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Paulo D. Barrozo

Boston College Law School, barrozo@bc.edu

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THE JURISPRUDENCE OF CRUELTY IN CRIMINAL LAW

Paulo Barrozo

ABSTRACT

This article identifies and explains four conceptions of cruelty in criminal law and reconstructs the models of practical reason they inhabit. It advances conceptual, historical, and normative arguments. Conceptually, it articulates distinct notions of cruelty according to the types of agency, victimhood, values, and causality they employ. Historically, it argues that these conceptions belong with three models of practical reason which the article reconstructs in their evolution. Normatively, it argues that the rejection of cruelty is one of the fundamental achievements of practical reason in criminal law. More generally, the article indicates how the operation of reflectivity in the context of ideas about cruelty serves as a model of legal reasoning to be emulated.

SUMMARY

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I. INTRODUCTION

Four distinct conceptions of cruelty are found in criminal law. This article has three objectives. First, it aims to explain those conceptions of cruelty according to the types of agency, victimhood, values, and causality involved. However, conceptions of cruelty do not emerge in an argumentative vacuum. Therefore, the second objective is to reconstruct the models of practical reason within which they first arose.¹ Each model of practical reason informs, in turn, conceptions of mercy² and of the requirements of a just system of criminal law. Finally, the article indicates how the *push of reflectivity* operating within each model of practical reason shapes the normative horizon of criminal law, offering a mode of legal reasoning to be emulated.

The four conceptions of cruelty are the following: *agent-objective*, *agent-subjective*, *victim-subjective*, and *victim-objective/agent-independent*. Each corresponds to one of three models of practical reasoning in of the rejection of cruelty, namely *cruelty as agency*, *cruelty as suffering*, or *cruelty as predicament*. The emergence of each conception of cruelty owes much to the push of reflectivity triggered by the limitations of previous conceptions and their respective models of practical reason.³ Although in their philosophical origins the four conceptions of cruelty emerged in chronological succession, they are now subsumed and integrated under the appeal and cogency of the

¹ My thinking on practical reason has been informed, among others, by the following: Aristotle, *Nicomachean Ethics* (Cambridge: Cambridge University Press); David Hume, *A Treatise of Human Nature*, L. A. Selby-Bigge and P. H. Niditch (eds.) (Oxford: Clarendon Press, 1978); Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Cambridge: Cambridge University Press, 1998); Immanuel Kant, *Critique of the Power of Judgment* (Cambridge: Cambridge University Press, 2001); Immanuel Kant, *Critique of Practical Reason* (Cambridge: Cambridge University Press, 1997); C. Korsgaard, *Creating the Kingdom of Ends* (Cambridge: Cambridge University Press, 1996); J. Habermas, *The Theory of Communicative Action, 2 Volumes* (Cambridge, MA: MIT Press, 1985); D. Parfit, *Reasons and Persons* (Oxford: Clarendon Press, 1984); M. Bratman, *Intention, Plans, and Practical Reason* (Cambridge, Mass.: Harvard University Press, 1987); John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1979); A. Gibbard, *Thinking How to Live* (Cambridge, Mass.: Harvard University Press, 2003); J. Hampton, *The Authority of Reason* (Cambridge: Cambridge University Press, 1998); Robert Nozick, *The Nature of Rationality* (Princeton: Princeton University Press, 1993); Onora O'Neill, *Constructions of Reason* (Cambridge: Cambridge University Press, 1989); J. Raz, *Engaging Reason* (Oxford: Oxford University Press, 1999); Joseph Raz, *Practical Reason and Norms* (New York: Oxford University Press, 1999); Thomas Scanlon, *What We Owe to Each Other* (Cambridge, Mass.: Harvard University Press, 1998); J. D. Velleman, J. D., *Practical Reflection* (Princeton: Princeton University Press, 1989); J. Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980); and A. MacIntyre, *Whose Justice? Which Rationality?* (University of Notre Dame Press, 1989).

² See on the topic of mercy Claudia Card, "On mercy", *the Philosophical Review*, 81(2), 182–207 (1972); Ross Harrison, "The Equality of Mercy," in *Jurisprudence: Cambridge Essays*, ed. Hyman Gross and Ross Harrison (Oxford: Oxford University Press, 1992); Nussbaum, Martha C. (1993). Equity and mercy. *Philosophy and Public Affairs*, 22(2); and Austin Sarat and Nasser Hussain, *Forgiveness, Mercy and Clemency* (Stanford: Stanford University Press, 2006).

³ See Thomas Kun, *The Structure of Scientific Revolutions* (Chicago: The University of Chicago Press, 1996) and Alasdair MacIntyre, "The Relationship of Philosophy to Its Past," in Richard Rorty, Jerome Schneewind, and Quentin Skinner (eds.), *Philosophy in History: Essays in the Historiography of Philosophy* (Cambridge: Cambridge University Press, 1984).

last model of practical reason in the rejection of cruelty. I argue that this model is superior to its predecessors.

A. Cruelty and Criminal Law

Consider the following overt or implied conceptions of cruelty:

1.

–It is ... within the historic process of constitutional adjudication to challenge the imposition of the death penalty in some **barbaric manner** or as a penalty wholly **disproportionate** to a particular criminal act. And in making such a judgment ... a court may consider **contemporary standards** to the extent they are relevant.”⁴

–Feelings of fear, anguish and inferiority‘ are the common lot of mankind constantly experienced by everyone in the course of ordinary everyday life: that is *„la condition humaine“*. Yet no one would consider himself, or regard others, as humiliated and debased because of experiencing such feelings, even though some experience them very easily and others only for greater cause. Thus **it is not the subjective feelings aroused in the individual that humiliate or debase but the objective character of the act or treatment** that gives rise to those feelings – if it does – **and even if it does not**, – for it is possible for fanatics at one end of the scale, and saints, martyrs and heroes at the other to undergo the most degrading treatment and feel neither humiliated nor debased, but even uplifted. **Yet the treatment itself remains none the less degrading.**”⁵

2.

–The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot ... add an element of cruelty to a subsequent execution. There is no **purpose** to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution.”⁶

⁴ Furman v. Georgia, 420, emphasis added.

⁵ Ireland v. United Kingdom, Judgment of 18 January 1978, 2 E.H.R.R. 25. Separate opinion by Judge Fitzmaurice, emphasis added

⁶ Francis v. Resweber, 464, emphasis added.

—This Court’s cases mandate inquiry into a prison official’s **state of mind**,‘ [...] and it is no accident that the Court has repeatedly said that the Eighth Amendment has a **subjective component**.⁷

—The five [sensory deprivation] techniques were applied in combination **with premeditation ...**⁸

3.

—**Pain**, certainly, may be a factor in the judgment. The infliction of an extremely severe punishment will often entail **physical suffering**. Yet the Framers also knew that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation. Even though there may be involved no physical mistreatment, no primitive torture, **severe mental pain** may be inherent in the infliction of a particular punishment.⁹

—Death is [...] an unusually severe punishment, unusual **in its pain, in its finality, and in its enormity**.¹⁰

—[I]ll-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 [of the European Convention on Human Rights]. **The assessment of this minimum is, in the nature of things, relative**; it depends on all the circumstances of the case, such as the duration of the treatment, **its physical or mental effects and**, in some cases, **the sex, age and state of health of the victim, etc.**¹¹

4.

—The basic concept underlying the Eighth Amendment is nothing less than **the dignity of man**. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of **civilized standards**.¹²

—The barbaric punishments condemned by history, ... are, of course, attended with acute pain and suffering. When we consider why they have been condemned, however, we realize **that the pain involved is not the only reason. The true significance of these punishments is that they treat members of the human**

⁷ Farmer v Brennan, 826, emphasis added.

⁸ Ireland v. United Kingdom, [page?], emphasis added.

⁹ Furman v. Georgia, 271, internal quotation marks and citations omitted, emphasis added.

¹⁰ Gregg v. Georgia, 428, emphasis added.

¹¹ Ireland v. United Kingdom, [page?], emphasis added.

¹² Trop v. Dulles, 100, emphasis added.

race as nonhumans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the Clause that **even the vilest criminal remains a human being possessed of common human dignity.**¹³

–The words ‘cruel and unusual’ certainly include penalties that are barbaric. But the words ...suggest that it is ‘cruel and unusual’ to apply the death penalty – or any other penalty – **selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board.**¹⁴

–[T]he **burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society. [...] Their impotence leaves them victims of a sanction** that the wealthier, better-represented, just-as-guilty person can escape. So long as the capital sanction is used only against the forlorn, easily forgotten members of society, **legislators are content to maintain the status quo**, because change would draw attention to the problem and concern might develop. **Ignorance is perpetuated and apathy soon becomes its mate, and we have today’s situation.**¹⁵

–The **atmosphere and environment** of incommunicado interrogation ... is inherently intimidating ... This atmosphere carries its own badge of intimidation. To be sure, **this is not physical intimidation, but it is equally destructive of human dignity.**¹⁶

–[T]he Court is of the opinion that **the prison conditions complained of diminished the applicant’s human dignity** and aroused in him feelings of anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical or moral resistance.¹⁷

–The Court would further emphasize that **the essence of such violation does not so much lie in the fact of the ‘disappearance’ of the family member but rather concerns the authorities’ reactions and attitudes to the situation when it is brought to their attention.**¹⁸

¹³ Furman v. Georgia, 272-273, internal quotation marks and citations omitted, emphasis added.

¹⁴ Furman v. Georgia, 244-245, emphasis added.

¹⁵ Furman v. Georgia, 365-366, emphasis added.

¹⁶ Miranda v. Arizona, emphasis added.

¹⁷ Peers v. Greece, Judgment of 19 April 2001, 33 E.H.R.R. 51.

¹⁸ Cakici v. Turkey, Judgment of 7 July 1999, 31 E.H.R.R. 5.

These conceptions of cruelty from American and European criminal law are representative of cruelty in many criminal jurisdictions.¹⁹ Even more broadly, they reflect an outlook that pervades several fields of national and international law.²⁰ The legal importance of the rejection of cruelty is obvious. Even in its ancient origins, the idea of cruelty was a matter of law. Bestiality, a form of brutality without a legal purpose, belonged with nature – *physis* – and not with law – *nomos*.²¹

Concepts of cruelty are distinguishable along two axes. In the first, the definitional element of cruelty runs from focus on agency to focus on victimization in the perpetrator-victim relationship. The second axis tracks emphasis on objectivist or subjectivist definitional elements. Objective conceptions emphasize the objective predicament of the victim or the behavior of agents of cruelty in relation to objective norms of behavior. Subjective conceptions require on the part of victims a minimum level of feeling or awareness, whereas on the part of agents of cruelty they require some type of *mens rea* or hedonistic gratification vis-à-vis the subjective suffering or objective condition of victims. The plane engendered by these two axes captures all four conceptions of cruelty revealed in criminal law adjudication and theory.

In contemporary criminal law, the four conceptions of cruelty have proved not to be mutually exclusive in practice. Rather, they relate to one another through a semantic and normative process of foregrounding and backgrounding the various definitional elements. The depth and breadth of the definitional regimes that emerge from this process

¹⁹ In some cases the prohibition appears under more inclusive language, thus setting higher the bar of protection. See, for example, the German Basic Law of 1949, Article 104 [Legal guarantees in the event of detention], “[...] *Detainees may not be subjected to mental or physical ill-treatment.*” The Brazilian Constitution of 1988, after proclaiming that no punishment shall be –eruel” (Article 5, XLVII, e) further asserts that to all prisoners it is guaranteed the respect to their physical and moral integrity (Article 5, XLIX).

²⁰The four conceptions of cruelty exemplified in the quotes above mirror ubiquitous conceptions of suffering, victimization, agency, and causality. To give just one example, in the areas of human rights, disabilities, family interactions, health care, and animal protection, the law attempts to capture the unjustifiable *suffering of victims* of neglect, discrimination, abuse, and brutality. The more general point to be made is that the commitment to human dignity, general solidarity, individual empowerment, and positive and negative structural justice found in the fourth, integrative conception of cruelty contributes to the normative foundation of the extensive juridical *corpus* regulating central aspects of welfare, equality, liberty, and solidarity. In its many connections, this legal corpus confronts structural problems of justice in modern societies and advances the fundamental individual and collective rights embodying aspirations for decent societies.

²¹ See Paulo Barrozo, *op. cit.* Of course the cultural presence of a concern with cruelty extrapolates the territory of legal and moral normativity. My soap bar label reads, –Chamomile: cruelty-free, biodegradable, natural, no artificial colors.” It is clear that the intensity of reflectivity in the rejection grows in inverted ratio to its spread. Indeed, there is a point where the concern is purely mimetic, lacking the sort of reflective mediation which accompanies normative development of the kind studied in this essay. That my soap bar label has anything to say about cruelty confirms the plausibility of theories of mimetic evolution (see Richard Dawkins’s *The Selfish Gene* (Oxford: Oxford University Press, 2006), and Jack M. Balkin’s *Cultural Software: A Theory of Ideology* (New Haven, CT: Yale University Press, 1998), while the push of reflectivity discussed below prove clearly the existence of a normative territory guarded by reflectivity and in which mimetic contamination is not the name of the game, at least not anymore or not yet.

correspond to the different models of practical reasoning in the rejection of cruelty in criminal law.

As if adding a third dimension to the plane designed by the two definitional axes just mentioned, consider further the way in which each conception of cruelty implicitly directs the influence of time and causation as legal considerations. While, as detailed below, the first three conceptions of cruelty direct the legal focus to units of action and feeling concentrated in time, the fourth conception invites attention and gives legal weight to protracted causality and long-term effects. This last, more continuous, role of temporal considerations in law is clearly manifest, for example, in the search for solutions to problems of social vulnerability and unequal protection by the law.

Focus on the evolutionary arc of the concern with cruelty in criminal law facilitates the sort of cultural introspection that I hope will remind us of the promises of justice and mercy that criminal law must help uphold. Moreover, using criminal law to provide a telescopic view into the nature of societies sheds light on the human condition.²² As one embarks in this sort of journey, he must remain constantly alert to what is at stake for both individuals and societies in the rejection of cruelty. Whatever is found at the end of this journey, and no matter how strenuous it may be, I suspect anyone would be ill-advised to ever return from it.

B. Cruelty, Practical Reason, and Reflectivity

As an ideal, the rejection of cruelty has shaped the criminal law of liberal democracies. Certainly, this influence has been exerted with faltering clarity, consistency, and efficacy. In legal practice, the rejection of cruelty has predominantly taken the form of doctrines that patrol the outer limits of punishment as set by constitutional prohibitions against cruel punishment. Outside the confines of legal practice, an influential tradition of liberal political and legal theory, rightly terrified by the ubiquity of brutality and the ever renewed threats of unjustifiable suffering, prescribes the cultivation of a pre-reflective sensibility that shuns cruelty.²³ The flaw in these doctrinal and philosophical approaches is basically twofold.²⁴ First, it underestimates the deep link between the reflective

²² For an interesting thesis about the heuristic value of criminal law in social theory see Emile Durkheim, *The Division of Labor in Society* (New York: Free Press, 1997).

²³ Judith Shklar offers a good example of this in her influential essay on the question of cruelty. In the Conclusion I briefly engage with the limitations and possibilities of the kind of normative vision on social life that Shklar advances. In its place, I propose the rudiments of an ideal more fully reflective in the rejection of cruelty. See Judith N. Shklar, *Ordinary Vices* (Cambridge, MA: Belknap, 1984), Chapter 1, and Richard Rorty's *Contingency, Irony, and Solidarity* (Cambridge: Cambridge University Press, 1989), which was written under the inspiration of the way Shklar connected a victim-subjective conception of cruelty with a particular tradition of liberal thought. John Kekes, in his "Cruelty and Liberalism," *Ethics* 106, no. 4 (1996): 834-844, resists, in the name of conservative politics, the liberal claim to monopoly of the concern with cruelty.

²⁴ I have detailed the nature and presented a critique of this kind of doctrinal effort in Paulo Barrozo, "*The Foundations of Constitutional Punishment*" (forthcoming).

soundness of a normative ideal and macro changes in moral sensibility. Second, it asks for too little. To avoid these flaws, this article rededicates the concern with cruelty to a deeper and more coherent image of justice in criminal law which, on the basis of stringent reflectivity, hopes to chart a path away from merely reactive legal doctrines and the type of liberalism that underestimates or even mistrusts the potential of practical reason in law.

Here, there is no need to inflate the notion of reflectivity or to appeal to arcane conceptions of it. By reflectivity I mean simply, but of course not merely, *ennoia*, in the ancient sense of intense, careful, and self-conscious thinking. In this sense, reflectivity informs models of practical reason which are mindful of and yet not reduced to instrumental, context-bound, and self-interested reasoning, for reflectivity implicates the faculty of judgment, attention to context accompanied by the capacity to transcend it in principled ways, and the constant critical folding upon itself, in ways that the operation of flat – purely empirical or merely consequentialist – rationality does not entail.²⁵ There are, despite slow progress and recurrent episodes of regress, good reasons to stay hopeful about the fate of a project to rethink cruelty as an enterprise of reason in criminal law.

At any rate, this deflated conception of reflectivity requires only acceptance of two uncontroversial claims. First, that normative worldviews are built upon the basis of, and expressed as, clusters of converging, when not cohering, normative arguments. That is, they are built upon models of practical reason. Second, that these models carry logical and deontological entailment as well as practical requirements, cognitive access to which is given by thinking thoroughly, clearly, and critically about them (that is, by reflectivity). To the extent that the push of reflectivity may prevail, it holds the promise of a criminal law that does not continue to compromise with cruelty as a quotidian event.

The emergence of the four conceptions of cruelty and the models of practical reason they inhabit follow, I have noted, a chronological sequence, as did their impact upon criminal law. This is no coincidence. Rather, it evinces the *modus operandi* of the push of reflectivity, and the way reflectivity acts on legal change. No doubt, the push of reflectivity works inside clusters of normative arguments in any number of ways, but to give evidence that it does work, we need only look at exemplary cases, such as the case of the evolution of ideas about cruelty in criminal law. At the end, the changes in practical reasoning analyzed in this article recommend interpretations of modernity that give prominence to the content-creation capabilities of reflective forces over the operation of content-blind rationalizing, or managerial and merely participatory mechanisms. The understanding of reflective evolution in criminal law ultimately

²⁵ Nietzsche – *The Pre-Platonic Philosophers* (Urbana and Chicago, IL: University of Illinois Press, 2006), 5-6 – speaks of “an excess of intellect that [a people or an individual] no longer directs [...] only for personal, individual purposes but rather arrives at a pure intuition with it.” Although an extensive treatment of the question of reflectivity cannot be accommodated in this essay, I am convinced that some form of intellectual exuberance of this sort is inextricably involved in reflectivity as a weighty causal factor in social processes. For a defense of the idea of a “Socratic citizenship” as a form of reflective agency, see Dana R. Villa’s *Socratic Citizenship* (Princeton, NJ: Princeton University Press, 2001).

provides the most elegant, historically informative, and critically consequent standpoint from which to understand the ways, good and bad, of criminal justice.

I have also noted that conceptions of cruelty do not emerge in an argumentative vacuum. They gain meaning and traction in the history of criminal law when embedded in models of practical reason. In order to reveal and reconstruct the models of practical reason which envelop the four conceptions of cruelty, I turn to their seminal formulation in the history of legal and moral thought.²⁶ Thus, in mobilizing seminal insights on the problem of cruelty by Seneca, Thomas Aquinas, Michel de Montaigne, Immanuel Kant, Karl Marx, and John Stuart Mill, I seek to show the types of arguments involved in forging the normative vistas corresponding to the distinct conceptions of cruelty.²⁷

II. FIRST MODEL OF PRACTICAL REASON: CRUELTY AS AGENCY

²⁶ As the philosopher Charles Taylor once wrote, “to understand ourselves today, we are pushed into the past for paradigm statements of our formative articulations. We are forced back to the last full disclosure of what we have been about, or what our practice has been woven about.” “Philosophy and Its History” in *Philosophy in History*, ed. Richard Rorty, et al. (Cambridge: Cambridge University Press, 1993), 26. I presuppose throughout the centrality of meaning in human experience. Max Weber more than any other has brought this centrality to the attention of the modern social scientist. I think Diderot captured it well when he wrote in the *Encyclopédie* that “if mankind, or the thinking and contemplative beings which comprise it, were banished from the surface of the earth, the moving and sublime spectacle of nature would be nothing more than a scene of desolation and silence. The universe would be mute; stillness and night would take possession of it. Everything would be transformed into a vast emptiness where unremarked phenomena would occur, dimly and unheard.” Denis Diderot’s *Political Writings* (Cambridge: Cambridge University Press, 2001), 25.

²⁷ The sources used here are Seneca’s *De Clementia*, written by AD. 55 or 56 and addressed to his pupil, the then young emperor Nero; Aquinas’ *Summa Theologiae*, published from 1265-1272, in particular Questions 2a2ae 157 and 159, dedicated to *De Clementia et Mansuetudine* and *De Crudelitate*, respectively, as part of his writings on the virtue of temperance; Montaigne’s essay “On Cruelty,” appearing in *Book II* of his *Essais*, which had various modified editions until his death in 1592; Kant’s *Groundwork of the Metaphysics of Morals* of 1785; Marx’s “On the Jewish Question” of 1843, “For a Ruthless Criticism of Everything Existing” of 1844, “Preface to „A Contribution to the Critique of Political Economy”” of 1859, and the first volume of *Capital*, written in 1866 and 1867 and published in 1867; and, finally, Mill’s *The Subjection of Women*, written in 1861 but not published until 1869. See Lucius Seneca, *Moral Essays, Vol. 1*, trans. John W. Basore (Cambridge, MA: Harvard University Press, 2003); Thomas Aquinas, *Summa Theologiae*, trans. Thomas Gilby (Cambridge: Blackfriars, 1972); Michel de Montaigne, *The Complete Essays*, trans. M.A. Screech (London: Penguin, 1991); Kant, *Groundwork of the Metaphysics of Morals in Practical Philosophy*, op. cit.; Karl Marx, “On the Jewish Question” in *Marx: Early Political Writings*, trans. Joseph O’Malley and Richard A. Davis (Cambridge: Cambridge University Press, 1994), “For a Ruthless Criticism of Everything Existing” in *The Marx-Engels Reader*, ed. Robert C. Tucker (New York: Norton, 1978), “Preface to „A Contribution to the Critique of Political Economy”” used in conjunction with his *The German Ideology: Part I* in *The Marx-Engels Reader*, ed. Robert C. Tucker (New York: Norton, 1978), *The German Ideology* was written in 1845-1846 but only published in 1932, and *Capital: A Critique of Political Economy, Vol. I*, trans. Ben Fowkes (New York: Vintage Books, 1977); and John Stuart Mill, *The Subjection of Women* in *John Stuart Mill: On Liberty and Other Essays*, ed. John Gray (Oxford: Oxford University Press, 1998).

C. CONCEPTION 1: AGENT-OBJECTIVE

In criminal law, agent-objective cruelty is characterized by punitive agency which goes further than the strict punishment demanded by the applicable norms. We owe to Seneca, author of the earliest surviving sustained discussion of cruelty, the seminal explanation of the agent-objective concept of cruelty.²⁸ Because his concept presupposes a suffering victim, cruelty is defined by the anomic behavior of the agent who causes that suffering. However, it is Seneca's emphasis on agency and objective norms of behavior that renders his conception agent-objective.

A stoic philosopher, Seneca defines cruelty in the context of a model of practical reason characterized by natural law and virtue ethics. Specifically, cruelty is a point on a continuum of vices and virtues, with the vices on each end: **pity ↔ mercy ↔ strictness ↔ cruelty**. In this continuum, pity is a vicious degeneration of the virtue of mercy in punishment, and cruelty is a vicious degeneration of the virtue of strictness. While excessive mercy turns into pity, excessive strictness trespasses into cruelty. Cruelty thus obtains when excessive suffering is caused by agents whose behavior deviates from statutory, customary, religious or moral norms of strictness. It is important to note that in Seneca's scheme, pity is opposed to strictness and cruelty to mercy. An excessively soft punitive system²⁹ can be cleansed by strictness, and a cruel one by mercy.

Seneca thus writes:

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

²⁸ Seneca, *De Clementia*, *op. cit.*

²⁹ On ancient punishment see David Luban, *Some Greek Trials: Order and Justice in Homer, Hesiod, Aeschylus, and Plato*, *Tennessee Law Review*, vol. 54, no. 2, pp. 279-325 (1987) and Adriaan Lanni, *Verdict Most Just: The Modes of Classical Athenian Justice* 16 *Yale J.L. & Human.* 277 (2004).

harshness. This quality mercy repels and bids it stand ajar from her; with strictness she is in harmony.”³⁰

This passage orients the scheme of vices and virtues in the context of punishment, a legal institution by definition. It offers a conception of cruelty as excess in punishment, where excess is determined in light of natural criminal law. In his effort to persuade his pupil Nero to abandon the ways of cruelty, Seneca reminded him that the only virtue that could truly rival great power was that of self-control. This self-control of sovereign punitive power takes the form of mercy. Commanded by natural criminal law, punitive mercy is also favored for consequentialist reasons – Mercy [...] makes rulers not only more honored, but safer, and is at the same time the glory of sovereign power and its surest protection.”³¹ Mercy is, furthermore, an unconditional virtue. No matter how atrocious the deed to be punished, its agent is to be treated mercifully by the punitive powers. Nothing can excuse the sovereign from this duty. The unconditionality of mercy helps explain why the character and behavior of the victim cannot excuse any withholding of mercy in the agent-objective conception of cruelty. However, mercy is not supposed to be unlimited, lest it degenerates into pity. Punishment, which has an important social function to meet, cannot succeed if it fails to express the distinction between vice and virtue. Mercy, therefore, must not operate to blur the distinction between good and bad.³² Its role is that of tempering punishment, the type and severity of which must be sufficient to demarcate virtue from vice without indulging in the infliction of all punishment power is capable of. In short, the gap between sufficient and possible punishment is not to be bridged, for when it is cruelty is what does it.

Seneca placed cruelty in a model of practical reason made possible by an absolute and immutable natural law system. This system was able to guide action toward virtue because it offered, Seneca believed, objective norms to access behavior independently of mentalist considerations. In contemporary criminal law, the normative benchmark of cruelty is no longer found in natural law, but rather in punitive tradition, communal standards, fables of original legislative meaning, or on specific laws or individualized sentences.³³ But even on the narrow grounds of the objective social or legal norms available to us, it would be very hard to argue that existing criminal justice systems are not cruel.³⁴ Even in what is usually seen as mainstream and legitimate punishment, the gap between minimally necessary punishment and all the punishment power has the resources to inflict is constantly bridged. By definition, this gap-filling is a manifestation of state violence which meets the definitional requirements of the agent-objective conception of cruelty.

³⁰ Seneca, *op. cit.*, 435–437.

³¹ *Ibid.*, 391.

³² See Seneca, 363–395.

³³ For a detailed discussion of the objective norms that now operate as functional equivalents of natural law, see Paulo Barrozo, “*The Foundations of Constitutional Punishment*,” *op. cit.*

³⁴ Paulo Barrozo, “*Punishing Cruelly: Punishment, Cruelty and Mercy*,” *op. cit.*

Seneca's conception of cruelty was made intelligible in its complex of assumptions and implications as part of a model of practical reason anchored in natural law and informed by a stoic outlook. Though his model of practical reason has since lost its appeal and authority, the resulting condemnation of cruelty has an enduring and pervasive influence in criminal law.

Furthermore, Seneca will always be right in his observation that "cruelty's greatest curse— [is] that one must persist in it, and no return to better things is open; for crime must be safeguarded by crime. But what creature is more unhappy than the man who now cannot help being wicked?"³⁵ Culturally speaking, when the time came to leave the learned, agonistic pages of *De Clementia*, criminal law theory benefitted, for the first time, from seeing cruelty explained, in one of its fundamental forms. Ever since, criminal law has lived under a normative horizon with enhanced moral and intellectual resources to reject it.

D. CONCEPTION 2: AGENT-SUBJECTIVE

Thomas Aquinas orchestrated a subjectivist turn in the conception of cruelty inherited from Seneca, while at the same time sharing with Seneca the main contours of a model of practical reason centered on natural law as a framework for an ethics of virtue. In Aquinas' formulation, and consistent with Seneca's definition, the concept of cruelty still presupposes a suffering victim, takes the agent end of the perpetrator-victim axis, and necessitates that the agent's suffering-causing commission or omission be in violation of an objectively ascertainable normative standard of behavior. However, Aquinas adds a subjective element: cruelty obtains only when the agent's deviant behavior is accompanied by a personal delight in causing and witnessing suffering.

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

Aquinas' subjectivist turn is best understood in the context of his natural law theory. More complex and developed than Seneca's, Aquinas' natural law theory speaks of a divinely ordered universe, the balance and symmetry of which is to be maintained first

³⁵ Seneca, op. cit., 397.

and foremost in the inner spaces of reason and passions.³⁶ Both Seneca and Aquinas conceive of a cosmic order permanently vulnerable to violation, in action or intention, by free-willing agents. In this worldview, punishment is a means to restore, via retribution and the expressionist function of punishment, a violated cosmic order, bringing it back to its *ex ante* perfection. To punish is to nullify³⁷ the aggression free-willing agents inflicted in the natural order of the universe. Hence, and importantly, both Seneca and Aquinas insist that punishment does not violate, objectively or subjectively, the order it seeks to repair.

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

Aquinas defines eternal law as the government, by God's reason, of everything existing in the universe.³⁸ In the jurisdiction of eternal law, Aquinas places the whole realm of *physis*, which comprises, for instance, the laws of nature in biology, chemistry, and physics; that is, laws which govern ~~the~~ the whole community of the universe...by Divine Reason."³⁹ Eternal law has, moreover, absolute binding power. The absoluteness of its power is faultlessly evinced in blind observance of its decrees by nature; a nature which, in its passiveness and unconsciousness, displays the prescriptions of God's reason. Eternal law is, therefore, the normative dimension of the great order of things.

Natural law applies solely to humankind. It is in a sense a section of eternal law, with specialized jurisdiction upon beings that partake, up to a limited but fundamental extent, in God's rational attributes: ~~the~~ the rational creature is subject to divine providence in the most excellent way [...]. [w]herefore it has a share of the eternal reason."⁴⁰ Analogous to and derived from God's, human reasoning is able, asserts Aquinas, to guide choices and deeds toward the common good, ~~and~~ and this participation of the eternal law in the rational creature is called the natural law."⁴¹ It is, thus, the ~~imprint~~ "imprint" on people of a ~~divine light~~ "divine light" that entrusts them, as the rational segment of God's creation, the co-responsibility for the government of the cosmos according to the good. In their possession and use of this natural reason, individuals join God as active participants in the government of the universe, specifically in the government of *society*.

In the natural association of individuals into society, humanity indeed lives as a ruled species; ruled, however, in self-government, for humanity is co-author, with God

³⁶ The modern natural law jurisprudence of Grotius and Hobbes intensifies the mentalist element of Aquinas' natural law, rather than completely breaking with it. See Hugo Grotius, *The Rights of War and Peace* ed. Richard Tuck (Indianapolis: Liberty Fund, 2005), Chapter I and Thomas Hobbes, *Leviathan* ed. R. Tuck. (Cambridge: Cambridge University Press, 1992).

³⁷ The same assertion is made by Kant's and Hegel's legal rationalism. [References]

³⁸ Aquinas, *op. cit.*, Q.91, Art. 1.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

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

For Aquinas, human law (positive law)⁴² is the human way of dealing, by the exercise of what amounts to only a hint of God's perfect reason, with the problems of generalization, universalization, and anomie. In this jurisprudential framework, human law must be derived from natural law as a logical "conclusion from premises" or as a "determination of certain generalities."⁴³ The problem of anomie is explained as the product of an imperfectly honed virtue which fails to shield itself from the influence of untamed passions. In order to perfect virtues, Aquinas recommends a "training, which compels through fear of punishment," that which is "the discipline of laws."⁴⁴ Human law is thus a human-made artifact in the service of natural law enforcement.

As a product of human reason for the purposes established by natural law, human law is, of course, bound to suffer from imperfections of conception and application. Because human law, as practical reason, is by definition preoccupied with practical affairs, it will certainly fail to achieve the infallibility of science. Mistakes, Aquinas contends, are thus to be expected in matters of practical reason. Consequently, immaculate perfection is not to be expected of human law, but only constant improvement - a perfectibility which "is possible in its own particular genus."⁴⁵

Moreover, Aquinas submits, human law cannot and should not cover the entire immense and sorrowful territory of human vices, but only those carrying grave social consequences.⁴⁶ The vices to be repressed by human law are those affecting the common good - those with a public implication. All vices with private consequences only (or primarily) are to be left alone by positive law. They constitute the proper domain of divine law, the fourth kind of law in Aquinas' jurisprudence.

Aquinas' anthropology maintains that humankind is naturally committed to the common good, "ordained" as it is to the end of eternal happiness, which can only be reached by following God's direct guidance through the language of law. In addition to providing firm guidance to souls struggling to earn salvation in the form of a heavenly

⁴² Ibid., Q.91, Art. 3.

⁴³ Ibid., Q. 95, Art. 2.

⁴⁴ Ibid., Q. 95, Art. 1.

⁴⁵ Ibid., Q. 91, Art. 3.

⁴⁶ Ibid., Q. 96, Art. 2.

afterlife, divine law has yet a second role in Thomistic jurisprudence. It assists in the correction of problems created by the fallibility and natural idiosyncrasies of human judgment as it tries to determine the content of natural law and to cope with the duty to posit a human law in accordance with natural law. Because divine laws were revealed by God through the *medium* of prophets, they cannot possibly err. Therefore, divine law, which is universal in reach, can offer untainted insight into the nature of goodness and unimpeachable certainty about which practices and intentions have redeeming value.

There is yet another problem to be addressed by divine law. Let us call this the problem of the double requirement of virtue:⁴⁷ “man is not competent to judge of interior movements, that are hidden, but only of exterior acts which appear: and yet for the perfection of virtue it is necessary for man to conduct himself aright in both kinds of acts.”⁴⁸ Divine law, whose perfection reflects the perfection of its lawgiver, is able to provide a trusted path to redemption and ultimate salvation via virtue.

Finally, as noted above, it would be neither possible nor desirable for human laws to punish all evils. Such a comprehensive punitive system would, unavoidably, have to work against the common good in many circumstances.⁴⁹ However, in order that no vice remains unpunished or incentivized, divine law makes whole the cosmic order by decreeing every sin forbidden.⁵⁰ There is no doubt that anomie also threatens divine law, but the punishment it carries never fails; as, Aquinas reassures us, God’s judgment never fails.

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

⁴⁷It is interesting to note the similarity here with Kant’s practical philosophy in which morality, binding in conscience as it is supposed to be, receives the complement of law, which binds the deeds only. See his three “Introductions,” the general one to the work and the two specific ones to the part on law and the part on virtues, respectively, in his *The Metaphysics of Morals* in Immanuel Kant *Practical Philosophy*. Trans. and ed. Mary J. Gregor (Cambridge: Cambridge University Press, 1999). About the dependence of morals on laws see Tony Honoré (citation).

⁴⁸ Aquinas, Q.91, Art. 4.

⁴⁹ Here the similarity is, interestingly enough, with John Stuart Mill’s liberalism. See, on this point, his *On Liberty* in *John Stuart Mill: On Liberty and Other Essays* ed. John Gray (Oxford: Oxford University Press, 1998).

⁵⁰ Aquinas, Q.91, Art.3.

In a first approximation, Aquinas raises the problem of cruelty as a deviation from the natural ordering of human affairs. He does this in two Questions (dedicated to the virtue of temperance) in the *Summa Theologiae* – Question 157, entitled *De Clementia et Mansuetudine*, and Question 159, entitled *De Crudelitate* – in which he directly interrogates Seneca’s ideas on cruelty (treating them sometimes almost as a *medium* for Aristotle). A fundamental difference that emerges relates to the requirements of virtue. Whereas, as discussed above, Seneca sets the two necessary requirements of compliance in mind and in action for a deed to be considered virtuous, Aquinas relaxes, for specific virtues such as temperance, the outcome requirement. Anti-consequentialist, he dispenses with the results of courses of action when assessing their moral value and the virtue of their agents. Hence, Aquinas’ jurisprudence does not require that deeds intended to relieve suffering achieve palpable success. Its only requirements are a righteous intention and sincere attempt. This is in line with the precedence Aquinas gives to the mind over the body in the mind-body problem in medieval philosophy.

Another distinction between Seneca and Aquinas is related to the first and is equally important. It bears on the problem of the motivation to act virtuously. In the architecture of Aquinas’s conception of cruelty, although the virtues of mercy, piety, and clemency⁵¹ express an inclination toward the relief of suffering, they originate from different motives. While piety is motivated by reverence for God, and mercy by compassion (that is, by the capacity to empathize with the suffering of others), clemency is motivated by judgment, where judgment is a sense of proportion and moderation of the mind operating under the tutelage of natural reason. It is through a judgment of proportion and moderation that clement relief of suffering is provided. Since proportion is a measure taken in light of a general standard (natural law in this case), relief of suffering is by definition motivated by a consideration alien to the passive experience of the agony of pain. Therefore, relief of torment is required by clemency, independent of the intention, even if righteous, of the agent who inflicts it. Herein lays the objectivist element in Aquinas’ conception who, like Seneca, sees the world through the lenses of an objective normative order.

Aquinas begins the Question on *De Crudelitate* with two guiding queries. The first is “whether [cruelty] is the opposite of clemency”⁵² and the second is “how [cruelty] compares with ferocity and savagery.”⁵³ His answers to these questions further reveal the subjective element in his concept of cruelty. As I show, Aquinas opposes cruelty to both clemency and mercy.

Aquinas starts with Clemency. Since cruelty is a problem of punitive excess, as it was for Seneca, it would seem that cruelty is not a counterpart to clemency but to mercy. However, Aquinas argues that clemency, as part of the virtue of temperance and not of justice, has to do not with equity, as mercy does, but with a mild disposition of the spirit -

⁵¹ There would be a point to be made on the Latin words translated into “mercy,” “pardon,” and “clemency” in Aquinas and Seneca. I will excuse myself from doing it here.

⁵² Ibid., Q. 159, Art. 1.

⁵³ Ibid., Q. 159, Art 2.

a state of mind. However, this conclusion is only one part of the general structure of Aquinas's argument. His objective is to make cruelty not only an injustice, but also a vice contrary to temperance, contrary to a balanced disposition of temperament. The reason why Aquinas would want to place cruelty under temperance rather than justice is the foregrounding of the agent's mental disposition in the definition of cruelty. Whereas for Seneca conflict with public good is a sufficient condition for a finding of vice, for Aquinas a special state of mind must obtain. It is in the intersection of what phenomenologically occurs with that which takes place invisibly in the inner citadel of the conscience that determines the cruelty of a deed. It is precisely in this subjective requirement⁵⁴ that the agent-subjective conception of cruelty finds both its semantic and normative cores.

Aquinas illustrates the mentalist element he brings to cruelty with an etymological argument. Here, again, the natural lawyer's appreciation of proportion is in operation. However, instead of geometrical analogies to describe the social order, Aquinas appeals to a sensorial analogy – tasting. The analogy with tasting is deployed as a way to overcome the difficulty in making cruelty the direct opposite to both clemency and mercy, as Seneca does. The point of the analogy depends on the etymological derivation of the word cruelty from "*cruditas*," that is, rawness. In this analogy, clemency –denotes a certain smoothness or sweetenes of soul," which inspires the mitigation of the punitive mind, whereas cruelty reflects sourness and bitterness of taste similar to that of unprepared food,⁵⁵ a bitterness that upsets the balance of reason and passions in the direction of savagery.

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

Moreover, the rectification of unjust punishment is a matter of equity, hence of mercy. Cruelty in this conceptual scheme refers to the state of mind that, contrary to the prescriptions of mercy, delights in –excess in punishing" and, contrary to what clemency commands to the conscience, yields to a –hardness of heart, which makes one ready to increase punishment."⁵⁶ Cruelty is then the intemperate mental disposition that seeks injustice in punishment. As with Seneca's conception of cruelty, Aquinas's clearly

⁵⁴ Ibid., Q. 157, Art. 3.

⁵⁵ Ibid., Q. 159, Art. 1.

⁵⁶ Ibid., Q. 159, Art. 1.

restricts it to the domain of punishment - a situation which would start to change only in the eighteenth-century.⁵⁷

On the second question, as to whether cruelty and savagery differ, Aquinas gives a provisional no – cruelty is the same as savagery. This provisional answer is in line with most ancient virtue philosophies, including Seneca's: for each virtue there is only one contrasting vice. Indeed, if cruelty and savagery are opposed to clemency, as Aquinas affirms they are, they would necessarily appear the same.⁵⁸ However, Aquinas is a philosopher concerned with human fault and redemption. Animal inclinations such as savagery are neither vices nor virtues. They constitute an indelible stain on God's rational creation, reminding humanity of its decayed condition. No matter how honorable the human condition is in comparison with other creatures, humanity's membership in the animal kingdom condemns it to experience, in the fragile and transitory existences of individuals, animal drives as well as God's enlightenment. This predicament renders each person susceptible to salvation solely in relation to that which in him is godlike – the rest is his fate. Fate rules, though, only until God intervenes. To the inhuman character of savagery, only another equally inhuman virtue can be opposed, a virtue that is a gift of God: piety. Hence, savagery and piety are, respectively, the attributes of two categories of inhuman beings: beasts and saints.⁵⁹

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

Aquinas' agent-subjectivism narrows the agent-based conception of cruelty. Where Seneca relied upon behavior in violation of an objective norm for a finding of cruelty, Aquinas internalized natural law's compliance requirements. According to agent-subjectivism, unless and until the conscience missteps, no cruelty can be found, even if otherwise cruel outcomes are present. Although Aquinas' mentalism emerged in the

⁵⁷ See Foucault's *Discipline and Punish: The Birth of the Prison* (New York, NY: Vintage Books, 1995) for the history of this change.

⁵⁸ Ibid., Q. 159, Art. 2.

⁵⁹ "Clemency is a human virtue; wherefore directly opposed to it is cruelty which is a form of human wickedness. But savagery or brutality is comprised under bestiality, wherefore it is directly opposed not to clemency, but to a more excellent virtue, which the Philosopher [Aristotle in *The Nicomachean Ethics*, VII, 5] calls heroic or god-like, which according to us, would seem to pertain to the gifts of the Holy Ghost. Consequently we may say that savagery is directly opposed to the gift of piety." Ibid. Also, "Properly speaking, brutality or savagery applies to those who in inflicting punishment have not in view a default of the person punished, but merely the pleasure they derive from a man's torture. Consequently it is evident that it is comprised under bestiality: but suchlike pleasure is not human but bestial. [...] On the other hand, cruelty not only regards the default of the person punished, but exceeds in the mode of punishing: wherefore cruelty differs from savagery or brutality, as human wickedness differs from bestiality." Ibid.

context of specific ancient and medieval philosophical problems, it anticipated a broader movement in modern crime doctrine, which foregrounds mens rea vis-à-vis behavioral models of criminal responsibility. But cruelty and liability for crimes are not the same. They speak to different moral and legal intuitions and principles. Hence, whereas subjectivism expanded the overlap between modern crime theory and theories of justice, subjectivism has a reductionist effect on the concept of cruelty. It is thus unsurprising that whenever courts decide to narrow the basis for findings of cruelty, they seek refuge in the agent-subjective conception.⁶⁰

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

Furthermore, on the cultural front, agent-objective and agent-subjective conceptions of cruelty cannot capture all instances of cruelty that our moral and legal outlooks can now detect. Case law shows that courts on both sides of the Atlantic have discovered this shortcoming. A model of practical reason is certain to fail if it seeks to resolve all problems of personal predicament that impact human dignity by focusing on the agent side of the agent-victim relation. Focusing instead on the victim side of this relation is an expected reaction to the perception that the previous model of practical reason has been exhausted. But how would cruelty look from the victim side of this relation - from a perspective that relies comparatively less on the legality and morality of cruel agency, with its intricate economy of vices and virtues, and more on insight into what it must feel like to suffer cruelly, no matter at whose hands?

III. SECOND MODEL OF PRACTICAL REASON: CRUELTY AS SUFFERING

E. CONCEPTION 3: VICTIM-SUBJECTIVE

The victim-subjective conception of cruelty, which we owe to Montaigne, turned the table on agent-based conceptions. Victim subjectivism presupposes cruel agency, thus remaining also an agent-dependent conception. However, the definitional element of cruelty rests in the victim's intense experience of suffering. Cognitively, compassion is the key impulse in the identification of instances of cruelty. The model of practical reason associated with victim subjectivism stipulates that sensibility counts more than reason.

⁶⁰ See Paulo Barrozo, *"The Foundations of Constitutional Punishment"*, *op. cit.*

Consequently, the perspective from which to understand cruelty is that of the suffering subject. In the context of punishment, cruelty obtains when someone subject to punitive agency experiences severe suffering. More recently, the requirement of intent to cause suffering has been relaxed.⁶¹

Montaigne's essay on cruelty is shorter than Seneca's or Aquinas's.⁶² His intellectual style is less assertive, his prose less pompous, and his analyses, at points, less coherent⁶³ than theirs. His essay is, nonetheless, astonishing. Much of the current understanding of cruelty is a cultural heir of the perspective on cruelty that Montaigne helped bring to the center of modern culture, particularly the sense of guilt for the suffering of others.⁶⁴

While I focus on the conception of cruelty Montaigne contributed, it is important to keep in mind that he was one of the first modern thinkers to put forward a completely non-metaphysical conception of law and a contextualizing and demystifying conception of legal authority.⁶⁵ This matters because when law and customary norms are contextual and their authority culture-specific, focus tends naturally to be directed to the differences that tangibly matter, such as, in the case of Montaigne, suffering. Rather than the theologically and metaphysically charged model of practical reason found in Seneca and Aquinas, Montaigne embraces a lighter, expressionist approach to "morals." In his moral outlook, Montaigne relies more on the cultivation of sensibilities, and on the heightening of the sense of guilt, than on engaging in the sometimes too-arid philosophical debates about norms, behavior, and intentions. Montaigne knew that, as Smith came to articulate it in the eighteenth-century, "no action can be properly called virtuous, which is not accompanied with the sentiment of self-approbation."⁶⁶ It is precisely this sentiment of self-approbation that a sense of guilt in relation to cruelty would encumber. Ultimately, this encumbrance makes cruelty incompatible with virtue – a frugal argument, for certain, but one that is so by design.

⁶¹ See *Brown v. Plata*. I discuss the mens rea requirement of cruelty in Paulo Barrozo, "The Foundations of Constitutional Punishment," *op. cit.*

⁶² An analysis of Montaigne's ideas on law, customs, natural and social orders, etc. would be of course helpful in the contextualization of his innovation on the theme of cruelty. It cannot, unfortunately, be done within the bounds of this essay.

⁶³ Montaigne, it should not be forgotten, is a self-proclaimed champion of contradictions in thought, if thought is to better reflect life as it is.

⁶⁴ Speaking about the origins and nature of our civilization, Freud sought to "represent the sense of guilt as the most important problem" in its development. The price paid by the cultural availability of the sense of guilt was, according to Freud, very high indeed: "for our advance in civilization is a loss of happiness through the heightening of the sense of guilt." Sigmund Freud, *Civilization and Its Discontents*, transl. by James Strachey (New York and London, Norton, 1989), 97. For insight into this sense of guilt see Friedrich Nietzsche, *On The Genealogy of Morality* (Cambridge: Cambridge University Press, 2000).

⁶⁵ As is well known, Montaigne has much to say about laws and customs in his peculiar form of legal historicism. However, the new normative vista opened by his take on cruelty does not require explication of his legal thought the same way Aquinas' did.

⁶⁶ Adam Smith, *The Theory of Moral Sentiments* (Indianapolis: Liberty Fund, 1982), 179.

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

Montaigne's skepticism found refuge and consolation in abiding by what Hume used to call the common affairs of life⁶⁷ and in the cultivation of compassion, both common themes in early modern humanism. The inclination toward ordinary life brought along, in Montaigne's case, a relentless defense of the actual normative structure of society: customs, which included the laws, long established habits and social manners, and morality in general. Naturally, this defense of the actual social arrangement goes well with a skepticism that is phobic of social invention, as is Montaigne's.

Montaigne would only moderate his defense of the social *status quo* under the recommendation of compassion. Even if, from a cognitive point of view, universalism is impossible, there is still no *a priori* impossibility of experiencing the feelings of fellow beings. It was in the capacity to represent the feelings – *co-passio* – of other creatures, not in the impossibility of importing and internalizing their worldviews, that Montaigne would find inspiration to favor efforts to mitigate the horrors of existing social arrangement, despite his conservatism. It is in this context that Montaigne's thought on cruelty and the accompanying model of practical reason is to be understood.

Like Aquinas, Montaigne studied Seneca. In fact, he starts his essay on cruelty by copying directly from Seneca's style in *De Clementia*. As Seneca's style was determined by the urge to both educate and sensitize Nero, Montaigne's style was designed to

⁶⁷ –But what have I here said, that reflections very refin'd and metaphysical have little or no influence upon us? This opinion I can scarce forbear retracting, and condemning from my present feeling and experience. The intense view of these manifold contradictions and imperfections in human reason has so wrought upon me, and heated my brain, that I am ready to reject all belief and reasoning, and can look upon no opinion even as more probable or likely than another. Where am I, or what? From what causes do I derive my existence, and to what condition shall I return? Whose favour shall I court, and whose anger must I dread? What beings surround me? And on whom have I any influence, or who have any influence on me? I am confounded with all these questions, and begin to fancy myself in the most deplorable condition imaginable, environ'd with the deepest darkness, and utterly depriv'd of the use of every member and faculty.[...] Most fortunately it happens, that since reason is incapable of dispelling these clouds, nature herself suffices to that purpose, and cures me of this philosophical melancholy and delirium, either by relaxing this bent of mind, or by some avocation, and lively impression of my senses, which obliterate all these chimeras. I dine, I play a game of backgammon, I converse, and am merry with my friends; and when after three or four hour's amusement, I wou'd return to these speculations, they appear so cold, and strain'd, and ridiculous, that I cannot find in my heart to enter into them any farther. Here then I find myself absolutely and necessarily determin'd to live, and talk, and act like other people in the common affairs of life." David Hume, *A Treatise of Human Nature* (Oxford: Clarendon Press, 1978), 268-269.

sensitize an audience who could hardly care less about the jurisprudential intricacies of a notion of cruelty. But while Seneca's audience was constituted in the first place by Nero, a person placed in a very special circumstance, Montaigne's audience was the ordinary person, the person who, in his or her mundane existence, was neither philosopher nor saint. Indeed, the ordinary person is alien to the thought that "it is more beautiful to prevent the birth of temptations by a sublime and god-like resolve."⁶⁸ Uncommon is also the possession of an "affable nature," a personality "which of itself finds indulgence and vice distasteful"⁶⁹ and is therefore naturally unsuited for it. Montaigne, in his effort to befriend his audience, placed himself among the latter, for, as he confessed, he would find "in many cases more rule and order in my morals than in my opinions, and my appetites less debauched than my reason."⁷⁰

For the ordinary person who was neither philosopher nor saint, virtue had to be won. Indeed, a mark of the model of practical reason from within which Montaigne writes is the redefinition of virtue as something earned in battle, for "virtue rejects ease as a companion." Virtue finds its foundation in the victory of the gentle part of the self over the part that internalizes socially conditioned and naturally developed desires that resist compassion. Unless there is a struggle against the self to avoid vice and do good, virtue does not obtain: virtue's path is "rough and thorny."⁷¹ Without this internal struggle, virtuous conduct is an aberration, an epiphenomenon of a god-like philosophical mind and resolve or of a personality whose original appetites coincidentally and naturally harmonize with the requirements of morality. That is why the two extremes of the "god-like resolve" and the "affable nature" are only borderline cases for virtue.

Having established his audience as consisting of the multitude of ignorant ordinary people living in the battlegrounds where virtue needs to be earned by actively conquering the social and natural forces of vice, and having defined the central case of virtue as a struggle by imperfect but well-intended natures to overcome vice and to instantiate that which is good, Montaigne is finally ready to apply his model of practical reason to the topic of cruelty. And he does this in the usual confessional tone to be found everywhere in his essay, proclaiming that of all vices "both by nature and judgment I have a cruel hatred of cruelty." Note that the skeptic in Montaigne finds it safer to rely on sensibility than reason: "I am so soft that I cannot even see anyone lop the head off a chicken without displeasure, and cannot bear to hear a hare squealing when my hounds get their teeth into it."⁷² Incidentally, similar moral pessimism is found in the anti-cruelty liberal tradition mentioned above.

When Montaigne attributes his hatred of cruelty to his natural softness, he is already electing compassion – a sentiment that will be so important to Rousseau, Smith, and Hume later on – to lead the revolt against the vice of cruelty. The faculty of

⁶⁸ Michel de Montaigne, "On Cruelty," in *The Complete Essays*, trans. M.A. Screech (London: Penguin, 1991), 476-477.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*, 479.

⁷¹ Montaigne, *op. cit.*, 474.

⁷² *Ibid.*, 480-481.

representation is fundamental in the operation of compassion. It is the image of the decapitated chicken or the sound of the squealing hare that, through the senses of sight and hearing, make it real to observers the pain and suffering of another being. This is by definition the job of representation: to make it possible to import into one's mind the feelings of others. And once this enlargement of one's sensory universe to incorporate the pain and terror of others is completed, one is bound to see the world from the perspective of suffering.

However, as he learned from Seneca and Aquinas, the vice of cruelty is understandable only as a derivation of cruelty itself. It is therefore necessary to first know what cruelty is before one becomes capable of evaluating courses of action prone to cause it. At this point in his argument, Montaigne's conceptual crafting is much less seamless than that of Seneca and Aquinas. Montaigne does not offer a conception of cruelty comparable, in jurisprudential detail and complexity, to those of Seneca or Aquinas. What Montaigne does is simply to place the suffering of the victim at the core of the conception of cruelty. According to him, it is in the act of causing suffering, in the actual victimization, and while it happens, that cruelty takes place. There is no cruelty, no matter how unbalanced a course of action or the state of mind of its agent, unless suffering is present. Montaigne's conception of cruelty is, of course, as much agent-dependent as Seneca's and Aquinas's depended on a presupposition of the victim's suffering. What accounts for the analytical distinction among their conceptions is the foregrounding and backgrounding of semantic and normative choices that place either the victim of cruelty in his suffering or the agent of cruelty in his behavior or state of mind at the center of the concept of cruelty. In opposition to Seneca and Aquinas, all allusions to acts or states of mind are subjected to the controlling criterion of suffering. It is suffering that gives to the acts and omissions causally linked to it their ultimate cruel nature. "If I had not seen it," says Montaigne, "I could hardly have made myself believe that you could find souls so monstrous that they would commit murder for the sheer fun of it." However, it is in "the pitiful gestures and twitchings of a man dying in agony, while hearing his screams and groans" that one finds "the farthest point that cruelty can reach."⁷³ Were it not for the screams and groans of a suffering victim, there would be no cruelty, despite any normative breach or psychological enjoyment on the part of a murderer. Without the victim's extreme suffering, the same acts, previously condemnable as cruelty, transubstantiate into innocent ones. Hence Montaigne's proposal that in order for the polity to abstain from cruelty while still achieving the ends of punishment, "exemplary severity intended to keep the populace to their duty would be practiced not on criminals but on their corpses."⁷⁴ In the victim-subjective conception of cruelty, the state of mind of agents adds just a qualification to cruelty, a degree, as it were, of blame for the vice of cruelty.

In place of an analysis of what kind of suffering the definition of cruelty requires or an interrogation of what kind of causal weight would be required before

⁷³ Ibid., 484.

⁷⁴ Ibid., 483.

considering an act or omission cruel, Montaigne simply appeals to human sensibility.⁷⁵ This sensibility is, however, capable of education. The training of sensibilities to identify and rebel against cruelty, to earn virtue by battling vice, prescribes a respect for all sentient creatures, for ~~n~~natures given to bloodshed where beasts are concerned bear witness to an inborn propensity to cruelty.”⁷⁶ But Montaigne does not restrict the education of sensibilities to a concern toward sentient beings for, as he submits, ~~there~~ there is a kind of respect and a duty in man as a genus which link us not merely to the beasts which have life and feelings, but even to trees and plants.” In extending the obligation of respect and consideration to the whole of nature, Montaigne seems to indicate that passions have the potential, even if necessarily meager, for some moral universalization not present in reason.

In conclusion, while compassion is the key impulse in the identification of cruelty, the suffering of victims is the necessary, although not the sufficient (since his conception is also agent-dependent), definitional element of cruelty. The political impact of this conception of cruelty and the urge that accompanies it to educate sensibilities is immense. One does not need to look far in order to identify heirs of Montaigne’s compassionate conservatism. Because compassion could conceivably reach a degree of moral generalization for which moral and cognitive idiosyncrasies ill-prepared humankind, it becomes the instrument par excellence for the moderation of the most extreme effects of what it takes to keep and reproduce the social status quo. If knowledge and moral cognitivism are not to be relied upon for the betterment of society, compassion is.

However right or wrong Montaigne may be, because of his cultural importance and literary felicity, there can be no complete retreat from his conception of cruelty and the sort of sensibility it helped create and nourish. Furthermore, the model of practical reason from which Montaigne writes is remarkably distinct from that of Seneca and Aquinas. Once the perspective of the suffering subject of cruelty was brought into the normative imagination, a whole new normative territory was open for colonization - a territory in which we are to this day willing settlers. And Montaigne accomplished all this while leaving untouched the theological, metaphysical, and jurisprudential questions Seneca and Aquinas sought so hard to resolve. The prestige of the victim-subjective conception of cruelty and its influence in criminal law cannot be overestimated. And yet, it is counter-intuitive in its call to background agency and insufficient to conceptually capture all the instances of cruelty relevant to criminal law and punishment.

Would it be possible to imagine a conception of cruelty that could reach beyond active agency and its motivations and beyond the actual and conscious suffering of victims? If at all possible, how would such a conception impact our normative vistas and

⁷⁵ ~~I~~ feel the most tender compassion for the affliction of others and would readily weep from fellow-feeling [...]. Nothing tempts my tears like tears – not only real ones but tears of any kind, in feint or paint. I scarcely ever lament for the dead: I would be more inclined to envy them; but I do make great lamentations for the dying. Savages do not upset me so much by roasting and eating the bodies of the dead as those persecutors do who torture the bodies of the living.” Ibid., 482.

⁷⁶ Ibid., 485.

the development of criminal law? What model of practical reason would render such a conception of cruelty compelling?

IV. THIRD MODEL OF PRACTICAL REASON: CRUELTY AS PREDICAMENT

F. CONCEPTION 4: VICTIM-OBJECTIVE, AGENT-INDEPENDENT

If the life of law is not solely logic, it is not solely pragmatism either.⁷⁷ Reflective progress is a force to be contended with in the evolution of criminal law. The concept of cruelty is a case in point. The push of reflectivity lays bare the limitations of agent and victim-based conceptions of cruelty and the models of practical reason they inhabit. By relying on objective norms (either as natural law as a foundation for an ethics of virtues or as hegemonic social morality), agent-based conceptions either beg or base on faith the question of the authority of those norms. To the extent that the agent-based conception is subjectivized, it raises, on one hand, the bar for a finding of cruelty too high to accommodate the evolution of the rejection of cruelty and, on the other, creates an incentive for elective blindness in relation to the cruelty one causes or allows to take place.⁷⁸ By relying on the suffering of victims, victim-subjective conceptions of cruelty fail to capture instances of cruelty in which the victim is deprived of his senses or consciousness about his predicament. The fourth conception of cruelty and the model of practical reason that gives meaning to it seek to address these limitations. They transcend discrete agency and conscious suffering as the core definitional elements of cruelty. In the victim-objective/agent-independent conception of cruelty, agency is transcended into structural causation and suffering is transcended into violation of human dignity.

The chief concern of the first three conceptions of cruelty is to tame power's propensity for brutality and its constant disregard for the pain of others. The fourth conception broadens this initial concern to include preoccupation with free and inviolable individual existences. I argue that the push of reflectivity is the force behind this broadening of the conception of cruelty. The point is simple: if you start from a position that accepts reasons for constraining agents of cruelty, and thought hard enough about them – avoiding inconsistencies, unleashing normative entailments, spelling out practical requirements, and seeking universalizability⁷⁹ – you will arrive at an agent-independent, victim-objective concept of cruelty. The point may be simple, but the third model of practical reason is a conceptually complex and normatively contested terrain in which the fourth conception of cruelty has to be articulated against the backdrop of changed legal

⁷⁷ See Oliver Wendell Holmes' "The Path of the Law," *Harvard Law Review* 10, no. 8 (1897): 457-478.

⁷⁸ This is one of the problems with the agent-subjective conception of cruelty in the Supreme Court's Eighth Amendment jurisprudence. See the quotes in the Introduction and Paulo Barrozo, "Foundations of Constitutional Punishment," *op. cit.*

⁷⁹ In the Kantian sense of a capacity of special normative formulations to be made universally required and valid. More on Kant's moral universalism is *infra*.

thought and experience, transformed cultural patterns, value pluralism, and expanded, although also more strained, means of social cohesion and solidarity.

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

In this section I focus, first, on how the preoccupation with punitive agency and intention led to the interrogation of structural, system-wide conditions of punishment. In the sequence, I address questions of human dignity and vulnerability.⁸⁰ Once suffering-causing agency is set under moral and legal scrutiny, and a concern with suffering is given legal and moral priority, reflectivity forces consideration of structural causation and suffering-independent reasons to care for others. When seen from this perspective, the rejection of cruelty in criminal law takes the form of a rejection of disrespect for the dignity of individuals, especially through brutality, neglect, exploitation, and subjection.

Analyzes of the model of practical reason that sees cruelty as a predicament requires that insights be gathered from different authors. For example, what in Montaigne was an empathetic preoccupation with suffering is transformed in Kant to a thesis about universal and unconditional human dignity, a dignity achieved by mere membership in the species.⁸¹ In another example, in Marx and Mill, what was in Seneca and Aquinas a concern with virtuous and vicious agency in the context of punishment is transmuted into questions about positive and negative structural conditions for justice, emancipation, and empowerment. These authors operated largely within a semantic menu that, although kindred to cruelty as a concept, never systematically employed it, nor provided any sustained conceptual analysis of it. Nonetheless, their influence on jurisprudence of cruelty in criminal law was tectonic.

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⁸⁰ Germany is the leading contemporary constitutional experience in developing and enforcing a legal conception of human dignity. Article 1 (Protection of human dignity) of the Basic Law for the Federal Republic of Germany reads "*The dignity of man is inviolable. To respect and to protect it shall be the duty of all public authority.*"

⁸¹ Later to be extended, under the pressure of the accusation of specism, to complex animal life in general. See, in this regard, Peter Singer, *Animal Liberation* (New York, NY: Ecco, 2002).

If concern for the suffering of others is not merely instinctive, as I argue it is not, why should we care? What is the normative basis for caring for the unbeknownst other in the way we often do? If this normative basis existed and could be found, would it render any obligations valid even when the individual in relation to whom we are obligated is not consciously suffering? The third model of practical reason in the rejection of cruelty provides compelling answers to these questions. Kant is the central figure in the articulation of this model. His *Groundwork of the Metaphysics of Morals* recounts the odyssey of practical reason that, by forces internal to itself, is condemned to dissatisfaction in relation to its ordinary powers, seeking in critical-reflectivity the uncontaminated sources of duty, and a glimpse into the nature of unconditional goodness. It is not, for Kant, that tested common opinion and ordinary reasoning are incapable of distinguishing good from evil, or plotting courses of action consistent with this distinction. The problem, for him, lies in the ease with which innocence is “seduced” by inclinations, interests, and all sorts of incentives foreign to the command of idealized duty itself.⁸² This seduction of mundane goodness is aggravated by what Kant calls a “natural dialectic,” that is, the rationalization of the seduction so as to render the original strictness of duty-imposing practical norms more amenable to contingent consideration of utilities.

There is, however, another dialectic in action in the operation of ordinary practical reason: the dialectic of reflection. This dialectic “is an essential principle of every use of our reason to push its cognition to consciousness of its necessity.”⁸³ This reflective folding of reason upon itself in search of assurances about the validity of its contents is the very element of transition from uncritical to critical morality. Whereas the judgments and opinions of uncritical morality or mere moral sensibility suffer, in Kant’s view, from the undue influence of the transitory forces of mundane experience, critical morality, when successful, is able to reach and articulate axioms that stand a priori in relation to experience and enjoy the seal of rational necessity. On the basis of this twofold pillar of independence from experience and rational necessity, Kant builds the idea of inherent dignity and its derivative duties, for a “duty in general – lies, prior to all experience, in the idea of a reason determining the will by means of a priori grounds.”⁸⁴

To the independence and necessity of the postulates of critical morality, Kant adds the requirement of universality, which refers not only to the unconditioned validity of moral norms, but also to a heuristic for,⁸⁵ and the boundaries of the jurisdiction of, these norms. The reflective conscience’s representation to itself of a postulate of practical reason that meets the simultaneous criteria of a priori and universal rational necessity is, in Kantian ethics, the representation of a law, “insofar as it and not the hoped-for effect [of the duty performed as required by it] is the determining ground of the will.” Hence, a

⁸² Kant, *Groundwork of the Metaphysics of Morals*, 59.

⁸³ *Ibid.*, 108, emphasis omitted.

⁸⁴ *Ibid.*, 62.

⁸⁵ “I do not, therefore, need any penetrating acuteness to see what I have to do in order that my volition be morally good. Inexperienced in the course of the world, incapable of being prepared for whatever might come to pass in it, I ask myself only: can you also will that your maxim become a universal law?” *Ibid.*, 57-58.

will so determined by an a priori and rationally necessary universal law is the primary, absolute moral good, a good which, it must follow, ~~is~~ already present in the person himself who acts in accordance with this representation.”⁸⁶

In this scheme of practical reason, virtues of moderation such as those Seneca eulogized are insufficient at best. Wisdom and wit are indeed desirable and frequently useful, explains Kant, but also efficient instruments of evil and harm if the will behind them is not itself good.⁸⁷ A good will is the basis of goodness, for, as noted above, it represents to itself as law the principles of practical reasonableness forged by reason aprioristically, before experience, and universally desirable and binding. Once a good will represents such a principle as law, it determines itself solely on the basis of the duty commanded by that principle. In Kant, the reliance on contextual judgment and virtues is transcended into the requirement that the agent’s will be intrinsically good on the basis of its exhaustive determination by the self-representation of an a priori and a-contextual rational duty.

A second transformation occurs when Kant substitutes the idea of the maxim of a universally valid self-legislated law for Aquinas’ fourfold normative system. In Kant, law must go through a *reductio ad unum* by reason, whereby both the laws of nature and human laws are analogized in their universality. This is why he offers the following as the formula of the perfect good will: ~~act~~ in accordance with maxims that can at the same time have as their object themselves as universal laws of nature.”⁸⁸

The notion of autonomy as a good will that legislates for itself is the pinnacle of Kant’s practical reason, for ~~autonomy~~ is therefore the ground of the dignity of human nature and of every rational nature.”⁸⁹ Built on the ideas of perfect good will and of rationally necessary, aprioristic, and universal maxims as the sole determinant of this will, autonomy is at once the proof of and test for our humanity. Thus, the individual, equipped with a reason which bestows upon his will its own moral laws is, as both an instantiation and receptacle of the good, an end in itself. From this special dignity necessarily follows, claims Kant, the duty to see all other comparable beings as potentially autonomous and, therefore, as ends in themselves,⁹⁰ as inhabitants of an ideational kingdom of ends.⁹¹ Contemplated in their mutually reinforcing relation, a

⁸⁶ Ibid, 56, emphasis omitted.

⁸⁷ Ibid., 49, emphasis omitted.

⁸⁸ Ibid., 86, emphasis omitted.

⁸⁹ Ibid., 85, emphasis omitted.

⁹⁰ “[E]very rational being, as an end in itself, must be able to regard himself as also giving universal laws with respect to any law whatsoever to which he may be subject: for, it is just this fitness of his maxims for giving universal law that marks him out as an end in itself; it also follows that this dignity (prerogative) he has over all merely natural beings brings with it that he must always take his maxims from the point of view of himself, and likewise every other rational being, as lawgiving beings (who for this reason are also called persons).” Ibid., 87.

⁹¹ “It is true that, even though a rational being scrupulously follows this maxim himself, he cannot for that reason count upon every other to be faithful to the same maxim nor can he count upon the kingdom of nature and its purposive order to harmonize with him, as a fitting member, toward a kingdom of ends possible through himself, that is, upon its favoring his expectation of happiness; nevertheless that law, act

priori normative reason and the legislative centrality of the self are considered to be sufficient elements for a conception of the inherent dignity of the person as an end in him or herself; an end who, as a full member of a kingdom of ends, can never be used solely as a means to achieve other ends.⁹²

From the incommensurability of autonomy – ~~in~~ the kingdom of ends everything has either a price or a dignity. What [...] is raised above all price and therefore admits of no equivalent has a dignity” – is derived the duty to unconditionally respect the inherent dignity of each person as such. This command is the third transformation Kant’s model of practical reason contributes to the concept of cruelty. What in Montaigne was an empathizing concern for the pain of the other, in Kant is a rational command to respect the dignity embodied in each and every individual. In Kant, the sensibility articulated by Montaigne is pushed toward its reflective horizon in the form of a vision about what a form of collective life under conditions of critical morality would require from all its members, and to what it would entitle them; ~~now~~, morality is the condition under which alone a rational being can be an end in itself, [...] a lawgiving member in the kingdom of ends.”⁹³

On a more general point, the idea of individuals possessing an inherent and unconditional dignity that commands universal and unconditional respect profoundly impacted modern moral, political, and legal reasoning. This idea is also the force behind the modern understanding of liberty as emancipation, where the negative concept of liberty as protection from undue interference is transformed into an affirmative concept of liberty as shaping individual and collective futures. It has furthermore, and it is no

in accordance with the maxims of a member giving universal laws for a merely possible kingdom of ends, remains in its full force because it commands categorically. And just in this lies the paradox that the mere dignity of humanity as rational nature, without any other end or advantage to be attained by it – hence respect for a mere idea – is yet to serve as an inflexible precept of the will, and that it is just in this independence of maxims from all such incentives that their sublimity consists, and the worthiness of every rational subject to be a lawgiving member in the kingdom of ends; for other wise he would have to be represented only as subject to the natural law of his needs.” Ibid., 87-88.

⁹² Here is the archetypical formulation of this idea in the Kantian corpus: –Rational nature is distinguished from the rest of nature by this, that it sets itself an end. This end would be the matter of every good will. But since, in the idea of a will absolutely good without any limiting condition (attainment of this or that end) abstraction must be made altogether from every end to be effected (this would make every will only relatively good), the end must here be thought not as an end to be effected but as an independently existing end, and hence thought only negatively, that is, as that which must never be acted against and which must therefore in every volition be estimated never merely as a means but always at the same time as an end. Now, this end can be nothing other than the subject of all possible ends itself, because this subject is also the subject of a possible absolutely good will; for, such a will cannot without contradiction be subordinated to any other object. The principle, so act with reference to every rational being (yourself and others) that in your maxim it holds at the same time as an end in itself, is thus at bottom the same as the basic principle, act on a maxim that at the same time contains in itself its own universal validity for every rational being. For, to say that in the use of means to any end I am to limit my maxim to the condition of its universal validity as a law for every subject is tantamount to saying that the subject of ends, that is, the rational being itself, must be made the basis of all maxims of actions, never merely as a means but as the supreme limiting condition in the use of all means, that is, always at the same time as an end.” Ibid., 86-87, emphasis omitted.

⁹³ Ibid., 84, emphasis omitted.

small feat, enabled criticism of courses of action, individual or collective predicaments, and states of affairs even when confronted with the complacency, acceptance or indifference of those subjected to them. In fact, to claim rights in the name of others has become the common practice not only in the courts of law, but in constitutional politics, social protest, and reform mobilizations everywhere. Had we not become able to articulate the normative basis for the claims we make on behalf of those incapable or unwilling to make them, modern law, society, and politics would be unrecognizable by us.

The normative vault under which we act and think, and beneath which our laws are created and enforced is shaped by the power of the idea of an inherent and unconditional dignity, the respect for which transcends instrumental interests, passions, and compassion. It has transformed and continues to transform modern criminal law, even as it struggles to grasp and live up to the demands and implications of human dignity. The idea of human dignity enhances the intellectual resources available to principled as well as to emotionalist rejections of cruelty. It however does not exhaust the cruelty-as-predicament model of practical reason. Human dignity needs to be complemented by sociological imagination and the insights into social structures and processes that come with it.⁹⁴

§

The nineteenth-century brought social theory to the center of the humanities and social sciences. This intellectual discipline proclaimed the insufficiency, or even naïveté, of methodological individualism to explain widely observed phenomena. To supplement or rectify explanatory atomism, social theory appealed to social structures, systems, and processes as the forces that cause, directly or by acting behind the backs of individuals, social phenomena. Criminal law was not immune to focus on structures, systems and processes. As the fourth group of quotes in the Introduction shows, courts have been aware of the structural causes and favoring conditions for cruelty, brutality, suffering, exploitation, disrespect for the dignity of the person, and vulnerability. However, how ideas of human dignity and social structures come together to forge a paradigm of practical reason about cruelty seems to have escaped the courts.

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

Closely intertwined with negative-structure and positive-structure is the idea of vulnerability. The rejection of vulnerability has taken two expressions in thought. The

⁹⁴ C. Wright Mills defined sociological imagination as knowledge about the ways biography and history intersect. See his *The Sociological Imagination* (New York: Oxford University Press, 2000)

first rejects vulnerability as an intrinsic component of the human predicament and responds to this predicament with mental flight – *ataraxia*, tranquility and suspension of judgment in the ancient Pyrrhonic and Epicurean traditions – and practical evasion. The second type of rejection of vulnerability embraces the risks of vulnerability that inhere in intellectual, moral, and practical engagement, concentrating on the imagination of strategies of individual and collective empowerment. It is in this second expression that a concern with vulnerability is best understood in the context of the third model of practical reason in the rejection of cruelty.

Consider first the idea of negative-structure, in the articulation of which John Stuart Mill played an important role. As a good social theorist, Mill recognized the fact that *modi vivendi* form human character.”⁹⁵ Social theory has a conservative as well as a progressive branch. It is to the latter – in its commitment to social and political emancipation”⁹⁶ and the felt angst that accompanies the certainty that “any society which is not improving, is deteriorating”⁹⁷ – that Mill belongs. The first insight of negative-structure thinking predates Mill by millennia and, more proximately to him, was powerfully articulated by Rousseau. Mill’s version of it is, however, made fully modern, placed as it was by Mill in the context of the modern rejection of social stasis and naturalized inequality. To stagnation and naturalization of social hierarchy Mill responds with hopes for individual *bildung* and social mobility under conditions of liberal politics and a capitalist economy. But above all, it is the realization that institutions never come to social life at a perfectly isonomic starting point for its members that makes this idea so important in criminal law. When they arrive in social life, the institutions of criminal justice operate to crystallize previous social arrangements and distributive patterns. Mill makes this point about laws in general, writing that:

“Laws and systems of polity always begin by recognizing the relations they find already existing between individuals. They convert what was a mere physical fact into a legal right, give it the sanction of society, and principally aim at the substitution of public and organized means of asserting and protecting these rights, instead of the irregular and lawless conflict of physical strength. Those who had already been compelled to obedience became in this manner legally bound to it.”⁹⁸

In *The Subjection of Women*, Mill speaks of the subtle relationships between social structures and forms of consciousness. In their evolutionary dynamic, these relationships hide behind the opacity of the mechanisms of social cohesion and behavioral patterns. Speaking of the predicament of women, Mill points to the way their embedding social structures negatively influence their opportunities to escape suffering, rendering them, on the contrary, more vulnerable to cruelty and exploitation. As he

⁹⁵ John Stuart Mill, *The Subjection of Women* in *John Stuart Mill: On Liberty and Other Essays*, ed. John Gray (Oxford: Oxford University Press, 1998), 494.

⁹⁶ *Ibid.*, 568.

⁹⁷ *Ibid.*, 574.

⁹⁸ *Ibid.*, 745.

unequivocally states the problem, ~~sex~~ is to all women [...] a peremptory exclusion.” A form of exclusion that, because of the largely stealthy negative operation of its structural components, remains widely unseen. Invisible, its victims are thus condemned to ~~the~~ feeling of a wasted life”⁹⁹ and suffering without sympathy from the rest of society.

Mill’s probing analysis played a major role in the form of criticism of the *status quo* that characterized the nineteenth-century. He speaks of the ~~eruel~~ experience” of those who historically tried to oppose the mechanisms of human unhappiness; and of how their insubordination was met with the force of law and the whole apparatus of social norms and entrenched prejudices. To make things worse, the rebels appeared ~~in~~ the eyes of those whom they resisted, [...] not only guilty of crime, but the worst of all crimes, deserving the most cruel chastisement which human beings could inflict.”¹⁰⁰ According to Mill, the legal and customary apparatuses of negative-structures are reinforced by the combination of impossibility of collective action caused by the dispersion of its victims and the proximity to which they are kept to the micro-agents – in the case of patriarchal societies, their fathers and husbands; in the case of the criminal justice system, sentencing judges and prison wards among others – of negative-structures. This situation, in Mill’s eyes and Foucault’s language, exemplifies the deployment of capillary power, where, ~~in~~ the case of women, each individual of the subject-class is in a chronic state of bribery and intimidation combined.”¹⁰¹

With the practical and institutional mechanisms of negative-structure – foremost among which is, in the case of the subjection of women, marriage as ~~domestic~~ slavery”¹⁰² – comes its ideological component, by the influence of which, Mill asks, ~~was~~ there ever any domination which did not appear natural to those who possessed it?”¹⁰³ A question which already speaks to the ~~fanaticism~~ with which men cling to the theories that justify their passions and legitimate their personal interest,”¹⁰⁴ Mill’s critique of negative-structure is indeed carved from the same block as much of its twentieth-century counterparts in critical theory and existential feminism: ~~in~~ the present day, power holds a smoother language, and whomsoever it oppresses, always pretends to do so for their own good.”¹⁰⁵

Against negative-structures’ instruments of social and cultural order – ~~institutions~~, books, education, society, all go on training human beings for the old, long after the new has come” – Mill prescribes reform on the shoulders of reflection.¹⁰⁶ Born to live as equals, according to Mill, individuals require a type of society in which the

⁹⁹ Ibid, 581-582, for both quotes.

¹⁰⁰ Ibid, 478.

¹⁰¹ Ibid, 482.

¹⁰² Ibid, 507.

¹⁰³ Ibid, 482.

¹⁰⁴ Ibid., 483.

¹⁰⁵ Ibid., 524-525.

¹⁰⁶ ~~H~~ is one of the characteristic prejudices of the reaction of the nineteenth-century against the eighteenth, to accord to the unreasoning elements in human nature the infallibility which the eighteenth-century is supposed to have ascribed to the reasoning elements.” Mill, *The Subjection of Women*, 473-474.

virtue of equality can be learned and practiced. It is exactly this greenhouse for the flourishing of human virtues that spurious negative-structures fail to provide. For example, the family under conditions of the subjection of women is, for Mill, a training camp of despotism.¹⁰⁷

Under the reflective push of social theory, the uniquely modern concern with human predicament is incorporated into moral and legal thought. This is the concern of an era in which —human beings are no longer [...] chained down by an inexorable bond to the place they are born to, but are free to employ their faculties [...] to achieve the lot which may appear to them most desirable.” The combined mission of reflection, freedom of thought, and institutions based on equality and liberty is to fight off spurious negative-structures.¹⁰⁸ Mill calls, therefore, for an intensified awareness about the surviving remains in modern times of pre-modern negative-structures, lest society continues to recreate the fertile soil in which cruelty and vulnerability thrive. The applicability of negative-structure thinking to the problem of cruelty in criminal law should be obvious.

§

The fundamental insight on the problem of positive-structures is that the diffuse agency of macro arrangements can actively and directly cause cruelty. Karl Marx is an important thinker in this regard, as he seeks to causally explain the cruelty of humiliation, exploitation, and existential oblivion as by-products of social structures. With him, concern with positive-structures is transformed in one of the causes célèbres and canonical themes of modern thought.¹⁰⁹ Another protagonist of the nineteenth-century tradition of social inquiry, Marx’s particular contributions to the philosophical analysis of positive-structures lays on the role of impersonal,¹¹⁰ often inescapable and stealthy causal complexes, set in place and urged forward by these structures. Inspiring Marx’s relentless criticism is a little noticed Kantian-style critique of the instrumentalization of individuals and of dehumanizing social practices.

Appreciation of Marx’s contribution is enhanced by contextualization of his critique of positive-structures within his broader philosophy of praxis. From his earlier works through *Das Capital*, Marx advances a conception of productive practice — labor¹¹¹

¹⁰⁷ Ibid., 580.

¹⁰⁸ Ibid., 488.

¹⁰⁹ The causal force of positive-structure figured prominently, if yet in a rustic and under-developed form, as early as in Plato’s work, as the initial exchanges in *Laws* illustrate. In this tradition, see also Jean-Jacque Rousseau’s *Discourse on the Origin and Foundations of Inequality Among Men* and *Discourse on the Sciences and Arts* (Cambridge: Cambridge University Press, 1997).

¹¹⁰ —do not by any means depict the capitalist and the landowner in rosy colours. But individuals are dealt with here only in so far as they are the personifications of economic categories, the bearers of particular class-relations and interests. My standpoint, from which the development of the economic formation of society is viewed as a process of natural history, can less than any other make the individual responsible for relations whose creature he remains, socially speaking, however much he may subjectively raise himself above them.” Ibid., 92 (Preface).

¹¹¹ Hannah Arendt rightly distinguishes between labor, work, and action. Much of what Marx refers to as labor would correspond to work, the activity of creation of objects with some independent permanency, in

– the essential human element of which is in the prior ideational representation of its object – the product of labor – whereby in the product of labor ~~man~~ not only effects a change of form in the materials of nature; he also realizes his own purposes in those materials.”¹¹² Hence, as an alter ego of the self, the product of labor gives an outward dimension to the otherwise esoteric contents of the consciousness. For Marx, it is the cumulative and collective process of interposing the product of labor as a buffer between the daily and ordinary human life, on the one hand, and immaculate nature, on the other, that humanizes the species and creates a social, human world. Labor is, in this picture, a necessary constitutive element to the very predicament of social life; it is, in Marx’s words, ~~an~~ eternal natural necessity which mediates the metabolism between man and nature, and therefore human life itself.”¹¹³ Labor, by definition, does not occur in a social vacuum. Its forms are, argues Marx, predicated upon preexisting macro social structures and their evolution over time. The historical organization of labor has a direct and profound impact on the very humanization of the species and the existential *fortuna* of each individual self. What, then, if certain historical forms of labor are inherently cruel in that they engender social processes of exploitation, misery, existential oblivion, and inauthenticity, and humiliation? If laboring inheres in the human condition, what to say of the stakes in a form of cruelty that is parasitic to it? When that is the case, the agency of cruelty comes from positive-structures rather than discreet and personal agency.

Structural cruelty, though impersonal in its agency and diffuse in its victimization, has nonetheless both a historical and a moral element, the combination of which opens up a new normative horizon. In the specific case of labor in early capitalism, rather than channeling the humanizing, outward surfeiting of the self into tangible tokens of creative freedom, labor enslaves, and ~~just~~ as man is governed, in religion, by the products of his own brain, so, in capitalist production, he is governed by the products of his own hand.”¹¹⁴

For Marx, capitalism consists of the dynamic and synergetic interplay between negative- and positive-structures. He shares with Mill the understanding that legal frameworks tend to crystallize preexisting regimes of power allocation and distributive schemes already prevailing on the ground. In the case of capitalism, the laborer, pressed by the ~~eruel~~ nature-imposed necessity that his capacity for labour has required for its production a definite quantity of the means of subsistence,”¹¹⁵ is forced to surrender his existential potentials to a life marked by extortion under the legitimizing cover of an

Arendt’s conceptual framework. See her *The Human Condition* (Chicago, IL: The University of Chicago Press, 1998), Chapters III, IV, and V.

¹¹² Adding that ~~this~~ is a purpose he is conscious of, it determines the mode of his activity with the rigidity of a law, and he must subordinate his will to it. This subordination is no mere momentary act. Apart from the exertion of the working organs, a purposeful will is required for the entire duration of the work. This means close attention. The less he is attracted by the nature of the work and the way in which it has to be accomplished, and the less, therefore, he enjoys it as the free play of his own physical and mental powers, the closer his attention is forced to be.” Karl Marx, *Capital: A Critique of Political Economy, Vol. I*. (New York: Vintage Books, 1977), 283-284.

¹¹³ *Ibid.*, 133.

¹¹⁴ *Ibid.*, 771-772.

¹¹⁵ *Ibid.*, 277.

appearance of justice and individual and political rights enforcement, that is in the ~~v~~ery Eden of the innate rights of man[...], the exclusive realm of Freedom, Equality, Property and Bentham.” But when we leave this sphere where the ~~f~~ree-trader vulgaris” performs the ventriloquism of rights, justice, and efficiency, the cruel and hitherto veiled reality of the structural conditions of laboring reveals the laborer, Marx indicts, as ~~s~~omeone who has brought his own hide to market [...] now has nothing else to expect but – a tanning.”¹¹⁶

The institutions of capitalism as a comprehensive positive-structure operate, according to Marx, with an iron law that commands the misery of the waged laboring classes; a misery which corresponds to the substitution of ~~e~~capitalist exploitation” for ~~f~~eudal exploitation.”¹¹⁷ Criticizing the political economists of the eighteenth and nineteenth centuries for their idyllicization of the passage from feudal bondage to free labor under capitalism, Marx reminds his readers that the *modus operandi* of primitive capital accumulation, with their massive populational dislocation and immiseration, are hardly idyllic.¹¹⁸ While the feudal structure of rural or guild-based labor kept laborers in abject personal bondage and subjection, it also afforded them some sort of de facto limits to exploitation and cruelty. With capitalism, the ties of bondage and subjection are broken and laborers are thrown into the market as free economic agents. However, this freedom is bought, says Marx, at a dear price: ~~r~~obbed of all their own means of production, and all the guarantees of existence afforded by the old feudal arrangements,”¹¹⁹ the newly freed laborers were condemned to sell their only remaining possession – themselves. The history behind this type of modern vulnerability is that of exploitation based, first, on the expropriation of the means of production and, in the sequence, on the laborer’s alienation from the very products their work and from fellow human beings. This history, accuses Marx, ~~i~~s written in the annals of mankind in letters of blood and fire.”¹²⁰ In fact, explained Marx, capitalism as a positive-structure forces the individuals to live a ~~d~~ouble life” as the abstract moral persona of the citizen in its entitlement to equality and commitments to the public good and, simultaneously, as the egoistic member of the civil society, acting as a private rent-seeker using (to repeat Kantian language) ~~o~~ther people as means.”¹²¹

¹¹⁶ Ibid., 279-280, emphases omitted.

¹¹⁷ Ibid., 875.

¹¹⁸ Ibid., 87. Also, on the same page, ~~i~~n actual history, it is a notorious fact that conquest, enslavement, robbery, murder, in short, force, play the greatest part. In the tender annals of political economy, the idyllic reigns from time immemorial.”

¹¹⁹ Ibid., 875.

¹²⁰ Ibid., 875.

¹²¹ Ibid., 36. The entire passage, with emphases omitted, reads: ~~W~~here the political state has attained its true development, man leads – and not only in thought, in consciousness, but also in reality, in life – a double life, a heavenly one and an earthly one, a life in the political community, in which he counts as communal being, and a life in civil society, in which he acts as a private individual, views other people as means, debases himself to the status of a means, and becomes the plaything of alien forces. The political state relates just as spiritually to civil society as heaven does to earth. It stands in the same opposition, and overcomes it in the same way as religion overcomes the limitedness of the secular world, i.e., by recognizing, restoring, and allowing itself to be governed by civil society. Man in his immediate reality, in civil society, is a secular being. Here, where he counts for himself and others as a real individual, he is a

Confronted, on one side, by the new forms of suffering engendered by modern positive-structures and, on the other, by the way in which dominant forms of legal and economic theory disregarded and veiled the cruelty inherent in the new human condition, Marx articulated an agenda of ~~human~~ emancipation.”¹²² This agenda inspired his project of a social order organized upon a normative view of human entitlements, and, in no uncertain Kantian spirit, constantly under the inspection of deep-cutting social criticism. Armed with this criticism, Marx offers a constructive stance on emancipation which aims at overcoming the vulnerabilities spurious positive-structures engender. Human emancipation takes on a concrete dimension around human praxis and the institutions within which they take. This, in turn, leads to a material view of the requirements of emancipation.

Marx’s materialist analysis has nonetheless an important ideational component. Because the general conditions of human praxis engender, in Marx’s as well as in Mill’s views, an overgrowth of reinforcing institutional and ideational apparatuses, critique of positive-structure should, if it aspires at being effective, target also the ideational mechanisms of rationalization, legitimation, and veiling. Reason is urged, in the Socratic fashion, to turn over itself in order to break free from its self-imposed fetters. However, and here is a conundrum always haunting reflective hopes, how is reason supposed to remove its blindfold if ~~it~~ is not the consciousness of men that determines their being, but, on the contrary, their social being that determines their consciousness.”¹²³

Marx’s answer to this conundrum is, as hinted at above, an ethos. An ethos and corresponding posture that tries to carve in human existence a balcony from which things become visible as they really are, in their intricate mechanisms and suffering-causing capabilities. This critical posture should, he recommends, ~~start~~ out by taking any form of theoretical and practical consciousness and develop from the unique forms of existing reality the true reality as its norm and final goal.”¹²⁴ It should turn itself into a ~~ruthless~~ criticism of everything existing.” Unforgiving criticism as a life posture ~~must~~ not be afraid of its own conclusions, nor of conflict with the powers that be.” However, once it manages to climb all the way up to that balcony, enlightened consciousness is not

false semblance. In the state, on the other hand, where man counts as a species-being, he is an imaginary member of an illusory sovereignty, is robbed of his actual individual life, and is filled with an unreal universality.” And Marx proceeds to add that ~~Political~~ democracy is Christian in that in it man [...] has value as a sovereign being, the highest being, but this is man in his uncultivated, unsocial aspect, man in his accidental existence, man just as he is, corrupted by the entire organization of our society, lost to himself, alienated, under the domination of inhuman relationships and elements – in a word, man who is not yet an actual species-being. The fantasy, the dream, the postulate of Christianity, namely the sovereignty of man – but man as an alien being, different from actual man – is in democracy a sensuous reality, presence, secular maxim.” Ibid, 41, emphases omitted.

¹²² ~~After~~ history has long enough been reduced to superstition, we are going to reduce superstition to history. The question of the relationship of political emancipation to religion becomes for us the question of the relationship of political emancipation to human emancipation.” Marx, ~~On~~ the Jewish Question,” 33-34, emphases omitted.

¹²³ Marx, *Capital*, 4 (Preface).

¹²⁴ Marx, ~~For~~ a Ruthless Criticism,” 14.

supposed to indulge itself in banal exercises of idealistic blue-printing.¹²⁵ The proper tasks appointed by Marx for the unfettered and awakened reflective conscience is both profoundly modern and philosophically archaic in its callings. He writes:

The reform of consciousness consists only in enabling the world to clarify its consciousness, in waking it from its dream about itself, in explaining to it the meaning of its own actions. [...] Our motto must therefore be: Reform of consciousness not through dogmas, but through analyzing the mystical consciousness, the consciousness which is unclear to itself [...]. Then it will transpire that the world has long been dreaming of something that it can acquire if only it becomes conscious of it. It will transpire that it is not a matter of drawing a great dividing line between past and future, but of carrying out the thoughts of the past. And finally, it will transpire that mankind begins no new work, but consciously accomplishes its old work. [...] It is a matter of confession, no more. To have its sins forgiven mankind has only to declare them to be what they really are.¹²⁶

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

§

The fourth conception of cruelty adjusts the definitional focus to human dignity as the highest value and to accommodate positive and negative structural conditions of cruelty. This significantly enhances the capacity of the conception of cruelty to capture cruel predicaments that the former conceptions left out of their conceptual net. Furthermore, the argumentative structure of the fourth conception of cruelty and the model of practical reason that gives it meaning and traction is capacious enough to subsume under it agent and victim-based conceptions. Under this latter conception, violations of human dignity that in normal circumstances reach the suffering threshold for cruelty constitute a sufficient criterion for a finding of cruelty. And that is the case even if the victim is unaware or unconscious and there is no individualized agency causally

¹²⁵ Ibid., 13, for all preceding quotes, with emphases omitted.

¹²⁶ Ibid., 15, emphases omitted.

responsible. By necessity, cruelty also obtains when discreet agency and actual suffering are the case.

V. CONCLUSION

The **agent-objective** conception of cruelty stipulates behavioral deviation from specific objective norms as the definitional element of cruelty. The **agent-subjective** conception demands, in addition, the presence of a specific type of mens rea before cruelty can be found. Both conceptions share emphasis on agency as the ultimate definitional element of cruelty. In contrast, the **victim-subjective** conception foregrounds suffering as the central element of cruelty, and is prepared to find it even in circumstances where questions about behavioral deviation and mens rea cannot be satisfied. The **victim-objective/agent-independent** definition of cruelty dispenses with the requirements of insulated agency and sentient victimhood. This fourth conception extrapolates from and yet incorporates the previous ones. In this fourth conception, cruelty occurs even in the absence of conscious physical or psychological suffering or is structurally and impersonally caused.

The fourth conception of cruelty departs fundamentally from the understandings of agency, victimization, and causality found in the others. Indeed, the fourth conception foregrounds the value of unconditional and inherent human dignity and is preoccupied with the positive and negative structural conditions of justice in criminal law. Unlike previous conceptions of cruelty, the fourth requires a model of practical reasoning that embraces the critique of thought and society as its leading task, and demands that significant coerced vulnerability and cruelty be rejected. This last model has been a fundamental force in the evolution of criminal law.

§

Philosophical analyses of concepts such as cruelty are often helpful in understanding the normative viewpoints influencing social developments more generally. As a medium between the mind and the outside world, normative concepts function as evaluative as well as cognitive lenses.¹²⁷ As cognitive lenses, concepts can conceal,

¹²⁷ Skinner offers an eloquent example of the cognitive and normative nature of concepts based on the well-known phenomenon of the requirements of social legitimation of the agency of the commercial classes in Elizabethan England: “The merchant cannot hope to describe any action he may choose to perform as being ‘religious’ in character, but only those which can be claimed with some show of plausibility to meet such agreed criteria as there may be for the application of the term. It follows that if he is anxious to have his conduct appraised as that of a genuinely religious man, he will find himself restricted to the performance of only a certain range of actions. Thus the problem facing the merchant who wishes to be seen as pious rather than self-interested cannot simply be the instrumental one of tailoring his account of his principles in order to fit his projects; it must in part be the problem of tailoring his projects in order to make them answer to

distort, or reveal parts of the world. As evaluative lenses – and as potential vessels of normative reflectivity – concepts can be used to criticize, justify, or point in directions that transform whole segments of society and culture. During the time of its cultural tenure, the same concept can, moreover, sometimes veil and at other times unveil, sometimes criticize and at other times legitimize the same or similar phenomena it is supposed to semantically cover.¹²⁸ That is why writing biographies of concepts¹²⁹ is a particularly fruitful way of discovering, from time to time, what counts as reality and what people think of it.

The biography of concepts and ideas may also raise awareness about the contingent and potentially fragile nature of what often achieves the ontological status of undisputed reality or the normative status of a good independence from transitory minds and historical contexts. In the particular case of normative ideas and concepts, their cultural fate is doomed to be an endless drama of dogma and trivialization, except when

the pre-existing language of moral principles.” He then concludes: “The story of the merchant suggests two morals. One is that it must be a mistake to portray the relationship between our social vocabulary and our social world as a purely external and contingent one. It is true that our social practices help to bestow meaning on our social vocabulary. But it is equally true that our social vocabulary helps to constitute the character of those practices. To see the role of our evaluative language in helping to legitimate social action is to see the point at which our social vocabulary and our social fabric mutually prop each other up. [...] The other moral is that, if there are indeed causal linkages between social language and social reality, to speak of the one as mirroring the other may be to envisage the causal arrows pointing in the wrong direction. As the example of the Elizabethan merchant suggests, to recover the nature of the normative vocabulary available to an agent for the description and appraisal of his conduct is at the same time to indicate one of the constraints on his conduct itself. This in turn suggests that, if we wish to explain why our merchant chose to concentrate on certain courses of action while avoiding others, we are bound to make some reference to the prevailing moral language of the society in which he was acting. For this, it now appears, must have figured not as an epiphenomenon of his projects, but as one of the determinants of his actions.” Quentin Skinner, “Language and Political Change” in *Political Innovation and Conceptual Change*, ed. Terence Ball, James Farr, and Russell L. Hanson (Cambridge: Cambridge University Press, 1995), 21-22. With insight forged under the “teruel iron” of slavery, Frederick Douglass, when speaking of the particular condition of slavery in Maryland, positioned as it was at the borders of freedom and the public opinion there bred, rightly affirmed that “Public opinion is, indeed, an unfailing restraint upon the cruelty and barbarity of masters, overseers, and slave- drivers, whenever and wherever it can reach them; but there are certain secluded and out-of-the-way places, even in the state of Maryland, seldom visited by a single ray of healthy public sentiment-- where slavery, wrapt in its own congenial, midnight darkness, – can–, and –does–, develop all its malign and shocking characteristics; where it can be indecent without shame, cruel without shuddering, and murderous without apprehension or fear of exposure. [...] Public opinion in such a quarter, the reader will see, is not likely to be very efficient in protecting the slave from cruelty. On the contrary, it must increase and intensify his wrongs. Public opinion seldom differs very widely from public practice. To be a restraint upon cruelty and vice, public opinion must emanate from a humane and virtuous community.” Ibid., 47-49.

¹²⁸ Cruelty is, of course, an “essentially contested concept” as its semantic frontiers are permanently in disputation in the various contexts in which a claim of cruelty is presented. The locus classical for the analyses of the nature of essentially contestable concepts is W.B. Gallie, “Essentially Contested Concepts,” *Proceedings of the Aristotelian Society* 56, no. 167 (1956): 167-178.

¹²⁹ A case in point is Daniel Baraz’s sound intellectual history of the concept of cruelty in his *Medieval Cruelty: Changing Perceptions, Late Antiquity to the Early Modern Period* (Ithaca, NY: Cornell University Press, 2003). An earlier article by Baraz – “Seneca, Ethics, and the Body: The Treatment of Cruelty in Medieval Thought,” *Journal of the History of Ideas* 59, no. 2 (1998): 195-215 – had already been helpful at a very early stage of the reflections culminating in this work.

they come to live under conditions of exacting reflectivity. When, and as long as, this is the case, their lives are marked by continuous reflective progress, if slow and under constant threat of temporary regress at every turn of events. How exacting reflectivity can be made in a large part a function of the broader models of practical reason within which social agents must argue and act.

The importance of reflectivity and practical reason goes a long way to explain the appeal and cogency of the victim-objective/agent-independent concept of cruelty and the model of practical reason committed to inherent and unconditional dignity and open to a more nuanced and complex notion of causation in human affairs. I argue that precisely because of its reflective strength, cruelty-as-predicament has carved, and continues to carve, leagues and leagues of the normative horizon before which criminal law evolves.

How then, we ask, accounts of the development of modern criminal law fail to consider the emergence and transformation of conceptions of cruelty? Law is not the normatively deaf product of social programming on the basis of instrumental and intra-systemic rationality, memetic forms of collective consciousness, brute power, political strategizing, or transitory public opinion. These are only as important as incomplete factors can be. Because the riddle of the development of modern criminal law is partially coextensive to the evolution of conceptions of cruelty and the models of practical reason that accompany them, we can now expect to be able to better solve it.

The key to the resolution of the interpretive-explanatory challenge of accounting for the evolution of criminal law passes, I suggested throughout, through the understanding of the independent causal force of the internal push toward ever greater reflectivity operating from within normative vistas subject to increasingly more pressing demands of rationality and justification. The sort of reflectivity which, as a virus, can be inoculated into normative argumentative structures and from within – as Socrates tried to teach Thrasimachus¹³⁰ – push their development in discernible directions. The development of the ideas about cruelty illustrates the point, for if we start from an agent-based conception of cruelty, under conditions of reflectivity, and with the other causal factors obtaining, at some point down the road of legal reflectivity the tendency would be to arrive at a victim-objective/agent-independent conception.

The implications for the jurisprudence of criminal law of the causal role of reflectivity are twofold. First, because reflectivity is a fundamental component of any causal explanation of the development of modern criminal justice systems, jurisprudential exercises that fail to take an evolutionary perspective oriented toward increasing reflectivity are stillborn. Second, because rationally justifiable ideals are deeply connected with the push of reflectivity, the hopes for a cruelty-free system of punishment

¹³⁰ See Plato's *Republic* (Cambridge, MA: Harvard University Press 1999-2000) and the reading of the Thrasymachus' exchange by Hanna Pitkin in Chapter VIII of her *Wittgenstein and Justice: On the Significance of Ludwig Wittgenstein for Social and Political Thought* (Berkeley, CA: University of California Press, 1972).

are over time silenced if criminal law theory fails to articulate the normative, institutional, and practical requirements of a cruelty-free criminal justice system.

Reflectivity has many allies, but at least as many enemies. Following the example of the Greeks, Montesquieu used to prescribe music as a preventive therapy against cruelty,¹³¹ for it humanizes the soul and softens the temper.¹³² The liberal legal tradition of Judith Shklar and Richard Rorty advises that we nurture and combine softness of sensibility with firmness of character in a way capable of inspiring an ever-enlarging sphere of cruelty-disgusted empathy. Opposing this sort of moral sensibility, the tradition of Callicles¹³³ and Nietzsche¹³⁴ confronts us with the accusation of appeasing to –slave morality,” a morality forever hostage to petty and resentful existences. Nevertheless, the reflective rejection of cruelty suggests a model of practical reason in criminal law that differs from both traditions. The force behind a model of practical reason such as cruelty-as-predicament is not a softened sensibility entailing an enlarged empathy, although we should certainly settle for that if hope for more had to be forfeited. The strength of cruelty-as-predicament lies in its greater reflectivity and the greater conceptual scope of the victim-objective/agent-independent understanding of cruelty it makes justifiable.

¹³¹ See Book IV (viii.i) of his *The Spirit of the Laws* (Cambridge: Cambridge University Press, 1989).

¹³² This is directly contested by Adam Smith, who saw more of these virtues – themselves so desired in commercial societies – among the Romans than the Greeks. See his *An Inquiry into the Nature and Causes of the Wealth of Nations* (Indianapolis, IN: Liberty Fund: 1981), pages 774-775.

¹³³ The dramatis personae in Plato's *Gorgias*.

¹³⁴ *On The Genealogy of Morality* (Cambridge: Cambridge University Press, 2000).