous, that I cannot find in my heart to enter into them any farther. Here then I find myself absolutely and necessarily determin'd to live, and talk, and act like other people in the common affairs of life." David Hume, *A Treatise of Human Nature* 268-69 (Clarendon Press 1978).

⁷⁷Michel de Montaigne, *On Cruelty*, in *The Complete Essays* 472, 476-77 (M.A. Screech trans., Penguin 1991).

⁷⁸Montaigne, *supra* note 77, at 476-77.

cases more rule and order in my morals than in my opinions, and my appetites less debauched than my reason.”⁷⁹

For the ordinary person who was neither philosopher nor saint, virtue had to be won. Indeed, a mark of the normative models from which Montaigne writes is the redefinition of virtue as something earned in battle, for “virtue rejects ease as a companion.”⁸⁰ Virtue finds its foundation in the victory of the gentle part of the self over the part that internalizes socially conditioned and naturally developed desires that resist compassion. Unless there is a struggle against the self to avoid vice and do good, virtue does not obtain: virtue’s path is “rough and thorny.”⁸¹ Without this internal struggle, virtuous conduct is an aberration, an epiphenomenon of a god-like philosophical mind and resolve, or of a personality whose original appetites coincidentally and naturally harmonize with the requirements of morality. That is why the two extremes of the “god-like resolve” and the “affable nature” are only borderline cases for virtue.

Having established his audience as consisting of the ignorant multitude living on a battleground where virtue can be earned only by actively conquering the social and natural forces of vice, and having defined the central case of virtue as a struggle by imperfect but well-intentioned natures to overcome vice and to instantiate the good, Montaigne is finally ready to apply his normative model to the topic of cruelty. He does this in the usual confessional tone found everywhere in his essay, proclaiming that of all vices “both by nature and judgment I have a cruel hatred of cruelty.”⁸² Note that the skeptic in Montaigne finds it safer to rely upon sensibility than reason: “I am so soft that I cannot even see anyone lop the head off a chicken without displeasure, and cannot bear to hear a hare squealing when my hounds get their teeth into it.”⁸³ Incidentally, similar moral pessimism is found in the anti-cruelty liberal tradition mentioned above.

When Montaigne attributes his hatred of cruelty to his natural softness, he is already electing compassion — a sentiment that will be so important to Rousseau, Smith, and Hume later on — to lead the revolt against the vice of cruelty. The faculty of representation is fundamental to the operation of compassion. The image of the decapitated chicken or the sound of the squealing hare makes the suffering of another being real to the observer through the senses of sight and hearing. This is by definition the job of representation: to make it possible to import into one’s mind the feelings and perceptions of others. Once this

⁷⁹Montaigne, *supra* note 77, at 479.

⁸⁰Montaigne, *supra* note 77, at 474.

⁸¹Montaigne, *supra* note 77, at 474.

⁸²Montaigne, *supra* note 77, at 480.

⁸³Montaigne, *supra* note 77, at 480-81.

enlargement of one's sensory universe to incorporate the pain and terror of others is completed, one is bound to see the world from the perspective of suffering.

However, as Montaigne learned from Seneca and Aquinas, the vice of cruelty is understandable only as a derivation of cruelty itself. Therefore, one must first know what cruelty is before one can become capable of evaluating courses of action prone to cause such cruelty. At this point in his argument, Montaigne's conceptual crafting is much less seamless than that of Seneca or Aquinas. Montaigne does not offer a conception of cruelty comparable in jurisprudential detail and complexity to those of Seneca or Aquinas. What Montaigne does is simply to place the suffering of the victim at the core of the conception of cruelty. According to him, it is in the act of causing suffering, in the actual victimization, and while it is happening, that cruelty takes place. There is no cruelty, no matter how unbalanced a course of action or the state of mind of its agent, unless suffering is present. Montaigne's conception of cruelty is as much agent-dependent as those of Seneca and Aquinas are victim-dependent. What accounts for the analytical distinction among their conceptions is the foregrounding and backgrounding of semantic and normative choices that place either the victim of cruelty in his suffering or the agent of cruelty in his behavior or state of mind at the center of the concept of cruelty. In opposition to Seneca and Aquinas, Montaigne subjects all allusions to acts or states of mind to the controlling criterion of suffering. It is suffering that gives to the acts and omissions causally linked to it their ultimate cruel nature. "If I had not seen it," says Montaigne, "I could hardly have made myself believe that you could find souls so monstrous that they would commit murder for the sheer fun of it. [. . . However, it is in] "the pitiful gestures and twitchings of a man dying in agony, while hearing his screams and groans" that one finds "the farthest point that cruelty can reach."⁸⁴ Were it not for the screams and groans of a suffering victim, there would be no cruelty, despite any psychological enjoyment that a murderer or other miscreant may take in his normative breach. Without the victim's extreme suffering, the same acts, previously condemnable as cruel, transubstantiate into innocent ones. Hence Montaigne's proposal that in order for the polity to abstain from cruelty while still achieving the ends of punishment, "exemplary severity intended to keep the populace to their duty would be practiced not on criminals but on their corpses."⁸⁵ On the victim-subjective conception of cruelty, the state of mind of agents merely adds a qualification to cruelty, a degree, as it were, of blame for the vice of cruelty.

In place of an analysis of the kind of suffering that the definition of

⁸⁴Montaigne, *supra* note 77, at 484.

⁸⁵Montaigne, *supra* note 77, at 483.

cruelty requires or an interrogation of the kind of causal weight required to make an act or omission cruel, Montaigne simply appeals to human sensibility.⁸⁶ This sensibility is, however, capable of education. The training of sensibilities to identify and rebel against cruelty and to earn virtue by battling vice prescribes a respect for all sentient creatures, for “natures given to bloodshed where beasts are concerned bear witness to an inborn propensity to cruelty.”⁸⁷

In conclusion, while compassion is the key impulse in the identification of cruelty, the suffering of victims is a necessary, although not a sufficient (since his conception is also agent-dependent), definitional element of cruelty. The political impact of this conception of cruelty and the urge to educate sensibilities that accompanies it is immense. One does not need to look far in order to identify heirs of Montaigne’s compassionate conservatism. Because compassion is capable of a degree of moral generalization often beyond the reach of the moral and cognitive capacities of humankind, it becomes the instrument par excellence for the moderation of the most extreme effects of the efforts of society to maintain and reproduce the social status quo. If knowledge and moral cognitivism are not to be relied upon for the betterment of society, one should rely on compassion to avoid making things worse.

Irrespective of the merits of Montaigne’s argument, there can be no complete retreat from his conception of cruelty and the sort of sensibility that it helped create and nourish. Furthermore, the normative model from which Montaigne writes is remarkably distinct from those of Seneca and Aquinas. Once the perspective of the suffering subject of cruelty was brought into the normative imagination, a whole new normative territory was open for colonization — a territory in which we are to this day willing settlers. Montaigne changed the concept of cruelty while leaving untouched the theological, metaphysical, and jurisprudential questions Seneca and Aquinas tried so hard to resolve. The standing of the victim-subjective conception of cruelty and its influence in criminal law cannot be overestimated. Yet it is insufficient to capture conceptually all the instances of cruelty relevant to criminal law and punishment.

Is it possible to imagine a conception of cruelty that can reach beyond active agency and its motivations and beyond the actual and conscious suffering of victims? If so, how would such a conception

⁸⁶“I feel the most tender compassion for the affliction of others and would readily weep from fellow-feeling [. . .]. Nothing tempts my tears like tears — not only real ones but tears of any kind, in feint or paint. I scarcely ever lament for the dead: I would be more inclined to envy them; but I do make great lamentations for the dying. Savages do not upset me so much by roasting and eating the bodies of the dead as those persecutors do who torture the bodies of the living.” Montaigne, *supra* note 77, at 482.

⁸⁷Montaigne, *supra* note 77, at 485.

change the contours of our normative vistas and the criminal law? What normative models would render such a conception of cruelty compelling?

IV. CRUELTY AS PREDICAMENT: VICTIM-OBJECTIVE, AGENT-INDEPENDENT CONCEPTION

If the life of law is not solely idealism, it is not solely consequentialism either. Reflective progress is a force to be contended with in the evolution of criminal law, and the concept of cruelty is a case in point. The push of reflectivity lays bare the limitations of both agent and victim-based conceptions of cruelty and the normative models they inhabit. Because they rely on objective norms (either on natural law as a foundation for an ethics of virtue or as hegemonic social morality), agent-based conceptions either fail to question the authority of those norms or base their authority on faith. To the extent that the agent-based conception is subjectivized, the bar for a finding of cruelty is raised too high to accommodate the way the rejection of cruelty has evolved and, at the same time, creates an incentive for elective ignorance in relation to the cruelty one causes or allows to take place.⁸⁸ By relying upon the suffering of victims, victim-subjective conceptions fail to capture instances of cruelty in which the victim is deprived of his senses or consciousness about his predicament. The fourth conception of cruelty and the normative model that gives it meaning seek to address these limitations. They transcend discrete agency and conscious suffering as the core definitional elements of cruelty. In the victim-objective/agent-independent conception of cruelty, agency is transcended by structural causation and suffering is transcended by violation of human dignity.

The first three conceptions of cruelty are chiefly concerned with taming power's propensity for brutality and its constant disregard for the pain of others. The fourth conception broadens this initial concern to include preoccupation with free and inviolable individual existences. I argue that the push of reflectivity is the force behind this broadening of the conception of cruelty. If you begin from a position that accepts reasons for constraining agents of cruelty, and think hard enough about them — avoiding inconsistencies, unleashing normative entailments, spelling out practical requirements, and seeking universalizability⁸⁹ — you will arrive at an agent-independent, victim-objective concept of cruelty. The point may be simple, but the third normative

⁸⁸This is one of the problems with the agent-subjective conception of cruelty in the Supreme Court's Eighth Amendment jurisprudence. See the quotes in the Introduction and Barrozo, *Reconstructing*, *supra* note 4.

⁸⁹In the Kantian sense of a capacity of special normative formulations to be made universally required and valid. More on Kant's moral universalism is *infra*. Once again, Christine M. Korsgaard's work is illuminating, now on the question of universalizability in (Kantian) moral theory. See Korsgaard, *supra* note 10. A helpful in-depth

model is a conceptually complex and normatively contested terrain in which the fourth conception of cruelty has to be articulated against the backdrop of changed legal thought and experience, transformed cultural patterns, value pluralism, and expanded — although also more strained — means of social cohesion and solidarity. More importantly, the normative model that the fourth conception of cruelty inhabits does not leave behind the previous notions of cruelty. Instead, the effect is cumulative.

On the fourth conception, cruelty refers to severe violations of the respect, recognition, and care that the unconditional and inherent dignity of each and every individual commands. The violation is attributable to personified agency and identifiable intention, or to the existence and operation of impersonal factors that shape the circumstances of the victims of cruelty, rendering them relatively more vulnerable to such violations. These impersonal factors are deemed problematic in light of the cruelty they engender or facilitate, or, with respect to the vulnerability they create, in light of the requirements of just forms of interaction or collective life that they fail to meet. In the context of punishment, according to the victim-objective/agent-independent conception, cruelty occurs when a grave violation of human dignity that in normal circumstances would amount to cruelty is caused by individuals or by the operation of impersonal institutions, structures or social processes, even if the victim is unaware of his predicament.

In this section, I focus first on how the preoccupation with punitive agency and intention led to the interrogation of structural, system-wide conditions of punishment. In the sequence, I address questions of human dignity and vulnerability.⁹⁰ Once suffering-causing agency is set under moral and legal scrutiny, and a concern with suffering is given legal and moral priority, reflectivity demands consideration of structural causation and suffering-independent reasons to care for others. When seen from this perspective, the rejection of cruelty in criminal law takes the form of a rejection of disrespect for the dignity of individuals, especially through brutality, neglect, exploitation, and subjection.

Analysis of the normative model that sees cruelty as a predicament requires that insights be gathered from different authors. For example, what in Montaigne was an empathetic preoccupation with suffering is transformed in Kant into a thesis about universal and unconditional

study of the formal requirements of universalizability is found in Włodzimierz Rabinowicz, *Universalizability: A Study in Morals and Metaphysics* (Springer 2013).

⁹⁰Germany is the leading contemporary constitutional experience in developing and enforcing a legal conception of human dignity. Article 1 (Protection of human dignity) of the Basic Law for the Federal Republic of Germany reads “The dignity of man is inviolable. To respect and to protect it shall be the duty of all public authority.”

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human dignity, a dignity achieved by mere membership in the species.⁹¹ In another example, what was in Seneca and Aquinas a concern with virtuous and vicious agency in the context of punishment is transmuted in Marx and Mill into questions about positive and negative structural conditions for justice, emancipation, and empowerment. These authors operated largely within a semantic system that, although it was consistent with cruelty as a concept, never systematically employed it, nor provided any sustained conceptual analysis of it. Nonetheless, their influence upon the jurisprudence of cruelty in criminal law was tectonic.

Assuming that concern for the suffering of others is not merely instinctive, why should we care for them? What is the normative basis for caring for the unknown other in the way we often do? If this normative basis existed and could be found, would it ground any obligations with respect to individuals who are not consciously suffering? The third normative model in the rejection of cruelty provides compelling answers to these questions. Kant is the central figure in the articulation of this model. His *Groundwork of the Metaphysics of Morals* recounts the odyssey of practical reason that, by forces internal to itself, is condemned to dissatisfaction in relation to its ordinary powers, seeking in critical-reflectivity the uncontaminated sources of duty and a glimpse into the nature of unconditional goodness. It is not, for Kant, that tested common opinion and ordinary reasoning are incapable of distinguishing good from evil, or plotting courses of action consistent with this distinction. The problem, for him, lies in the ease with which innocence is “seduced” by inclinations, interests, and all sorts of incentives foreign to the command of idealized duty itself.⁹² This seduction of mundane goodness is aggravated by what Kant calls a “natural dialectic,” that is, the rationalization of the seduction so as to render the original strictness of duty-imposing practical norms more amenable to contingent consideration of utilities.

There is, however, another dialectic in action in the operation of ordinary practical reason: the dialectic of reflection. According to Kant, this dialectic “is an essential principle of every use of our reason to push its cognition to consciousness of its necessity.”⁹³ This reflective folding of reason upon itself in search of assurances about the validity of its contents is the very element of transition from uncritical to critical morality. Whereas the judgments and opinions of uncritical morality or mere moral sensibility suffer, in Kant’s view, from the undue influ-

⁹¹Later to be extended, under the pressure of the accusation of speciesism, to complex animal life in general. See, in this regard, Peter Singer, *Animal Liberation* (Ecco 2002).

⁹²Kant, *supra* note 13, at 59.

⁹³Kant, *supra* note 13, at 108 (emphasis omitted).

ence of the transitory forces of mundane experience, critical morality, when successful, is able to reach and articulate axioms that stand a priori in relation to experience and enjoy the seal of rational necessity. On the basis of this twofold pillar of independence from experience and rational necessity, Kant builds the idea of inherent dignity and its derivative duties, for a “duty in general lies, prior to all experience, in the idea of a reason determining the will by means of a priori grounds.”⁹⁴

To the independence and necessity of the postulates of critical morality, Kant adds the requirement of universality, which refers not only to the unconditioned validity of moral norms, but also to a heuristic for⁹⁵ and the boundaries of the jurisdiction of these norms. The reflective conscience’s representation to itself of a postulate of practical reason that meets the simultaneous criteria of a priori and universal rational necessity is, in Kantian ethics, the representation of a law, “insofar as it and not the hoped-for effect [of the duty performed as required by it] is the determining ground of the will.”⁹⁶ Hence, a will so determined by an a priori and rationally necessary universal law is the primary, absolute moral good; a good which, it must follow, “is already present in the person himself who acts in accordance with this representation.”⁹⁷

In this scheme of practical reason, virtues of moderation such as those extolled by Seneca are insufficient at best. Wisdom and wit are indeed desirable and frequently useful, explains Kant, but can also be instruments of evil and harm if the will behind them is not itself good.⁹⁸ A good will is the basis of goodness, for, as noted above, it represents to itself as law the principles of practical reasonableness forged by reason a priori, before experience, which are universally desirable and binding. Once a good will represents such a principle as law, it determines itself solely on the basis of the duty commanded by that principle. In Kant, reliance on contextual judgment and virtues is transcended by the idea that the agent’s will can be intrinsically good only on the basis of its exhaustive determination by the self-representation of an a priori and a-contextual rational duty.

A second transformation occurs when Kant replaces Aquinas’ fourfold normative system with the idea of a universally valid self-

⁹⁴Kant, *supra* note 13, at 62.

⁹⁵“I do not, therefore, need any penetrating acuteness to see what I have to do in order that my volition be morally good. Inexperienced in the course of the world, incapable of being prepared for whatever might come to pass in it, I ask myself only: can you also will that your maxim become a universal law?” Kant, *supra* note 13, at 57-58.

⁹⁶Kant, *supra* note 13, at 56 (emphasis omitted).

⁹⁷Kant, *supra* note 13, at 56 (emphasis omitted).

⁹⁸Kant, *supra* note 13, at 49 (emphasis omitted).

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legislated law. In Kant, law must go through a *reductio ad unum* by reason, whereby both the laws of nature and human laws are analogized in their universality. This is why he offers the following as the formula of the perfect good will: “act in accordance with maxims that can at the same time have as their object themselves as universal laws of nature.”⁹⁹

The notion of autonomy as a good will that legislates for itself is the pinnacle of practical reason for Kant, for “autonomy is therefore the ground of the dignity of human nature and of every rational nature.”¹⁰⁰ Built upon the ideas of perfect good will and of rationally necessary, a priori, and universal maxims as the sole determinant of this will, autonomy is at once the proof of and test for our humanity. Thus, the individual, equipped with a reason which bestows upon his will its own moral laws is, as both an instantiation and receptacle of the good, an end in himself. From this special dignity necessarily follows, claims Kant, the duty to see all individuals as potentially autonomous and, therefore, as ends in themselves¹⁰¹ and inhabitants of an ideational kingdom of ends.¹⁰² Contemplated in their mutually reinforcing relation, a priori normative reason and the legislative centrality of the self are considered to be sufficient elements for a conception of the inherent dignity of the person as an end in himself — an end who, as a full

⁹⁹Kant, *supra* note 13, at 86 (emphasis omitted).

¹⁰⁰Kant, *supra* note 13, at 85 (emphasis omitted).

¹⁰¹“[E]very rational being, as an end in itself, must be able to regard himself as also giving universal laws with respect to any law whatsoever to which he may be subject: for, it is just this fitness of his maxims for giving universal law that marks him out as an end in itself; it also follows that this dignity (prerogative) he has over all merely natural beings brings with it that he must always take his maxims from the point of view of himself, and likewise every other rational being, as lawgiving beings (who for this reason are also called persons).” Kant, *supra* note 13, at 87.

¹⁰²“It is true that, even though a rational being scrupulously follows this maxim himself, he cannot for that reason count upon every other to be faithful to the same maxim nor can he count upon the kingdom of nature and its purposive order to harmonize with him, as a fitting member, toward a kingdom of ends possible through himself, that is, upon its favoring his expectation of happiness; nevertheless that law, act in accordance with the maxims of a member giving universal laws for a merely possible kingdom of ends, remains in its full force because it commands categorically. And just in this lies the paradox that the mere dignity of humanity as rational nature, without any other end or advantage to be attained by it — hence respect for a mere idea — is yet to serve as an inflexible precept of the will, and that it is just in this independence of maxims from all such incentives that their sublimity consists, and the worthiness of every rational subject to be a lawgiving member in the kingdom of ends; for otherwise he would have to be represented only as subject to the natural law of his needs.” Kant, *supra* note 13, at 87-88.

member of a kingdom of ends, must never be used solely as a means to achieve the ends of others.¹⁰³

From the incommensurability of autonomy — “in the kingdom of ends everything has either a price or a dignity. What [. . .] is raised above all price and therefore admits of no equivalent has a dignity”¹⁰⁴ — is derived the duty of unconditional respect for the inherent dignity of each person as such. This command is the third transformation that Kant’s normative model contributes to the concept of cruelty. What in Montaigne was an empathizing concern for the pain of the other, in Kant is a rational command to respect the dignity embodied in each and every individual. In Kant, the sensibility articulated by Montaigne is pushed toward its reflective horizon. It becomes a vision about what a collective life under conditions of critical morality would require from all its members, and to what it would entitle them: “now, morality is the condition under which alone a rational being can be an end in itself, [. . .] a lawgiving member in the kingdom of ends.”¹⁰⁵

On a more general point, the idea of individuals possessing an inherent and unconditional dignity that commands universal and unconditional respect has had a profound impact on modern moral, political, and legal reasoning. This idea is also the force behind the modern understanding of liberty as emancipation, where the negative concept of liberty as protection from undue interference is transformed into an affirmative concept of liberty as shaping individual and collective futures. It has furthermore enabled the criticism of courses of action, individual or collective predicaments, and states of affairs even

¹⁰³Here is the archetypical formulation of this idea in the Kantian corpus: “Rational nature is distinguished from the rest of nature by this, that it sets itself an end. This end would be the matter of every good will. But since, in the idea of a will absolutely good without any limiting condition (attainment of this or that end) abstraction must be made altogether from every end to be effected (this would make every will only relatively good), the end must here be thought not as an end to be effected but as an independently existing end, and hence thought only negatively, that is, as that which must never be acted against and which must therefore in every volition be estimated never merely as a means but always at the same time as an end. Now, this end can be nothing other than the subject of all possible ends itself, because this subject is also the subject of a possible absolutely good will; for, such a will cannot without contradiction be subordinated to any other object. The principle, so act with reference to every rational being (yourself and others) that in your maxim it holds at the same time as an end in itself, is thus at bottom the same as the basic principle, act on a maxim that at the same time contains in itself its own universal validity for every rational being. For, to say that in the use of means to any end I am to limit my maxim to the condition of its universal validity as a law for every subject is tantamount to saying that the subject of ends, that is, the rational being itself, must be made the basis of all maxims of actions, never merely as a means but as the supreme limiting condition in the use of all means, that is, always at the same time as an end.” Kant, *supra* note 13, at 86-87, emphasis omitted.

¹⁰⁴Kant, *supra* note 13, at 84.

¹⁰⁵Kant, *supra* note 13, at 84 (emphasis omitted).

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when confronted with the complacency, acceptance or indifference of those subjected to them. In fact, to claim rights in the name of others has become the common practice not only in the courts of law, but in politics, social movements, and reform mobilizations everywhere. Were we not able to make claims on behalf of those incapable or unwilling to make them, modern law, society, and politics would be so much changed as to be unrecognizable.

The normative vault under which we act and think, and beneath which our laws are created and enforced, is shaped by the power of the idea of an inherent and unconditional dignity, the respect for which transcends instrumental interests, passions, and compassion. It has transformed modern criminal law, even as it struggles to grasp and live up to the demands and implications of human dignity. The idea of human dignity enhances the intellectual resources available to principled as well as to emotionalist rejections of cruelty. However, it does not exhaust the cruelty-as-predicament normative model. Human dignity needs to be complemented by sociological imagination and the insights into social structures and processes it provides.¹⁰⁶

In the nineteenth century, social theory challenged methodological individualism as an explanatory model for socio-legal phenomena. To complement or rectify explanatory atomism, social theory appealed to social structures, systems, and processes as the forces that cause social phenomena, directly or through the conditioned agency of individuals. Criminal law was not immune to the focus on structures, systems and processes. As evidenced by the fourth group of quotes in the Introduction, courts have been aware of the structural causes that enable cruelty, brutality, suffering, exploitation, disrespect for the dignity of the person, and vulnerability. However, how ideas of human dignity and social structures came together to forge a paradigm of practical reason for cruelty seems to have escaped the courts.

The first thing to understand about structural thinking is that structural causes or conditions can be positive or negative. Negative structures function by restricting or filtering out opportunities for escaping cruelty and by maintaining conditions that favor cruelty. Positive structures, on the other hand, set in place the causes of cruelty and the conditions under which it thrives.

Closely intertwined with negative structure and positive structure is the idea of vulnerability. The rejection of vulnerability has been expressed in two ways. The first rejects vulnerability as an intrinsic component of the human predicament and responds to this predicament with mental flight — *ataraxia*: tranquility and suspension of judg-

¹⁰⁶C. Wright Mills defined sociological imagination as knowledge about the ways biography and history intersect. See C. Wright Mills, *The Sociological Imagination* (Oxford Univ. Press 2000).

ment in the ancient Pyrrhonic and Epicurean traditions — and practical evasion. The second type of rejection embraces the risks of vulnerability that inhere in intellectual, moral, and practical engagement. It focuses instead on imagining strategies for individual and collective empowerment. It is in this second expression that a concern with vulnerability is best understood in the context of the third normative models in the rejection of cruelty.

John Stuart Mill was instrumental in articulating the idea of the negative structure. A good social theorist, Mill recognized that *modi vivendi* shape human character.¹⁰⁷ Social theory has a conservative as well as a progressive branch. It is to the latter that Mill — with his commitment to “social and political emancipation”¹⁰⁸ and the feeling of angst resulting from the certainty that “any society which is not improving, is deteriorating”¹⁰⁹ — belongs. The first insight into negative-structure thinking predates Mill. However, Mill placed his own version in the context of the modern rejection of social stasis and naturalized inequality, rendering it fully modern. To stagnation and naturalization of social hierarchy, Mill responds with hopes for individual *bildung* and social mobility under conditions created by liberal politics. But above all, it is the realization that institutions never enter social life at a perfectly isonomic starting point for their members that makes the idea of negative structure important in criminal law. When they arrive in social life, the institutions of criminal justice operate to crystallize previous social arrangements and distributive patterns. Mill makes this point about laws in general:

Laws and systems of polity always begin by recognizing the relations they find already existing between individuals. They convert what was a mere physical fact into a legal right, give it the sanction of society, and principally aim at the substitution of public and organized means of asserting and protecting these rights, instead of the irregular and lawless conflict of physical strength. Those who had already been compelled to obedience became in this manner legally bound to it.¹¹⁰

In *The Subjection of Women*, Mill speaks of the subtle relationships between social structures and forms of consciousness. In their evolutionary dynamic, these relationships hide behind the opaque mechanisms of social cohesion and behavioral patterns. Speaking of the predicament of women, Mill points to the ways in which embedded social structures negatively influence their opportunities to escape suffering, instead rendering them more vulnerable to cruelty and exploitation. As he unequivocally describes the problem, “sex is to all

¹⁰⁷ Mill, *supra* note 13, at 494.

¹⁰⁸ Mill, *supra* note 13, at 568.

¹⁰⁹ Mill, *supra* note 13, at 574.

¹¹⁰ Mill, *supra* note 13, at 745.

women [. . .] a peremptory exclusion.”¹¹¹ A form of exclusion that, because of the largely stealthy negative operation of its structural components, remains widely unseen. Invisible, its victims are thus condemned to “the feeling of a wasted life”¹¹² and suffering without sympathy from the rest of society.

Mill’s probing analysis played a major role in the form of criticism of the status quo that characterized the nineteenth century. He speaks of the “cruel experience” of those who historically had tried to oppose the mechanisms of human unhappiness,¹¹³ and of how their insubordination was met with the force of law and the whole apparatus of social norms and entrenched prejudices. To make things worse, the rebels appeared “in the eyes of those whom they resisted, [. . .] not only guilty of crime, but the worst of all crimes, deserving the most cruel chastisement which human beings could inflict.”¹¹⁴ According to Mill, the legal and customary apparatuses of negative structures are perpetuated by both the dispersion of victims and the proximity in which they are kept to the micro-agents of negative structures — in the case of patriarchal societies, their fathers and husbands; in the case of the criminal justice system, sentencing judges and prison wards, among others. Collective action is thus rendered impossible. This situation, in Mill’s eyes, exemplifies the deployment of what Foucault would later name capillary power,¹¹⁵ where, “in the case of women, each individual of the subject-class is in a chronic state of bribery and intimidation combined.”¹¹⁶

The practical and institutional mechanisms of negative structure — for example, marriage as “domestic slavery”¹¹⁷ — are accompanied by its ideological component, on the influence of which, Mill asks, “was there ever any domination which did not appear natural to those who possessed it?”¹¹⁸ Calling attention to the “fanaticism with which men cling to the theories that justify their passions and legitimate their personal interest,”¹¹⁹ Mill’s critique of negative structure is carved from the same stone as its twentieth-century counterparts in critical theory

¹¹¹ Mill, *supra* note 13, at 581.

¹¹² Mill, *supra* note 13, at 582.

¹¹³ Mill, *supra* note 13, at 478.

¹¹⁴ Mill, *supra* note 13, at 478.

¹¹⁵ According to Foucault, power in its capillary form is “where power reaches into the very grain of individuals, touches their bodies and inserts itself into their actions and attitudes, their discourses, learning processes and everyday lives.” Michel Foucault, *Prison Talk*, in *Power/Knowledge: Selected Interviews and Other Writings 1972-1977*, 37, 39 (Colin Gordon ed., Harvester Books 1980).

¹¹⁶ Mill, *supra* note 13, at 482.

¹¹⁷ Mill, *supra* note 13, at 507.

¹¹⁸ Mill, *supra* note 13, at 482.

¹¹⁹ Mill, *supra* note 13, at 483.

and existential feminism: “in the present day, power holds a smoother language, and whomsoever it oppresses, always pretends to do so for their own good.”¹²⁰ Against the instruments of social and cultural order belonging to negative structures — “institutions, books, education, society, all go on training human beings for the old, long after the new has come” — Mill prescribes reform on the shoulders of reflection.¹²¹ Born to live as equals, according to Mill, individuals require a type of society in which the virtue of equality can be learned and practiced. It is exactly this greenhouse for the flourishing of human virtues that unfair negative structures fail to provide. For example, the subjection of women, for Mill, causes the family to become a training camp of despotism.¹²²

Under the reflective push of social theory, the uniquely modern concern with the human predicament is incorporated into moral and legal thought. This is the concern of an era in which “human beings are no longer [. . .] chained down by an inexorable bond to the place they are born to, but are free to employ their faculties [. . .] to achieve the lot which may appear to them most desirable.”¹²³ The combined mission of reflection, freedom of thought, and institutions based on equality and liberty is to resist unfair negative structures. Mill calls, therefore, for an intensified awareness of the surviving remnants in modern times of pre-modern negative structures, lest society continue to recreate the fertile soil in which cruelty and vulnerability thrive. The applicability of negative-structure thinking to the problem of cruelty in criminal law should be obvious.

. . .

The fundamental insight into the problem of positive structures is that the diffuse agency of macro arrangements can actively and directly cause cruelty. Karl Marx contributes to this insight, turning the concern with positive structures into one of the causes célèbres and canonical themes of modern thought.¹²⁴ Another protagonist of the nineteenth-century tradition of social inquiry, Marx focuses on the role

¹²⁰Mill, *supra* note 13, at 524-25.

¹²¹“It is one of the characteristic prejudices of the reaction of the nineteenth-century against the eighteenth, to accord to the unreasoning elements in human nature the infallibility which the eighteenth-century is supposed to have ascribed to the reasoning elements.” Mill, *supra* note 13, at 473-74.

¹²²Mill, *supra* note 13, at 580.

¹²³Mill, *supra* note 13, at 488.

¹²⁴The causal force of positive structure figured prominently, if in a rustic and under-developed form, as early as in Plato’s work, as the initial exchanges in *Laws* illustrate. In this tradition, see also Jean-Jacques Rousseau’s *Discourse on the Origin and Foundations of Inequality Among Men* and *Discourse on the Sciences and Arts* (Cambridge Univ. Press 1997).

of impersonal,¹²⁵ often inescapable and stealthy, causal complexes set in place and urged forward by positive structures. Inspiring Marx's relentless criticism is a little noticed Kantian-style critique of the instrumentalization of individuals and of dehumanizing social practices.

Comprehension of Marx's contribution is enhanced by placing it in the context of his philosophy of praxis. From his earlier works through *Das Capital*, Marx advances a conception of productive practice — labor¹²⁶ — the essential human element of which is the prior ideational representation of its object — the product of labor. In the product of labor, “man not only effects a change of form in the materials of nature; he also realizes his own purposes in those materials.”¹²⁷ Hence, as material expression of the self, the product of labor gives an outward dimension to the otherwise esoteric contents of the consciousness. For Marx, it is the cumulative and collective process of interposing the product of labor as a buffer between everyday human life, on the one hand, and immaculate nature, on the other, that humanizes the species and creates a social, human world. Labor is, in this picture, a necessary constitutive element of the very predicament of social life; it is, in Marx's words, “an eternal natural necessity which mediates the metabolism between man and nature, and therefore human life itself.”¹²⁸ Labor, by definition, does not occur in a social vacuum. Its forms are predicated upon preexisting macro social structures and their evolution over time. The historical organization of labor has a direct and profound impact on the very humanization of the species and the existential *fortuna* of each individual self. What, then, if certain historical forms of labor are inherently cruel in that they engender social processes of exploitation, misery, existential oblivion, inauthenticity,

¹²⁵“I do not by any means depict the capitalist and the landowner in rosy colours. But individuals are dealt with here only in so far as they are the personifications of economic categories, the bearers of particular class-relations and interests. My standpoint, from which the development of the economic formation of society is viewed as a process of natural history, can less than any other make the individual responsible for relations whose creature he remains, socially speaking, however much he may subjectively raise himself above them.” Marx, *Capital*, supra note 13, at 92 (Preface).

¹²⁶Hannah Arendt rightly distinguishes between labor, work, and action. Much of what Marx refers to as labor would correspond to work, the activity of creation of objects with some independent permanency, in Arendt's conceptual framework. See Hannah Arendt, *The Human Condition* ch. III — V (The Univ. of Chicago Press 1998).

¹²⁷Adding that “this is a purpose he is conscious of, it determines the mode of his activity with the rigidity of a law, and he must subordinate his will to it. This subordination is no mere momentary act. Apart from the exertion of the working organs, a purposeful will is required for the entire duration of the work. This means close attention. The less he is attracted by the nature of the work and the way in which it has to be accomplished, and the less, therefore, he enjoys it as the free play of his own physical and mental powers, the closer his attention is forced to be.” Marx, *Capital*, supra note 13, at 283-84.

¹²⁸Marx, *Capital*, supra note 13, at 133.

and humiliation? If laboring inheres in the human condition, what to say of the stakes in a form of cruelty that is parasitic to it? When cruelty takes this form, its agency is found in positive structures rather than in discrete individual agency.

Structural cruelty, though impersonal in its agency and diffuse in its victimization, has nonetheless both a historical and a moral element, the combination of which opens up a new normative horizon. In the specific case of labor in early capitalism, rather than channeling the humanizing, outward surfeiting of the self into tangible tokens of creative freedom, labor enslaves, and “just as man is governed, in religion, by the products of his own brain, so, in capitalist production, he is governed by the products of his own hand.”¹²⁹

For Marx, capitalism consists of the dynamic and synergetic interplay between negative and positive structures. He shares with Mill the understanding that legal frameworks tend to crystallize regimes of power allocation and resource distribution prevailing on the ground. In the case of capitalism, the laborer, pressed by the “cruel nature-imposed necessity that his capacity for labour has required for its production a definite quantity of the means of subsistence,”¹³⁰ is forced to surrender his existential potential. Deprived of a future, the lower classes live lives marked by extortion under the legitimizing cover of a rhetoric of justice and rights, that is in the “very Eden of the innate rights of man[. . .], the exclusive realm of Freedom, Equality, Property and Bentham.” But when we leave this sphere where the “free-trader vulgaris” performs the ventriloquism of rights, justice, and efficiency, the cruel and hitherto veiled reality of the structural conditions of *laboring* reveals the laborer to be, in Marx’s words of indictment, “someone who has brought his own hide to market [and] now has nothing else to expect but — a tanning.”¹³¹

The institutions of capitalism as a comprehensive positive structure operate, according to Marx, with an iron law that commands the misery of the wage-earning classes; a misery which corresponds to the substitution of “capitalist exploitation” for “feudal exploitation.”¹³² Criticizing the political economists of the eighteenth and nineteenth centuries for their idyllization of the passage from feudal bondage to free labor under capitalism, Marx reminds his readers that the *modus operandi* of primitive capital accumulation, with its massive geographi-

¹²⁹Marx, *Capital*, supra note 13, at 771-72.

¹³⁰Marx, *Capital*, supra note 13, at 277.

¹³¹Marx, *Capital*, supra note 13, at 279-80 (emphases omitted).

¹³²Marx, *Capital*, supra note 13, at 875.

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cal dislocation and economic immiseration, are hardly idyllic.¹³³ While the feudal structure of rural or guild-based labor kept laborers in abject personal bondage and subjection, it also afforded them some de facto limits on exploitation and cruelty. With capitalism, the ties of bondage and subjection are broken and laborers were thrown into the market as free economic agents. However, this freedom was bought, says Marx, at a dear price: “robbed of all their own means of production, and all the guarantees of existence afforded by the old feudal arrangements,”¹³⁴ the newly freed laborers were condemned to sell their only remaining possession — themselves. The history behind this type of modern vulnerability is that of exploitation based, first, upon the expropriation of the means of production and, subsequently, on the laborer’s alienation from the very products of his work and from fellow human beings. This history, accuses Marx, “is written in the annals of mankind in letters of blood and fire.”¹³⁵ In fact, he explains, capitalism as a positive structure forces the individuals to live a “double life” as the abstract moral persona of the citizen entitled to equality and committed to the public good and, simultaneously, as the egoistic member of the civil society, acting as a private rent-seeker using, in Kantian language, “other people as means.”¹³⁶

Confronted, on one side, by the new forms of suffering engendered

¹³³Marx, *Capital*, supra note 13, at 87 (“[I]n actual history, it is a notorious fact that conquest, enslavement, robbery, murder, in short, force, play the greatest part. In the tender annals of political economy, the idyllic reigns from time immemorial.”).

¹³⁴Marx, *Capital*, supra note 13, at 875.

¹³⁵Marx, *Capital*, supra note 13, at 875.

¹³⁶Marx, *Capital*, supra note 13, at 36. The entire passage, with emphases omitted, reads: “Where the political state has attained its true development, man leads — and not only in thought, in consciousness, but also in reality, in life — a double life, a heavenly one and an earthly one, a life in the political community, in which he counts as communal being, and a life in civil society, in which he acts as a private individual, views other people as means, debases himself to the status of a means, and becomes the plaything of alien forces. The political state relates just as spiritually to civil society as heaven does to earth. It stands in the same opposition, and overcomes it in the same way as religion overcomes the limitedness of the secular world, i.e., by recognizing, restoring, and allowing itself to be governed by civil society. Man in his immediate reality, in civil society, is a secular being. Here, where he counts for himself and others as a real individual, he is a false semblance. In the state, on the other hand, where man counts as a species-being, he is an imaginary member of an illusory sovereignty, is robbed of his actual individual life, and is filled with an unreal universality.” Marx proceeds to add that “Political democracy is Christian in that in it man [. . .] has value as a sovereign being, the highest being, but this is man in his uncultivated, unsocial aspect, man in his accidental existence, man just as he is, corrupted by the entire organization of our society, lost to himself, alienated, under the domination of inhuman relationships and elements — in a word, man who is not yet an actual species-being. The fantasy, the dream, the postulate of Christianity, namely the sovereignty of man — but man as an alien being, different from actual man — is in democracy a sensuous reality, presence, secular maxim.” Marx, *Capital*, supra note 13, at 41 (emphases omitted).

by modern positive structures and, on the other, by the way in which dominant forms of legal and economic theory disregarded and obscured the cruelty inherent in the new human condition, Marx articulated an agenda of “human emancipation.”¹³⁷ This agenda inspired his project of a social order organized upon a normative view of human entitlements, and, in no uncertain Kantian spirit, constantly under the inspection of deep-cutting social criticism. Armed with this criticism, Marx offers a constructive stance on emancipation which aims at overcoming the vulnerabilities that oppressive positive structures engender. Human emancipation takes on a concrete dimension in human praxis and its institutional forms. This, in turn, leads to a material view of the requirements of emancipation.

Marx’s materialist analysis nonetheless has an important ideational component. Because the general conditions of human praxis engender, in Marx’s as well as in Mill’s views, an overgrowth of mutually reinforcing institutional and ideational apparatuses, an effective critique of oppressive positive structure must target also the ideational mechanisms of rationalization, legitimation, and veiling. Reason is urged, in the Socratic fashion, to overturn itself in order to break free from its self-imposed fetters. However, how is reason supposed to remove its blindfold if “it is not the consciousness of men that determines their being, but, on the contrary, their social being that determines their consciousness”?¹³⁸ Here is a conundrum that constantly haunts reflective hopes.

Marx’s answer to this conundrum is, as hinted at above, an ethos; an ethos that tries to carve in human existence a balcony from which things become visible as they really are, in their intricate mechanisms and suffering-causing capabilities. This critical posture should, he recommends, “start out by taking any form of theoretical and practical consciousness and develop from the unique forms of existing reality the true reality as its norm and final goal.”¹³⁹ It should turn itself into a “ruthless criticism of everything existing.”¹⁴⁰ Unforgiving criticism as a life posture “must not be afraid of its own conclusions, nor of conflict with the powers that be.”¹⁴¹ However, once it manages to climb all the way up to that balcony, enlightened consciousness is not supposed to

¹³⁷“After history has long enough been reduced to superstition, we are going to reduce superstition to history. The question of the relationship of political emancipation to religion becomes for us the question of the relationship of political emancipation to human emancipation.” Marx, *On the Jewish Question*, supra note 13, at 33-34 (emphases omitted).

¹³⁸Marx, *Capital*, supra note 13, at 4.

¹³⁹Marx, *Ruthless Criticism*, supra note 13, at 14.

¹⁴⁰Marx, *Ruthless Criticism*, supra note 13, at 13.

¹⁴¹Marx, *Ruthless Criticism*, supra note 13, at 13.

indulge itself in banal exercises of idealistic blue-printing.¹⁴² The proper task appointed by Marx for the unfettered and awakened reflective conscience is both profoundly modern and philosophically archaic in its callings. He writes:

The reform of consciousness consists only in enabling the world to clarify its consciousness, in waking it from its dream about itself, in explaining to it the meaning of its own actions. [. . .] Our motto must therefore be: Reform of consciousness not through dogmas, but through analyzing the mystical consciousness, the consciousness which is unclear to itself [. . .]. Then it will transpire that the world has long been dreaming of something that it can acquire if only it becomes conscious of it. It will transpire that it is not a matter of drawing a great dividing line between past and future, but of carrying out the thoughts of the past. And finally, it will transpire that mankind begins no new work, but consciously accomplishes its old work. [. . .] It is a matter of confession, no more. To have its sins forgiven mankind has only to declare them to be what they really are.¹⁴³

With the critique of positive structures, the conception of cruelty in criminal law is inoculated with another agent-independent component. Only those prepared to pay a significant intellectual price can remain oblivious to the pervasive impersonal social mechanisms of exclusion, exploitation, immiseration, and humiliation. When we think about the development of clusters of normative arguments tenable under conditions of reflectivity, the critique of positive structures stands out as an integral part of the novel normative models in law. In this model, sociological imagination — in the sense of critical awareness of the nature and operation of social structures and processes as they work to the detriment of individuals and groups — in the service of emancipation replaces an objective normative system supposedly able to tell virtue from vice.

The fourth conception of cruelty places the definitional focus on human dignity as the highest value and accommodates positive and negative structural conditions of cruelty in its causal understanding of the phenomenon. This significantly enhances the capacity of the conception to capture cruel predicaments, which the former conceptions failed to bring under their meaning. Furthermore, the argumentative structure of the normative model *cruelty as predicament* is capacious enough to subsume both agent and victim-based conceptions of cruelty. Under the *victim objective/agent independent* conception of cruelty, violations of human dignity that in normal circumstances reach the suffering threshold for cruelty constitute a sufficient criterion for a finding of cruelty. This is the case even if the victim is unaware or unconscious and no individualized agency is causally responsible. By

¹⁴²Marx, *Ruthless Criticism*, supra note 13, at 13.

¹⁴³Marx, *Ruthless Criticism*, supra note 13, at 15 (emphases omitted).

necessity, cruelty also obtains when discrete agency and actual suffering obtain.

CONCLUSION

This Article has detailed four distinct conceptions of cruelty that appear under-articulated in criminal law sources. I showed that the *agent-objective* conception focuses on the agent's behavioral deviation from objective norms of conduct as the definitional element of cruelty. The *agent-subjective* conception also focuses on the agent but requires, in addition to conduct that violates norms, the presence of *mens rea* or other fault of character before cruelty can be found. While these two conceptions presuppose a sentient victim and share emphasis on agency as the core definitional element of cruelty, the *victim-subjective* conception foregrounds the victim's suffering as the central element of cruelty and is prepared to find it even in circumstances where questions about the existence of objective prohibitions, deviation from those prohibitions, or *mens rea* cannot be resolved. The *victim-objective/agent-independent* definition of cruelty dispenses with the requirements of individualizable agency and sentient victimhood. This last conception rests the definitional core of cruelty on violations of unconditional and inherent human dignity that would normally meet the suffering threshold for cruelty whether the actual victim is or not conscious or sentient. When it comes to causation, the *victim-objective/agent-independent* conception is preoccupied as much with the positive and negative structural conditions and causes of cruelty as it is with direct genital causes. In sum, the *victim-objective/agent-independent* conception of cruelty incorporates and fundamentally transcends the understandings of agency, victimization, and causation found in the other conceptions.

I argued also that cruelty is a problem of practical reason that calls for solutions. However, I explained, we only start to bridge the gap between concept and action on the basis of some understanding of the broader normative models — *cruelty as agency*, *cruelty as sentience* and *cruelty as predicament* — which host and render intelligible and actionable each conception of cruelty. In this regard, my contention was that *cruelty as predicament* extrapolates from and yet incorporates the previous normative models and their respective conceptions of cruelty. *Cruelty as predicament* embraces dignitarian concerns about individuals and the critique of thought and society as potential systemic or structural causal factors. The dignitarian perspective provides the most principled way to identify the violations that constitute cruelty, while the more sophisticated view of causation that includes agency as well as structure better captures the causal complexity behind cases of cruelty.

At this point in the history of criminal law, all four conceptions of cruelty have currency. It must indeed be so if we are to conceptually capture the variations of the phenomenon of cruelty and to carry on

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the mission of getting rid of it. And yet, large and small forms of cruelty are still perpetrated and tolerated by criminal justice systems. One important reason for the persistence of cruelty is that criminal law sources and the societies they inhabit still lack understanding of the various conceptions and the ways each conception separately and all of them cumulatively engage our practical reason in the quest to banish the scourge of cruelty.

The best way forward is to take full reflective ownership of *cruelty as predicament* as the normative model informing all conceptions of cruelty, for its dignitarian and more sophisticated causal framework accumulates the lessons from and transcends the previous normative models. *Cruelty as predicament* is the most capacious normative model precisely because it was forged by the push of reflectivity that showed the exhaustion of each of the previous conceptions of cruelty and their hosting normative models.

Were courts and legislators to take full reflective ownership of *cruelty as predicament* they would understand better all the conceptions of cruelty they employ. But even in the current truncated, under-articulated way they represent cruelty, criminal law sources reflect the fundamental role in the evolution of criminal law that has been played by the opposition to cruelty.¹⁴⁴ The task that remains is to tap the potential of a jurisprudence of cruelty to work a profound transformation of the criminal law toward cruelty-free criminal justice systems.

One should not underestimate the deep connection between, on one hand, ideals and, on the other, macro changes in moral outlooks and legal institutions. Ideals do have causal consequence, and analyses of concepts and understanding of normative models such as those devoted to cruelty are often helpful in the explanation of social developments more generally. As a medium between the mind and the outside world, concepts of the normative kind and normative models function as evaluative as well as cognitive lenses leading to action.¹⁴⁵ As cognitive lenses, concepts are able to conceal, distort, or reveal

¹⁴⁴Before I am accused of unbridled optimism, let me say that I see the tensions that inhere in criminal law as a project of both power and reason. See Alan Norrie, *Law, Ideology and Punishment* (Kluwer Academic 1990) and Mark Kelman, *Interpretive Construction in Criminal Law*, 33 *Stan. L. Rev.* 591 (1981). Identification of these tensions has a long history, as I hope my analyses of Seneca and Aquinas have shown. See also Benjamin L. Berger, *On the Book of Job, Justice, and The Precariousness of the Criminal Law*, 4 *Law, Culture & Human.* 98 (2008).

¹⁴⁵Quentin Skinner offers a good example of the cognitive and normative nature of concepts based on the well-known phenomenon of the requirements of social legitimation of the agency of the commercial classes in Elizabethan England: "The merchant cannot hope to describe any action he may choose to perform as being 'religious' in character, but only those which can be claimed with some show of plausibility to meet such agreed criteria as there may be for the application of the

parts of the world. As evaluative lenses, concepts can be used to criticize, justify, or point to action in directions that transform whole segments of society and culture. That is why analysis of concepts¹⁴⁶ and explanation of their embedding normative models is a particularly fruitful way of discovering, from time to time, what counts as reality and how it is evaluated and acted upon.

term. It follows that if he is anxious to have his conduct appraised as that of a genuinely religious man, he will find himself restricted to the performance of only a certain range of actions. Thus the problem facing the merchant who wishes to be seen as pious rather than self-interested cannot simply be the instrumental one of tailoring his account of his principles in order to fit his projects; it must in part be the problem of tailoring his projects in order to make them answer to the pre-existing language of moral principles.” He then concludes: “The story of the merchant suggests two morals. One is that it must be a mistake to portray the relationship between our social vocabulary and our social world as a purely external and contingent one. It is true that our social practices help to bestow meaning on our social vocabulary. But it is equally true that our social vocabulary helps to constitute the character of those practices. To see the role of our evaluative language in helping to legitimate social action is to see the point at which our social vocabulary and our social fabric mutually prop each other up. [. . .] The other moral is that, if there are indeed causal linkages between social language and social reality, to speak of the one as mirroring the other may be to envisage the causal arrows pointing in the wrong direction. As the example of the Elizabethan merchant suggests, to recover the nature of the normative vocabulary available to an agent for the description and appraisal of his conduct is at the same time to indicate one of the constraints on his conduct itself. This in turn suggests that, if we wish to explain why our merchant chose to concentrate on certain courses of action while avoiding others, we are bound to make some reference to the prevailing moral language of the society in which he was acting. For this, it now appears, must have figured not as an epiphenomenon of his projects, but as one of the determinants of his actions.” Skinner, *supra* note 8, at 21-22. With insight forged under the “cruel iron” of slavery, Frederick Douglass, when speaking of the particular condition of slavery in Maryland, positioned as it was at the borders of freedom and the public opinion there bred, rightly affirmed that “Public opinion is, indeed, an unfailing restraint upon the cruelty and barbarity of masters, overseers, and slave-drivers, whenever and wherever it can reach them; but there are certain secluded and out-of-the-way places, even in the state of Maryland, seldom visited by a single ray of healthy public sentiment — where slavery, wrapt in its own congenial, midnight darkness, -can-, and -does-, develop all its malign and shocking characteristics; where it can be indecent without shame, cruel without shuddering, and murderous without apprehension or fear of exposure. [. . .] Public opinion in such a quarter, the reader will see, is not likely to be very efficient in protecting the slave from cruelty. On the contrary, it must increase and intensify his wrongs. Public opinion seldom differs very widely from public practice. To be a restraint upon cruelty and vice, public opinion must emanate from a humane and virtuous community.” Skinner, *supra* note 8, at 47-49.

¹⁴⁶The present paper is not an exercise in intellectual history, at least not primarily so. For that one can turn to Daniel Baraz’s sound intellectual history of the concept of cruelty in his *Medieval Cruelty: Changing Perceptions, Late Antiquity to the Early Modern Period* (Cornell Univ. Press 2003). An earlier article by Baraz — “Seneca, Ethics, and the Body: The Treatment of Cruelty in Medieval Thought, 59 *J. of Hist. of Ideas* 195 (1998) — had already been helpful at a very early stage of the reflections culminating in the work.

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The study of concepts and normative paradigms is also a reminder of the contingent and potentially fragile nature of what often achieves the ontological status of undisputed reality or the normative status of good or evil independent from reason and from transitory minds and historical contexts. At the end of the day, the tenure in culture of concepts and normative models will be a function of internal and external factors. Of the internal factors influencing the appeal and cultural traction of concepts and normative paradigms, maybe none is more important than their reflective strength. That is why, unless unsurmountable external factors get on the way, I predict that *cruelty as predicament* will increasingly carve and shape the normative horizon before which criminal law will continue to evolve. Indeed, law is not solely the normatively deaf product of social programming on the basis of instrumental and intra-systemic rationalities, memetic forms of collective consciousness, brute power, political strategizing, or transitory public opinion. These are only as important as incomplete factors can be. *Cruelty as predicament* is a compelling normative model, well-positioned to take its share of causation in the evolution of criminal law.

The more general thesis I defend here is therefore that the evolution of criminal law is not spared the causal force of the internal push toward ever greater reflectivity which operates from within normative models as they are subjected to increasingly more pressing demands of rationality and justification.¹⁴⁷

The implications of the “causal” force of reflectivity for the jurisprudence of criminal law are twofold. First, because reflectivity is a fundamental component of any causal explanation of the development of modern criminal justice systems, jurisprudential exercises that fail to take an evolutionary perspective oriented toward increasing reflectivity are incomplete at best. Second, because rationally justifiable ideals are deeply connected with the push of reflectivity, the hope for a cruelty-free criminal law system is silenced over time if criminal law theory fails to articulate the normative, institutional, and practical requirements of such a system.

Reflectivity has many allies, but at least as many enemies. Following the example of the Greeks, Montesquieu prescribed music to sensitize the soul and soften the temper as prevention against cruelty.¹⁴⁸ The liberal tradition of Judith Shklar and Richard Rorty counsels that we nurture and combine softness of sensibility with firmness of character in ways capable of inspiring an ever-enlarging sphere of empathy and

¹⁴⁷See generally 1-2 Jürgen Habermas, *Theory of Communicative Action*, (Beacon Press 1985); Rainer Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice* (Columbia Univ. Press 2011).

¹⁴⁸See Charles de Montesquieu, *The Spirit of the Laws* Book IV, at viii.i (Cambridge Univ. Press 1989).

consequent disgust for cruelty.¹⁴⁹ Opposing this sort of moral sensibility, the tradition of Callicles¹⁵⁰ and Nietzsche¹⁵¹ confronts us with the accusation of appeasement of “slave morality,” a morality forever hostage to resentful normative models. The reflective rejection of cruelty, however, suggests a normative model in criminal law that diverges from both traditions. The power of *cruelty as predicament* lies neither in softened sensibilities and enlarged circles of empathy, (although we should certainly settle for that if forced to forfeit hope for more) nor in an appeal to the resentment of the disempowered. The power of *cruelty as predicament* lies rather in its greater reflectivity and in how it weaves together in a dignitarian and reflective way the conceptual reach of the *victim-objective/agent-independent* understanding and the three previous conceptions of cruelty.

Maybe a more serious objection to the hopes I place in rationality, reflectivity, and legal and moral constructivism is that which sees evil — and with it cruelty — as a part of the human condition that we cannot will away. For example, Paul Kahn has powerfully argued that he does “not believe we are in a position to reframe the character of our experience, such that love and evil disappear. In truth,” he added, “we have no choice about the nature of the human.”¹⁵² Kahn may well be right, for as biographies and history abundantly show, no amount of rule-following, rational attachment to values or concern with consequences has proven enough to guard actors against committing cruelty or societies against embarking on cruel paths.

I expect, however, that this last objection will also be proven wrong in the longer term. The human condition is not outside evolution. The expansion or decline of the human capacities to learn, reason, create, judge, invent, connect, empathize, and act is the most important front in emancipatory and dignitarian struggles. A future is not impossible in which these capacities would have evolved enough to largely remove the blight of cruelty from human institutions. For the sake of this possible future — near or afar — we need to understand better the notions of cruelty, the normative models they inhabit, and what is entailed by the ideal of cruelty-free criminal justice systems.

This Article was written with that future in sight. The hope is that better understanding of the different conceptions and normative

¹⁴⁹See Judith N. Shklar, *Ordinary Vices* (Belknap 1984) and Rorty, *supra* note 16, which was written in part under the inspiration of the way Shklar connected a victim-subjective conception of cruelty with a particular tradition of liberal thought. John Kekes, in his *Cruelty and Liberalism*, 106 *Ethics* 834 (1996), resists, in the name of conservative politics, the liberal claim to monopoly of the concern with cruelty.

¹⁵⁰The *dramatis personae* in Plato’s *Gorgias*.

¹⁵¹Nietzsche, *supra* note 73.

¹⁵²Paul W. Kahn, *Out of Eden: Adam and Eve and the Problem of Evil* (Princeton Univ. Press 2007).

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models of cruelty in criminal law will facilitate the sort of cultural introspection that reminds us of the promises of justice, mercy, and respect for the dignity of every person that criminal law must help uphold, while at the same time shedding light on the nature of societies.¹⁵³ Whatever the future may hold, as we embark on this sort of cultural introspective journey, we must remain alert to what is at stake for both individuals and societies in the rejection of cruelty. And whatever is found at the end of this journey of cultural introspection, I suspect we would be ill-advised ever to abandon the search for critical self-knowledge that inspires it.

¹⁵³For the classical thesis about the heuristic importance of criminal law for a general theory of society, see Emile Durkheim, *The Division of Labor in Society* (Free Press 1997).