

DOLOVICH ANALYSIS

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Constitutional Requirements: Eighth and Fourteenth Amendments of the United States Constitution

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Justice System Exploratory Committee
Hugo Neighborhood Association & Historical Society

Very Draft April 14, 2016

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Chapter IV, Section C: Dolovich Analysis

The full text of the Eighth Amendment of the U.S. Constitution reads as follows.

“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

Although the 8th Amendment Clause prohibits cruel and unusual punishment, its normative force derives chiefly from its use of the word cruel. The following Dolovich topics are from *Cruelty, Prison Conditions, and the Eighth Amendment*. They are not definitive; see original.

- Dolovich, Sharon. October 27, 2009. *Cruelty, Prison Conditions, and the Eighth Amendment*. New York University Law Review, Vol. 84, No. 4, 2009; Georgetown University Law Center.
- supreme court principles guiding judicial analyses of the eighth amendment
- pretrial detainees & 14th amendment due process clause
- overcrowding
- unconstitutional conditions when they satisfy two doctrinal components
- *Farmer v. Brennan*'s flawed reasoning
- prison conditions as state punishment
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- the problem with negligence
- the case for (modified) strict liability
- conclusion: judicial cruelty and the limits of the law

Abstract of *Cruelty, Prison Conditions, and the Eighth Amendment*

The Eighth Amendment prohibits cruel and unusual punishment, but its normative force derives chiefly from its use of the word cruel. For this prohibition to be meaningful in a society where incarceration is the primary mode of criminal punishment, it is necessary to determine when prison conditions are cruel. Yet the Supreme Court has thus far avoided this question, instead holding in *Farmer v. Brennan* that unless some prison official actually knew of and disregarded a substantial risk of serious harm to prisoners, prison conditions are not “punishment” within the meaning of the Eighth Amendment. *Farmer’s* reasoning, however, does not withstand scrutiny. As this Article shows, all state-created prison conditions should be understood to constitute punishment for Eighth Amendment purposes. With this in mind, this Article first addresses the question of when prison conditions are cruel, by considering as a normative matter what the state is doing when it incarcerates convicted offenders as punishment and what obligations it thereby incurs toward its prisoners. This Article then turns to the question of constitutional implementation and considers what doctrinal standards would best capture this understanding of cruel conditions.

At the heart of the argument is the recognition that the state, when it puts people in prison, places them in potentially dangerous conditions while depriving them of the capacity to provide for their own care and protection. For this reason, the state has an affirmative obligation to protect prisoners from serious physical and psychological harm. This obligation, which amounts to an ongoing duty to provide for prisoners’ basic human needs, may be understood as the state’s carceral burden. This, at its core, is the problem with *Farmer’s* recklessness standard: It holds officers liable only for those risks they happen to notice - and thereby creates incentives for officers not to notice - despite the fact that when prison officials do not pay attention, prisoners may be exposed to the worst forms of suffering and abuse. As this Article shows, either a heightened negligence standard on which a lesser burden would attach to those claims alleging macro-level failures of care or a modified strict liability approach would be far more consistent with the possibility of meaningful Eighth Amendment enforcement. Unfortunately, by encouraging judges to deny the existence of cruel treatment in the prisons, the prevailing doctrinal regime instead makes the judiciary into yet another cruel institution vis-à-vis society’s prisoners.

The Dolovich topics will be addressed by 1. court opinion and 2. law review and/or other study referenced by Dolovich in *Cruelty, Prison Conditions, and the Eighth Amendment*.

1. COURT OPINIONS SUPPORTING DOLOVICH TOPICS The following lists of opinions are not definitive; see original.

Supreme Court Principles Guiding Judicial Analyses of the Eighth Amendment

- 1892. *O'Neil v. Vermont*, 144 U.S. 323, 339 (1892)
- 1958. *Trop v. Dulles*, 356 U.S. 86, 100 n.32 (1958)
- 1972. *Furman v. Georgia*, 408 U.S. 238, 382 (1972)
- 1991. *Harmelin v. Michigan*, 501 U.S. 957, 1004–05 (1991)
- 2002. *Atkins v. Virginia*, 536 U.S. 304, 314–16 (2002)
- 2005. *Roper v. Simmons*, 543 U.S. 551, 564–65 (2005)
- 2008. *Kennedy v. Louisiana*, 128 S. Ct.2641, 2651 (2008)

Pretrial Detainees & Fourteenth Amendment Due Process Clause

- 1979. *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979)
- 1983. *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983)
- 2005. *Suprenant v. Rivas*, 424 F.3d 5, 18 (1st Cir. 2005)
- 2005. *Turner v. Kight*, 121 F. App'x 9, 13 (4th Cir. 2005)
- 2005. *Estate of Harbin v. City of Detroit*, 147 F. App'x 566, 569 (6th Cir. 2005)
- 2006. *Meyers v. Majkic*, 189 F. App'x 142, 143 n.2 (3d Cir. 2006)

Overcrowding

- 1981. *Rhodes v. Chapman*, 452 U.S. 337, 371 n.3 (1981)

Unconstitutional Conditions When They Satisfy Two Doctrinal Components

- 1976. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)
- 1991. *Wilson v. Seiter*, 501 U.S. 294, 296, 298 (1991)
- 1993. *Helling v. McKinney*, 509 U.S. 25, 35 (1993)
- 1994. *Farmer v. Brennan*, 511 U.S. 825, 834, 836 - 37 (1994; key case in this area)

***Farmer v. Brennan's* Flawed Reasoning**

- 1944. *Commonwealth v. Welansky*, 55 N.E.2d 902, 905 - 07 (Mass. 1944)
- 1976. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)
- 1981. *Rhodes v. Chapman*, 452 U.S. 337 (1981)
- 1985. *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985)
- 1991. *Wilson v. Seiter*, 501 U.S. 294, 296, , 300 (1991) - 97
- 1994. *Farmer v. Brennan*, 511 U.S. 825, 836 - 38, 844 (1994) 834,

Prison Conditions as State Punishment

1878. *Wilkerson v. Utah*, 99 U.S. 130 (1878)
1890. *Kemmler v ?*, 136 U.S. 436 (1890)
1941. *United States v. Classic*, 313 U.S. 299, 326 (1941)
1961. *Monroe v. Pape*, 365 U.S. 167, 184 - 87, 209 - 10 (1961)
1973. *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973)
1981. *Rhodes v. Chapman*, 452 U.S. 337, 347, 349 (1981)
1985. *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985)
1956. *United States ex rel. Atterbury v. Ragen*, 237 F.2d 953, 954–55 (7th Cir. 1956)
1991. *Wilson v. Seiter*, 501 U.S. 294 , 297, 300 (1991)
1993. *Helling v. McKinney*, 509 U.S. 25, 38, 40 (1993)
1994. *Farmer v. Brennan*, 511 U.S. 825, , 829, 859 (1994)
2003. *Overton v. Bazzetta*, 539 U.S. 126, 138, 140 (2003)
2008. *Baze v. Rees*, 128 S. Ct. 1520 (2008)

Francis, 329 U.S. 464, 459 () ??

The Reach of State Punishment: Harms on the Margins

1985. *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985)
1986. *Daniels v. Williams*, 474 U.S. 327, 328 (1986)
1991. *Wilson v. Seiter*, 501 U.S. 294, 300 (1991)
1994. *Farmer v. Brennan*, 511 U.S. 855 (1994)

The State's Carceral Burden

1878. *Wilkerson v. Utah*, 99 U.S. 130, 135 - 36 (1878)
1968. *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)
1972. *Furman v. Georgia*, 408 U.S. 238, 272 (1972)
1976. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)
1976. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)
1981. *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)
1982. *Youngberg v. Romeo*, 457 U.S. 307, 315–16 (1982)
1984. *Hudson v. Palmer*, 468 U.S. 517, 526 (1984)
1989. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 199–200 (1989)
1991. *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)
1993. *Helling v. McKinney*, 509 U.S. 25, 33 - 34, (1993)
1994. *Farmer v. Brennan*, 511 U.S. 825, 852, 828, 833 (1994)
2008. *Baze v. Rees*, 128 S. Ct. 1520, 1530 - 31 (2008)

State Punishment and Cruel Institutions

Official Actions and Institutional Cruelty

1992. *Hudson v. McMillian*, 503 U.S. 1, 99 -104 (1992)

Prisons as Sites of Institutional Cruelty

Capturing Cruelty Doctrinally

1991. *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)

Overcoming the Eleventh Amendment

1999. *Alden v. Maine*, 527 U.S. 706, 713, 728 (1999)

The Problem with Strict Liability

The Problem with Recklessness and the Case for (Heightened) Negligence

1994. *Farmer v. Brennan*, 511 U.S. 825, 828, 833, 837 (1994)

2001. *Lytle v. Gebhart*, 14 F. App'x 675, 677 (7th Cir. 2001)

2004. *Rodriguez v. Lozano*, 108 F. App'x 823, 828 (5th Cir. 2004)

2006. *Trevino v. Jimenez*, No. 1:05CV00836REC-LJO-P, 2006 WL 903529, at *2 (E.D. Cal. Apr. 6, 2006)

2007. *Hull v. Ford*, No. C.A. C-05-043, 2006 WL 470597, at *8-9 (S.D. Tex. Feb. 27, 2006), *aff'd*, 235 F. App'x 972 (5th Cir. 2007)

Implementing Negligence: the Case for a Double Standard

1975. *Gamble v. Estelle*, 516 F.2d 937, 938 (5th Cir. 1975), *rev'd*, 429 U.S. 97 (1976).

1976. *Estelle v. Gamble*, 429 U.S. 97, 104, 117 (1976)

1976. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)

1977. *Williams v. Edwards*, 547 F.2d 1206, 1216-19 (5th Cir. 1977)

1981. *Rhodes v. Chapman*, 452 U.S. 337, 347, (1981)

1983. *Wellman v. Faulkner*, 715 F.2d 269, 272-74 (7th Cir. 1983)

1985. *French v. Owens*, 777 F.2d 1250, 1252 (7th Cir. 1985)

1991. *Wilson v. Seiter*, 501 U.S. 294, 296, 300, 303, 311 (1991)

1994. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)

2000. *Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir. 2000)

2008. *Tafuya v. Salazar*, 516 F.3d 912, 916 (10th Cir. 2008)

The Problem with Negligence

1871. *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871)

1927. *United States ex rel. Vajtauer v. Comm'r of Immigration*, 273 U.S. 103, 106 (1927)

1965. *Phillips v. U.S. Bd. of Parole*, 352 F.2d 711, 713 (D.C. Cir. 1965)

1974. *Procunier v. Martinez*, 416 U.S. 396, 404–05 (1974)
1985. *Superintendent, Massachusetts Correctional Institution v. Hill*, 472 U.S. 445, 455 (1985)
1986. *Jacobsen v. Filler*, 790 F.2d 1362, 1364–65 n.4 (9th Cir. 1986)
1987. *Turner v. Safley*, 482 U.S. 78, 89 (1987)
1989. *Thornburgh v. Abbott*, 490 U.S. 401, 413–14 (1989)
1994. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)

The Case for (Modified) Strict Liability

1992. *Hudson v. McMillian*, 503 U.S. 1, 18, 20, 27 (1992)
2003. *Overton v. Bazzetta*, 539 U.S. 126, 139–40 (2003)

Conclusion: Judicial Cruelty and the Limits of the Law

1938. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938)
1955. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955)
1978. *Procunier v. Navarette*, 434 U.S. 555 (1978)
1982. *Harlow v. Fitzgerald*, 457 U.S. 800, 801 (1982)
1987. *Turner v. Safley*, 482 U.S. 78, 84, 89 (1987)

2. LAW REVIEW/STUDIES SUPPORTING DOLOVICH TOPICS

Lists are in the sequential order written in *Cruelty, Prison Conditions, and the Eighth Amendment*. They are not definitive; see original.

Supreme Court Principles Guiding Judicial Analyses of the Eighth Amendment

- David B. Hershenov, *Why Must Punishment Be Unusual as Well as Cruel To Be Unconstitutional?*, 16 PUB. AFF. Q. 77 (2002)
- John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739 (2008).
- Philip P. Hallie, *Cruelty*, in 1 ENCYCLOPEDIA OF ETHICS 229, 229 (Lawrence C. Becker & Charlotte B. Becker eds., 1992) (“Cruelty is the activity of hurting sentient beings.”)
- John Kekes, *Cruelty and Liberalism*, 106 ETHICS 834, 838 (1996)
- Dean J. Champion, *Measuring Offender Risk* 53–54 (1994)

Pretrial Detainees & 14th Amendment Due Process Clause

- Margo Schlanger, *Differences Between Jails and Prisons* 42 (Spring 2003) (unpublished manuscript) (contrasting jail with prison, which houses long-term felony offenders).
- Theodore L. Dorpat, *Crimes of Punishment: America’s Culture of Violence* 55 (2007) (“In 1970, there were about 200,000 Americans in prison.”);
- Bureau of Justice Statistics, U.S. Dep’t of Justice, *Report to the Nation on Crime and Justice* 104 (2d Ed., 1988) (reporting that number of jail inmates reached 160,863 in 1970)
- The Pew Ctr. On States, *One in 100: Behind Bars in America 2008*, at 5 (2008) (“With 1,596,127 in state or federal prison custody, and another 723,131 in local jails, the total adult inmate count at the beginning of 2008 stood at 2,319,258.”).
- Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations’*, N.Y. TIMES, Apr. 23, 2008, at A1 (“The United States has less than 5 percent of the world’s population. But it has almost a quarter of the world’s prisoners.”)
- the Sentencing Project, *Facts about Prisons and Prisoners* (2006), (“The 2005 United States’ rate of incarceration of 737 inmates per 100,000 population is the highest reported rate in the world . . .”).

Overcrowding

- Governor of the State of Cal., *Prison Overcrowding State of Emergency Proclamation* (Oct. 14, 2006), [hereinafter *Proclamation*].
- Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 438–39 (2004) (discussing problem of prison overcrowding).
- Terry A. Kupers, *Prison and the Decimation of Pro-Social Life Skills, in the Trauma of Psychological Torture* 127, 130 (Almerindo Ojeda ed., 2008). Under these conditions,

- Kupers asks, “[i]s it any wonder that research clearly links prison crowding with increased rates of violence, psychiatric breakdowns, rapes, and suicides”? *Id.*
- Allen J. Beck & Paige M. Harrison, Dep’t of Justice, Bureau of Justice Statistics, *Special Report: Sexual Victimization in State and Federal Prisons Reported by Inmates*, 2007, at 1 (2007), <http://www.ojp.usdoj.gov/bjs/pub/pdf/svsfpri07> A 2007 survey by the Bureau of Justice Statistics (BJS) estimates that more than 60,000 people serving time in prison annually experience some form of sexual misconduct.pdf (revised Apr. 9, 2008).
 - *Stop Prisoner Rape, PREA Update: Unique Opportunity to Stimulate Reform* 6 (2008).
 - Human Rights Watch, *No Escape: Male Rape in U.S. Prisons* 70 (2001)
 - Donny” Donaldson, *A Million Jockers, Punks, and Queens*, in Prison Masculinities 119, 120 (Don Sabo, Terry A. Kupers & Willie London eds., 2001).
 - T.J. Parsell, *Fish: a Memoir of a Boy in a Man’s Prison* xi (2006).
 - Adam Liptak, *Ex-Inmate’s Suit Offers View into Sexual Slavery in Prisons*, N.Y. TIMES, Oct. 16, 2004, at A1.
 - *Benjamin Fleury-steiner with Carla Crowder, Dying Inside: the HIV/aids Ward at Limestone Prison* 5 (2008).
 - John J. Gibbons & Nicholas De B. Katzenbach, Vera Inst. Of Justice, *Confronting Confinement: a Report of the Commission on Safety and Abuse in America’s Prisons* 29 (2006).

Unconstitutional Conditions When They Satisfy Two Doctrinal Components

- Howard Gillman, *Political Development and the Origins of the “Living Constitutionalism”* 4. Although living constitutionalism is generally regarded as opposed to originalism.
- Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 557 (2009).

Farmer V. Brennan’s Flawed Reasoning

- Model Penal Code § 2.02(2)(c) (1962).

Prison Conditions as State Punishment

- Judith N. Shklar, *The Liberalism of Fear*, in Liberalism and the Moral Life 21, 29 (Nancy L. Rosenblum ed., 1989).
- Thomas K. Landry, “Punishment” and the Eighth Amendment, 57 OHIO ST. L.J. 1607, 1610 (1996).
- H. L. A. Hart, *Punishment and Responsibility* 4 (1968).
- *Restatement (Third) of the Law of Agency* § 7.03 cmt. d(1) (2006).
- Christine Peek, Comment, *Breaking Out of the Prison Hierarchy: Transgender Prisoners, Rape, and the Eighth Amendment*, 44 Santa Clara L. Rev. 1211, 1247 (2004).
- Sydney Tarzwell, Note, *The Gender Lines Are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 Colum. Hum. RTS. L. Rev. 167, 213–14 (2006).

The Reach of State Punishment: Harms on the Margins

The State's Carceral Burden

- Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1277–79 (2006) (arguing that concern for judicially manageable standards often causes courts to underenforce constitutional guarantees).
- Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213–20 (1978) (arguing that Court often fails to enforce constitutional provisions to their full conceptual boundaries due to institutional concerns).
- Malcolm M. Feeley, *Entrepreneurs of Punishment: The Legacy of Privatization*, 4 *Punishment & Soc’y* 321, 327 (2002).
- Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* 4 (1961) (defining “total institutions” as those which represent complete “barrier to social intercourse with the outside”).
- Inmate Pay Rates, Schedule and Exceptions, CAL. CODE REGS. tit. 15 § 3041.2 (2009) (fixing wage rates for California prisoners at between \$0.08 and \$0.37 per hour);
- Alison Hawkes, *Druce Up For Parole: In March, the Former State Representative Will Have Served Two Years for Hit-and-Run*, *the Intelligencer* (Doylestown, Pa.), Jan. 17, 2006, at A1 (“The minimum prison wage [in Pennsylvania] is 19 cents an hour.”);
- Reggie Rivers, *Wages Unfair in Prisons*, DENVER POST, Sept. 23, 2005, at B.07 (“At 40 cents an hour, [Utah] inmates are earning \$1.60 a day. Assuming that an inmate works five days a week, he makes \$32 a month. . . . [Wages for prisoners] who work for the state of Colorado (in general prison maintenance jobs) are capped at 60 cents a day. Inmates who work for private industries fare only slightly better.”).
- Sean McConville, *Local Justice: The Jail, in the Oxford History of the Prison: the Practice of Punishment in Western Society* 297, 300 (Norval Morris & David J. Rothman eds., 1995) (explaining that in early English jails, there were “admittance and discharge fees, fees for ironing and de-ironing,” i.e., putting prisoners in, and releasing them from, shackles, as well as “fees for food, water, and lodgings”);
- Sharon Dolovich, *State Punishment and Private Prisons*, 55 *Duke L.J.* 437, 450–51 (2005) (explaining that early English and American jails were profit centers for jailors).
- Caroline Wolf Harlow, U.S. Dep’t of Justice, *Education and Correctional Populations* 10 tbl.14 (2003). To take another measure of indigence, less than 20 percent of felony defendants in state courts in the country’s 75 largest counties in 1996 and only a third of felony defendants in federal court in 1998 could afford their own attorneys.
- Caroline Wolf Harlow, U.S. Dep’t of Justice, *Defense Counsel in Criminal Cases* 1 (2000).
- Joan Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* 4 (2003).
- Rebecca B. Schechter, Comment, *Intentional Starvation as Torture: Exploring the Gray Area Between Ill-Treatment and Torture*, 18 AM. U. INT’L L. REV. 1233, 1253 (2003) (“Depriving individuals of food or water produces the same, if not a higher, level of suffering as acts currently stigmatized as torture.”).

- James Gilligan, *Violence: Our Deadly Epidemic and its Causes* 166 (1996) (arguing that “[prison] authorities tacitly and knowingly tolerate” sexual violence by some prisoners against others “so that the rapists in this situation are acting as the vicarious enforcers of a form of punishment that the legal system does not itself enforce formally or directly”).
- Jessica R. MacNiel, Mark N. Lobato & Marisa Moore, *An Unanswered Health Disparity: Tuberculosis Among Correctional Inmates, 1993 Through 2003*, 95 AM. J. PUB. HEALTH 1800, 1802 (2005) (finding that tuberculosis rates among prisoners were substantially higher than among general population).
- Brent Staples, Editorial, *Treat the Epidemic Behind Bars Before It Hits the Streets*, N.Y. TIMES, June 22, 2004, at A18 (describing widespread incidence of H.I.V., hepatitis, tuberculosis, and staph in U.S. prisons).
- Silja J.A. Talvi, *Deadly Staph Infection ‘Superbug’ Has a Dangerous Foothold in U.S. Jails*, Alternet, Dec. 4, 2007 (describing resistant strain of staphylococcus in prison system).
- Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321-66 to 1321-77 (codified as amended in scattered sections of 11, 18, 28 & 42 U.S.C.), demonstrates the ease with which the suffering of prisoners may be trivialized in order to excuse its infliction.
- *Fleury-steiner with Crowder*, *supra* note 22, at 67–68 (describing anecdotes regarding frivolous prisoner lawsuits promulgated by PLRA supporters and providing evidence that their anecdotes were misleading).
- Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 520–22 (1996) (citing three examples of prisoner suits condemned as frivolous in letter by four state attorneys general; showing that in each case, more detailed understanding of factual context revealed more legitimate claim; and condemning letter’s decontextualized presentation of facts as “misleading”).
- Jennifer Winslow, Comment, *The Prison Litigation Reform Act’s Physical Injury Requirement Bars Meritorious Lawsuits: Was It Meant To?*, 49 UCLA L. REV. 1655, 1666–67 (2002) (detailing allegations of “frivolous” prisoner lawsuits made during Congressional debates over PLRA, and noting that such allegations obscured many meritorious claims prisoners brought regarding conditions of their confinement). For example, in recounting the “verbal parade of examples of ridiculous lawsuits filed by prisoners” offered by U.S. senators in their debate over the PLRA.
- Lorna A. Rhodes, *Changing the Subject: Conversation in Supermax*, 20 Cultural Anthropology 388, 397–98 (2005) (noting that “a major area of intensity and hazard in supermax involves the presence of sex criminals and especially of child molesters,” since “the hierarchy of crimes in the prison’s general population” means that “some prisoners actively persecute sex criminals”).
- Sanyika Shakur, Aka Monster Kody Scott, *Monster: the Autobiography of an L.A. Gang Member* 327–28 (1993) (noting conversation with correctional officer in L.A. County Jail who explained that facility’s officers were “scared to death” of Scott and his gang).
- David T. Risser, *The Social Dimension of Moral Responsibility: Taking Organizations Seriously*, 27 J. SOC. PHIL. 189, 201 (1996) (“When organizations are implicated in causing harm, it is more likely to be because of negligence or carelessness than conscious design or purposive malfeasance.”).

State Punishment and Cruel Institutions

- Peter A. French, *The Corporation as a Moral Person*, in Collective Responsibility: Five Decades of Debate in Theoretical and Applied Ethics 133, 133 (Larry May & Stacey Hoffman eds., 1991) [hereinafter Collective Responsibility] (arguing that corporations can be regarded as “full-fledged moral persons and have whatever privileges, rights and duties as are, in the normal course of affairs, accorded to moral persons”).
- Manuel G. Velasquez, *Why Corporations Are Not Morally Responsible for Anything They Do*, in Collective Responsibility, *supra*, at 111, 117 (disagreeing with French’s position that corporations are morally responsible for their actions).
- Martin Benjamin, *Can Moral Responsibility Be Collective and Nondistributive?*, 4 SOC. Theory & Prac. 93, 93 (1976) (“[A]ttributions of *moral* responsibility for collective action must ultimately be analyzed in terms of individual moral responsibility.”).
- David Luban et al., *Moral Responsibility in the Age of Bureaucracy*, 90 Mich. L. Rev. 2348, 2374 (1992) (“We do not alter an organization by appealing to its sense of decency or duty; we do so by appealing to the sensibilities of its employees and officials . . .”).
- David Copp, *Collective Actions and Secondary Actions*, 16 AM. Phil. Q. 177, 177 (1979). Indeed, as Copp goes on to argue, “[e]ven relatively unorganized and impermanent collectives perform actions.
- Tom Regan, *Cruelty, Kindness, and Unnecessary Suffering*, 55 PHIL. 532, 534 (1980); (suggesting that “sadistic cruelty” may be “[t]he central case of cruelty”).
- Giorgio Baruchello & Wendy Hamblet, *What Is Cruelty? A Discussion Between Giorgio Baruchello and Wendy Hamblet*, 5 Appraisal 33, 34 (2005).
- Margaret Schein, *Cruelty: On the Limits of Humanity* 46–47 (Mar. 2006) (unpublished dissertation, University of Chicago) (on file with the *New York University Law Review*) (noting “imprecise usage” of term “‘cruelty’ in history and literature,” and concluding that “a survey of political theory, history and ethics reveals scattered, contradictory, and impoverished definitions of cruelty”). There is, however, agreement among philosophers who have studied the question that an actor may be judged cruel either when she takes delight in or when she is indifferent to the suffering she causes others.
- Wendy C. Hamblet & Giorgio Baruchello, *Discussion: Is Violence Always Cruel?*, 5 APPRAISAL 91, 91 (2005) (statement of Wendy Hamblet) (noting that “for action to be named truly cruel, there must be . . . a certain pleasure in the suffering of the other, or at the very least indifference to that suffering”).
- John Howard Griffin’s *Black Like Me* offers a chilling portrait of life for African Americans in the Jim Crow South, one which leaves no doubt about the possibility of institutional cruelty in this sense.
- John Howard Griffin, *Black like Me* (Penguin Group 1996) (1961).
- Hannah Arendt, *Eichmann in Jerusalem: a Report on the Banality of Evil* 135 (Penguin Books 2006) (1963).

Official Actions and Institutional Cruelty

Prisons as Sites of Institutional Cruelty

- Harold Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 AM. J. SOC. 420, 420 (1956).
- James Gilligan, *Violence: Our Deadly Epidemic and its Causes* 152–53 (1996).
- Kelsey Kauffman, *Prison Officers and Their World* 231 (1988). As Kauffman explained: The perception that a class of individuals constitute a breed apart, “that those people are the scum of the earth and there is not even a slight resemblance to me,” plays an important part in lowering barriers to violence in prison Officers . . . spoke of maggots killing each other, of *inmates* bleeding and dying, not men. “What happens here to the inmates does not bother me now in the least. I have no compassion for the inmates as a group . . . I used to pass out at the sight of blood. Now it doesn’t bother me. It’s *inmate* blood.”
- Dick Franklin, *Culture IS . . . as Culture DOES*, in Nat’l Inst. Of Corr., Contemporary Issues in Prison Management: Additional Readings 24, 28 (1999),
- Albert Bandura, *Selective Moral Disengagement in the Exercise of Moral Agency*, 31 J. MORAL EDUC. 101, 111 (2002) (describing famous Zimbardo prison simulation experiment in which college students randomly chosen to be guards with unilateral power began immediately mistreating those students chosen to be prisoners).
- Philip Zimbardo, *The Lucifer Effect: Understanding How Good People Turn Evil* 307 (2007) (“By identifying certain individuals or groups as being outside the sphere of humanity, dehumanizing agents suspend the morality that might typically govern reasoned actions toward their fellows. . . . Under such conditions, it becomes possible for normal, morally upright, and even usually idealistic people to perform acts of destructive cruelty.”).
- Philip G. Zimbardo & Christina Maslach, *Depersonalization*, 4 International Encyclopedia of Psychiatry, Psychology, Psychoanalysis, & Neurology 52, 52 (Benjamin B. Wolman ed., 1977) (“Dehumanization does have some adaptive functions [in that] it protects the individual against any kind of emotion that is painful, overwhelming, debilitating, inhibiting, or which interferes with some necessary, ongoing behavior.”).
- Kathleen M. Dennehy & Kelly A. Nantel, *Improving Prison Safety: Breaking the Code of Silence*, 22 WASH. U. J.L. & POL’Y 175, 181–82 (2006) (suggesting that even in correctional setting, “[v]iewing anyone as less than ‘human’ dulls our senses of observation. The need to establish appropriate boundaries presents a difficult line to walk. The need for boundaries is imperative, yet the consequence of dehumanization is catastrophic”).
- Nancy C. Jurik, *Individual and Organizational Determinants of Correctional Officer Attitudes Toward Inmates*, 23 Criminology 523, 534–35 (1985) (describing how seeing prisoners as having “relinquished their claims to moral consideration” was one way of “neutralizing guilt” about mistreatment of inmates).
- Ann Chih Lin, *Reform in the Making: the Implementation of Social Policy in Prison* (2000) (conducting detailed examination and comparative analysis of different U.S. prisons in order to assess and explain successes and failures of prison reform policies).

Capturing Cruelty Doctrinally

Overcoming the Eleventh Amendment

The Problem with Strict Liability

The Problem with Recklessness and the Case for (Heightened) Negligence

- According to the Model Penal Code, a “person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct.” MODEL PENAL CODE § 2.02(2)(d) (1962).
- Generally speaking, heightened negligence is distinguished from ordinary civil negligence only with respect to the nature of the risk, which in the former case must be “substantial and unjustifiable,” *see* MODEL PENAL CODE § 2.02(2)(d) (1962), as compared with only an undue or unreasonable risk in the latter
- MODEL PENAL CODE § 2.02(2)(c) (1962) (explaining that “[a] person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct”); MODEL PENAL CODE § 2.02(2)(d) (1962) (explaining that person acts with criminal negligence “with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct”).
- MODEL PENAL CODE § 2.02(2)(c) (1962) (defining criminal recklessness); MODEL PENAL CODE § 2.02(2)(d) (1962) (defining criminal negligence).

Implementing Negligence: the Case for a Double Standard

The Problem with Negligence

- MODEL PENAL CODE § 2.02(2)(d) (1962); *see also id.* § 2.02 cmt. 3, at 237 (explaining that jury should “measure the substantiality and unjustifiability of the risk by asking whether its disregard, given the actor’s perceptions, involved a gross deviation from the standard of conduct that a law-abiding person in the actor’s situation would observe”).
- Samuel H. Pillsbury, *Crimes of Indifference*, 49 RUTGERS L. REV. 105, 106, 150–51 (1996) (“Criminal responsibility should depend on the nature of the risk involved, their obviousness, and the reasons for the defendant’s lack of perception or disregard of those risks.”).

The Case for (Modified) Strict Liability

- Terry A. Kupers, *Rape and the Prison Code*, in *Prison Masculinities*, *supra* note 21, at 111, 114 (“Prison is an extreme environment. The men have to act tough, lift weights, and be willing to fight to settle grudges. Any sign of weakness leads to being labeled a victim, and weaklings are subject to beatings and sodomy.”).

Conclusion: Judicial Cruelty and the Limits of the Law

- As Robert Post and Reva Siegal put it, “[i]f courts interpret the Constitution in terms that diverge from the deeply held convictions of the American people, Americans will find ways to communicate their objections and resist judicial judgments.” Robert Post & Reva Siegal, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374 (2007).
- Jack Landman Goldsmith III & Daryl J. Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1834 (2009) (noting that Supreme Court “lacks the power to push constitutional law very far from the center of political gravity”).
- Robin West, *Unenumerated Duties*, 9 U. PA. J. CONST. L. 221, 243 (2006) (identifying what she calls “three definitional equivalencies” in American constitutional culture, in which “moral questions are equated with constitutional questions, constitutional questions are understood to be legal questions, and legal questions are understood to be adjudicative”).
- Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649 (2005).
- The question of benefits, and whether they are worth the considerable social harms caused by mass incarceration. For discussion of the latter, see generally Sharon Dolovich, *Foreword: Incarceration American-Style*, 3 *Harvard Law & Pol’y Rev.* 237 (2009).
- Christina Brooks Whitman, *Emphasizing the Constitutional in Constitutional Torts*, 72 *Chi.-kent L. Rev.* 661, 677–78 (arguing that § 1983 actions should not be vehicle to compensate for official mistakes but should instead be way to hold governmental officials to account for abuses of particular powers delegated to them by state).
- In 2003, Congress passed the Prison Rape Elimination Act (PREA) of 2003, Pub. L. No. 108-79, 117 Stat. 972 (codified at 42 U.S.C. §§ 15601–15609 (2006)), which allocated funding for research into the incidence of prison rape, created the National Prison Rape Elimination Commission, and directed the U.S. Attorney General to promulgate regulations for passage by the states reflecting best practices for prevention. PREA passed with the combined efforts of progressives, prisoners’ rights activists, and evangelical Christians.
- Pat Nolan & Marguerite Telford, *Indifferent No More: People of Faith Mobilize To End Prison Rape*, 32 J. LEGIS. 129, 129 (2006) (noting “unique coalition of civil rights groups and religious organizations that pressed prison rape onto Congress’ agenda”). Critics charge that PREA lacks teeth, especially given that it directs the Attorney General not to propose regulations likely to impose substantial financial burdens on the states.

- Alice Ristroph, *Sexual Punishments*, 15 Colum. J. of Gender & L. 139, 176 (2006) (noting that PREA “prohibits the establishment of any national prevention standards that ‘would impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities’” (quoting 42 U.S.C. § 15607(a)(3) (2000 & Supp. V 2006))).
- Robert Weisberg & David Mills, *Violence Silence: Why No One Really Cares About Prison Rape*, SLATE, Oct. 1, 2003, (observing that “the main thing [PREA] aims to do is collect data, and that may be, paradoxically, both quixotic and redundant”). But it is certainly a start. 343 For instance, Congress and various states have passed “No Frills” laws, which effected the elimination or restriction of particular inmate privileges, such as visitation, telephone privileges, access to personal property, access to television, recreation time, and access to weightlifting equipment.
- Cyndi Banks, *Punishment in America* 138 (2005).
- Peter Finn, *No-Frills Prisons and Jails: A Movement in Flux*, 60 FED. Probation 35, 35–36 (1996). In addition, in 1994 Congress eliminated the availability of Pell Grants for prisoners, thus largely foreclosing the possibility of post-secondary education in the prisons.
- Violent Crime Control and Law Enforcement Act of 1994, § 20411, 20 U.S.C. § 1070a(b)(8) (2006) (“No Federal Pell Grant shall be awarded under this subpart to any individual who is incarcerated in any Federal or State penal institution.”).
- According to the Sentencing Project: 48 states and the District of Columbia prohibit inmates from voting while incarcerated . . . 35 states prohibit felons from voting while they are on parole and 30 of these states exclude felony probationers as well. . . . Two states deny the right to vote to all ex-offenders who have completed their sentences. Nine others disenfranchise certain categories of ex-offenders and/or permit application for restoration of rights for specified offenses after a waiting period Each state has developed its own process of restoring voting rights to exoffenders but most of these restoration processes are so cumbersome that few ex-offenders are able to take advantage of them. . . . An estimated 5.3 million Americans, or one in forty-one adults, have currently or permanently lost their voting rights as a result of a felony Conviction. The Sentencing Project, Felony Disenfranchisement Laws in the United States 1 (2008),
- Carol S. Steiker, *Death, Taxes and—Punishment? A Response to Braithwaite and Tonry*, 46 UCLA L. REV. 1793, 1797 (1999) (“[Q]uite apart from serving as a subtle proxy for race or class hatred, harsh penological practices give people a new ‘outsider’ to hate, at a time when so many other outsiders have become more assimilated into society.
- U.S. Census Bureau, State & County QuickFacts, “USA,”(last visited Aug. 26, 2009).
- William J. Sabol & Heather Coutre, U.S. Dep’t of Justice, Bureau of Justice Statistics Bulletin, *Prison Inmates at Midyear 2007*, at 7 tbl.9 (2008), (estimating that of 2,090,800 people behind bars in United States in 2007, 814,700 were Black males and 67,600 were Black females).
- *The Sentencing Project: Facts about Prisons and Prisoners*, (estimating that 40% of persons in jails or prisons in 2005 were Black) (reporting that 410,900 of 2,090,800 prisoners are Hispanic). Native Americans are also over represented in the prison population.

- Suzanne J. Crawford & Dennis F. Kelley, *American Indian Religious Traditions: an Encyclopedia* 486 (2005) (“Disproportionately high numbers of Native Americans are confined in U.S. prisons.”).
- Ronald Barri Flowers, *Minorities and Criminality* 111 (1988) (“Native Americans have a strikingly high overall rate of arrest relative to their population size.”).
- David M. Oshinsky, “*Worse than Slavery*”: *Parchman Farm and the Ordeal of Jim Crow Justice* 63–67 (1996) (describing practice in post–Civil War South of using the criminal law to target emancipated former slaves by dramatically increasing sentences exacted for petty crimes).
- Loïc Wacquant, *The New ‘Peculiar Institution’: On the Prison as a Surrogate Ghetto*, 4 *Theoretical Criminology* 377, 384 (2000) (arguing that today’s “black ghetto,” together with contemporary American prison, “constitute[s] a single *carceral continuum* which entraps a redundant population of younger black men (and increasingly women) who circulate in closed circuit between its two poles in a selfperpetuating cycle of social and legal marginality with devastating personal and social consequences”).
- David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System* 144–46 (1999).
- Steven R. Donziger, *The Real War on Crime: the Report of the National Criminal Justice Commission* 115–21 (1996).
- Michael Tonry, *Malign Neglect: Race, Crime, and Punishment in America* 104–16 (1995). Although African Americans use illegal drugs in the same proportion as whites, African Americans are overrepresented in arrests, prosecutions, convictions, and incarcerations for drug crimes.
- According to the U.S. Department of Justice *2006 Uniform Crime Report*, African Americans comprise 35.1% of the total percentage arrested for drug offenses, including crimes relating to sales, manufacture, and possession.
- U.S. Department of Justice, *Uniform Crime Report 2006*, tbl.43, Of the defendants in U.S. district courts sentenced for drug offenses, 29.5% were Black, 42.7% were Hispanic, and only 24.3% were White.
- Sourcebook of Criminal Justice Statistics Online, *Drug Offenders Sentenced in U.S. District Courts Under the U.S. Sentencing Commission Guidelines, By Offender Characteristics, Mode of Conviction, and Drug Offense, Fiscal Year 2007*,
- *The Sentencing Project, the Federal Prison Population: a Statistical Analysis 2*, (“African American drug offenders have a 20% greater chance [than whites] of being sentenced to prison In 2002, the average prison term of 105 months for African Americans was 69% longer than the average of 62 months for whites.”).