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STATE INTENTIONS AND THE LAW OF PUNISHMENT

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Forget dogs: do people *distinguish between being stumbled over and being kicked? Assessments of intentions are considerably more complex than Holmes's classic quip suggests. This Article examines the substantial, but so far overlooked, role of intent analysis in the constitutional law of punishment. As a doctrinal matter, the success or failure of a constitutional challenge to punishment often depends on a judicial assessment of official intent. As a normative matter, constitutional theory and moral philosophy offer conflicting accounts of the significance of intentions to the legal or moral permissibility of acts. Many of the constitutional theorists' arguments in favor of motive analysis have little applicability in the context of state punishment, and many of the philosophical reasons to deny the normative significance of intentions are especially powerful in that context. If the Constitution is to provide meaningful limitations on the power to punish, we should reconsider, and reduce, the current doctrinal emphasis on state intentions.*

I. INTRODUCTION

With respect to states of mind, we are of many minds. Sometimes we think mental states matter, and sometimes we think they don't. Most simply, bare voluntariness is usually viewed as a threshold requirement for legal or moral responsibility. Perhaps it seems obvious that purposeful acts should be treated differently than mere accidents, an intuition reflected in Holmes's quip that "even a dog distinguishes between being stumbled over and being kicked."[1] In some contexts, legal standards not only ask whether

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[1] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 3 (Little, Brown & Co. 1945) (1881).

an action was voluntary rather than accidental, but inquire further and attempt to determine the actor's specific purposes or reasons for action. In still other circumstances, the law denies the relevance of subjective mental states altogether by imposing strict liability standards or "objective" tests. Again, we are of many minds: sometimes we forgive or even admire those who mean well but do badly; at other times we say that good intentions pave the road to hell.

Inquiries into purpose, intention, and motivation are especially prevalent in constitutional doctrine.[2] Though it is not intuitively obvious that the government entities regulated by these doctrines can be said to possess "states of mind" at all, courts have developed various methods to assess governmental motives or purposes.[3] As many scholars have noted, motives play central roles in First and Fourteenth Amendment analysis.[4] The difference between a valid regulation of speech and a violation of the First Amendment might turn on whether the state intends to suppress particular ideas.[5] The permissibility of public displays of religious symbols can rest on whether the state intends to promote religion.[6] The

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[2] In this Article, I use the terms "purpose," "intent" or "intention," and "motive" or "motivation" interchangeably. Occasionally, scholars have distinguished between motive, understood as the incentive or reason to act, and purpose, understood as the hoped-for result of one's actions. For example, a murderer may be motivated by anger, but his purpose in pulling the trigger is to kill. *See* HENRY M. HART, JR., & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1413-17 (tent. ed. 1958) (distinguishing between motive and purpose in the context of legislative action). Like several contemporary commentators, I do not find the distinction to be very helpful, especially in the context of government action, where motive and purpose are always constructions of a third-party observer. *See, e.g.*, Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 426 n.40 (1996) (rejecting distinctions between purpose, intent, motive, basis, and reason).

[3] *See infra* Parts II.A and II.C.

[4] *See, e.g.*, Lawrence A. Alexander, *Introduction: Motivation and Constitutionality*, 15 SAN DIEGO L. REV. 925 (1978), and the subsequent articles in that volume; Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065 (1998); Kagan, *supra* note 2; Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767 (2001); Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 55 SUP. CT. REV. 197 (2003); David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935 (1989).

[5] *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("The principal inquiry . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.").

[6] *See, e.g.*, McCreary County v. ACLU, 545 U.S. 844, 860 (2005) ("When the government acts with the ostensible and predominant purpose of advancing religion, it violates [the] central Establishment Clause value of official religious neutrality . . . .").

constitutionality of state action with disparate impact by race or gender may turn on whether the state intends to discriminate.[7] Courts and academic commentators alike frequently refer to Holmes and the dog's distinction to explain these rules: the Constitution is violated not when an individual is stumbled over by state actors, but only when she is kicked.[8]

Of course, the state doesn't often literally kick its citizens. But in the enforcement of criminal laws, it regularly uses physical force against them. And in the constitutional doctrines that apply to the most systematic and severe uses of force—imprisonment and execution—state intentions matter greatly.[9] Constitutional evaluations of prison and death sentences begin with questions about the state's specific "penological purpose." When those already incarcerated challenge specific events or conditions within a prison, constitutional doctrine requires an assessment of prison officials' intentions. In sharp contrast to the law of constitutional criminal procedure, which often eschews inquiries into police officers' subjective mental states, the law of punishment frequently asks what state actors intended.[10]

This Article takes up two questions concerning state intentions, one inquiry narrow and doctrinal, the other much broader and more conceptual. With respect to doctrine, the Article examines the substantial, but so far

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[7] *See, e.g.*, Washington v. Davis, 426 U.S. 229, 240 (1976) ("[T]he invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.").

[8] *See, e.g.*, *McCreary County*, 545 U.S. at 866 n.14 ("Just as Holmes's dog could tell the difference between being kicked and being stumbled over, it will matter to objective observers whether posting the [Ten] Commandments follows on the heels of displays motivated by sectarianism, or whether it lacks a history demonstrating that purpose."); Wilson v. Jones, 130 F. Supp. 2d 1315, 1325 (S.D. Ala. 2000) ("The constitution is not offended [if racially disparate voting districts arise] by happenstance . . . . It is offended if the districts are deliberately constructed to achieve that outcome. To paraphrase Justice Holmes, even a dog knows the difference between being stumbled over and being kicked."); Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 98 (1997) ("The most familiar explanation of the relevance of governmental purpose in constitutional law builds on Holmes's aphorism that '[e]ven a dog distinguishes between being stumbled over and being kicked.'").

[9] In discussions of the criminal justice system, the term "use of force" is often used narrowly in reference to police officers' exercises of force in searches and arrests. Of course, the prison system itself is also a use of force. *Cf.* Hudson v. McMillian, 503 U.S. 1, 26 (1992) (Thomas, J., dissenting) ("[F]orcibly keeping prisoners in detention is what prisons are all about.").

[10] *See, e.g.*, Brigham City v. Stuart, 547 U.S. 398, 404-05 (2006) (noting that officers' subjective motivations are usually irrelevant to Fourth Amendment doctrine, though inquiries into "programmatic purpose" are sometimes appropriate); George E. Dix, *Subjective "Intent" as a Component of Fourth Amendment Reasonableness*, 76 MISS. L.J. 373 (2006) (chronicling the general irrelevance of subjective intent in Fourth Amendment law, and suggesting that courts should "give subjectivity a chance").

overlooked, role of intent analysis in the constitutional law of punishment. This task is newly important, as it is only recently becoming evident that there *is* a constitutional law of punishment, distinct from the constitutional law of arrests, investigations, and trial procedure.[11] As the United States' prison population continues to expand and as death sentences continue to capture substantial public and judicial attention, many of the most pressing controversies in criminal justice concern not the ways in which government investigates or prosecutes crime, but what it does to criminals after conviction.[12] In this context, we need to learn the constitutional law of punishment, and an important first lesson is the ways in which a state's penological purposes (or lack thereof) determine the constitutionality of punishment.[13]

State intentions are relevant to the constitutional law of punishment in three primary ways. First, as a threshold matter, courts may decline to apply the Ex Post Facto Clause, Double Jeopardy Clause, or other constitutional restrictions on the penal power unless the challenged policy or practice was adopted with punitive intent. In other words, if a restrictive state action that resembles punishment—confinement in a state prison, for example—is intended to serve civil, nonpunitive goals, the constitutional restrictions on punishment do not apply.[14] Second, courts evaluate the state's penological purposes as a component of Eighth Amendment proportionality analysis. When a defendant challenges a sentence as

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[11] I discuss the development of the constitutional law of punishment at the beginning of Part III. Capital punishment has been regulated under the Eighth Amendment for over thirty years, but doctrinal regulations of non-capital punishments have taken longer to develop. *See infra* Part III; *cf.* Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049 (2004) (addressing the constitutional restrictions on disproportionate punishment); Markus Dirk Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509, 512-14 (2004) (suggesting that several recent Supreme Court decisions provide a basis for a "new constitutional law of crime and punishment").

[12] *See, e.g.*, PEW CHARITABLE TRUSTS, PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 (2008), *available at* http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf (presenting data on rising incarceration rates). As for the death penalty, it was the focus of two of the Supreme Court's most publicized decisions in the October 2007 term. *See* Kennedy v. Louisiana, 128 S. Ct. 2641, 2646 (2008) (holding that the death penalty is an unconstitutionally severe punishment for the crime of child rape); Baze v. Rees, 128 S. Ct. 1520, 1532-34 (2008) (announcing the constitutional standard to evaluate challenges to methods of execution, and finding that Kentucky's lethal injection protocol satisfies that standard).

[13] *See, e.g.*, Ewing v. California, 538 U.S. 11, 29 (2003) (noting the importance of recognizing state's "penological goal"); Rhodes v. Chapman, 452 U.S. 337, 347 (1981) (noting that prison conditions may violate the Eighth Amendment if they fail to serve any "penological purpose").

[14] *See infra* Part III.A.

excessive and thus "cruel and unusual," courts will inquire into the state's purposes in punishing to decide whether the sentence is in fact too severe.[15] Finally, official intentions matter in the analysis of Eighth Amendment challenges to prison conditions or uses of force within prison. A prisoner challenging the conditions of his confinement must show that prison officials acted with "deliberate indifference" to serious deprivations, and a prisoner alleging excessive force must show that prison officials acted with sadistic or malicious intent.[16]

In practice, then, the success or failure of a constitutional challenge to punishment often depends on an assessment of official intent. Usually, it is failure; successful constitutional challenges to punishment are very rare. To understand this result, I suggest, we must appreciate the imprecision—what has been called the "slop"—of determinations of intent.[17] When an observer or fact-finder assesses the intent of another individual or of an institution, there is nearly always room for interpretation. The punitive or penological purposes of a legislature, and even the mental state of a particular prison official, can usually be presented at the time of litigation in a way that avoids constitutional offense. It is very difficult for individual litigants to prove convincingly the subjective mental states required to establish a constitutional violation.[18] Evidentiary ambiguities allow for discretionary judgment, and courts have considerable leeway to find the requisite intent (or not) in order to reach a preferred outcome.

Thus, there is a second sense in which we are of many minds about states of minds: in any particular case, you and I may have different assessments of a third person's state of mind. This observation is not a claim of epistemic futility—it is not that "we just can't know" intentions, and so any effort to determine them is hopeless. Rather, it is a call for honesty about epistemic limitations and the opportunities they produce. In a famous philosophical study of intention, Elizabeth Anscombe argued that claims about an individual's intentions could be verified by an external observer, but only "up to a point."[19] Eventually, "there comes a point at which the skill of psychological detectives has no criteria for its own success."[20] This claim about individual intentions has even greater force when applied to institutional intentions, since the very concept of

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[15] *See infra* Part III.B.

[16] *See infra* Part III.C.

[17] Michael S. Moore, *Patrolling the Border of Consequentialist Justifications: The Scope of Agent-Relative Restrictions*, 27 L. & PHIL. 35, 51 (2008).

[18] *See infra* Part III.

[19] G.E.M. ANSCOMBE, INTENTION 43 (2d ed. 1963).

[20] *Id.* at 48.

institutional intention already entails the *attribution* of intention to the institution. We can and do make claims about what a person, or corporation, or legislature, intended; the point here is simply that in making those claims, we rely on normative and often contested judgments.[21]

As we identify a constitutional law of punishment, then, we might also find occasion for critical reflection on its emphasis on state intentions. Such reflection is the second, and broader, purpose of this Article. Of particular interest is a growing body of philosophical literature that questions whether an actor's intentions determine the moral permissibility of his action.[22] This work in philosophy stands in stark contrast to the discussions of government motives in constitutional theory, where most scholars have accepted the premise that motives are relevant to constitutionality.[23] This Article brings the arguments from these two disciplines together in order to evaluate the role of state intentions in the law of punishment. This evaluation reveals that many of the constitutional theorists' arguments in defense of motive analysis in First or Fourteenth Amendment jurisprudence are inapplicable or unpersuasive in the context of state punishment. At the same time, many of the philosophers' reasons to deny the normative significance of intentions are especially powerful in the context of state punishment. Together, these literatures suggest some grounds for caution about motive analysis in the law of punishment. In practice, the emphasis on state intentions has given courts that are sympathetic to state agencies, and unsympathetic to prisoners, an opportunity to ensure that most constitutional challenges to punishment fail. Notwithstanding the development of a constitutional law of punishment that could serve to limit the power to punish, the courts have chosen a deferential approach and penal practices have been left relatively unregulated.

Doctrinal standards that focus more on objective factors and less on the state's intentions might ensure somewhat more meaningful regulation of punishment; this Article notes the standards that seem most ripe for reform. However, adjustments to doctrine, standing alone, are unlikely to transform the constitutional law of punishment into the strong limitation on state power that many observers might like it to be. We probably cannot eliminate all inquiries into state intentions, and it is not clear that we would want to do so. It is nonetheless useful to identify and scrutinize the

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[21] *Cf.* Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 603-05, 620-33 (1981) (describing various arational "interpretive constructions" deployed in the law to assess individuals' volition or intent).

[22] *See infra* Part IV.B.

[23] *See infra* Part IV.A.

doctrines of state intentions: this endeavor helps us see what these doctrines can, and cannot, accomplish. Ultimately, awareness of the limitations of motive-based constitutional doctrines may simply provide an incentive to explore other avenues of criminal justice reform.

This Article proceeds in four major parts. Part II identifies some key points of reference, distinguishing different roles that assessments of intent play in legal analysis. The aim is not to be comprehensive, but to place in the foreground some features of intent analysis that will help clarify the constitutional law of punishment. Part III turns to constitutional doctrine, tracing the three primary areas in which state intentions matter to the regulation of punishment. Part IV examines an array of explicitly normative arguments concerning whether and why intentions should matter to the legal or moral permissibility of an action, and Part V applies those arguments to the constitutional doctrines that regulate punishment.

II. POINTS OF REFERENCE

Intent standards are everywhere in the law: in criminal mens rea categories; in civil tort claims; in antidiscrimination statutes; in the tax code and many administrative regulations; in the canons of interpretation applied to statutes, contracts, and other legal texts; and of course, in several areas of constitutional doctrine. A full taxonomy of legal intent standards is a project too large for one article, but fortunately the task here is less onerous. A few general observations about the role of intention in legal analysis will set the stage for a study of the constitutional law of punishment. The aim is simply to organize the familiar, and to do so in a way that will illuminate the remainder of my analysis.

A. INTERPRETATION AND CLASSIFICATION DISTINGUISHED

There are many ways that the law uses assessments of individual or collective intention, two of which are important here. First, intention is sometimes relevant to the task of textual interpretation: the meaning of a legal text—a contract, a will, a statute, a constitutional provision—may be determined with reference to the intentions of the person or persons who produced the text. Second, intention may also be relevant to the evaluation and classification of an action. For example, the classification of killing as murder, manslaughter, or justified self-defense (or something else) requires a determination of the killer's intent.

A seminal case illustrates both roles for intention, and invokes Holmes's dog to boot. In *Morissette v. United States*,[24] the Supreme Court

[24] 342 U.S. 246 (1952).

considered a federal statute that provided for fines or imprisonment for any individual who "embezzles, steals, purloins, or knowingly converts" government property.[25] Joseph Morissette, a scrap iron collector, was prosecuted and convicted under the statute after removing spent bomb casings from an "uninhabited . . . and sparsely populated" area.[26] Though Morissette admitted that he took the casings, he maintained that he believed them to be abandoned property and did not intend to steal.[27] The issue, then, was whether the phrase "knowingly converts" implicitly required proof of wrongful intent.

That question required the Court to interpret the statute, and to do that, it addressed a prior question of *congressional* intent. In other words, the Court could not say whether Morissette's intentions were relevant to the classification of his conduct as criminal until it first consulted legislative intentions. In its search for legislative intent, the Court noted that Congress acted in the context of "the ancient requirement" that criminal punishment could be imposed only upon proof of "a culpable state of mind."[28] The Court concluded that given the historical tradition of culpability requirements, it would not assume that Congress intended to eliminate such requirements, absent clear evidence of such intent.[29] The Court read the phrase "knowingly converts" to require not only that the defendant knew he was taking property, but also that the defendant knew he was *converting* property.[30] That is, the Court interpreted the statute to require proof that the defendant knew the property he was taking was owned by someone else. The interpretive question—what Congress intended—was resolved in favor of an implicit requirement of proof of the defendant's culpable intent. The classificatory question—whether Morissette's action was "knowing conversion" as prohibited by statute—then required an analysis of Morissette's intent. Without proof of culpable intent, Morissette's conviction was reversed.[31]

A coda adds one more twist. Subsequent cases depicted *Morissette* as standing for a constitutional requirement that a criminal statute may not

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[25] *Id.* at 248 (quoting 18 U.S.C. § 641 (2000)).

[26] *Id.* at 247-48.

[27] *Id.* at 248-49.

[28] *Id.* at 250. To illustrate this longstanding rule, the Court recalled Holmes's "pithy observation" that "[e]ven a dog distinguishes between being stumbled over and being kicked." *Id.* at 252 n.9.

[29] *Id.* at 263.

[30] *Id.* at 270-71.

[31] *Id.* at 276. The Court rejected the government's argument that as a matter of law, the act of taking the casings should allow a presumption of wrongful intent. *Id.* at 273-74.

presume wrongful intent.[32] Such a presumption violates the due process requirements of the Fifth and Fourteenth Amendments, which require the government to prove beyond a reasonable doubt every element of the charged offense.[33] This rule means that the *interpretation* of a statute's mens rea provisions (which, again, may call for an analysis of legislative intent) can be determinative of the *classification* of that statute as constitutional or not. As a fact-finder judging a defendant might assess his intent in order to classify his acts as criminal, so a court judging a due process challenge to a statute might assess legislative intent in order to understand the meaning of the statute and classify it as constitutional.

One could think of the constitutional law of punishment as conduct rules for the legislatures that authorize punishment and the law enforcement officials that impose it.[34] As courts classify legislative or enforcement action as constitutional or not, they refer to the intentions of the public officials involved. But questions of interpretation matter as well. When confronting a constitutional challenge to legislation, courts are sometimes required to interpret legislation in order to determine its constitutionality. Keeping the distinction in mind will be useful, especially when these two roles of intent appear simultaneously.

B. INTENTIONS ARE PLURAL, NOT BINARY

Like many maxims, Holmes's quip about dogs offers brevity at the price of oversimplification. Dogs may distinguish only between kicks and stumbles, but the law makes much more nuanced distinctions.[35] When

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[32] *See, e.g.*, Sandstrom v. Montana, 442 U.S. 510, 523-24 (1979); United States v. U.S. Gypsum Co., 438 U.S. 422, 435 (1978).

[33] Mullaney v. Wilbur, 421 U.S. 684, 698-700 (1975); *In re* Winship, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

[34] *Cf.* Carol Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2470 (1996) ("[A]s any teacher of both substantive and procedural criminal law knows, constitutional criminal procedure is a species of substantive criminal law for cops."). On "conduct rules," see Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in the Criminal Law*, 97 HARV. L. REV. 625, 627 (1984).

[35] As some commentators have noted, it is doubtful whether dogs even do distinguish between kicks and stumbles. "In claiming that 'even a dog distinguishes between being stumbled over and being kicked' Justice Holmes demonstrated his limited knowledge of the canine world." Schauer, *supra* note 4, at 197 (footnote omitted); *see also* Adam Kolber, Note, *Standing Upright: The Moral and Legal Standing of Humans and Other Apes*, 54 STAN. L. REV. 163, 163 (2001) (noting that Holmes's claim is not usually considered "an empirical statement about the abilities of dogs").

intentions are used to classify actions, it matters not only whether an action was intentional, but what the actor's specific motivation was. Put differently, the law would not only differentiate an intentional kick from an unintentional stumble, but would also distinguish among kicks on the basis of the specific intentions that motivate them. A wake-up kick intended to move a sleeping dog out of the path of an oncoming steamroller would be treated differently from a kick intended as deserved punishment for biting, chewing, or some other doggie offense; and both would be treated differently from a kick intended only to hurt, administered out of sheer cussedness. In law, there are usually more than two categories of relevant intention.

Five general mental state categories are applicable in various areas of the law.[36] From most serious or wrongful to least serious, these five categories are: purpose, knowledge or belief, recklessness, negligence, and strict liability.[37] The first four categories correspond to the categories of mens rea identified by the Model Penal Code and employed in the criminal codes of many American jurisdictions.[38] Most criminal codes also include a threshold voluntary act requirement, which might be understood as the minimum level of intent: a voluntary act is nothing more than willed physical movement.[39]

Intention can be sliced much finer still. In the criminal law, specific intent offenses impose liability only on defendants who act with some specially identified purpose: those who commit assault with intent to cause great bodily injury, for example, or those who kill for pecuniary gain.[40] As interpreted by the Court, the federal statute at issue in *Morissette v. United States* is a specific intent offense. It was not enough that Joseph Morissette voluntarily took the bomb casings; the statute required proof that he took

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[36] Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 465 tbl.1 (1992).

[37] *Id.* Simons proposes an alternative, more complex matrix with additional mental states. *Id.* at 465 tbl.2.

[38] MODEL PENAL CODE § 2.02 (1980); *see also* Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815, 815 (1980) (suggesting that the concepts of culpability in the Model Penal Code may be the "most significant and enduring achievement" of the drafters).

[39] *See, e.g.*, MODEL PENAL CODE § 2.01; MICHAEL S. MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW 46 (1993) ("[B]efore one can be punished for any crime whatsoever, one must have performed some simple bodily movement caused by one's volition . . . ."). *But see* Francisco Munoz-Conde & Luis Ernesto Chiesa, *The Act Requirement as a Basic Concept of Criminal Law*, 28 CARDOZO L. REV. 2461, 2470-76 (2007) (proposing a communicative theory of action as an alternative to a theory of action as "'willed bodily movement'").

[40] *See* WAYNE R. LAFAVE, CRIMINAL LAW § 3.5(e) (3d ed. 2000).

them with the specific intent to deprive someone else of her property.[41] Similarly, several criminal law defenses eliminate or mitigate the criminal liability of defendants who act for particular purposes.[42] In constitutional law, certain government motivations are subjected to greater scrutiny or prohibited outright. For example, a state's "purposeful or deliberate" exclusion of Blacks from juries violates the Equal Protection Clause.[43] Any legal burden on religious practices that is motivated by religious prejudice will be subject to strict judicial scrutiny.[44] In short, a binary classification of actions as either intentional or accidental is too simplistic to capture all the ways in which intentions are legally relevant. Even among intentional actions, we can draw further distinctions based on the narrow and specific purposes of the actor.[45] As will become clear, these more nuanced categories of intention introduce evidentiary challenges as well as complex philosophical questions.

C. EVIDENTIARY CHALLENGES AND NORMATIVE JUDGMENTS

Whether intentions are invoked to interpret a text or to classify an action, we need to know what the relevant party's intentions were. This determination is difficult in any context; a person's intentions do not appear on her forehead in bold print.[46] Determining intent may be particularly difficult when the relevant parties are long deceased (like the drafters of the U.S. Constitution) or composite actors (such as legislatures or corporations). The question, then, is how to ascertain intention, and on the basis of what evidence? The assessment of intention is itself an interpretive exercise that calls for normative, and contested, judgments.

Direct evidence of intention is rare, and the predominant means of proving intention is circumstantial evidence.[47] Certain presumptions also

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[41] Morissette v. United States, 342 U.S. 246, 270-71 (1952).

[42] For example, self-defense claims require proof that the defendant acted in order to preserve herself from death or great bodily harm, and with a reasonable belief that the victim posed an immediate danger. LAFAVE, *supra* note 40, § 5.7(d).

[43] Batson v. Kentucky, 476 U.S. 79, 84 (1986) (quoting Swain v. Alabama, 380 U.S. 202, 203-04 (1965)).

[44] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

[45] Even within the category of accidents, we draw distinctions, such as that between gross negligence and mere negligence.

[46] As Deborah Denno recently noted with respect to mental states, "How odd for a legal system to base so much on something about which it seems to know so little." Deborah W. Denno, *Criminal Law in a Post-Freudian World*, 2005 U. ILL. L. REV. 601, 605 (2005).

[47] For example, the purchase of a life insurance policy for one's spouse is classic circumstantial evidence of intent to kill the spouse; employer hostility toward women may serve as circumstantial evidence of a discriminatory firing in the employment context. *See,*

operate to facilitate the determination of intent. For example, we tend to presume that an individual intended "the natural and probable consequences" of her actions, so that one who stabs a victim multiple times is usually thought to have intended to kill notwithstanding her protests to the contrary.[48] Though, as we know from *Morissette*, jurors may not be required to presume intent as a matter of law, it is permissible to instruct them that they are free to conclude, in light of the circumstantial evidence, that the defendant intended the natural and probable consequences of her actions.[49]

For the most part, fact-finders appear comfortable making mental state determinations for individual defendants, even with only circumstantial evidence.[50] Indeed, they may trust their own judgments about what a defendant intended more than they trust the defendant's own direct statements of intent. The defendant obviously has an incentive to deny that she possessed any mental state that is an element of the offense. Jurors lack similar incentives to misrepresent mental states, but even well-intentioned

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e.g., State v. Smith, 77 P.3d 984, 987 (Id. Ct. App. 2003) ("A finding of criminal intent may be based upon circumstantial evidence . . . . A defendant's intent may be inferred from his acts and conduct . . . ."); Parks v. Commonwealth, 270 S.E.2d 755, 759 (Va. 1980) (noting that in some cases, circumstantial evidence is "practically the *only* method of proof" of intent); *see also* 2 WIGMORE, EVIDENCE § 242 (Chadbourn rev. 1979) ("[T]here is no special evidence of intent . . . apart from evidence of emotion, of knowledge, of design . . . . So if one is charged with wife murder, his ill feelings toward the wife would be an ingredient of criminal intent, and whatever evidence would be otherwise suitable to show motive (i.e., ill feeling) would be receivable . . . ."); *cf.* LAFAVE, *supra* note 40, § 3.5(f), at 241 (noting that at the time of a crime, the defendant "does not often contemporaneously speak or write out his thoughts for others to hear or read," nor does the defendant usually admit later to having had the requisite criminal intent).

[48] *See, e.g.*, Smith v. State, 986 S.W.2d 137, 138 (Ark. Ct. App. 1999) ("The trier of fact is allowed to draw upon his own common knowledge and experience to infer intent from the circumstances. Because of the difficulty in ascertaining a person's intent, a presumption exists that a person intends the natural and probable consequences of his acts." (citation omitted)).

[49] Francis v. Franklin, 471 U.S. 307, 315-25 (1985) (finding a jury instruction that "[t]he acts of a person of sound mind and discretion are presumed to be the products of the person's will, but the presumption may be rebutted" to reallocate the burden of proof from prosecution to defense to violate the Due Process Clause); Sandstrom v. Montana, 442 U.S. 510, 523-24 (1979).

[50] Even though direct evidence of the defendant's intent is rarely available, see *supra* note 47, juries nonetheless convict in a significant majority of criminal trials. *See* Neal Vidmar et al., *Should We Rush to Reform the Criminal Jury? Consider Conviction Rate Data*, 80 JUDICATURE 286, 287 (1995) (reporting jury conviction rate of 82% for non-drug federal offenses and 87% for drug offenses); *id.* at 288-89 (reporting conviction rates of 58.9%-84% in state jury trials). Of course, mental state determinations are not critical to all trials, and even where mental state is an issue, a conviction does not tell us exactly how jurors make assessments of intent.

jurors may be poorly equipped to read the defendant's mind. Empirical research on juries indicates that they bring considerable background knowledge into their deliberative processes, and that they fit together the factual evidence presented at trial into a narrative that makes sense given their background knowledge.[51] The opacity of the human mind means that fact-finders are typically making guesses about an individual's mental state, but this is a necessity that the criminal law accepts with little fanfare.

The point here is simply that courts and juries regularly make determinations of individuals' intentions without too much handwringing; I do not claim that these determinations are "accurate." Indeed, I share Christopher Slobogin's view that "[e]xcept at the margin, assessing the relative 'accuracy' of such normative judgments [mental state determinations] is an oxymoronic exercise."[52] The claim "she intended to be cruel" is simply not the same sort of claim as "she slapped him." Michael Moore has recently put the point more colloquially: a judgment that an individual acted with a particular intention is one that "inevitably will have some slop in it."[53] It seems likely that jurors perceive the inevitable moral judgment in assessments of intention, and they may be more comfortable determining intent for precisely that reason. Scrutinizing the mind and discovering its secrets is a sophisticated task for experts, but attributing fault is something every layman knows how to do.

The normative, discretionary nature of intent assessments means that intent standards offer points of flexibility in the law. When a decision-maker has a strong intuition in favor of a particular outcome, determinations of intent can serve as the mechanism by which the preferred outcome is achieved. As an illustration, consider a rare recording of an actual jury deliberation in a state criminal trial.[54] The defendant had been

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[51] *See* Darryl K. Brown, *Plain Meaning, Practical Reason, and Culpability: Toward a Theory of Jury Interpretation of Criminal Statutes*, 96 MICH. L. REV. 1199, 1216-31 (1998) (describing jury decision-making and summarizing empirical research); Kevin Jon Heller, *The Cognitive Psychology of Mens Rea*, 99 J. CRIM. L. & CRIMINOLOGY (forthcoming 2009), *available at* http://ssrn.com/abstract=1155304 (arguing that jurors tend to use projection or prototyping to make mens rea judgments).

[52] Christopher Slobogin, *Doubts About Daubert: Psychiatric Anecdata as a Case Study*, 57 WASH. & LEE L. REV. 919, 945 (2000). Recall Elizabeth Anscombe's claim, quoted in my Introduction: "[T]here comes a point at which the skill of psychological detectives has no criteria for its own success." ANSCOMBE, *supra* note 19, at 48. Insofar as we *can* assess the accuracy of mens rea findings, there is reason to believe that jury findings are not very accurate. *See* Heller, *supra* note 51, at 34-60.

[53] Moore, *supra* note 17, at 50-51.

[54] I take this account of *Wisconsin v. Reed* from Brown, *supra* note 51. The deliberations were broadcast on PBS. *See* FRONTLINE: INSIDE THE JURY ROOM (PBS television broadcast Apr. 8, 1986).

charged under Wisconsin's very simple weapon possession statute; the prosecution needed to establish only that the defendant had a prior felony conviction, possessed a gun, and knew that he possessed the gun.[55] The jurors initially agreed that the elements had been "technically" proven, but expressed reluctance to convict: the defendant was sympathetic, and the crime was not vicious or harmful.[56] To "find room in the law," in the words of one juror, the jury eventually focused on the statute's mens rea requirement that the defendant "knew" he possessed a weapon.[57] Aware of the defendant's considerable mental disabilities, the jury eventually construed "to know" in very narrow terms and voted to acquit.[58] The jurors appear to have reasoned backward from an intuitively just outcome to the necessary mental state determination that would dictate that outcome.

Importantly for constitutional law, intent standards are no less—and possibly more—flexible when collective intention is at stake. Determinations of collective intention are always constructions: the court or fact-finder may rely on direct or circumstantial evidence when available, but the very notion of collective intention requires some degree of extrapolation from the facts.[59] Put differently, an assessment of legislative motive is "a construct synthesized from the text, context, operation, and public meaning of the statute."[60] The assessment of a collective entity's

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[55] *See* Brown, *supra* note 51, at 1199.

[56] *Id.* at 1240. The defendant was mentally impaired with a second-grade reading level. *Id.* at 1239-40. He had ordered the gun with the hope to take a mail-order course and become a private detective. *Id.* He told a police officer about his plan, and the officer asked him to get the gun and bring it to the police department. *Id.* The defendant did so and was then arrested. *Id.*

[57] *Id.* at 1245.

[58] *Id.*

[59] This is true both of corporate intent inquiries in criminal law, see William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L.J. 647, 704 (1994) (discussing "constructive corporate liability"), and of legislative or government intent inquiries in constitutional law, see Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1520-21, 1524-25 (2000). *See also* Seana Valentine Shiffrin, *Speech, Death, and Double Effect*, 78 N.Y.U. L. REV. 1135, 1155 (2003) (discussing "objective constructions of intention").

[60] Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 516 (2003). There is, of course, a vast literature on how to determine the intentions of collective bodies—and whether such intentions exist. For my purposes, what is most important about this literature is that among those who agree that it is reasonable to speak of collective intentions, even those who characterize collective intentions as a "fact" also acknowledge that intentions must be "ascribed to" or "attributed to" the collective by some interpreting observer. *See, e.g.*, ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 120 (2d ed. 2005) (describing legislative intention as "a matter of fact"); *id.* at 122 (arguing that the rules of collective institutions enable us to attribute intentions to them); *id.*

intentions, like the assessment of individual intention, always leaves room for normative judgment.[61] Indeed, many controversies over collective intention in legal analysis seem motivated less by a philosophical desire to get our conceptual descriptions "right" than by disputes over *which* intentions should be attributed to particular institutions. As we examine constitutional doctrine in more detail, we will see that cases often turn on an assessment of government intention that the given court easily could have made differently.

Much more could be said about the role of intentions in legal analysis. For purposes of this Article, however, these general observations will suffice. First, intentions may be relevant to the interpretation of legal texts, or they may be relevant to the classification of conduct. Some cases require both types of intent analysis. Second, the dog's distinction between kicks and stumbles, if taken literally, is too simple. The law recognizes not simply a binary distinction between intentional and unintentional action, but a much more complex array of relevant mental states. Finally, determining intention is an imprecise activity that necessarily involves normative judgment. With these points of reference in mind, consider the constitutional doctrine that regulates criminal punishment in the United States.

III. THE CONSTITUTIONAL LAW OF PUNISHMENT

For at least half a century, scholars have called for more robust constitutional restrictions on substantive criminal law.[62] They have argued

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at 124 ("Attributing shared intentions to a group is not a purely quantitative matter of counting . . . .").

[61] This fact has not been lost on critics of some aspects of constitutional motive analysis. For example, the Court's current Establishment Clause jurisprudence assesses whether state action, as perceived by an "objective observer," is intended to promote or suppress religion. *See* McCreary County v. ACLU, 545 U.S. 844, 862 (2005) (explaining that courts determine government purpose through the eyes of an "objective observer," focusing on "readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts"). Justice Scalia criticized this approach in dissent:

> [I]t is an odd jurisprudence that bases the unconstitutionality of a government practice that does not *actually* advance religion on the hopes of the government that it *would* do so. But that oddity pales in comparison to the one invited by today's analysis: the legitimacy of a government action with a wholly secular effect would turn on the *misperception* of an imaginary observer . . . .

Id. at 901 (Scalia, J., dissenting) (citation omitted).

[62] *See, e.g.*, Ronald Jay Allen, Mullaney v. Wilbur, *the Supreme Court, and the Substantive Criminal Law—An Examination of the Limits of Legislative Intervention*, 55 TEX. L. REV. 269, 297-301 (1977); Dubber, *supra* note 11, at 509-16; Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 409-12 (1958); Herbert L.

for limits on both the scope of the criminal law (that is, what may be criminalized) and the severity of punishment.[63] For the most part, the scholars' wishes have remained unfulfilled. Nevertheless, in recent years courts have increasingly confronted questions about whether, and how, the Constitution restricts the power to impose punishment. In answering those questions, the courts have developed a constitutional law of punishment. This area of law is not nearly as intricate as the doctrines surrounding the First Amendment, the Equal Protection Clause, and many other constitutional provisions, but it is one with several identifiable and related constitutional rules.

The constitutional law of punishment has developed through a number of different kinds of cases. First, the Supreme Court "constitutionalized" capital punishment in the 1970s by holding that the Eighth Amendment prohibition of cruel and unusual punishment created both procedural and substantive limits on death sentences.[64] The capital punishment cases reinvigorated the notion that the Eighth Amendment contained an implicit proportionality requirement, and the Court began to encounter proportionality challenges to non-capital sentences.[65] The second half of

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Packer, The Aims of the Criminal Law *Revisited: A Plea for a New Look at "Substantive Due Process,"* 44 S. CAL. L. REV. 490, 494-95 (1970); William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 29-38 (1996).

[63] *See, e.g.*, Allen, *supra* note 62, at 297-301 (setting forth the basic principles of a proportionality test as a constitutional limitation on punishment); Hart, *supra* note 62, at 431 ("Despite the unmistakable indications that the Constitution means something definite . . . when it speaks of 'crime,' the Supreme Court of the United States has hardly got to first base in working out what that something is.").

[64] In 1972, the Court invalidated the death penalty as it was then administered. Furman v. Georgia, 408 U.S. 238, 240-41 (1972). Four years later, it sustained a revised Georgia death penalty statute in *Gregg v. Georgia*, 428 U.S. 153, 207 (1976). The two cases initiated a capital punishment jurisprudence that focuses mainly on death sentencing procedures, see, e.g., Zant v. Stephens, 462 U.S. 862, 876-77 (1983) (requiring capital sentencing procedures that guide discretion by "genuinely narrow[ing] the class of persons eligible for the death penalty"), but also contains some substantive restrictions on who may be put to death, see, e.g., Roper v. Simmons, 543 U.S. 551, 570-71 (2005) (holding that the Eighth Amendment prohibits execution of defendants who committed crimes as juveniles); Coker v. Georgia, 433 U.S. 584, 598 (1977) (holding that the Eighth Amendment prohibits execution as penalty for adult rape). *See also* Carol Steiker & Jordan Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835, 838 (1992) (book review) ("[D]ecisions regarding the imposition of the death penalty are 'constitutionalized' . . . .").

[65] *See, e.g.*, Ewing v. California, 538 U.S. 11, 28-31 (2003) (challenge to 25-50-year sentence under California's three strikes law); Harmelin v. Michigan, 501 U.S. 957, 962-66 (1991) (plurality opinion) (challenge to mandatory life sentence for first-time possession of cocaine); Solem v. Helm, 463 U.S. 277, 280-82 (1983) (challenge to life without parole for

the twentieth century also saw federal courts use the Constitution, especially the Eighth Amendment, to protect prisoners' rights and to impose restrictions on the conditions within prisons.[66] Still another set of constitutional questions arose from the increasing prevalence of "hybrid" sanctions, classified as civil, but seemingly very similar to criminal penalties.[67] Because many constitutional provisions apply only to criminal punishment, challenges to hybrid sanctions required courts to address what counts as punishment for constitutional purposes. Finally, and most recently, the Supreme Court has held that the Sixth Amendment right to a jury trial restricts the procedures under which sentences can be determined.[68]

These collections of cases make up the constitutional law of punishment. And like other areas of constitutional law, this one is rife with references to the intentions of state actors. This Part examines the role of state intentions in three contexts: the threshold determination of whether state action is punishment; Eighth Amendment proportionality analysis; and Eighth Amendment evaluations of conditions or violent incidents within prisons.[69] Throughout the constitutional law addressing the imposition and

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writing bad check); Rummel v. Estelle, 445 U.S. 263, 264-66 (1980) (challenge to life sentence for three thefts totaling $230).

[66] Courts' responses to prisoners' claims evolved from the early American doctrine that the prisoner was a "slave of the state" without enforceable rights, *Ruffin v. State*, 62 Va. (21 Gratt.) 790, 796 (1871), to a "hands-off" doctrine that recognized some minimal protections, but was largely deferential to prison administrators, to evaluation of prisoners' constitutional claims under a "reasonableness" standard. *See* Procunier v. Martinez, 416 U.S. 396, 404-05 (1974) (describing the hands-off doctrine); *see also* Turner v. Safley, 482 U.S. 78, 84 (1987) ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."); *id.* at 89 (setting forth reasonableness standard for evaluation of prisoners' constitutional claims). Many of the early federal decisions came during the civil rights movement and addressed racially discriminatory prison practices. *See, e.g.*, Lee v. Washington, 390 U.S. 333, 334 (1968) (holding that racial segregation in Alabama prisons violates equal protection).

[67] *See, e.g.*, Allen v. Illinois, 478 U.S. 364, 370-75 (1986) (holding that statutory commitment of sex offenders was not sufficiently punitive to trigger Fifth Amendment protection against compelled self-incrimination); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 165-66 (1963) (holding that nominally civil deprivation of citizenship was sufficiently punitive to require the criminal due process protections of the Constitution). On the increasing prevalence of "hybrid" sanctions, see Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 792-94 (1997).

[68] *See* Gall v. United States, 128 S. Ct. 586 (2007); United States v. Booker, 543 U.S. 220 (2005); Blakely v. Washington, 542 U.S. 296 (2004).

[69] In this Article, I do not address at length the recent Sixth Amendment cases regulating sentencing procedures. But as I argue elsewhere, some of those decisions do reflect

administration of punishment, the state's intentions can make the difference between a constitutional violation and a permissible use of the penal power.

A. INTENT *TO PUNISH*

The Eighth Amendment prohibition of cruel and unusual punishments is the most visible constitutional regulation of punishment, but it is not the only one. Various procedural protections, including the prohibitions on ex post facto laws and bills of attainder in Article I, as well as the Double Jeopardy Clause of the Fifth Amendment, effectively restrict the manner in which the state exercises its power to punish. For these constitutional restrictions to apply, the state action in question must be properly characterized as "punishment," or in some cases, even more narrowly as "*criminal* punishment."[70] Whether state action constitutes criminal punishment is an inquiry that begins with the state's intentions: when the state imposed the burden or liability at issue, did it intend to punish? Or, to use the Supreme Court's term of art, did the state have "punitive intent"?[71]

Recent laws targeted at sex offenders have generated a series of cases in which the parties contest the punitive character of the state action.[72]

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concerns about the substantive severity of criminal sentences. *See* Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 320-22 (2005).

[70] The doctrine gets a bit complicated because the Eighth Amendment is the only one of these various constitutional provisions that actually uses the term "punishment." The Supreme Court has recognized a category of "civil punishment" and applied the Eighth Amendment to civil forfeitures. Austin v. United States, 509 U.S. 602, 609-10 & n.6 (1993). The Bill of Attainder Clause also applies only to "punishment," *Nixon v. Admin. Gen. Servs.*, 433 U.S. 425, 468-71 (1977), but in that context "punishment" need not be criminal, *United States v. Lovett*, 328 U.S. 303, 315 (1946). For other constitutional provisions, the question has often been framed as whether the punishment being imposed is *criminal*. *See* Hudson v. United States, 522 U.S. 93, 98-100 (1997) ("[T]he Double Jeopardy Clause does not prohibit the imposition of all additional sanctions that could, in common parlance, be described as punishment. The Clause protects only against the imposition of multiple *criminal* punishments for the same offense." (internal quotation marks and citations omitted)); Kansas v. Hendricks, 521 U.S. 346, 369-71 (1997) (rejecting double jeopardy and ex post facto challenges on grounds that the challenged law did not impose criminal punishment). The privilege against self-incrimination, the due process requirement of proof beyond a reasonable doubt, and Sixth Amendment protections are also limited to criminal cases.

[71] *See, e.g.*, *Hendricks*, 521 U.S. at 368-69. As will become clear, "punitive intent" is to be distinguished from another term used by the Court, "penological purpose." Penological purpose refers to the goals or desired ends of punishment, not the mere intent to punish. For more on penological purpose, see *infra* Part III.B.

[72] A second set of examples, which I do not discuss in the text, are cases involving constitutional challenges to conditions of confinement brought by pre-trial detainees. Since the detainees are not yet convicted and sentenced, a question arises as to whether their conditions of confinement may be labeled "punishment" for purposes of constitutional analysis. *See* Bell v. Wolfish, 441 U.S. 520, 535 (1979) (deciding, in the context of a Fifth

Consider Leroy Hendricks: on the eve of his scheduled release from prison for sex offenses, Kansas passed the Sexually Violent Predator Act, which established procedures for the indefinite commitment of sex offenders designated "sexually violent predators," and promptly committed Hendricks under the new law.[73] When Hendricks challenged the law on double jeopardy and ex post facto grounds, Kansas argued that the law did not impose criminal punishment and thus neither of these constitutional provisions applied.[74]

To decide whether the constitutional restrictions on punishment apply to a sanction not clearly labeled as criminal, courts look to legislative intent. This inquiry is "first of all a matter of statutory construction."[75] If the relevant statute reveals a clear intent to impose criminal punishment, the Ex Post Facto Clause and other constitutional restrictions on punishment apply. If the manifest legislative intent is not punitive—if, for example, the law's preamble cites a concern for public safety and the law is codified in the civil code—courts will go on to ask "whether the statutory scheme is so punitive either in purpose or effect as to negate [the State's] intention to deem it civil."[76] To analyze the punitive effects of a law, courts may consider several factors, including whether the sanction involved an affirmative

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Amendment due process challenge to "double-bunking" of pretrial detainees, that "the proper inquiry is whether those conditions amount to punishment"); *id.* at 538 ("A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental objective."); Demery v. Arpaio, 378 F.3d 1020, 1033 (9th Cir. 2004) (finding that a sheriff's use of webcams to stream live images of pretrial detainees onto the Internet was "not reasonably related to a non-punitive purpose" and thus constituted punishment).

[73] *Hendricks*, 521 U.S. at 350-52 (describing the 1994 Act); *id.* at 353-54 (stating that Hendricks was convicted in 1984, sentenced to ten years in prison, and originally scheduled for release in 1994); *id.* at 367-68 (stating that Hendricks was the first person committed under the Act).

[74] *Id.* at 360-61. Hendricks also raised substantive due process arguments, which the Supreme Court rejected. *See id.* at 356-60. Because I am interested in the state's use of force, I focus on cases involving compelled physical confinement of sex offenders. However, similar constitutional analysis has been applied to other burdens on sex offenders, including registration requirements and residency restrictions. *See, e.g.*, Smith v. Doe, 538 U.S. 84, 96 (2003) (upholding Alaska Sex Offender Registration Act); Doe v. Miller, 405 F.3d 700, 723 (8th Cir. 2005) (upholding Iowa law prohibiting those convicted of sex offenses against minors from residing within 2000 feet of a school or child care facility); Russell v. Gregoire, 124 F.3d 1079, 1089, 1093 (9th Cir. 1997) (upholding registration and notification provisions of Washington sex offender statute).

[75] *Hendricks*, 521 U.S. at 361 (quoting Allen v. Illinois, 478 U.S. 364, 368 (1986)).

[76] *Smith*, 538 U.S. at 92 (internal quotation marks omitted) (quoting *Hendricks*, 521 U.S. at 361). This language reveals, albeit subtly, the extent to which collective intention is constructed rather than "discovered." The Court's formulation allows for the possibility of a law that lacks "manifest" punitive intent, but is nonetheless "punitive in purpose."

disability or restraint; whether the sanction is historically associated with criminal punishment; whether scienter or intent is required; whether the sanction serves retributive or deterrent aims; whether the behavior for which the sanction is imposed is already defined as a crime; whether the sanction is rationally connected to an alternative, non-punitive purpose; and whether the sanction is excessive in relation to that alternative purpose.[77] Under current doctrine, these factors are "neither exhaustive nor dispositive."[78] Emphasizing the Kansas legislature's intent to ensure public safety by incapacitating dangerous sex offenders, the *Hendricks* Court found that the Kansas Sexually Violent Predator Act was not "punishment" for constitutional purposes.[79]

As it was originally stated in 1963 in *Kennedy v. Mendoza-Martinez* and summarized in subsequent opinions, the punitiveness analysis requires judicial scrutiny of both legislative purposes and statutory effects.[80] The statutory text is the starting point, but it is not the final arbiter of intention. "[A] civil label is not always dispositive."[81] Indeed, the *Mendoza-Martinez* approach to punitive intent contemplates the possibility of a disparity between legislative intent as determined by statutory construction, on one hand, and legislative intent as determined by a more complex analysis of multiple factors, on the other. Moreover, legislative intent—however ascertained—is not itself wholly determinative. The doctrine allows, in theory, for a statute's effects to take precedence over its intent: a law sufficiently "punitive in its effects" will be subject to constitutional restrictions on punishment notwithstanding a manifest civil purpose.[82]

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[77] This list of factors was originally set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). These factors are culled from cases addressing what counts as punishment in several contexts—ex post facto, double jeopardy, bills of attainder, and the Sixth and Eighth Amendments. Accordingly, "the *Mendoza-Martinez* factors are designed to apply in various constitutional contexts" and "are neither exhaustive nor dispositive, but are useful guideposts." *Smith*, 538 U.S. at 97 (internal quotation marks and citations omitted).

[78] *See Smith*, 538 U.S. at 97 (quoting United States v. Ward, 448 U.S. 242, 249 (1980)).

[79] The Court first noted that "commitment under the Act does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence." *Hendricks*, 521 U.S. at 361-62. The Court then acknowledged that the state court had construed "the Act's sole purpose [as] incapacitation," but argued that "incapacitation may be a legitimate end of the civil law." *Id.* at 365-66; *see also id.* at 368-69 (concluding that the Act was non-punitive).

[80] "Purpose tests" and "effects tests" are, of course, frequently deployed in constitutional doctrine, and the Eighth Amendment is not the only context in which the Court combines the two sorts of inquiries. *See* Fallon, *supra* note 8, at 69-74.

[81] *Hendricks*, 521 U.S. at 361 (quoting Allen v. Illinois, 478 U.S. 364, 369 (1986)).

[82] Attempts to establish punitiveness through punitive *effects* may be difficult after *Seling v. Young*, 531 U.S. 250 (2001). There, Andre Brigham Young brought double jeopardy and

As applied, however, the *Mendoza-Martinez* test has rarely led courts to find legislative intent to be anything other than what, at the time of litigation, government lawyers claim it to be.[83] The individual challenging an allegedly punitive law has the burden to establish its punitive character by "the clearest proof."[84] This rigid evidentiary standard obscures the fact that intentions, especially collective intentions, are not "proven," strictly speaking, but only constructed. There is considerable room for interpretation, especially when a decision-maker must classify an intention expressed in one way (intent to incapacitate) as a member of a larger category of intention (intent to punish).[85] All observers may agree that the Kansas law was intended to incapacitate, but it is far from clear that incapacitation is an alternative to punishment, as opposed to a specific form of it. The *Hendricks* majority cited retribution and deterrence as the primary purposes of the criminal law, but in other contexts the preservation of public safety via incapacitation is widely recognized as a goal of punishment.[86] The process of constructing intent, and of classifying intentions into legally relevant categories, necessarily involves normative judgments.[87]

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ex post facto challenges to a sex offender confinement statute very similar to the one sustained in *Hendricks*. Young argued that given the restrictive conditions and indefinite duration of his confinement, the confinement statute was clearly punitive in effect as applied to him. *Id.* at 259-60, 262. The Supreme Court rejected the "punitive-as-applied" challenge as categorically unworkable: since an individual offender's conditions of confinement are likely to change over time, an as-applied analysis "would never conclusively resolve whether a particular scheme is punitive." *Id.* at 263. The Court reserved the question whether it might consider actual conditions of confinement to determine "in the first instance" if a statute was civil or criminal. *Id.* at 266. The problem with Young's claim seemed to be that he acknowledged the statute was civil in general, then argued it was punitive as applied to him.

[83] In *Mendoza-Martinez*, the Court found punitive intent underlying a federal statute that deprived those who left the country to avoid military service of citizenship. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 166-69 (1963). Subsequent Supreme Court decisions that apply *Mendoza-Martinez* have consistently found the government practices in question not to qualify as punishment. *See Smith*, 538 U.S. 84 (discussed *supra* note 74); *Seling*, 531 U.S. 250 (discussed *supra* note 82); Hudson v. United States, 522 U.S. 93 (1997); *Hendricks*, 521 U.S. at 368-69; *Ward*, 448 U.S. at 249-51 (holding that monetary penalty for oil pollution did not constitute punishment); Bell v. Wolfish, 441 U.S. 520, 537-41 (1979) (finding that "double-bunking" of pretrial detainees did not constitute punishment).

[84] *See, e.g.*, *Seling*, 531 U.S. at 261.

[85] For further elaboration, see *infra* notes 199-201 and accompanying text.

[86] *Hendricks*, 521 U.S. at 361-62. In *Ewing v. California*, the Court identified incapacitation as the intention underlying California's clearly punitive three strikes law. *See infra* Part III.B.

[87] *See supra* Part II.C.

Which normative judgments were important to *Kansas v. Hendricks*? The text of the majority opinion offers reason to believe that the outcome of *Hendricks* was driven primarily by the Court's determination that the appropriate response to sex offenders is a matter of legislative prerogative, not to be second-guessed by the judiciary.[88] If this reading is correct, the discussion of punitive intent is best understood as a proxy for a principle of deference to legislative choices. And despite the frequent claim that "deference" manifests judicial abstention from the exercise of subjective judgment, in the context of judicial review the choice to defer is a normative choice.[89]

Most of the cases involving a search for punitive intent have involved constitutional provisions other than the Eighth Amendment. Recently, however, the Supreme Court introduced something akin to a punitive intent requirement to its Eighth Amendment capital punishment jurisprudence.[90] In *Baze v. Rees*, the Court interpreted the ban on cruel and unusual punishments to proscribe only pain or harm that resulted from more than mere negligence. Ralph Baze and Thomas Bowling, prisoners facing execution, argued that Kentucky's lethal injection procedures posed an unnecessary and thus unconstitutional risk of accidental infliction of severe pain.[91] The majority rejected this argument, borrowing from Eighth Amendment decisions concerning prison conditions to conclude that only exposure to "a substantial risk of serious harm" or an "objectively intolerable risk of harm," neither of which was proven by the Kentucky prisoners, could establish that state officials were sufficiently blameworthy

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[88] Justice Thomas's majority opinion contains several statements of deference to legislative choices. *See Hendricks*, 521 U.S. at 359 ("[W]e have never required state legislatures to adopt any particular nomenclature in drafting civil commitment statutes."); *id.* at 360 n.3 ("We recognize . . . that psychiatric professionals are not in complete harmony in casting pedophilia, or paraphilias in general, as 'mental illnesses.' These disagreements, however, do not tie the State's hands in setting the bounds of its civil commitment laws. In fact, it is precisely where such disagreement exists that legislatures have been afforded the widest latitude . . . ."); *id.* at 368 n.4 ("[T]he States enjoy wide latitude in developing treatment regimens.").

[89] Paul Horwitz identifies two general reasons that courts might defer to a legislature or some other decisionmaking entity: the legal authority of the deferee; and the "epistemic authority," or superior knowledge, of the deferee. Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1078-90 (2008). But as becomes clear in Horwitz's discussion, comparative epistemic advantage and the scope of legal authority are themselves subject to judicial interpretation. *See, e.g.*, *id.* at 1093-94; *see also* Rostker v. Goldberg, 453 U.S. 57, 112 (1981) (Marshall, J., dissenting) (describing professed deference to legislative authority as a "hollow shibboleth" invoked to substitute for more substantive constitutional analysis).

[90] Baze v. Rees, 128 S. Ct. 1520 (2008).

[91] *Id.* at 1530.

and thus that the Eighth Amendment had been violated.[92] Recalling Holmes once more, we might understand the Court as holding that painful executions, if too slight a risk, are mere stumbles. The Eighth Amendment, by this reasoning, requires a kick.[93]

As noted previously, various constitutional claims require a threshold showing that the state action in question is punishment. What counts as punishment is dependent, in turn, on the relevant state actor's (usually the legislature's) punitive intent. But legislative intent is not an objective fact that is plugged into a formalistic legal analysis; rather, it is a matter of interpretation that demands normative judgment. As the Wisconsin jury discussed above managed to reach an acquittal by declining to find that the defendant "knew" he possessed a gun, a court can exempt legislative action from the constitutional restrictions on punishment by declining to find punitive intent.[94]

B. INTENT *IN* PUNISHING

Even when the state's general intent to punish is not questioned, constitutional protections may vary depending on the specific reason for which the state wishes to punish. Penological purposes, or the state's intentions *in* punishing, are central to the Eighth Amendment proportionality analysis. In deciding whether a punishment is disproportionately severe, and thus cruel and unusual, courts identify the state's penological purposes and ask whether the punishment is excessive in relation to those purposes.

The Supreme Court has based a handful of recent Eighth Amendment decisions on assessments of penological purpose,[95] but these assessments were nowhere more critical than in *Ewing v. California*.[96] In a well-publicized challenge to California's three strikes law, Gary Albert Ewing argued that a prison sentence of twenty-five years to life was disproportionately severe, and thus cruel and unusual, when imposed for

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[92] *Id.* at 1530-31 (quoting Farmer v. Brennan, 511 U.S. 825, 842, 846 & n.9 (1994)). For more on the Eighth Amendment jurisprudence of prisons, see *infra* Part III.C.

[93] *See Baze*, 128 S. Ct. at 1531 ("[A]n isolated mishap alone does not give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty, or that the procedure at issue gives rise to a 'substantial risk of serious harm.'").

[94] *See supra* text accompanying notes 54-58.

[95] *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 571 (2005); Ewing v. California, 538 U.S. 11, 29-31 (2003); Atkins v. Virginia, 536 U.S. 304, 318-20 (2002).

[96] 538 U.S. 11.

shoplifting with a prior criminal record.[97] A plurality of the Court agreed that the Eighth Amendment prohibited "grossly disproportionate" sanctions, but ultimately rejected Ewing's claim that his sentence was excessive in relation to his crime.[98] The state's specific penological goals were a crucial ingredient of the proportionality analysis: in order to determine whether a sentence was disproportionate, or excessive, it was necessary to consider what goal the sentence was intended to serve.[99] California had decided to incapacitate repeat offenders by imposing long prison sentences, and, the plurality reasoned, Ewing's effective life sentence was not excessive given that specific purpose.[100]

In a separate concurrence, Justice Scalia set forth an even stronger account of the importance of the state's penological purpose to the outcome. He claimed that "[p]roportionality—the notion that the punishment should fit the crime—is inherently a concept tied to the penological goal of retribution."[101] On this reasoning, a state that imposes punishment for any reason other than retribution is not subject to a proportionality requirement. Justice Scalia argued that because the Eighth Amendment does not require states to pursue retribution as a penological goal, the Eighth Amendment contains no proportionality principle whatsoever.[102] So far, no Supreme Court majority has endorsed this claim that the variety of permissible purposes of punishment eliminates any constitutional proportionality requirement; the *Ewing* plurality insisted the Eighth Amendment contained a "narrow proportionality principle" applicable to non-capital sentences.[103]

One could view the inquiry into penological purpose as a mechanism for judicial deference to the legislative branch, much as the inquiry into punitive intent in *Kansas v. Hendricks* served deference to the legislature there. In the Eighth Amendment proportionality context, courts take state intentions into account so as not to interfere with them.[104] Put differently, one could view the inquiry into penological purposes as an attempt to set a

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[97] *Id.* at 28-30.

[98] *Id.* at 21, 30.

[99] *See id.* at 24-27. Justice O'Connor's plurality opinion reasoned that because "the Constitution does not mandate adoption of any one penological theory," courts should defer to legislative policy choices concerning the purposes of criminal sanctions. *Id.* at 25.

[100] *Id.* at 29-30.

[101] *Id.* at 31 (Scalia, J., concurring).

[102] *Id.*; *see also* Harmelin v. Michigan, 501 U.S. 957, 965 (1991) (Scalia, J., joined by Rehnquist, C.J.).

[103] *Ewing*, 538 U.S. at 20. However, any limitation on government power imposed by this narrow proportionality principle may be effectively eliminated by the state's ability to choose among broadly defined penological goals. *See infra* Part IV.B.

[104] *See Ewing*, 538 U.S. at 24-26, 29-30.

baseline against which courts judge whether punishments are "excessive" or not. In *Ewing*, for instance, the plurality implied indirectly, and Justice Scalia suggested even more explicitly, that had California adopted its three strikes law with the intent to impose "just deserts" in a retributive sense, the appropriate punishment for shoplifting golf clubs may well have been less severe.[105] Against a baseline determined by incapacitation as a goal, however, the 25-50-year sentence was not excessive. Obviously, this approach leaves the Eighth Amendment as a relatively weak restriction of legislative power, since the legislature is permitted to select the baseline against which its own acts will be judged.[106]

On the particular facts of *Ewing*, it is not clear that the Supreme Court was actually deferring to legislative purpose so much as simply endorsing the mandatory sentence itself. A close reading reveals no evidence for the proposition that the adoption of the three strikes law represented "a shift in the State's sentencing policies" away from retribution.[107] Rather, California had long taken the "kitchen sink" approach to penological purposes, citing multiple goals at once. The preamble to the three strikes law specifically identifies "ensur[ing] greater punishment" as one of the many goals of the law, and the State's brief to the Supreme Court emphasized that the long sentences were justified by the "enhanced blameworthiness" and "aggravated . . . culpability" of the repeat offender.[108] The notion that California had deliberately foregone retribution in favor of other penological purposes was apparently introduced, with some help from Justice Scalia, at oral argument.[109] A better reading of

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[105] *See id.* at 25-26 (plurality opinion) (emphasizing that "the Constitution 'does not mandate adoption of any one penological theory,'" and attributing California's law to the adoption of incapacitation and deterrence theories); *id.* at 31 (Scalia, J., concurring) (claiming that proportionality is an inherently retributive concept, and stating that the *Ewing* plurality failed to "establish that 25-years-to-life is a 'proportionate' punishment for stealing three golf clubs").

[106] *See infra* notes 220-23 and accompanying text.

[107] *Ewing*, 538 U.S. at 14.

[108] CAL. PENAL CODE § 667(b) (West 1999); Respondent's Brief on the Merits at 8, 18, 21, *Ewing*, 538 U.S. 11 (No. 01-6978). Furthermore, the political and popular discourse surrounding the enactment of the law strongly emphasized "just deserts." *See* Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1317 (2006) (collecting sources).

[109] *See* Transcript of Oral Argument at 44, *Ewing*, 538 U.S. 11 (No. 01-6978) ("QUESTION: I would have thought your response . . . would [be] that . . . it depends on what you want your penal goals to be. California has decided that disabling the criminal is the most important thing . . . . QUESTION: . . . If the objective . . . is retribution, then, sure, I guess it's disproportionate . . . . But if your purpose is disabling the criminal, I'm not sure that [a life term for speeding tickets] is disproportionate."). For more details, see Ristroph, *supra* note 108, at 1317-18 & nn.87-89.

Ewing, then, may be that the intent inquiry simply served as a vehicle for a normative judgment about the right outcome of the case. A majority of Justices seem to have believed that California's law, and Gary Ewing's sentence, was worth sustaining, and they were able to achieve this result with their own distinctive interpretation of the state's penological purposes. Critics of appeals to legislative intent in statutory interpretation argue that because judges can always find evidence to support any professed intent, legislative intent analysis actually serves as a vehicle for judges to enforce their subjective policy preferences. If using legislative history is like "looking over a crowd and picking out your friends," perhaps the same is true of the appeals to penological purpose in *Ewing*.[110]

Indeed, without an understanding of intent analysis as an opportunity for normative judgment, it is difficult to reconcile the analysis of state intentions in *Hendricks* and *Ewing*. Recall that in *Hendricks*, public safety as a state purpose was viewed as evidence that long-term, indefinite confinement was not punishment at all and not subject to ex post facto or double jeopardy restrictions. In *Ewing*, public safety as a state purpose was viewed as a rationale for punishment that rendered long-term, indefinite confinement permissible under the Eighth Amendment.[111] The cases are clearly inconsistent in their assessments of the significance of public safety as a motive for confinement. They are consistent, however, in that in each case, the inquiry into state intentions appears to be a point of flexibility at which the Court can give effect to a normative judgment about the right outcome.

Assessments of the state's intentions in punishing have similarly shaped several recent and controversial capital punishment decisions. In *Atkins v. Virginia*, the Supreme Court held that death sentences were impermissible for any mentally retarded offenders, reasoning that the Eighth Amendment banned "excessive" punishments,[112] including punishments that fail to "measurably contribute" to a legitimate penological purpose.[113] The Court concluded that death sentences for mentally retarded offenders failed to "measurably advance the deterrent or retributive purpose of the death penalty."[114] It applied similar reasoning in *Roper v. Simmons* to find the death penalty unconstitutional for any defendant who committed

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[110] *See* Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (attributing this criticism of judicial reliance on legislative history to Judge Harold Leventhal).

[111] *See supra* note 79 and accompanying text.

[112] 536 U.S. 304, 311 (2003).

[113] *Id.* at 319 (quoting Enmund v. Florida, 458 U.S. 782, 798 (1982)).

[114] *Id.* at 321.

his crime while still a juvenile[115] and in *Kennedy v. Louisiana* to find the death penalty unconstitutional as punishment for child rape not resulting in death.[116]

On the surface, these capital cases turn more on a judgment about the state's means than on one about ends or purposes. The critical finding in each case is the Court's determination that capital punishment, as applied in the particular case, is not an effective or necessary means to achieve legitimate penological purposes. The Court's initial assessment of penological purposes is nonetheless central to the outcome: were incapacitation recognized as a legitimate purpose of capital punishment (as it is a legitimate purpose of imprisonment in *Ewing*), it would be much harder to conclude that executions of juveniles, mentally disabled offenders, or child rapists failed to serve legitimate purposes. Furthermore, the very judgment that the means fail to serve retributive or deterrent purposes is a highly contested one. Whether the death penalty for this or that class of offenders has deterrent effects is, in theory, subject to empirical verification, but in practice researchers have reached little consensus on the issue.[117] And whether the death penalty serves retributive purposes is not even pretended to be an empirical question. *Atkins*, *Roper*, and *Kennedy* each produced vehement dissenting opinions that reasserted the retributive value of capital punishment in the particular circumstances in question.[118]

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[115] 543 U.S. 551, 571-73 (2005).

[116] 128 S. Ct. 2641, 2661-62 (2008).

[117] *See, e.g.*, Jeffrey Fagan, *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*, 4 OHIO ST. J. CRIM. L. 255, 260-61 (2006) (listing flaws in studies that purport to show the deterrent effects of the death penalty); Lawrence Katz et al., *Prison Conditions, Capital Punishment, and Deterrence*, 5 AM. L. & ECON. REV. 318, 321-22 (2003) ("There simply does not appear to be enough information in the data on capital punishment to reliably estimate a deterrent effect."); Joanna M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment's Differing Impact Among States*, 104 MICH. L. REV. 203, 204-07 (2005) (reporting empirical findings that capital punishment has a deterrent effect in some states but a "brutalization" effect (increasing murder rates) in many more states).

[118] *See Kennedy*, 128 S. Ct. at 2675-77 (Alito, J., dissenting); *Roper*, 543 U.S. at 621 (Scalia, J., dissenting) ("The Court's contention that the goals of retribution and deterrence are not served by executing murderers under 18 is . . . transparently false."); *Atkins*, 536 U.S. at 350-52 (Scalia, J., dissenting); *see also* Ristroph, *supra* note 108, at 1334-35 (discussing the non-falsifiable character of claims of retribution).

C. INTENT IN THE PRISON

A third context in which intentions matter to the law of punishment is the regulation of prison itself. When conditions or events within prisons[119] are challenged as cruel and unusual punishment, courts assess the states of mind of the prison officials involved. As a preliminary matter, note the distinctive procedural context in which challenges to prison conditions arise. The ex post facto, double jeopardy, and Eighth Amendment proportionality claims discussed in Parts III.A and III.B are typically raised as quasi-defenses in criminal litigation, that is, as arguments against sentences imposed by the state. In those cases, the remedy sought is simply not to be punished, or to be punished less severely. But Eighth Amendment challenges to specific acts or conditions within prison are usually framed as civil suits seeking damages under 42 U.S.C. § 1983 or as *Bivens* actions against federal officials.[120] When Eighth Amendment claims are raised in § 1983 suits, courts are not trying to assess an *institutional* intent in the sense of a legislative intent to punish or to pursue a given penological goal. Rather, the intent inquiry is into the mental state of an identifiable individual state actor (or several specific individuals) who may be personally liable for a constitutional violation.[121] Specifically, prisoner

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[119] I am focusing on prison terms for already-convicted individuals. As noted above, conditions of pretrial detention must first meet the threshold inquiry of punitive intent, or else they are not considered punishment at all. *See supra* note 72.

[120] *See* 42 U.S.C. § 1983 (2000); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). In § 1983 suits, there is a clearly identified individual or group of individuals who both represent the state and bear personal liability for any constitutional violation. Nominally, the question whether the individual state official violated the Constitution is a question of fact for a jury. However, state officials sued under § 1983 nearly always invoke the doctrine of qualified immunity, which protects the official from suit so long as her conduct does not violate "clearly established . . . constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Whether qualified immunity applies is a question of law, and one that courts decide at the earliest possible stage of the litigation. *See, e.g.*, Crawford-El v. Britton, 523 U.S. 574, 589 (1998). In conducting qualified immunity analysis, courts end up effectively deciding the factual questions, including those concerning the official's intentions, which would otherwise go to a jury. So, it is appropriate to say here that courts, not jurors, assess prison officials' states of mind. *See* Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 232 (2006) ("The more [the Supreme Court] treats qualified immunity as a legal question, and the less it acknowledges factual complexity, the better the Court can justify the allocation of decision-making about officials' entitlement to qualified immunity to judges, even where that might be inappropriate under ordinary rules of summary judgment.... [The Court] is transferring the adjudication of civil rights claims toward judges and away from juries.").

[121] *See* Farmer v. Brennan, 511 U.S. 825, 841 (1994) (distinguishing the "search for a subjective state of mind of a government entity" from the search for the state of mind of an individual government official); Hafer v. Melo, 502 U.S. 21, 27-30 (1991) (personal

plaintiffs must show that prison officials acted with bad intentions—"deliberate indifference" to grossly inadequate conditions or "malicious and sadistic" intentions in using force. As in the other areas of the law of punishment discussed above, the determinations of official intent offer judges a chance to give effect to their normative preferences.

The applicable intent standard in these cases depends on the substance of the prisoner's complaint. Challenges to conditions of confinement must show that prison officials acted with "deliberate indifference" to known and substantial deprivations of basic human necessities.[122] Deliberate indifference requires that prison officials have actual knowledge of substantial deprivations—such as grossly inadequate medical care—or substantial risks of serious harm—such as credible threats from other inmates—and that the officials fail to take reasonable measures to address the known deprivations or risks.[123] As the Supreme Court explained in *Farmer v. Brennan*, the actual knowledge requirement is a higher threshold than a civil recklessness standard (failure to act in face of an unjustifiable risk of which the defendant knew *or should have known*), and is instead equivalent to a criminal recklessness standard: "a person disregards a risk of harm of which he is aware."[124]

In a gesture similar to the preliminary inquiry of what constitutes punishment, the Court reasoned that the criminal recklessness standard more accurately reflected the intentionality implicit in the concept of punishment. "[A]n official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment."[125] In other words, negligent, but not deliberate, indifference[126] to the prisoners under one's care is not properly called "punishment," and so does not fall within the purview of the Eighth Amendment.

When a prisoner's Eighth Amendment complaint concerns a specific use of force by a prison official rather than the conditions of his

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liability); *see also* John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 49-57 (1998) (providing an overview of § 1983 claims and the doctrine of qualified immunity).

[122] Wilson v. Seiter, 501 U.S. 294, 301-05 (1991). As noted above, the Supreme Court recently adapted this "deliberate indifference" standard to evaluate the constitutionality of methods of execution. *See supra* notes 91-94 and accompanying text.

[123] *See Farmer*, 511 U.S. at 838-42.

[124] *Id.* at 837.

[125] *Id.* at 838; *see also id.* at 837 ("The Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments.'").

[126] The *Farmer* Court noted that deliberate indifference fell "between the poles of negligence at one end and purpose or knowledge at the other . . . ." *Id.* at 836.

confinement, a different intent standard applies. In excessive force cases, the question is whether the official used force "in a good faith effort to maintain or restore discipline[,] or maliciously and sadistically for the very purpose of causing harm."[127] The Court initially introduced this more stringent malice standard as a necessary accommodation of the competing interests at stake in prison disturbances. Though deliberate indifference to ongoing inadequate conditions "can typically be established without the necessity of balancing competing institutional concerns," the more complex decision to use force requires prison officials "to take into account the very real threats the unrest presents . . . ."[128] Prison disturbances called for greater deference to prison administrators, the Court reasoned. In this particular context, "a deliberate indifference standard does not . . . convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance."[129] Subsequently, the Court extended the "malicious and sadistic" intent standard to all excessive force claims against prison officials, whether the claims arose in the context of a disturbance or not.[130] Even as the Court retained the subjective element of an Eighth Amendment claim, it also specified objectively observable factors that could help judges make the intent assessment. "[T]he extent of injury suffered by an inmate," "the need for the application of force," "the amount of force used," the threat as perceived by the officials, and "any efforts made to temper the severity of a forceful response" could all help a court decide whether a prison official acted maliciously and sadistically.[131]

Tellingly, the "malicious and sadistic" standard is characterized as a "core *judicial* inquiry."[132] It is almost always judges rather than jurors who make factual findings about what prison officials intended.[133] This judicial fact-finding has tended to favor prison officials. The existing doctrinal formulation implies that good faith intentions to discipline and malicious sadism are the only two possible mental states with which corrections

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[127] Hudson v. McMillian, 503 U.S. 1, 6 (1992) (quoting Whitley v. Albers, 475 U.S. 312, 320-21 (1986)). *Whitley* introduced the "maliciously and sadistically" standard to govern claims of excessive force in the specific context of responses to a prison disturbance, see 475 U.S. at 320-21, but *Hudson* extended this standard to all allegations of excessive force within prison, see 503 U.S. at 7.

[128] *Whitley*, 475 U.S. at 320.

[129] *Id.*

[130] *Hudson*, 503 U.S. at 6-7.

[131] *Id.* at 7 (quoting *Whitley*, 475 U.S. at 321).

[132] *Id.* (emphasis added).

[133] *See supra* note 120.

officers use force.[134] Without proof of malice or sadism, courts presume that prison officials acted in good faith.[135] Of course, prison officials nearly invariably claim that their uses of force were good faith efforts to maintain order, and courts nearly invariably defer to these claims.[136] Though circumstantial evidence is nominally a permissible way to prove that force was used "wantonly" or maliciously, such evidence rarely persuades courts deciding between prisoners' claims of excessive force and officers' professions of good faith.[137] A regular exception appears to be the case of the prisoner who is badly beaten while in handcuffs or other restraints.[138] Otherwise, many excessive force claims falter on insufficient evidence of malice or deliberate indifference.[139]

Thus, in suits brought by prisoners, as in other areas of the constitutional law of punishment, judicial inquiries into state intentions are crucial and very often, outcome-determinative. Once again, the critical role of intent standards must be understood as a vehicle for courts to exercise

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[134] *Hudson*, 503 U.S. at 6 ("[T]he question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on whether force was applied in a good faith effort to maintain or restore discipline *or* maliciously and sadistically for the very purpose of causing harm." (quoting *Whitley*, 475 U.S. at 320-21) (emphasis added)).

[135] *See, e.g.*, Jeffers v. Gomez, 267 F.3d 895, 911-13 (9th Cir. 2001) (per curiam) (finding that correction officer who shot a prisoner who was being attacked by another inmate may have acted negligently, but nevertheless acted in good faith rather than maliciously or sadistically).

[136] *See, e.g.*, *Whitley*, 475 U.S. at 321-22; Rhodes v. Chapman, 452 U.S. 337, 350 n.14 (1981) (describing internal prison security as a matter within the discretion of prison administrators); *Jeffers*, 267 F.3d at 911-13; Williams v. Burton, 943 F.2d 1572, 1575 (11th Cir. 1991).

[137] *See Hudson*, 503 U.S. at 7 (stating that relationship between need for force and amount of force used, as well as extent of injury, may be considered to determine motive).

[138] *See, e.g.*, *id.* at 4, 9-10 (finding that prisoner stated Eighth Amendment claim after he was beaten while handcuffed, shackled, and held in place by a second officer); Watts v. McKinney, 394 F.3d 710, 711-12 (9th Cir. 2005) (finding that prisoner stated Eighth Amendment claim by alleging being slammed into wall and kicked in groin while handcuffed); Brooks v. Kyler, 204 F.3d 102, 107 (3d Cir. 2000) (finding that prisoner stated Eighth Amendment claim by alleging being beaten while handcuffed to a waist restraint belt and in leg shackles); Mitchell v. Maynard, 80 F.3d 1433, 1440 (10th Cir. 1996) (finding that prisoner stated Eighth Amendment claim by alleging being beaten while naked and shackled); *cf.* Hope v. Pelzer, 536 U.S. 730, 738 (2002) (finding "obvious" Eighth Amendment violation when prisoner was shackled to "hitching post" for hours without water or bathroom break, and noting "[a]ny safety concerns had long since abated by the time petitioner was handcuffed to the hitching post").

[139] *See, e.g.*, Duckworth v. Ahmad, 532 F.3d 675, 681-82 (7th Cir. 2008) (upholding denial of prisoner's Eighth Amendment claim for failure to establish "deliberate indifference," and noting that conduct constituting medical malpractice does not necessarily establish deliberate indifference); *see also supra* notes 135-36.

considerable discretion. There is substantial room for interpretation as to what a specific individual prison official was thinking as a prisoner was injured or mistreated, and even more room for interpretation when a court is asked to assess the intentions of a collective entity such as a legislature or executive agency.

IV. CONSTITUTIONALITY, MORALITY, AND INTENTION

The imprecision of intent analysis that we have seen in the law of punishment is not unknown to other areas of constitutional doctrine. From time to time, judges and scholars have suggested that government intentions are unknowable, too easily misconstrued, or irrelevant.[140] Despite the occasional complaints, government motives continue to drive much of constitutional doctrine.[141] One very notable exception is Fourth Amendment doctrine, which has repeatedly rejected inquiries into police officers' subjective mental states in favor of objective "reasonable officer" tests.[142] Somewhat incongruously, then, the pre-conviction use of force by state officials in arrests and investigations is regulated primarily through objective tests, while, as we have seen, the post-conviction use of force is regulated by an array of subjective inquiries.

Outside of the Fourth Amendment, in First and Fourteenth Amendment jurisprudence, motive analysis is so much taken for granted today that only rarely do courts or commentators articulate why motives matter. According to Richard Fallon, "The most familiar explanation of the relevance of governmental purpose in constitutional law builds on Holmes's aphorism that '[e]ven a dog distinguishes between being stumbled over and being kicked.'"[143] This is a lot of weight to put on a simple quip.[144] This

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[140] *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 610-11 (1987) (Scalia, J., dissenting) (criticizing the Court for striking down a law "essentially on the basis of 'its visceral knowledge of what *must* have motivated the legislators'" (quoting Edwards v. Aguillard, 778 F.2d 225, 227 (5th Cir. 1985) (Gee, J., dissenting))); *id.* at 612-16 (critiquing "secular purpose" as element of Establishment Clause jurisprudence).

[141] This is so despite the Supreme Court's occasional proclamations to the contrary. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 383 (1968) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."). For discussions of the misleading nature of *O'Brien*, see Kagan, *supra* note 2, at 414 ("[N]otwithstanding the Court's protestations in *O'Brien*, . . . First Amendment law . . . has as its primary, though unstated, object the discovery of improper government motives."); Rubenfeld, *supra* note 4, at 775-76 ("[T]he *O'Brien* test itself is centrally concerned with legislative purpose, despite the Court's protests to the contrary.").

[142] *See infra* notes 164-68 and accompanying text.

[143] Fallon, *supra* note 8, at 98.

Part looks beyond the quip to more elaborate normative arguments for and against basing constitutional outcomes on government intentions. Two disciplines, constitutional law theory and moral philosophy, give varying answers to the question whether intentions should matter to the permissibility of action.

A. INTENTIONS AND CONSTITUTIONAL THEORY

Recall that intentions have several functions. Authorial intention may be relevant to the task of textual interpretation, and separately, an actor's intention may determine the law's classification of his or her act. The vast literature on authorial intent and the interpretation of constitutional or statutory text may be set aside here, for our focus is on the question of classification: why might state intentions be relevant to the classification of state actions as constitutional or unconstitutional? Here, I explore several arguments in defense of intent inquiries, and then examine the rationales for the *rejection* of subjective inquiries in Fourth Amendment doctrine.

First, the relevance of state intentions can be defended with a consequentialist argument that focuses on the correlation between intentions and results; the claim is that by basing legal liability on certain intentions, we can prevent or reduce the bad results associated with those intentions. Under this view, intent may be legally significant if it serves as a proxy or predictor of some other harm. A kick is worse than a stumble because kicks cause more damage, or because those who intend to kick are more likely to do damage than those who are merely clumsy or negligent.[145] Elena Kagan has proposed an argument along these lines as a possible

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[144] Even the quip is unclear: it is usually taken to signify that there is a recognized distinction between accidents and intentional harm, one so obvious that even a dog could see it. But note that the quip could also direct our attention to the subjective views of the victim of harm—the dog—and suggest that because all victims see a distinction between intentional harm and accidents, the law should reflect that distinction as well. With the possible exception of *Baze v. Rees*, see supra notes 90-93 and accompanying text, American courts have not typically considered the subjective experience of the prisoner as a key determinant of whether state action is "punishment," or whether it is "cruel and unusual." In a forthcoming article, Adam Kolber argues that assessments of punishment severity must take into account the prisoner's subjective experience. Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. (forthcoming 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1090337.

[145] For example, Holmes noted that the common law crime of larceny required both the taking of property and proof of an intention to deprive the owner of ownership. Accidental displacement of property, or even unauthorized borrowing, is not larceny. Here intent serves to identify a likely future harm—permanent deprivation of property—and allow the state to punish for that. "[T]he intent is an index to the external event which probably would have happened . . . ." HOLMES, *supra* note 1, at 72.

explanation for the focus on content-based and viewpoint-based suppression of speech in First Amendment doctrine.[146] And Charles Fried has suggested that motive inquiries may sometimes be the most efficient way of preventing bad results or achieving good ones.[147]

Another theory of government motive analysis focuses on certain kinds of intentions as being themselves intrinsically harmful. On Kagan's account, this theory underlies Holmes's distinction between stumbles and kicks: "The former may suggest a lack of optimal care, but the latter suggests contempt or hatred."[148] Similar reasoning drives expressive theories of law, which classify certain kinds of government action as constitutional or unconstitutional based on the attitudes said actions express.[149] An attitude is not exactly equivalent to an intention, but government intentions help determine the social meaning, or expressed attitude, of state action.[150] The concern with intentional discrimination in equal protection doctrine can be understood as a reflection of the view that certain motivations are intrinsically harmful.[151] Scholars sympathetic to the expressivist view often emphasize that illicit intentions are neither necessary nor sufficient to establish unconstitutionality; courts must

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[146] Kagan, *supra* note 2, at 506-10.

> [I]n general, a system in which the government freely may restrict ideas on the ground that they challenge the power or wisdom of officials will produce a less healthy debate than a system in which the government has no such ability. A rule proscribing actions arising from censorial motive thus will promote [open discourse].

Id. at 508.

[147] If a particular effect is likely to be produced [in most cases] only by those who want to produce that effect, and if it is an effect that people not seeking to produce it are likely to avoid—as in the case of killing—then the prohibition directed at intentional killing reaches much of what is needed and does so without sweeping in presumably neutral or useful conduct that only produces this result accidentally.

Charles Fried, *Types*, 14 CONST. COMMENT. 55, 64 (1997).

[148] Kagan, *supra* note 2, at 510.

[149] *See* Anderson & Pildes, *supra* note 59, at 1504-05; Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 13-15 (2000).

[150] *See* Anderson & Pildes, *supra* note 59, at 1509 ("An attitude toward a person is a complex set of dispositions to perceive, have emotions, deliberate, and act in ways oriented toward that person."); *id.* at 1513 ("[P]eople's conscious purposes and intentions, while relevant, are not the sole determinants of what attitudes their actions express.").

[151] Kagan writes that "equal protection law . . . treats deliberate discrimination having trivial consequences as more problematic than incidental discrimination having great impact," Kagan, *supra* note 2, at 510-11, but the expressivist might refine this explanation to say that the consequences of deliberate discrimination are never trivial: "For example, the harm from racial segregation does not lie simply in its material consequences . . . . There is . . . also an independent expressive harm, which we would call a 'stigmatic' harm." Anderson & Pildes, *supra* note 59, at 1542.

evaluate the full public meaning of government action, taking into account not only intentions, but also effects and perceptions.[152]

A related but distinct account holds that illicit motives are a mark of bad moral character. Charles Fried defends this view, suggesting that even collective entities can have bad characters: "Our actions and our goals are what define us and what determine our character, and if bad things are part of what we are invested in, the corruption is more intense and complete. And so it may be with institutions as well."[153] But stated as a concern about institutional character, this argument seems ill-suited to explain constitutional doctrine. It requires us to understand findings of unconstitutionality as attributions of blame or condemnation applied to government entities. On most accounts, though, the Constitution is not so much a moral catechism for a personified government as a set of limitations on government power.[154] The concern with moral corruption relies on an anthropomorphic view of the state and may produce overly narrow constitutional protections.[155]

A more promising approach recasts the argument that illicit motives are a mark of bad character as a claim that illicit motives violate principles of government neutrality. Here, the concern is not so much a moral evaluation of the government, but an effort to preserve an open, unbiased decisionmaking process.[156] Paul Brest defended this account of motive

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[152] *See* Hellman, *supra* note 149, at 39 ("[E]vidence of subjective intent matters only so long as that evidence contributes to the public meaning of the action."). Tribe argues that "if a government-enacted rule of conduct is constitutionally inoffensive both on its face and as applied to the particular individual challenging it"—that is, inoffensive in its effects—the fact of illicit motive "tells us nothing more than that the government body engaged in an *unsuccessful attempt* to violate the Constitution." Laurence H. Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 SUP. CT. REV. 1, 23.

[153] Fried, *supra* note 147, at 64.

[154] Or, as put by Todd Rakoff: "We are not really that interested in whether our officials have good or bad souls . . . ." Todd Rakoff, Washington v. Davis *and the Objective Theory of Contracts*, 29 HARV. C.R.-C.L. L. REV. 63, 76 (1994).

[155] Several commentators have resisted any approach to equal protection doctrine that looks for blameworthy, "guilty" state actors rather than demanding collective responsibility for the effects of even unconscious discrimination. *See, e.g.*, Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1036 (1988); Lawrence, *supra* note 4, at 323-26.

[156] Fried, after initially introducing the language of character, seems to shift toward this more procedural commitment to government neutrality:

> The limits the Constitution places on government may be understood not just in terms of minimizing certain sorts of harms, but in ruling certain goals out of bounds for government altogether. The furtherance or suppression of religion, for instance, are simply not part of what government may aim at all.

analysis in one of the earliest treatments of the issue.[157] A reviewing court should ask "what criteria or objectives the [government] decisionmaker took into account"; the aim is not to prohibit specific substantive outcomes, but to ensure an unbiased political process.[158]

Since constitutional theorists first turned substantial attention to motive analysis over thirty years ago, almost all have concluded that motives are relevant to constitutionality in at least some ways, in at least some circumstances. Each of the accounts above recognizes the evidentiary challenges of motive analysis, but suggests that courts are capable of overcoming these challenges and making fair assessments of government intentions.[159] To be clear, these accounts suggest that only rarely, if ever, should government motives be wholly dispositive. Bad motives with no corresponding bad effects are sometimes portrayed as merely "unsuccessful attempt[s]" to violate the Constitution.[160] Separately, courts and commentators often assert that benign motives cannot save an otherwise unconstitutional law.[161] Within these limitations, constitutional theorists

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Fried, *supra* note 147, at 64.

[157] Paul Brest, Palmer v. Thompson*: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 125; *see also* Kagan, *supra* note 2, at 512-13 (describing requirements of neutral decisionmaking based in liberal and democratic theory).

[158] Brest, *supra* note 157, at 125. Brest applies this reasoning to argue that *Palmer v. Thompson*, 403 U.S. 217 (1971), was wrongly decided. *Palmer* involved an equal protection claim that the city of Jackson, Mississippi had closed its public swimming pools only to avoid having to open them to Blacks. The Supreme Court rejected this complaint: "[N]o case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it." *Id.* at 224. But under Brest's neutral process theory, actual racist motivations, assuming they were present, distorted the neutral decisionmaking process and violated the Equal Protection Clause, even if a fair and unbiased deliberation could conceivably have produced the same substantive outcome. Brest, *supra* note 157, at 125.

[159] *See, e.g.*, Anderson & Pildes, *supra* note 59, at 1524 (claiming that "[e]xpressive theories have resources, beyond agents' self-interpretations, for interpreting their purposes," and describing those resources); Brest, *supra* note 157, at 119-24 (discussing ways of ascertaining government intentions); Fried, *supra* note 147, at 61 (describing "a variety of devices" that can be used to assign intent to public actors); Kagan, *supra* note 2, at 509-10 (describing First Amendment rules that help "flush out improper motive"); Larry G. Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041, 1065-1127 (1978) (outlining extensive evidentiary principles to establish racial prejudice as a motivation).

[160] Tribe, *supra* note 152, at 23.

[161] *See, e.g.*, Simon, *supra* note 159, at 1046-47 (arguing that motive analysis "does *not* mean that a court should hold government action unconstitutional on the basis of the motivation behind it without regard to whether harmful consequences result"); Tribe, *supra* note 152, at 26 ("[A]n otherwise impermissible government action ordinarily cannot be saved from constitutional invalidation by the innocent, benign, or even exemplary motives or

have generally embraced the various ways in which First Amendment and equal protection doctrines take government motives into consideration.

There is one more explanation for the judicial concern with state intentions, an explanation more prosaic and less extensively theorized. The focus on state intentions may simply be an attempt to cabin the reach of the Constitution—that is, an attempt to avoid a world in which every government action comes within the Constitution's purview and requires extensive judicial scrutiny. This explanation seems most plausible when state intentions are critical to a threshold inquiry that precedes ultimate resolution of the constitutional question. For example, an intent to classify by race is a threshold requirement of equal protection doctrine; upon a showing of intentional racial classification, a court will then apply strict scrutiny to the classification. But without evidence that disparate effects are the result of intentional discrimination, courts apply a more deferential standard.[162] Similarly, as we have seen, an intent to punish is a threshold requirement of several constitutional provisions, including the Ex Post Facto Clause and the Double Jeopardy Clause, and in the absence of punitive intent courts tend to defer to legislative choices.[163]

To varying degrees, these arguments for the relevance of state intentions might explain aspects of First, Fourteenth, and Eighth Amendment doctrine. With respect to the *Fourth* Amendment, however, the Supreme Court has taken a different approach. Though the dog's distinction between kicks and stumbles is not entirely irrelevant to Fourth Amendment doctrine,[164] the Court has repeatedly emphasized that the

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intentions that led the government to take that action."); *see also* Parents Involved in Community Schools v. Seattle Sch. Dist. 1, 127 S. Ct. 2738, 2764-65 (2007) (rejecting argument that "benign" racial classifications be afforded more deference).

[162] Washington v. Davis, 426 U.S. 229, 242 (1976) ("Disproportionate impact is not irrelevant, but . . . [s]tanding alone, it does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.").

[163] *See supra* Part III.A.

[164] In *Brower v. County of Inyo*, 489 U.S. 593 (1989), the Court held that a Fourth Amendment "seizure" requires that the police act intentionally. The word "seizure," the Court reasoned, "can hardly be applied to an unknowing act." *Id.* at 596. But the Court parsed the kind of intention required in very specific terms:

> Thus, if a parked and unoccupied police car slips its brake and pins a passerby against a wall, it is likely that a tort has occurred, but not a violation of the Fourth Amendment. And the situation would not change if the passerby happened, by lucky chance, to be a serial murderer for whom there was an outstanding arrest warrant--even if, at the time he was thus pinned, he was in the process of running away from two pursuing constables. It is clear, in other words, that a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual's

constitutional reasonableness of police action does not depend on officers' intentions.[165] As other commentators have observed, this general rule is repeated often, but rarely explained or defended.[166] Government briefs defending strictly objective Fourth Amendment tests have made broad references to "justice and practicality"[167] and have warned of the "variability and instability"[168] of subjective inquiries. Wayne LaFave has argued that subjective inquiries will end up requiring too much of police officers.[169] It could be that courts believe themselves ill-suited to inquire into the subjective mental states of police officers. It could be that we care about how officers act, not what they think.[170] (Notice, though, that all these explanations for objective inquiries in Fourth Amendment doctrine could apply to the use of force in the Eighth Amendment context as well.)

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freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement *through means intentionally applied.*

Id. at 596-97. The Court has also found state intentions relevant to the Fourth Amendment analysis of "special needs" searches. *See, e.g.*, City of Indianapolis v. Edmond, 531 U.S. 32, 45-46 (2000) ("[P]rogrammatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion.").

[165] *See, e.g.*, Bond v. United States, 529 U.S. 334, 338 n.2 (2000) ("[T]he subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment .... [T]he issue is not his state of mind, but the objective effect of his actions." (citations omitted)); Whren v. United States, 517 U.S. 806, 813 (1996) ("[W]e have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers ...."); Graham v. Connor, 490 U.S. 386, 397 (1989) ("An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional."). *See generally* Dix, *supra* note 10 (describing rejection of subjective intent inquiries in most Fourth Amendment contexts).

[166] *See* Dix, *supra* note 10, at 444 (noting the "lack of any focused attention" on whether the rejection of subjective inquiries is consistent with Fourth Amendment principles).

[167] Brief for the United States at 31, Scott v. United States, 436 U.S. 128 (1978) (No. 76-6767).

[168] Brief for the United States as Amicus Curiae Supporting Petitioner at 19, Brigham City v. Stuart, 547 U.S. 398 (2006) (No. 05-502).

[169] 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 1.4(d) (4th ed. 2004).

[170] In *Whren v. United States*, the Supreme Court explained that the doctrinal focus on "objective factors" is not based primarily on evidentiary considerations. *Whren*, 517 U.S. at 814 (1996). But the Court offered no alternative rationale; it simply asserted that "the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, whatever the subjective intent." *Id.* This claim states the conclusion, but makes no defense of it. The concept of reasonableness does not itself preclude consideration of motivations. For example, in evaluating the reasonableness of a decision to hire or fire an employee, one might consider whether the decision was based on racial bias toward the employee.

Whatever the reason for the emphasis on objective inquiries in Fourth Amendment law, that doctrinal area is clearly exceptional: for the First, Eighth, and Fourteenth Amendments, state intentions matter.

B. INTENTIONS AND MORAL PERMISSIBILITY

In stark contrast to the widespread emphasis on intentions in constitutional analysis, a growing philosophical literature argues that intentions are *irrelevant* to moral permissibility. For the most part, these philosophical arguments draw on fictional problems that compare a scenario in which harm is intentionally inflicted to a similar scenario in which harm is foreseen and allowed to occur, but not actively intended.[171] The constitutional law of punishment occasionally relies on a similar intention-foresight distinction: legislation may be classified as non-punitive if the law's punishment-like effects are only foreseen but not intended,[172] and the use of force in prison passes constitutional muster when gratuitous harm to the prisoner is foreseen but not intended.[173] The philosophical challenges to this distinction may offer reasons for skepticism about these intent standards in the law of punishment. Indeed, David Enoch has recently argued that the reasons to question the distinction between intention and foresight are especially forceful in the context of state action.[174]

Much of the philosophical literature on intentions and moral permissibility stems from doubts about the doctrine of double effect. Generally, this doctrine posits that when an action has both a desirable and an undesirable effect—double effects—the action may be morally permissible so long as the undesirable effect, though foreseeable, is not actively intended either as an independent end or as a means to an end.[175]

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[171] This philosophical distinction between intention and foresight is not parallel to the simplest version of the dog's distinction, which separates intended harms from not-necessarily-foreseen stumbles. Here we are in the realm of more nuanced intent judgments.

[172] *See* Smith v. Doe, 538 U.S. 84, 98-99 (2003) (arguing that stigma imposed by sex offender registration requirement did not render the law punitive, since the stigma was merely incidental and not "an integral part of the objective of the regulatory scheme"). *See generally* Part III.A, *supra*.

[173] *See* Farmer v. Brennan, 511 U.S. 825, 841-43 (1994). *See generally* Part III.C, *supra*.

[174] *See* David Enoch, *Intending, Foreseeing, and the State*, 13 LEGAL THEORY 69 (2007).

[175] The doctrine is traced to the works of St. Augustine and Thomas Aquinas, and frequently invoked in Catholic theology. *See* Philippa Foot, *The Problem of Abortion and the Doctrine of Double Effect*, *in* VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY 19 (Oxford ed. 2002). For discussions of the doctrine in relation to *Vacco v. Quill*, 521 U.S. 793 (1997), and other constitutional decisions, see Edward C. Lyons, *In Incognito—The Principle of Double Effect in American Constitutional Law*, 57 FLA. L. REV. 469 (2005); Shiffrin, *supra* note 59.

Put simply, under the doctrine of double effect, intentions are at least sometimes relevant to moral permissibility.[176] To take one example, the doctrine is used to distinguish between a terrorist bomber who targets a children's hospital and intends the children's deaths, and a strategic bomber who targets a munitions factory, foreseeing but not intending that his bomb will also destroy a nearby children's hospital and kill the patients there. The terrorist bomber acts immorally; the strategic bomber does not.[177]

Some critics have rejected the doctrine as facially absurd: "It is a very odd idea . . . that a person's intentions play a role in fixing what he may or may not do."[178] Judith Jarvis Thomson imagines a pilot considering whether to bomb a village with both a munitions factory and a children's hospital: "Can anyone really think that the pilot should decide whether he may drop the bombs by looking inward for the intention with which he would be dropping them if he dropped them?"[179] Others place the burden of persuasion on the doctrine's proponents: "[N]o one has . . . come up with a satisfying theoretical explanation of why . . . the difference between consequences that are intended and those that are merely foreseen . . . should make a moral difference."[180] The critics of the doctrine of double effect argue that it rests on a mistaken conflation of the moral permissibility of an action with the moral worth of the agent who performs the action. Intentions are clearly relevant to the latter, but not necessarily relevant to the former: "There is such a thing as doing the right (or a permissible) thing for reasons that show one to be a bad person."[181]

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[176] *See* Foot, *supra* note 175, at 22 (emphasizing that supporters of the doctrine of double effect are committed to "the thesis that *sometimes* it makes a difference to the permissibility of an action involving harm to others that this harm, although foreseen, is not part of the agent's direct intention").

[177] I have adapted this example from Judith Jarvis Thomson, *Self-Defense*, 20 PHIL. & PUB. AFF. 283, 292 (1991). Thomson does not herself subscribe to the doctrine of double effect.

[178] *Id.* at 293.

[179] *Id.*; *see also* Judith Jarvis Thomson, *Physician-Assisted Suicide: Two Moral Arguments*, 109 ETHICS 497, 515 (1999) (imagining a doctor deciding whether to inject a patient with a lethal drug dose, and claiming that it is "absurd" to think that the moral permissibility of the injection "turns on whether the doctor would be doing so intending death or only intending relief from pain").

[180] T.M. Scanlon & Jonathan Dancy, *Intention and Permissibility* (pt. 1), 74 PROC. ARISTOTELIAN SOC. 301, 303 (2000).

[181] *Id.* at 305; *see also* Frances M. Kamm, *Terrorism and Several Moral Distinctions*, 12 LEGAL THEORY 19, 28 (2006) (arguing that an actor's intentions matter to the moral assessment of the actor, but not necessarily to the judgment whether the act itself is permissible); Thomson, *supra* note 179, at 517 ("[T]he question whether it is morally permissible for a person to do a thing just is not the same as the question whether the person who does it is thereby shown to be a bad person.").

David Enoch has recently expanded upon these appeals to intuition with the suggestion that reliance on the intention-foresight distinction is often an attempt to avoid moral responsibility. A bomber deciding whether to target a village should take responsibility for all foreseen consequences. Insisting that he intends some deaths but only foresees others is, arguably, "not so much . . . an honest attempt to unearth the morally relevant features of the circumstances but . . . an attempt to prepare a line of defense."[182] And this objection to the purported distinction between intended and merely foreseen harm, Enoch argues, is particularly relevant in the context of state action. "Perhaps . . . individuals are entitled to . . . settle for having a good will, and beyond that let chips fall where they may. But this is precisely what stateswomen and statesmen—and certainly states—are not entitled to settle for."[183] State actors have special responsibility to take into account all foreseen effects of their actions, and may not "hide behind the intending-foreseeing distinction."[184]

Enoch also suggests that because the collective intentions of state institutions are "highly complex" and "artificial things" constructed out of "the intentions of [individual state actors], . . . facts about decisionmaking mechanisms, . . . matters of institutional design, [and] internal power struggles," they are "very poor candidates for intrinsic normative significance."[185] He concludes that "we should be *very* suspicious" of the intending/foreseeing distinction "in the case of state action."[186] And even if

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[182] Enoch, *supra* note 174, at 81; *see also* ROBERT E. GOODIN, UTILITARIANISM AS A PUBLIC PHILOSOPHY 49 n.5 (1995) (noting that motives are usually invoked "principally in after-the-fact justifications of one's actions to others").

[183] Enoch, *supra* note 174, at 91. Enoch elaborates, citing Daryl Levinson:

> [P]erhaps restrictions on the responsibility of individuals are justified because individuals are autonomous, because much of the value in their lives comes from personal pursuits and relationships that are possible only if their responsibility for what goes on in the (more impersonal) world is restricted. But none of this is true of states and governments.

Id. at 91 (citing Daryl J. Levinson, *Personified Government and Constitutional Morality* (unpublished manuscript), *available at* http://www.law.ucla.edu/docs/daryl_draft__2_.pdf (last visited Oct. 11, 2008).

[184] *Id.* at 91. As Enoch notes, his argument is somewhat similar to one recently advanced by Cass Sunstein and Adrian Vermeule in the context of capital punishment. *See* Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 722 (2005) ("The very concept of 'intentional' action, and the moral relevance of intention, are both obscure when government is the pertinent moral agent."). Sunstein and Vermeule go on to argue that the act-omission distinction is inapplicable to governments, which influence outcomes both by acting and declining to act, and therefore empirical evidence that capital punishment deters murders may generate a positive obligation to impose death sentences. *See id.* at 724-28.

[185] Enoch, *supra* note 174, at 86.

[186] *Id.* at 93.

we retain doctrinal inquiries into state intentions, we should "be clear about the rationales" for doing so.[187]

Here, then, we have several arguments that intentions do not necessarily determine moral permissibility, especially in the context of state action. There is, of course, considerable distance between these philosophical discussions, focused as they are on the narrow distinction between intention and foresight, and the explanations offered by constitutional theorists for motive analysis in constitutional law. Together, however, the two literatures provide a substantial array of arguments that might justify, or condemn, the focus on state intentions in the constitutional law of punishment.

V. THE CONSTITUTIONAL LAW OF PUNISHMENT REVISITED

A. THE THRESHOLD INQUIRY

The first way in which state intentions are relevant to the constitutional law of punishment is the threshold inquiry into punitive intent. It seems clear that in order to apply constitutional provisions that restrict punishment, courts need a definition of punishment and some way to distinguish punishment from other unpleasant consequences of state action. Should intent be the basis of this distinction?

At least three different approaches to defining punishment have been proposed in Supreme Court opinions. The majority approach, as we have seen, places considerable weight on evidence of the state's "punitive intent," but objective factors are also nominally relevant.[188] A narrower definition, advanced by Justice Thomas, holds that only sentences formally authorized by statute or pronounced by a judge constitute "punishment."[189] Finally, some Justices have argued for a definition that focuses on the actual experience of the prisoner and encompasses prison conditions without

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[187] *Id.* at 97.

[188] *See supra* Part III.A.; *see also* Kamal Ghali, *No Slavery Except as a Punishment for Crime: The Punishment Clause and Sexual Slavery*, 55 UCLA L. REV. 607, 634-35 (2008) (describing "the intent approach" to defining punishment); Thomas K. Landry, *"Punishment" and the Eighth Amendment*, 57 OHIO ST. L.J. 1607, 1616-20 (1996) (describing "the subjectivist definition").

[189] *See* Helling v. McKinney, 509 U.S. 25, 40 (1993) (Thomas, J., dissenting) ("[J]udges or juries—but not jailers—impose 'punishment.'"). For further discussion of Justice Thomas's arguments, see Ghali, *supra* note 188, at 637-38 (labeling Justice Thomas's view "the formalist approach"); Landry, *supra* note 188, at 1613-14 (labeling Justice Thomas's view "the strictural definition"); Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139, 163-65 (2006).

reference to prison officials' intentions.[190] Of these accounts, Justice Thomas's is the narrowest, requiring not only intent to punish but a manifestation of that intent in the particular form of a criminal statute or sentencing decision, and the focus on the prisoner's actual experience is the broadest. In principle, the majority approach seems to steer a middle course. In practice, though, the considerable deference afforded to the descriptions of state intentions by government lawyers at the time of litigation means the majority approach has produced a relatively narrow understanding of punishment that is much closer to Justice Thomas's approach.[191]

There are several reasons to reject the claim that punitive intent, narrowly understood, is essential to the very concept of punishment. First, recall that intention is not simply binary—intentional or accidental—but plural, so that the category of intentional acts may be further subdivided according to the actor's specific purposes.[192] In one oft-cited passage on the intentional nature of punishment, the Court invokes both binary and plural concepts of intention, only to collapse them:

> The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today; it is what it meant in the eighteenth century . . . . [I]f [a] guard accidentally stepped on [a] prisoner's toe and broke it, this would not be punishment in anything remotely like the accepted meaning of the word, whether we consult the usage of 1791, or 1868, or 1985.[193]

Even assuming this passage to be correct with respect to history and ordinary meaning, it is important to note that the proffered example does not support the initial claim that punishment must be "intended to chastise or deter." To exclude the broken toe from the category of punishment is only to invoke the dog's binary distinction between kicks and stumbles; it is to say that purely accidental stumbles cannot constitute punishment. That claim tells us nothing about *which* intentions, once we are in the realm of kicks, might underlie acts properly classified as punishment.

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[190] *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 854-55 (1994) (Blackmun, J., concurring) ("'Punishment' does not necessarily imply a culpable state of mind on the part of an identifiable punisher. A prisoner may experience punishment when he suffers 'severe, rough, or disastrous treatment.'" (internal citations omitted)); Wilson v. Seiter, 501 U.S. 294, 306 (1991) (White, J., concurring) ("[Prison] conditions are themselves *part of the punishment*, even though not specifically 'meted out' by a statute or judge."); *see also* Ghali, *supra* note 188, at 635-36 (labeling this view "the realist approach"); Landry, *supra* note 188, at 1614-16 (labeling it "the experiential definition").

[191] *See supra* note 83.

[192] *See supra* Part II.B.

[193] *Wilson*, 501 U.S. at 300 (quoting Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985)).

It is simply not true that only acts intended to chastise or deter are commonly recognized as punishment, or were recognized as punishment at the time the Eighth Amendment was adopted. Public officials, legislators, sentencing commissioners, sociologists, political scientists, and other punishment theorists have cited a wide range of reasons to punish. There is little doubt that what we call punishment is sometimes aimed at incapacitation, sometimes at reform or rehabilitation, and in still other instances at restoration of wealth or other goods to the victim, at demonstrating the punisher's political power, or at the satisfaction of popular sentiment.[194] In ordinary language, the term *punishment* is used still more broadly, referring to any deliberate infliction of severe pain or harsh physical treatment irrespective of the motive behind the infliction. Importantly for those who purport to care about the original understanding of the Eighth Amendment, the Amendment's early defenders explicitly stated that it would prevent *torture intended to produce confessions.*[195] Such torture was neither authorized as a sentence pursuant to a conviction nor intended to chastise or deter, but it was unquestionably an instance of "cruel and unusual punishment" in the view of Patrick Henry, George Mason, and other early Americans. Today, discussions of torture rarely address the Eighth Amendment, because the Court's modern understanding of the definition of punishment excludes interrogation methods or other

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[194] For arguments that a central purpose of modern punishment is the consolidation and reinforcement of political power, see JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007); Stuart A. Scheingold, *Constructing the New Political Criminology: Power, Authority, and the Post-Liberal State*, 23 L. & SOC. INQUIRY 857, 861-63 (1998). *See also* Morris J. Fish, *An Eye for an Eye: Proportionality as a Moral Principle of Punishment*, 28 OXFORD J. LEGAL STUD. 57, 67-68 (2008) (identifying six objectives of punishment mentioned in Canadian criminal law).

[195] At the meeting of Virginia delegates to discuss the proposed federal constitution, Patrick Henry raised the possibility that without a ban on cruel and unusual punishments, Congress might introduce "the practice . . . of torturing, to extort a confession of the crime." 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, TOGETHER WITH THE JOURNAL OF THE FEDERAL CONVENTION, LUTHER MARTIN'S LETTER, YATE'S MINUTES, CONGRESSIONAL OPINIONS, VIRGINIA AND KENTUCKY RESOLUTIONS OF '98-'99, AND OTHER ILLUSTRATIONS OF THE CONSTITUTION 448 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott & Co. 1881). When another delegate suggested that a bill of rights would provide "no security against torture," George Mason responded that "[a]nother clause of the bill of rights provided that no cruel and unusual punishments shall be inflicted; therefore, torture was included in the prohibition." *Id.* at 452.

exercises of force prior to a criminal conviction.[196] Ironically, the Court reached the conclusion that the Eighth Amendment applied only post-conviction by rejecting a purpose-based understanding of punishment in favor of one that focused on the actual circumstances of the punished.[197] Still, it is worth remembering that interrogational torture was very much on the minds of those who insisted on the necessity of the Eighth Amendment's ban on cruel and unusual punishments.[198]

So history and common linguistic usage belie the Court's (and originally, Judge Richard Posner's) claim that punishment encompasses only "act[s] intended to chastise or deter."[199] Nor is it the case that in order to punish, an actor must necessarily think of himself as punishing. Even if punishment is always a deliberate act—that is, non-accidental—it need not be defined in terms of intent *to punish*. Michael Moore's recent discussion of "classificatory questions" of intention is helpful here.[200] A criminal statute may prohibit "intentional maiming." A defendant swings a stick intending to put out his victim's left eye, but the concept of *maiming* does not cross the defendant's mind. Even though the defendant does not formulate his own purpose in terms of maiming per se, a fact-finder might reasonably conclude that intent to put out an eye is properly classified as intent to maim.[201] Similarly, deliberate state action may sometimes be properly classified as punishment, even if the state actors themselves decline to formulate their purpose in terms of punishment. Indeed, this understanding of punishment motivated the Court's list of factors in *Kennedy v. Mendoza-Martinez*.[202] Under that test, a number of objective factors—the type of sanction, its severity, and its imposition for criminal behavior—could demonstrate the punitive nature of a law, regardless of whether the legislature chose to label its action as "punishment." Purely

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[196] *See* Ingraham v. Wright, 430 U.S. 651, 671 n.40 (1977) ("Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.").

[197] *See id.* at 669-70 (emphasizing objective differences between schoolchildren and prisoners); *id.* at 670 n.39 (rejecting "purposive analysis" proposed by the dissent).

[198] For a lengthier discussion of references to interrogational torture in early discussions of the Eighth Amendment, see Celia Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment*, 31 PEPP. L. REV. 661 (2004). *See also* Michael J. Zydney Mannheimer, *When the Federal Death Penalty Is "Cruel and Unusual,"* 74 U. CIN. L. REV. 819, 834-35, 838-39 (2006).

[199] Judge Posner authored the *Duckworth v. Franzen* passage quoted by the Court in *Wilson v. Seiter*.

[200] *See* Moore, *supra* note 17, at 50-53.

[201] *Id.* at 51-52.

[202] 372 U.S. 144, 168-69 (1963); *see supra* Part III.A.

accidental conduct (a prison official's stumble over a prisoner's foot) would not satisfy the *Mendoza-Martinez* test, but a deliberate state action (the indefinite confinement of sex offenders) might qualify as punishment even if the state claimed to act without punitive intent.

Even if punitive intent is not essential to the definition of punishment, the question arises whether other considerations might make motive analysis appropriate here. Most of the arguments advanced by constitutional theorists for scrutinizing state intentions in the context of First Amendment and equal protection challenges seem inapplicable. In those contexts, courts have identified categorically objectionable motives for state action, such as racial bias or intent to suppress ideas or promote religion. Because the motives are always objectionable, it makes sense to look for them. But the intent to punish is not categorically prohibited. Unlike the intent to discriminate by race, the intent to punish does not distort the political process, nor does it seem to constitute a dignitary violation in itself.

There is a sense, however, in which expressive theories of law might find the intent to punish relevant. As detailed above, some scholars understand scrutiny of government motives relevant to an assessment of the "expressed attitude" of government action.[203] If we were to understand punishment in expressivist terms, as many commentators have argued we should, then the intent to punish may appear important.[204] In expressive theories, punishment is best understood as a stigma imposed by society to communicate condemnation and disapproval.[205] Just as evidence of the government's intent to discriminate by race would be one determinant of the attitude expressed by policies of segregation, evidence of a legislative intent to punish would be one determinant of the attitude expressed by various burdens imposed on convicted criminals.

Assuming, for purposes of argument, that the expressive theory is persuasive,[206] it is important to note that it does not require us to make punitive intent a *necessary* condition of punishment. Some expressive theorists deny that professed intentions are wholly determinative of the public meaning of an act, and so would explicitly reject a doctrinal

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[203] *See* Anderson & Pildes, *supra* note 59.

[204] The classic expressivist account of punishment is Joel Feinberg, *The Expressive Function of Punishment*, *in* DOING AND DESERVING 95 (1970).

[205] *See id.* at 100-01.

[206] For an extensive critique of expressive theories, including a detailed analysis of expressive theories of punishment, see Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000).

definition of punishment that made punitive intent dispositive.[207] Furthermore, to the extent that expressive theories direct our attention to the stigma imposed by criminal punishment, we should note that the state can stigmatize without necessarily intending to do so. In fact, the Supreme Court acknowledged the stigma of sex offender registration requirements in *Smith v. Doe*, but seemed to invoke a distinction between intention and foresight.[208] Though registration requirements could "cause adverse consequences for the convicted defendant, running from mild personal embarrassment to social ostracism," this "stigma" was not "an integral part of the objective of the regulatory scheme."[209] Stigma was a foreseeable consequence, but it was not intended. If Enoch is persuasive that the intention/foresight distinction has little relevance to our evaluations of state action, then the expressive concern with stigma does not supply an argument in favor of intent standards in the constitutional law of punishment.

As the preceding discussion shows, arguments by constitutional theorists and philosophers about the significance of government motive do not provide a convincing defense of the substantial weight placed on "punitive intent," and they provide several reasons to question that doctrinal approach. At a broader level, we might ask whether the concern with punitive intent is based on a misconception of the category *punishment*. Under existing doctrine, courts treat punishment as a discrete act carried out by a single actor: they identify particular statutes, policies, or events within prison and ask whether these specific state actions were undertaken with punitive intent. On this approach, punishment is a deliberate act that is, at least conceptually, similar to intentional actions by individual humans. This account grossly misrepresents government-imposed punishment. Punishment is, in fact, a complex set of practices that involve a wide array of actors and institutions.[210] Rarely can a single coherent intent be attributed to the entire institutional apparatus that imposes punishment. The intentions of individual officials within the criminal justice system may be relevant to, but are not dispositive of, the question whether the system is imposing punishment.

Consider all the state actions that must occur in order for a person to be punished with a prison sentence: a legislature must codify an offense and prescribe sanctions; law enforcement must detect a violation and prosecutors must press charges; a court must oversee a trial or, more likely,

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[207] *See* Anderson & Pildes, *supra* note 59; Hellman, *supra* note 149, at 39-40.

[208] 538 U.S. 84, 97-99 (2003).

[209] *Id.* at 99.

[210] *See* Ristroph, *supra* note 189, at 167-70.

a plea agreement; police or other law enforcement personnel must physically transfer the convicted person to the prison; and prison officials must take and keep custody of the convict.[211] Even if the individual legislators who codify the offense are thinking of nothing other than winning reelection—or even if they are not thinking at all—and even if the prosecutor is similarly concerned with reelection, and even if all other participants view themselves as mere functionaries trying to avoid being fired in order to keep their government paychecks, we do and should say that this individual was punished. By common understanding (and for originalists, by the common understanding at the time of the Founding), punishment encompasses most of the unpleasant burdens that the state imposes in response to ostensible misconduct.[212]

None of this is to suggest that punitive intent is wholly irrelevant to the question whether state action is subject to the restrictions of the Bill of Attainder Clause, or the Ex Post Facto Clause, or the Double Jeopardy Clause. The argument, rather, is that punitive intent should not be the determinative factor. To place as much weight on punitive intent as the Court has done in *Kansas v. Hendricks* and other cases is to fail to acknowledge the complex nature of state punishment. And the present emphasis on punitive intent is, given the inevitable mushiness and "slop" of intent assessments, an opening for courts to manipulate outcomes. We might avoid some of the slop simply by reinvigorating the *Kennedy v. Mendoza-Martinez* standard, which makes punitive intent only one among many factors that inform a decision to classify state action as punishment.[213]

B. CRUELTY AND NUANCED INTENTIONS

Beyond the threshold inquiry into whether a state action is properly called punishment, additional questions about state intention arise when state action that is unquestionably punishment is claimed to be "cruel and unusual." Just as we need a doctrinal account of punishment, we need a doctrinal account of cruelty—and unusualness, perhaps, though the Court

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[211] Even this account is greatly oversimplified; I have not mentioned the vast administrative apparatus that enables the participants from each branch of government to carry out their functions in this process.

[212] According to Justice Thomas, one understanding of punishment in the early United States was "[a]ny pain or suffering inflicted on a person for a crime or offense." Helling v. McKinney, 509 U.S. 25, 38 (1993) (Thomas, J., dissenting) (quoting 2 N. WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

[213] *See supra* notes 75-82 and accompanying text.

has tended to collapse unusualness into its concept of cruelty.[214] As a matter of broad principle, the Supreme Court has held that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[215] This reference to "standards of decency" appears to appeal to an objective, external measure of cruelty, one not necessarily determined by a state actor's intentions.[216] But as we have seen, the actual implementation of the Eighth Amendment has produced rules that call for nuanced judgments about state intentions.

At least three different accounts of cruelty are at work, and each turns on a determination of state intentions. When a punishment is challenged as disproportionately severe, "cruel and unusual" is taken to mean "excessive," and "excessive" means "more than the state's penological purposes require." When ongoing conditions within a prison are challenged, "cruel and unusual" means "deliberately indifferent to deprivations of basic needs." Finally, when a specific act of force in prison is challenged, "cruel and unusual" means "malicious and sadistic." The question here is whether the work by constitutional theorists on government motive analysis, or the philosophical literature on intentions and permissibility, can shed light on these doctrinal references to state intentions.

In Eighth Amendment proportionality analysis, state intentions play a peculiar role that seems to render the constitutional theory and moral philosophy arguments inapplicable. In this context, courts do not make normative evaluations of the state's penological purposes; rather, penological purpose simply sets the baseline against which the court evaluates whether the punishment is excessive.[217] Recall that in *Ewing v.*

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[214] *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 100 n.32 (1958) ("Whether the word 'unusual' has any qualitative meaning different from 'cruel' is not clear."). Two recent articles critique the Court's approach and argue that the term "unusual" has independent significance. *See* Joshua L. Shapiro, *And Unusual: Examining the Forgotten Prong of the Eighth Amendment*, 38 U. MEM. L. REV. 465 (2008); John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739 (2008).

[215] *Trop*, 356 U.S. at 101.

[216] Paulo Barrozo identifies four conceptions of cruelty: one focused on the suffering of the victim; one focused on the state of mind of the allegedly cruel agent; one focused on the behavior of the agent; and one focused on the context of the act, including any structural injustices. Paulo D. Barrozo, *Punishing Cruelly: Punishment, Cruelty, and Mercy*, 2 CRIM. L. & PHIL. 67, 69-70 (2008). The fourth of these conceptions is "objective," Barrozo argues, and he suggests that it underlies challenges to the death penalty that focus on background inequality and race discrimination. *See id.* at 70 n.9.

[217] For capital sentences, the analysis is somewhat different. The Supreme Court has assumed two possible purposes of capital punishment—retribution and deterrence—and in

California, a twenty-five-years-to-life sentence for shoplifting may have been excessive against a just deserts standard, but given the state's underlying goal of incapacitation, the long sentence was appropriate.[218] Again, the Court has not suggested that the punishing state's penological goals are relevant to constitutional analysis because they have intrinsic moral significance. In fact, the Supreme Court's deferential approach seems specifically to reject the claim that penological theories have intrinsic moral relevance that would require the Eighth Amendment to be understood in terms of one or another specific punishment theory.[219]

This deference to penological purposes renders the proportionality requirement of the Eighth Amendment fairly weak, and maybe even completely ineffectual. The scope of the Eighth Amendment depends on what purposes the legislature has chosen to pursue (or what purposes may be attributed to the legislature).[220] As long as the legislature can tell a plausible story about its purposes and the connection between purposes and policies, the Eighth Amendment is satisfied.[221] Under this approach, the Eighth Amendment does not itself impose limitations on what purposes the legislature may legitimately choose, and it does not seem to impose any real limitation on what the state may do in pursuit of its chosen penological

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individual cases, it does not inquire which, if either, of these purposes actually motivated the punishing state. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 319 (2002) (identifying retribution and deterrence as social purposes of the death penalty). Instead, in recent decisions, the Court has taken a majoritarian approach, declaring the death penalty unconstitutionally severe for certain categories of crime if and only if there is a "national consensus" opposing the penalty in that context. *See id.* at 313-16; see also Kennedy v. Louisiana, 128 S. Ct. 2641, 2650 (2008) (identifying possible purposes of the death sentence, but then describing the national consensus approach).

[218] *See supra* Part III.B.

[219] *See supra* Part III.B.

[220] As we saw with respect to the claim that California had rejected just deserts in favor of incapacitation in *Ewing*, the purposes attributed to a criminal statute at the time of litigation need not coincide with those articulated by the legislature that passed it. *See supra* Part III.B.

[221] This point was raised during oral arguments in *Ewing*, though it obviously did not determine the outcome of the decision.

> QUESTION: . . . If we allow, for purposes of proportionality or gross disproportionality analysis, . . . the consideration of varying intentions—retribution, incapacitation, deterrence, and so on—and every time the State gets to a very high offense, the State says, 'Oh, we've changed the theory. We've gone from deterrence to retribution,' it seems to me that it makes . . . proportionality analysis—impossible . . . . [I]f we accept the State's option to say, 'We've changed the theory,' don't we read comparability analysis right out of the law?

Transcript of Oral Argument, *supra* note 109, at 46, Ewing v. California, 538 U.S. 11 (2003) (No. 01-6978).

purposes.[222] If we are committed to a proportionality restriction on the government's power to punish, we need to look for an alternative to an intent-based standard.[223]

In the Eighth Amendment cases that involve prisoners' complaints about specific acts of violence or conditions of confinement, "cruel and unusual" means "deliberately indifferent" or "malicious and sadistic." Here, the concern with official intentions is more easily comparable to motive analysis elsewhere in constitutional law (and perhaps in other areas of law as well). One could make consequentialist, expressivist, and character-based arguments in support of the claims that prison officials' intentions are relevant to constitutional analysis.[224] For example, the deliberate indifference standard could plausibly provide an effective incentive for prison administrators to maintain adequate conditions. Additionally, prison employees who use force with malice or sadism may be likely to cause greater harm than those who do not. With respect to expressive harms, one could argue that to be deprived of adequate nutrition, medical care, or other necessities by an official acting *deliberately*, or to be violently treated by an official acting *with malice*, is to suffer a greater harm than to experience the same objective injuries without the accompanying nasty intentions. On this account, deliberate indifference and malice are themselves intrinsically harmful. Along similar lines, to the extent that we view an individual public official's liability under § 1983 as a reflection of his or her character, deliberate indifference or malice seem relevant aspects of a character judgment.

So the rationales for motive analysis from constitutional theory have some purchase in the context of Eighth Amendment challenges by prisoners. At the same time, David Enoch's arguments against giving substantial moral weight to *state* intentions seem particularly forceful here. Enoch suggests that claims to have acted with good intentions—or claims not to have had evil intentions—are most easily understood as evasions of responsibility. Enoch argues that evasions of responsibility are troubling when they come from state actors, who are charged with much greater responsibilities than private individuals. And nowhere is the state's responsibility for the safety and well-being of individual human beings

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[222] In a separate concurrence in *Ewing*, Justice Scalia argued that because the Eighth Amendment did not mandate any particular theory of punishment, it could contain no proportionality principle at all. *See Ewing*, 538 U.S. at 31 (Scalia, J., concurring).

[223] For an alternative approach to proportionality that does not depend on assessments of penological purpose, see Ristroph, *supra* note 69, at 284-91, 326.

[224] *See supra* Part IV.A.

greater than when the state forcibly confines them.[225] Indeed, federal decisions involving prisoners' claims of cruel and unusual punishment do seem to establish that official intentions are a device to evade responsibility. Whatever transpires in the nation's prisons, the officials involved can nearly always claim that they did not intend for the harm to occur.[226] The burden to prove otherwise is on the prisoner plaintiff, and it is a nearly impossible burden to meet.

And of course, the problem is not simply that prisoners, and courts, lack good evidence of prison officials' intentions. The further problem—one familiar to us by now—is that judgments about intentions are inevitably contestable. When a judge or other third party tries to ascertain a state actor's intentions, she inevitably brings to bear her own background knowledge and normative predilections. When the constitutional law of punishment focuses on government motives, outcomes depend on subjective judicial preferences.

VI. CONCLUSION

Americans troubled by the present scope of the penal power have looked to the Federal Constitution to limit it. This Article has shown that there is, in fact, a constitutional law of punishment, although its restrictions are not very powerful. And the weakness of these restrictions seems related to the significant role that state intentions play in determining the constitutionality of state action. Analysis of the doctrinal significance of state intentions gives us a more informed perspective on both the law of punishment as it has been and the law as it might be.

First, the law as it has been. The language of judicial deference and legislative prerogative in cases such as *Ewing v. California* and *Kansas v. Hendricks* creates the impression that these decisions reflect judicial restraint—the Court's modest refusal to impose its own subjective preferences on democratically elected legislatures. Close attention to the Court's determinations of legislative motives undermines the image of restraint and modesty. There is no objective, disinterested way to ascertain intention; a finding of intention is always a normative judgment. Whenever the disposition of a case turns on a judicial construction of a state actor's intentions, look closely: the intentions probably could have been

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[225] Similar reasoning led to the Supreme Court's finding that the state was obligated to provide medical care and other basic necessities to prisoners. *See* Estelle v. Gamble, 429 U.S. 97, 103-04 (1976); *see also id.* at 116 n.13 (Stevens, J., dissenting) (arguing that the state has an affirmative duty to provide care to those it chooses to imprison, and denying that intent is a necessary component of an Eighth Amendment claim).

[226] *See, e.g.*, *supra* notes 135-36.

constructed otherwise. The Court could have drawn on the retributive language in the preamble to California's three strikes law to strike down Gary Ewing's sentence. The language of incapacitation and public safety used to defend the Kansas Sexually Violent Predator Act could have been used to classify that act as punishment. Again, constructions of intention almost always could have come out otherwise.

And the law as it might be? Though motive analysis is prevalent throughout several areas of constitutional law, I have suggested that it should not necessarily occupy the same central role in the law of punishment. Punishment seems to render individuals vulnerable to the state in much more profound ways than most other state actions, and thus, it seems to produce special obligations that state actors cannot avoid simply by meaning well, or by claiming to have meant well.[227] In the specific context of punishment, it may be especially true that the road to hell is paved with good intentions.

Justice William Brennan emphasized the distinctive nature of punishment in his dissent in *McCleskey v. Kemp*,[228] arguing that state intentions that may be relevant in the equal protection context were nonetheless irrelevant to Eighth Amendment analysis.[229] Warren McCleskey was a black man sentenced to death in Georgia for the murder of a white police officer.[230] He challenged his sentence on both equal protection and Eighth Amendment grounds, introducing statistical evidence that death sentences in Georgia and elsewhere were given disproportionately to black defendants who killed white victims.[231] A majority of the Supreme Court rejected McCleskey's claims, emphasizing that the statistics did not prove discriminatory intent and announcing, "[W]e decline to assume that what is unexplained is invidious."[232]

In dissent, Justice Brennan argued that discriminatory intent should not be required to establish an Eighth Amendment claim. "While the Equal Protection Clause forbids racial discrimination, and intent may be critical in a successful claim under that provision, the Eighth Amendment has its own

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[227] *Cf.* Graham v. Connor, 490 U.S. 386, 397 (1989) ("An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.").

[228] 481 U.S. 279 (1987).

[229] *Id.* at 323 (Brennan, J., dissenting).

[230] *Id.* at 283.

[231] *Id.* at 286-91.

[232] *Id.* at 313. With respect to the equal protection claim, the majority also emphasized that there was no evidence that the Georgia legislature adopted or maintained its capital sentencing procedures with racially discriminatory intent. *Id.* at 298-99.

distinct focus: whether punishment comports with social standards of rationality and decency."[233] In effect, Justice Brennan was arguing for an interpretation of the Eighth Amendment that focused on empirically observable factors rather than the subjective mental states of legislators, jurors, or other state actors. "Once we can identify a pattern of arbitrary sentencing outcomes, we can say that a defendant runs a risk of being sentenced arbitrarily. It is . . . immaterial whether the operation of an impermissible influence such as race is intentional."[234] And although Justice Brennan was writing in dissent in *McCleskey*, the general notion that the Eighth Amendment should focus on more objectively ascertainable factors is often echoed elsewhere in Supreme Court opinions.[235]

Thus, one way to make the Constitution a more effective limitation on the power to punish would be to reduce the doctrinal focus on state intentions. This Article suggests a few specific ways in which courts could do that. They could, for example, take seriously the full range of factors identified in *Kennedy v. Mendoza-Martinez* in order to decide when state action constitutes punishment. Courts could also move away from consideration of penological purpose in proportionality analysis, thus limiting legislatures' abilities to define the standards by which their actions will be judged. Finally, courts could place greater emphasis on observable harms and other objective factors in prison cases.

But even as we consider ways in which to make constitutional law a more effective limitation of the power to punish, it is worth remembering the limits of constitutional law itself. Even with doctrinal reform, enforcing the Eighth Amendment and other constitutional provisions will remain a deeply normative enterprise. Government motives will sometimes be important, and even when they are not, other questions of interpretation will require courts to exercise discretion. With respect to punishment and elsewhere, constitutional law will continue to reflect the particular, contestable judgments of the people who devise and apply it. At the very least, we may hope that the judges who ascertain state intentions acknowledge and attend to the normative nature of their enterprise. In this context, self-awareness is as necessary a virtue as self-restraint.

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[233] *Id.* at 323 n.1 (Brennan, J., dissenting).

[234] *Id.*

[235] *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 589-90 (2005) (O'Connor, J., dissenting) (reiterating that the Eighth Amendment draws its meaning from evolving standards of decency, and that "in discerning those standards, we look to objective factors to the maximum possible extent" (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977))); Ewing v. California, 538 U.S. 11, 23 (2003) (adopting Justice Kennedy's claim that proportionality review must be "guided by objective factors").