

## NATURAL PUNISHMENT\*

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*A man, carrying a gun in his waistband, robs a food vendor. In making his escape, the gun discharges, critically injuring the robber. About such instances, it is common to think, “he got what he deserved.” This Article seeks to explore cases like that—cases of “natural punishment.” Natural punishment occurs when a wrongdoer faces serious harm that results from her wrongdoing and not from anyone seeking retribution against her. The Article proposes that U.S. courts follow their peers and recognize natural punishment as genuine punishment for legal, specifically constitutional, purposes. Were U.S. courts to do so, they would need to reduce the amount of punishment they would otherwise bestow on wrongdoers upon conviction if a natural punishment has occurred or foreseeably will occur. A handful of foreign jurisdictions already accept something like this Article’s proposal, but natural punishment has no formal legal recognition in the United States. The goal of this Article is twofold: first, it offers a rigorous and defensible definition of natural punishment by distinguishing it from nearby notions and dispelling any association with supernatural ideas; second, it demonstrates that recognizing natural punishment as genuine punishment will not much disturb existing American legal institutions and understandings.*

*As an added bonus, the concept of natural punishment can be employed to solve a longstanding problem in criminal law theory, the Mystery of Credit for Time Served. The Mystery surrounds the common practice of giving prisoners credit toward their prison sentences for their time served in jail awaiting trial. The Mystery poses a dilemma about whether the detention time was punishment: If it was punishment, then the detainee was punished before trial in violation of Due Process; however, if the time was not punishment, there is no reason to discount the prison sentence. Seeing the time in detention as an instance of natural punishment resolves the Mystery.*

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## INTRODUCTION

Terrion Pouncy was an unlucky criminal. Armed with a .38 caliber pistol, Pouncy robbed Maxwell Street Express, a hot dog stand on Chicago's Southside.<sup>1</sup> After lifting cash and two employees' phones and wallets, he took

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1. David Moye, *Man Shot Himself in Penis While Robbing Hot Dog Stand, Police Say*, HUFFPOST (Nov. 3, 2017, 1:04 PM), [https://www.huffpost.com/entry/shoot-penis-hot-dog-stand\\_n\\_59fc8f64e4b0b0c7fa39d30f](https://www.huffpost.com/entry/shoot-penis-hot-dog-stand_n_59fc8f64e4b0b0c7fa39d30f) [<https://perma.cc/52PP-P6GQ>].

off running.<sup>2</sup> While in flight, he accidentally triggered the pistol in his waistband, shooting himself in the penis.<sup>3</sup>

Brittany Stephens was even more unlucky. Stephens was a passenger in a small SUV, an overcrowded small SUV at that.<sup>4</sup> The vehicle had seats for five, but on a fateful October day in Baton Rouge, Louisiana, it held eight people: four adults and four children, including Stephens's infant daughter.<sup>5</sup> Irresponsibly and illegally, Stephens placed her baby in a car seat and wedged the car seat between the front two seats on the center console.<sup>6</sup> Christopher Manuel, an off-duty police officer, was driving recklessly at ninety-four miles per hour when the speed limit was fifty.<sup>7</sup> He struck the SUV, killing the infant.<sup>8</sup> Stephens was charged with negligent homicide for failing to properly secure the car seat, which contributed to her baby's death.<sup>9</sup>

Cases like the preceding are paradigmatic instances of what I call *natural punishment*. Roughly, the idea is that, in such cases, *the world* punishes the wrongdoer.<sup>10</sup> Natural punishment may seem mysterious, but it is not unfamiliar. For one thing, in English, we have a similar term, *poetic justice*, which is in common use.<sup>11</sup> A central assumption of this Article is that natural punishment is one of our ideas, but one we fear to be both unsound and unserviceable.

For present purposes, an idea is unsound if it is the kind of idea that turns out to be nonsense on reflection. The idea of a smallest real number or of a perpetual motion machine—these are paradigmatic cases of unsound ideas. Once one has a mature understanding of real numbers or machines, one sees that those ideas could never be. Is natural punishment like that? An idea is unserviceable if, whether sound or not, it simply cannot be realized or

2. *Id.*

3. *Id.* Cue the wiener puns.

4. Julia Jacobo & Barbara Schmitt, *Louisiana Mother Charged with Killing 1-Year-Old Daughter in Car Crash She Didn't Cause*, ABC NEWS (Mar. 1, 2018, 4:47 PM), <https://abcnews.go.com/US/louisiana-mother-charged-homicide-crash-killed-year-daughter/story?id=53437927> [<https://perma.cc/RB7W-XA4L>].

5. *Id.*

6. *Id.*

7. Ellyn Couvillion, *Off-Duty Baton Rouge Police Officer Going 94 mph in Crash that Killed 1-Year-Old Baby, Police Say*, ADVOCATE (Feb. 16, 2018, 3:21 PM), [https://www.theadvocate.com/baton\\_rouge/news/crime\\_police/article\\_68f0a8ba-135f-11e8-a469-1f2229e20faf.html](https://www.theadvocate.com/baton_rouge/news/crime_police/article_68f0a8ba-135f-11e8-a469-1f2229e20faf.html) [<https://perma.cc/EE83-B3E2> (staff-uploaded archive)].

8. *Id.*

9. Lea Skene & Grace Toohey, *Experts Question Mother's Arrest in Crash that Killed Baby; Off-Duty Cop Going 94 mph Remains on Paid Leave*, ADVOCATE (Feb. 28, 2018, 11:54 AM), [https://www.theadvocate.com/baton\\_rouge/news/crime\\_police/article\\_7c7f4602-1cb0-11e8-a723-0bc2db424e30.html](https://www.theadvocate.com/baton_rouge/news/crime_police/article_7c7f4602-1cb0-11e8-a723-0bc2db424e30.html) [<https://perma.cc/A67Z-VLX2> (staff-uploaded archive)].

10. A formal definition of the phenomenon comes later. See *infra* Part I.

11. These are similar but not synonymous because natural punishment can be unduly harsh. See *infra* Section III.A. Poetic justice, on the other hand, is, well, just. I thank Eric Miller for pressing me on this.

implemented in our world as we know it. Perpetual motion machines and cold fusion are paradigmatic cases of unserviceable ideas. Wonderful as they might be in theory, these ideas simply cannot take shape in our world. Is natural punishment like that? In clarifying the idea of natural punishment below, I show it to be sound, and by explaining how the notion can be incorporated into American law, I demonstrate its serviceability.

To understand how one can incorporate natural punishment into American law, consider the following. We not only recognize instances of natural punishment; we also have various *practical intuitions* about natural punishment, that is, “gut feelings” about its goodness or badness and about how people should respond to instances of it.<sup>12</sup> I mention just two of those intuitions here.

First is the intuition that an instance of natural punishment can be a good thing. More precisely, we sometimes think that the natural punishment is just what a wrongdoer deserves.<sup>13</sup> The Wiener case perhaps activates this intuition. Second is the intuition that, where natural punishment has befallen a wrongdoer, would-be punishers should reduce the amount of intentionally produced punishment that they would otherwise bestow upon the wrongdoer.<sup>14</sup> At the limit, we sometimes think that bestowing *any* intentionally produced punishment would be excessive because the wrongdoer has already been punished enough.<sup>15</sup> The grief-stricken mother probably draws upon this intuition. We might find other cases that tug at our heart strings.<sup>16</sup> With this

12. Some lawyers will raise an eyebrow at talk of intuitions, fearing that unchecked prejudice or something worse can be “smuggled” into our thought if we rely on intuitions. I understand this worry, but I also tend to think intuitions are indispensable for doing normative work. We have to take those intuitions about specific cases and compare them with more general normative principles that we endorse, maybe modifying the former, maybe modifying the latter until we reach a coherent outlook. This process, which Rawls calls “reflective equilibrium,” is really the only game in town. JOHN RAWLS, *A THEORY OF JUSTICE* 18 (rev. ed. 1999).

13. Thaddeus Metz, *Why We Welcome Poetic Justice and Despair at Poetic Injustice*, CONVERSATION (June 21, 2017, 11:18 AM), <https://theconversation.com/why-we-welcome-poetic-justice-and-despair-at-poetic-injustice-79771> [<https://perma.cc/YF8M-QY3P>] [hereinafter Metz, *Why We Welcome Poetic Justice and Despair at Poetic Injustice*].

14. For empirical evidence that Americans hold this practical intuition, see Paul H. Robinson, Sean E. Jackowitz & Daniel M. Bartels, *Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good Deeds, Apology, Remorse, and Other Such Discretionary Factors in Assessing Criminal Punishment*, 65 VAND. L. REV. 737, 774–85 (2012).

15. *Already punished enough* language appears in many places. See, e.g., Hannah Knowles, *A Baby Died After an Officer Crashed His Corvette at 94 mph, Investigators Say. He Won't Face Charges.*, WASH. POST (Nov. 15, 2019), <https://www.washingtonpost.com/nation/2019/11/15/baby-died-after-cop-drove-94-mph-crashed-his-corvette-officer-wont-face-charges/> [<https://perma.cc/UJ7T-R7A7> (dark archive)].

16. An interesting case out of Washington State demonstrates how courts might use clever statutory construction to reach a result that is motivated by the thought that a wrongdoer was already punished enough. In the case, Teresa Hedlund drank excessive amounts of alcohol with her fiancé and encouraged him to drive her and five others somewhere. *City of Auburn v. Hedlund*, 201 P.3d 315, 316–17 (Wash. 2009). The drive resulted in death for six people—everyone but Hedlund. *Id.* at 317.

all in mind, to incorporate natural punishment into American law means letting these practical intuitions influence legal outcomes.

This Article has two main goals: (1) to clarify the notion of natural punishment, and (2) to propose one way this idea can be incorporated into American law. To fully vindicate natural punishment would require more moral and political theorizing to demonstrate that these intuitions about natural punishment are not mere gut feelings but that they are warranted conclusions that deserve a formal presence in American law. This Article begins that work by showing that these intuitions can influence American law without doing too much damage to the existing architecture. The more philosophical project is something I now defer; however, if the present effort is successful, it thereby demonstrates that this more ambitious undertaking is worth pursuing.

While this Article aims to clarify and explain, rather than to justify, my proposal, the reader should not be wholly left in the dark about those justifications. First, the idea of letting natural punishment serve as a genuine legal punishment is already embodied in other developed nations' legal systems.<sup>17</sup> Thus, in not acknowledging natural punishment, the American criminal justice system has a blind spot. Second, some American jurists might already be recognizing natural punishment *sotto voce*.<sup>18</sup> By giving the doctrine a name, clarifying its contours, and demonstrating that it can comfortably fit within the American legal system, my proposal promises to bring certain decisions into the daylight, as it were. Third, natural punishment can serve all of the classic purposes of intentional punishment;<sup>19</sup> refusing to treat it as such looks hypocritical or implausibly formalistic. Fourth, and finally, my proposal, if adopted, could provide advocates with a tool in the struggle against overcriminalization and excessive punishment. Many voices from the

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She was, however, severely injured and suffered great emotional pain, due to the death of her fiancé and friends. *Id.* at 319. She was charged with, and convicted of, being an accomplice to an instance of driving under the influence ("DUI"). *Id.* at 317. Eventually, the Washington Supreme Court would overturn the conviction because, under Washington law, victims of crimes cannot be accomplices, and the Washington court found that Hedlund was a victim of the DUI. *Id.* at 320–21. I called this clever statutory construction because this seems mistaken as a matter of existing law but good for reaching a favorable result. The *Hedlund* court seems mistaken on the law because DUI offenses are, commonsensically, victimless crimes. If one brings injury to someone or someone's property during one's drunken driving—that is, if there is an actual victim—that is a different crime. Still, Hedlund had already suffered enough, and the court found a way to reach that result.

17. *See infra* Part V.

18. *See supra* note 16.

19. *See infra* Section I.C.

academe,<sup>20</sup> the bar,<sup>21</sup> the bench,<sup>22</sup> the press,<sup>23</sup> and politicians on the left,<sup>24</sup> right,<sup>25</sup> and center<sup>26</sup> have all expressed concern that America criminalizes too many things and punishes too harshly. A central part of my proposal is that those who suffer natural punishment should receive punishment discounts; in other words, a natural punishment should count against one's ordinary sentence.<sup>27</sup> Were this to happen, it would mean shorter prison sentences on average. To be sure, my proposal will not roll back mass incarceration or change the overbroad criminal

20. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507 (2001) ("American criminal law, federal and state, is very broad; it covers far more conduct than any jurisdiction could possibly punish. The federal code alone has thousands of criminal prohibitions covering an enormous range of behavior, from the heinous to the trivial. State codes are a little narrower, but not much. . . . Of course, criminal law's breadth is old news. It has long been a source of academic complaint.").

21. Progressive attorney groups such as the National Lawyers Guild and the National Association of Criminal Defense Lawyers predictably critique mass incarceration and overcriminalization. *Our Work*, NAT'L LAWS. GUILD, <https://www.nlg.org/our-work> [<https://perma.cc/7CMW-C82L>] ("The Guild has engaged in numerous initiatives to promote an end to mass incarceration nationally and locally."); *The Face of Overcriminalization*, NAT'L ASS'N CRIM. DEF. LAWS. (Aug. 19, 2020), <https://www.nacdl.org/Content/TheFaceofOvercriminalization> [<https://perma.cc/D8XH-ZAV5>]. There has also been a wave of so-called progressive prosecutors who have joined this chorus of voices. See Heather L. Pickerell, *Critical Race Theory & Power: The Case for Progressive Prosecution*, 36 HARV. BLACKLETTER L.J. 73, 73 (2020) (remarking on "the growing wave of 'progressive' prosecutors who have crept into the national conscience since Larry Krasner's shock victory in the Philadelphia District Attorney Democratic primary grabbed headlines in 2017").

22. Alan Feuer, *Federal Judge Urges U.S. To 'Jettison the Madness of Mass Incarceration'*, N.Y. TIMES (June 23, 2016), <https://www.nytimes.com/2016/06/24/nyregion/federal-judge-urges-us-to-jettison-the-madness-of-mass-incarceration.html> [<https://perma.cc/27SN-3MUX> (dark archive)] (chronicling several federal judges who have criticized mass incarceration).

23. Even the right-wing Christian Broadcasting Network decided to launch "a series of investigations into a growing phenomenon called 'overcriminalization' and how it's making America a nation of criminals." *'Overcriminalization' Making Us a Nation of Felons?*, CHRISTIAN BROAD. NETWORK, <https://www1.cbn.com/content/overcriminalization-making-us-nation-felons#Transcript> [<https://perma.cc/3NJK-DJR2>].

24. German Lopez, *Bernie Sanders Was Arguing Against Mass Incarceration as Early as 1991*, VOX (Feb. 27, 2019, 9:00 AM), <https://www.vox.com/policy-and-politics/2019/2/27/18240474/bernie-sanders-mass-incarceration-president-campaign> [<https://perma.cc/S7VB-YWKA> (staff-uploaded archive)] (reporting on left-wing Vermont Senator Bernie Sanders's crusade against mass incarceration, long before it was in vogue).

25. Daniel Dew, *Senator Rand Paul: Overcriminalization Champion*, HERITAGE FOUND. (Dec. 27, 2012), <https://www.heritage.org/report/senator-rand-paul-overcriminalization-champion> [<https://perma.cc/68NE-MNX4>] (reporting on conservative Kentucky Senator Rand Paul's crusade against overcriminalization).

26. In 2015, former President Bill Clinton made remarks admitting fault for mass incarceration and calling for its remediation. Peter Baker, *Bill Clinton Concedes His Crime Law Jailed Too Many for Too Long*, N.Y. TIMES (July 15, 2015), <https://www.nytimes.com/2015/07/16/us/politics/bill-clinton-concedes-his-crime-law-jailed-too-many-for-too-long.html> [<https://perma.cc/VK6G-SV3P> (dark archive)]. In 2018, centrist Democrat Bob Casey wrote on his social media about "work[ing] to address our Nation's mass incarceration problem." Senator Bob Casey (@SenBobCasey), TWITTER (Dec. 19, 2018, 12:21 PM), <https://twitter.com/SenBobCasey/status/1075440908848508928> [<https://perma.cc/3DVC-3VX6>].

27. See *infra* Section II.C.

codes, but it will place one more tool in the arsenal of those who combat these problems.

The layout of the Article is as follows. Part I defines *natural punishment*. In the course of defining the concept, I show that, unlike karma or divine punishment, it requires nothing supernatural. Also in Part I, I explain how the definitional task here is practical as opposed to metaphysical. Parts II and III concern the incorporation of natural punishment into American law. Part II explains and illustrates my proposal to treat natural punishment as punishment for constitutional purposes. Part III raises and resolves three constitutional puzzles that arise from my proposal. Part IV highlights some important questions for further research. Part V considers jurisdictions outside of the United States that already adopt something close to my proposal. Finally, I conclude by taking a wider view of why one might care about natural punishment.

### I. DEFINING NATURAL PUNISHMENT

*Natural punishment*, as defined here, refers to any sufficiently serious adversity resulting from a wrongdoer's misconduct without the intervention of anyone intending to cause retributive harm to the wrongdoer. Thus, three elements define the phenomenon: (1) adversity, (2) caused by wrongdoing, and (3) not caused by anyone's intention to exact retribution on the wrongdoer.

A note of clarification about retributive harm is in order. *Retribution* has at least two senses, a weak sense and a strong sense.<sup>28</sup> In the weak sense, retribution only requires the aim of getting back at someone for a wrong. In the strong sense, retribution names some theory that attempts to justify imposing punishment. When we discuss retribution in the strong sense, notions about proportionality and the requirement to limit punishment to the perpetrator and not, say, her kith and kin, emerge.<sup>29</sup> Retribution in the strong sense attempts to explain how and when it is permissible (and perhaps required) to exact retribution in the weak sense. With that in mind, I can raise and quickly dispatch a worry about the third element of natural punishment. One might worry that, on my version of natural punishment, a utilitarian vigilante mob who beats up a wrongdoer might count as exacting natural punishment because (1) the roughing-up counts as adversity, (2) the wrongdoing obviously plays some causal role in the roughing-up, and (3) the mob does not intend to exact retribution because they are utilitarians, not retributivists. I do not count the

28. For more detailed discussion, see Raff Donelson, *Cruel and Unusual What? Toward a Unified Definition of Punishment*, 9 WASH. U. JURIS. REV. 1, 37–38 (2016) [hereinafter Donelson, *Cruel and Unusual What?*].

29. Retributive thinking did not always have these sorts of limits. As philosopher Philip Kitcher notes, developing these limits was ethical progress. PHILIP KITCHER, *THE ETHICAL PROJECT* 140–41 (2011).

mob's actions as natural punishment because they are exacting retribution, just retribution in the weak sense.<sup>30</sup>

The two examples from above<sup>31</sup> clearly conform to this definition. Pouncy obviously suffered a traumatic injury, so we have the adversity. This adversity did result from the wrongdoing, for it seems that his haste in fleeing the scene of the crime caused him to accidentally shoot himself. If he had not held up the wiener stand, he would not have had to hurry away from the scene. In fact, he would not have needed to carry a loaded firearm in the first place. Finally, this was an accident, so the adversity befell Pouncy without anyone intending to cause him any harm. In the Stephens case, we can observe a similar pattern. She lost her baby, which we can assume is an adversity. We have no evidence that she desired her child's death. I assume, for illustrative purposes, that things are as the police allege and that this adversity was partially caused by her wrongdoing.<sup>32</sup> Sure, we might think that the speeding cop was the more proximate cause, but that does not absolve Stephens. Her conduct was likely still a but-for cause—but for Stephens's negligence in securing the child, the child would have survived. Finally, this was an accident, so no one who contributed to the accident intended to cause Stephens or anyone else any harm, much less retributive harm.

With the set of elements in view and with a couple of examples in tow, the concept of natural punishment should be clearer. I further clarify the notion in four ways. First, I distinguish my idea from a few others. Second, I demonstrate that natural punishment takes a neutral view about the justification of punishment. Third, I show that the notion of natural punishment does not require anything supernatural or magical. Fourth, I consider the question of whether natural punishment is *real* punishment. About this fourth task, punishment theorists have adduced definitions of punishment that preclude natural punishment, unless it were divine punishment. Responding to the challenge from punishment theorists enables me to properly frame my project of defining natural punishment.

#### A. *Other Thinkers on Natural Punishment*

I am not the first theorist to write on natural punishment.<sup>33</sup> Here, I distinguish my version of the concept from versions advanced by Immanuel

30. For those who think that leaving the vigilante mob out as natural punishment is a mistake, see *infra* Section IV.A.

31. See *supra* text accompanying notes 1–9.

32. As of the date of this Article, the fact of physical causation is unresolved. See Jacobo & Schmitt, *supra* note 4.

33. The Chilean legal theorist Carlos Bobadilla Barra details a rich literature on the subject in parts of the Spanish-speaking world. Carlos Bobadilla Barra, *La "Pena Natural": Fundamentos, Límites y Posible Aplicación en el Derecho Chileno*, 11 *POLÍTICA CRIM.* 548, 550–53 (2016) (Chile).



Kant, by readers of John Locke, by Jacques Derrida, and by contemporary legal theorist Doug Husak.

Immanuel Kant wrote of natural punishment and defined it as that which occurs when “vice punishes itself.”<sup>34</sup> Kant distinguishes this from forensic punishment, that is, punishment by the courts.<sup>35</sup> Kant’s natural punishment notion is very close to my own, but there are two small ambiguities in his account. Depending on how one resolves them, his account might be closer or further from mine. In discussing these ambiguities, the aim is not to exposit Kant, but rather to become perspicuous about my own account. In that spirit, I turn to the ambiguities of Kant’s account. First, it is hard to be sure what Kant means by vice. Vice is a term with moral valence in a way that the term I use, wrongdoing, is not. For instance, conceptually speaking, some action A might be a legal wrongdoing, even if A is morally commendable.<sup>36</sup> On my understanding of natural punishment, it is conceptually possible for an instance of natural punishment to occur after someone commits such an action. It is not clear that Kant can say this, for there was no vice in the normal, morally-charged sense of the word. Second, Kant does not specify *how* vice punishes itself. On my conception, there is a third element, namely that the punishment comes about without the intervention of anyone seeking to bestow retributive harm. Kant does not specify whether vice may enlist others in its service to punish the vicious one. My thought is that vice can only elicit natural punishment by enlisting unwitting participants.

Moving from Kant to Locke, some readers of the *Second Treatise on Government* refer to Lockean “natural punishment.”<sup>37</sup> For these readers, natural punishment is any extrajudicial punishment in the state of nature. This idea is obviously distinct from my own. On my conception, all natural punishment is extrajudicial, but not all extrajudicial punishment is natural.<sup>38</sup>

Next, I distinguish my conception from Derridean accounts that identify natural punishment with the wrongdoer’s own strong feelings of remorse.<sup>39</sup> Jacques Derrida saw himself as expounding upon the (rather scant and

34. IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 105 (Mary Gregor ed. & trans., Cambridge Univ. Press 1996) (1797).

35. *Id.* (explaining that judicial or juridical punishment (*poena forensis*) is to be distinguished from natural punishment (*poena naturalis*), in which crime as vice punishes itself, and does not as such come within the cognizance of the legislator).

36. This is not a slight to natural law theorists. Their view may be true; it just is not a conceptual truth.

37. Locke himself never uses the phrase “natural punishment,” but there are readers who employ this term. See, e.g., Andrew Dilts, *To Kill a Thief: Punishment, Proportionality, and Criminal Subjectivity in Locke’s Second Treatise*, 40 *POL. THEORY* 58, 66 (2012).

38. See *infra* Section IV.A.

39. See 2 JACQUES DERRIDA, *THE DEATH PENALTY* 37–39 (Geoffrey Bennington & Marc Crépon eds., Elizabeth Rottenberg, trans., Univ. of Chi. Press 2016) (2015).

ambiguous) account from Kant in the *Metaphysics of Morals*.<sup>40</sup> While Derrida's account is interesting, the conception that I wish to investigate differs from his in two respects. First, on my conception, natural punishment is not necessarily "the intolerable suffering of a feeling of guilt."<sup>41</sup> Recalling the Pouncy case from above,<sup>42</sup> it demonstrates that natural punishment can encompass a wrongdoer's dismemberment.<sup>43</sup> The more general point is that natural punishment, as employed here, can encompass many sorts of adversity. Second, on my conception, while natural punishment *may* include serious, purely psychical harm,<sup>44</sup> this is not the paradigmatic case. Paradigmatically, when the harm is largely psychical, the natural punishment will frequently have to include something else too, something more *substantial*, for lack of a better word. This enables the adversity to fill the complex practical role that punishment does. This combination of great psychical harm with something else is arguably met in the case of Stephens who lost her infant due, in part, to her negligence.<sup>45</sup> Of course, none of the preceding should suggest that true remorse is a painless affair. Remorse can quickly turn into other things like self-harm, but should that eventuate, that would not be the extra oomph needed to make such harm natural punishment. Instead, it would count as another divergence from my account. Someone who intentionally self-harms out of remorse for her wrongdoing does not produce natural punishment because natural punishment, on my conception, requires a lack of intention to exact retributive harm.

Finally, I distinguish my account from a similar view on offer from Doug Husak. Husak discusses what he calls the "already punished enough plea," the claim that "the contempt of the public" can be so stigmatizing that a wrongdoer deserves some mitigation in punishment.<sup>46</sup> Husak's idea differs from my own in at least two respects. First, contempt of the public may well be intended as retribution for a wrong. When this is so, it cannot be natural punishment, for it runs afoul of my third element, which requires that the adversity not be caused by anyone's intention to exact retribution on the wrongdoer. Second, the phenomenon that Husak discusses is more limited than what I envision in that he focuses on contempt of the public,<sup>47</sup> while I consider various kinds of adversity.

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40. *Id.*

41. *Id.* at 38.

42. See *supra* text accompanying notes 1–3.

43. Pun intended.

44. I thank Paul Butler for pressing me on this point.

45. See *supra* text accompanying notes 4–9.

46. Douglas N. Husak, "Already Punished Enough," 18 PHIL. TOPICS 79, 82 (1990).

47. *Id.*

B. *Natural Punishment Does Not Require Magic*

Natural punishment has affinities with ideas like karma or divine punishment. In natural punishment and in these other ideas, we get adversity, wrongdoing that causes the adversity, and no intervention by any human agent seeking to exact retributive harm upon the wrongdoer. The difference is that natural punishment does not require any supernatural forces or magic.

Natural punishment only requires that someone's wrongdoing play a causal role in her undoing and that the undoing not result from anyone seeking retribution against the wrongdoer. Ensuring that these two causal relations hold does not require a higher power or magical force. At this point, one might wish to argue that it makes no sense to call this *punishment* unless someone or something actively sought the adverse outcome. This is a worry considered in the next section. For now, it should be clear that, whatever we call it, the necessary causal relations can obtain without any magic.

To conclude this section, I consider the compatibility of the magical stuff with natural punishment. I have established that natural punishment can occur without magic, but is it possible that, after all, magic produces natural punishment? I consider divine punishment and karma separately. Divine punishment is ruled out from counting as natural punishment because it likely fails the third element, about intending retributive harm. In paradigm cases of divine punishment, the deity exacts retributive harm. Zeus sends down a lightning bolt,<sup>48</sup> or God turns people into pillars of salt.<sup>49</sup> Karma provides a more interesting case. Karma is a force that maintains the causal relations of natural punishment, but karma does not *intend* those relations, for it is not agential.<sup>50</sup> As traditionally understood, karma is like the normative version of Newton's Third Law. Newton's Third Law provides that for every action there is an equal and opposite reaction.<sup>51</sup> A bird's wings push air downward, and the air pushes back, upward, creating lift. With karma, when a person does wrong,

48. In Book XII of *The Odyssey* (lines 340–415), one finds that “Zeus thundered and hurled bolts to strike the ship” of the men who stole and slaughtered cows of Helios. HOMER, *THE ODYSSEY* 312–14 (Emily Wilson ed. & trans., W.W. Norton & Co. 2018).

49. Popularly, it was God who turned Lot's wife into the pillar of salt. See, e.g., Philip Goff, *Orthodox Property Dualism + The Linguistic Theory of Vagueness = Panpsychism*, in 6 *CONSCIOUSNESS INSIDE AND OUT: PHENOMENOLOGY, NEUROSCIENCE, AND THE NATURE OF EXPERIENCE* 75, 84 (Richard Brown ed., 2014) (“In the bible we hear that God turned Lot's wife into a pillar of salt.”). However, the passage in *Genesis* 19:26 does not say that God did anything to her; instead, the salty transformation seems more like how I describe karma.

50. Philosopher Charles Goodman distinguishes traditional understandings of karma, which view karma as a cosmic force, from modern understandings, which view it as a psychological phenomenon. On both understandings, karma is not agential. See Charles Goodman, *Modern and Traditional Understandings of Karma*, in *A MIRROR IS FOR REFLECTION: UNDERSTANDING BUDDHIST ETHICS* 131, 131–45 (Jake H. Davis ed., Oxford Univ. Press 2017).

51. ISAAC NEWTON, *THE MATHEMATICAL PRINCIPLES OF NATURAL PHILOSOPHY* 83 (Andrew Motte trans., Daniel Adee 1848) (1687).

the world similarly pushes back. If a man unjustly enriches himself, one day he will be impoverished. Nobody intends for the world to push back any more than anyone intends for Newton's Third Law to govern the universe; that is just how things are. Karma, then, seems compatible with natural punishment.

C. *Natural Punishment Does Not Presuppose a Particular Justification of Punishment*

Next, I explain why natural punishment does not presuppose any particular theory about the proper justification of punishment. This serves two purposes. First, insofar as my view looks ecumenical, it should garner more adherents. Second and more importantly, one misunderstands the phenomenon if one views it as something that, say, only deterrence theorists could maintain. In order to demonstrate that natural punishment and its attending practical intuitions are ecumenical, I review six prominent theories about the proper justification of punishment. For each, I explain how natural punishment might satisfy the proffered end of punishment.

First, consider the rehabilitative or educational theory offered by many thinkers from Plato onward.<sup>52</sup> On this view, punishment is justified insofar as it makes the wrongdoer a better person. On Plato's view, wrongdoing results from normative ignorance.<sup>53</sup> Punishing someone teaches them right from wrong. Natural punishment could plausibly perform this function, or at least, perform it just as well as a term of imprisonment. At sentencing, the wrongdoer would be told that her action was wrongful and that the adversities that she has suffered should be an indication of the degree of wrongfulness of her actions. If this all sounds too formalistic, I can remind the reader of Brittany Stephens, the mother who lost her child in a car accident. It would be entirely normal for someone like Stephens to say, after losing her child, that *now* she really sees why we have these rules about car seat placement. If we ignore these rules, tragedy can result.

Second, I turn to specific deterrence theories. As traditionally understood, on this type of view, punishment is justified insofar as it deters the wrongdoer in question from committing that wrong again.<sup>54</sup> One can broaden the view to

52. See PLATO, THE LAWS bk. IX, at 860–64b (c. 348 B.C.E.); PLATO, GORGIAS 474, 476a–79c (c. 380 B.C.E.) [hereinafter PLATO, GORGIAS]; PLATO, PROTAGORAS 323 *passim* (c. 380 B.C.E.); MARY MARGARET MACKENZIE, PLATO ON PUNISHMENT 179–206 (1981); HEGEL, PHILOSOPHY OF RIGHT 66–74 (Thomas Malcolm Knox trans., Clarendon Press 1952) (1821); Herbert Morris, *A Paternalistic Theory of Punishment*, 18 AM. PHIL. Q. 263, 264 (1981); ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 363–97 (1981); Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFFS. 208, 209–12 (1984); Dan Demetriou, *Justifying Punishment: The Educative Approach as Presumptive Favorite*, 31 CRIM. JUST. ETHICS 2, 2–3 (2012).

53. PLATO, GORGIAS, *supra* note 52, at 476a–79c.

54. See JEREMY BENTHAM, THEORY OF LEGISLATION 360 (C.K. Ogden ed., Harcourt Brace Co. 1931) (1802); JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND

claim that punishment is justified insofar as it *prevents* the wrongdoer in question from committing that wrong again. The difference between the broad and more traditional understandings is that one can prevent a wrongdoer from reoffending in multiple ways; deterrence is one specific strategy—offering a negative incentive. An incapacitating punishment prevents reoffending, but it is not quite right to claim that it deters reoffending. Whether construed broadly or narrowly, natural punishment can fulfill the role of making it less likely that the wrongdoer reoffends.<sup>55</sup> Pouncy, the wiener bandit, may well desist from robbing people after his accident. Were his accident worse, he might have been completely disabled from walking again and that natural punishment would ultimately end his robbery days, whether he wanted it or not.

Third, I consider general deterrence theories. On this type of view, punishment is justified insofar as it deters others—not the wrongdoer in question—from committing the same wrong.<sup>56</sup> At first glance, one might doubt that natural punishment can serve as a general deterrent, for would-be criminals might see natural punishment as the kind of thing that only befalls fools or the ill-fated, not themselves.<sup>57</sup> Or, to put the point more concretely, would-be robbers might disregard the injuries sustained by Pouncy because people typically keep their appendages intact while committing robberies. Even so, while some will be inclined to “roll the dice,”<sup>58</sup> others might reasonably see natural punishment as a warning about what could happen to them. One is unlikely to be detected and punished for stealing a bicycle,<sup>59</sup> but it may well be

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LEGISLATION (1789), reprinted in 1 THE WORKS OF JEREMY BENTHAM 1, 83 (John Bowring ed., Thoemmes Press 1962); JEREMY BENTHAM, PRINCIPLES OF PENAL LAW (1843), reprinted in THE WORKS OF JEREMY BENTHAM, *supra*, at 365, 396; JOHN STUART MILL, UTILITARIANISM 68–70 (Oskar Pietsch ed., Bobbs-Merrill Educ. Publ'g Co. 1957) (1861); H.J. McCloskey, *A Non-Utilitarian Approach to Punishment*, in CONTEMPORARY UTILITARIANISM 239, 255–57 (Michael D. Bayles ed., 1968); Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. IN AM. 1975–2025, at 199, 201–02 (2013).

55. Some argue that the claim that natural punishment can specifically deter is “merely a speculative observation.” Mirko Bagaric, Lidia Xynas & Victoria Lambropoulos, *The Irrelevance to Sentencing of (Most) Incidental Hardships Suffered by Offenders*, 39 U. NEW S. WALES L.J. 47, 78 (2016). Fair enough, but this speculation is not demonstrably false, and, in cases where natural punishment completely incapacitates the wrongdoer, the speculation is demonstrably true. Thus, if one is a specific deterrence theorist, one can endorse natural punishment.

56. See Daniel M. Farrell, *The Justification of General Deterrence*, 94 PHIL. REV. 367, 367–68 (1985); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 17 (8th ed. 2018); Russell L. Christopher, *Detering Retributivism: The Injustice of “Just” Punishment*, 96 NW. U. L. REV. 843, 857–58 (2002).

57. James Duffy, *Roll the Dice, Rational Agent: Should Extra-Curial Punishment Mitigate an Offender’s Sentence?*, 31 U. QUEENSL. L.J. 115, 126 (2012).

58. *Id.*

59. See Casey Neistat, *‘Bike Thief,’* N.Y. TIMES (Mar. 20, 2012), <https://www.nytimes.com/2012/03/13/opinion/bike-thief.html> [<https://perma.cc/34BM-ET8D> (dark archive)] (explaining the author’s “bike theft experiment” in which he locked up his own bike and proceeded to steal it using “brazen means” in order to find out whether onlookers or law enforcement would intervene).

that the penalty for bike theft deters some folks from engaging in this behavior. In this way, natural punishment is no different from intentionally inflicted punishment: both provide general deterrence but provide it imperfectly.

Fourth, I consider retributivism. Above, I spoke of retributivism in the strong sense—that is, retributivism as a theory that justifies punishment by advertent to just deserts.<sup>60</sup> According to retributivists, wrongdoers simply deserve some amount of hard treatment or deprivation for their wrongs.<sup>61</sup> Because natural punishment can serve as that deprivation, it is consistent with retributivism.<sup>62</sup> As two prominent retributivists put it, “it may be that the human practice of punishment relies on a combination of censure and suffering, but what retributive desert itself requires is just the suffering.”<sup>63</sup>

Fifth, I turn to expressive or communicative theories of punishment. On this type of view, punishment is justified to the extent that it communicates to the wrongdoer (and perhaps also to the wider society) that the wrongdoer’s act was wrong.<sup>64</sup> While some respected voices have expressed doubt as to whether natural punishment can play this communicative role,<sup>65</sup> it surely can, provided that natural punishments are adequately publicized and correctly framed by authorities. For example, the Stephens tragedy, if widely publicized, would undoubtedly communicate to society the danger of failing to properly secure a car seat.

60. See *supra* notes 28–30 and accompanying text.

61. See IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE*, at xix (John Ladd trans., 1965) (1797); IMMANUEL KANT, *THE PHILOSOPHY OF LAW* 195 (W. Hastie trans., 1887) (“For one man ought never to be dealt with merely as a means subservient to the purpose of another, nor be mixed up with the subjects of Real Right. Against such treatment his Inborn Personality has a Right to protect him, even although he may be condemned to lose his Civil Personality. He must first be found guilty and *punishable*, before there can be any thought of drawing from his Punishment any benefit for himself or his fellow citizens.”); Herbert Morris, *Persons and Punishment*, 52 *MONIST* 475, 476–80 (1968); ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 45–58 (1976); Michael S. Moore, *Justifying Retributivism*, 27 *ISR. L. REV.* 15, 21 (1993); MICHAEL S. MOORE, *PLACING BLAME* 153–88 (1997).

62. For retributivists saying as much, see LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, *REFLECTIONS ON CRIME AND CULPABILITY: PROBLEMS AND PUZZLES* 200–04 (2018).

63. *Id.* at 182.

64. See Joel Feinberg, *The Expressive Function of Punishment*, 49 *MONIST* 397, 401–04 (1965); Jean Hampton, *The Retributive Idea*, in *FORGIVENESS AND MERCY* 111, 129–33 (Jeffrie G. Murphy & Jean Hampton eds., 1988); Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 *UCLA L. REV.* 1659, 1691–92 (1992); R.A. DUFF, *TRIALS AND PUNISHMENTS* 64–73, 254–62, 268–77 (1986); R.A. DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY* 80–83 (2001); M. Margaret Falls, *Retribution, Reciprocity, and Respect for Persons*, 6 *LAW & PHIL.* 25, 45–46 (1987); Igor Primoratz, *Punishment as Language*, 64 *PHIL.* 187, 188–91 (1989); Thaddeus Metz, *Censure Theory and Intuitions About Punishment*, 19 *LAW & PHIL.* 491, 494–96 (2000); Joshua Glasgow, *The Expressivist Theory of Punishment Defended*, 34 *LAW & PHIL.* 601, 602–11 (2015).

65. R.A. Duff, *The Intrusion of Mercy*, 4 *OHIO ST. J. CRIM. L.* 361, 367 n.16 (2007) (“[I]t is hard to see how [natural punishment] could serve the ends of communicative punishment.”).

Sixth and finally, I consider the reconstructive theory of punishment. On this view, punishment is justified insofar as it reestablishes the empirical validity of a community's norm.<sup>66</sup> When someone flouts the community's norm, the norm falls into doubt: it is unclear that the norm is operative, or as Kleinfeld puts it, "actualized," anymore.<sup>67</sup> When the community punishes, it reestablishes the norms as operative. Punishment not only *communicates* that the community obeys this norm; punishment speaks that obeisance into being.<sup>68</sup> Punishment is a kind of performative, in J.L. Austin's sense.<sup>69</sup> Just as with the expressive theories, I contend that natural punishment may fill this role, so long as it is adequately publicized and correctly framed by authorities.

#### D. *Natural Punishment as Real Punishment*

The final issue to consider is whether natural punishment is *real* punishment. One might hold that real punishment is something intentionally inflicted as punishment. Natural punishment, as I define it, is not like that. In suggesting that natural punishment be considered as genuine punishment, I seem to face substantial opposition, as noted philosophers<sup>70</sup> and some courts<sup>71</sup> have maintained that punishment must be intentionally inflicted. While there have been some dissenters to the mainstream view,<sup>72</sup> it appears that my proposal faces an uphill battle on this weighty question. As I explain below, there is a sense in which this Article takes a stand on the question, but there is another sense in which I leave the question for nobler minds to ponder.<sup>73</sup> To see this requires making an important distinction.

66. See, e.g., Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1545 (2016).

67. *Id.* at 1499 ("For example, the norm requiring that people respect one another's physical security is de-actualized when one person assaults another: though no less valid as an abstract, conceptual matter, the norm no longer holds as a description of actual social arrangements.")

68. *Id.* at 1513.

69. See J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 4–5 (J.O. Urmson & Marina Sbisa eds., 2d ed. 1975) (isolating explicit performatives as utterances that are not true or false and that are a part of an action which is more than simply saying something).

70. See, e.g., H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 5 (2d ed. 1968) (asserting that punishment "must be intentionally administered," not accidental); Metz, *Why We Welcome Poetic Justice and Despair at Poetic Injustice*, *supra* note 13 (claiming that natural punishment is not real punishment because "[p]eople are undergoing harm or discomfort, but these bads are not being intentionally inflicted by an agent to censure wrongdoing, a straightforward understanding of punishment").

71. See *Wilson v. Seiter*, 501 U.S. 294, 300–01 (1991); *Duckworth v. Franzen*, 780 F.2d 645, 652–53 (7th Cir. 1985).

72. Adam J. Kolber, *Unintentional Punishment*, 18 LEGAL THEORY 1, 7–10 (2012) [hereinafter Kolber, *Unintentional Punishment*]; see also Donelson, *Cruel and Unusual What?*, *supra* note 28, at 33 (arguing on pragmatic grounds that negligent inflictions of harm should count as punishment for legal purposes).

73. As I explain below, one could understand thinking about punishment as a purely theoretical matter, as an attempt to understand the *true nature* of punishment. Interesting and ennobling as such questions *might* be—Aristotle, for instance, suggests that the noblest objects of study are such purely

There are two ways to understand the task of defining punishment. On the one hand, one might conceive this task as an exercise in metaphysics; that is, one might think that *punishment* names some abstract entity whose nature courts and commentators should aim to discover. If defining punishment is metaphysical, success in such inquiry depends on whether a proffered definition accurately tracks this preexisting abstract entity. On the other hand, one might conceive of defining punishment as a practical task; that is, one might think that we ought to place certain phenomena into the category of punishment when doing so has certain practical advantages like promoting justice. If defining punishment is practical, success in such inquiry depends on whether a proffered definition enables us to achieve the specified practical goals.

This Article is unconcerned with the metaphysics of punishment. Maybe the true nature of punishment has an intent requirement, as Hart claimed,<sup>74</sup> or maybe Kolber is right that it doesn't.<sup>75</sup> Since this Article is not concerned with the metaphysics of punishment, it cannot be an objection that it gets the metaphysics wrong. If Hart is right about the metaphysics, that is no strike against this defense of natural punishment.

As an aside, I note that it is not obvious why anyone should care about the metaphysics of punishment in the first place. I would have thought that punishment theorists are most concerned with the *practical* question of how to order society. That certain abstract entities are such-and-so seems irrelevant. Why should abstract entities dictate how we order society?<sup>76</sup> Of course, if punishment theorists were most concerned with writing a dictionary, perhaps the metaphysics of punishment *would* matter, but since we are not lexicographers, we should focus on offering the definition of punishment that best advances our practical purposes.

I have digressed. As a practical matter, natural punishment should count as punishment. Instead of proving this, I merely note that this seems to follow from the practical intuitions mentioned at the outset: (1) that natural punishment can be a proper response to wrongdoing and (2) that natural punishment should be considered when deciding how much additional punishment an offender warrants. These intuitions just amount to the claim that we should treat natural punishment as punishment. To treat something as punishment is to allow it to function in these two roles, as something that is a proper response to wrongdoing and as something that can diminish our warrant

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theoretical matters—this Article simply does not engage such questions. See ARISTOTLE, NICOMACHEAN ETHICS bk. X, at 1177a–1178a (Roger Crisp ed., Cambridge Univ. Press 2014) (c. 350 B.C.E.).

74. HART, *supra* note 70, at 4–5.

75. Kolber, *Unintentional Punishment*, *supra* note 72, at 3.

76. Ronald Dworkin once pointed out the absurdity of this in his discussion of “morons.” Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFFS. 87, 120 (1996).



for inflicting punishment. Of course, these practical intuitions may be mistaken, but the present project has assumed that they are correct.

E. *Summary*

Part I of this Article has sought to clarify the idea of natural punishment. Offering a reductive three-pronged definition began our foray into rendering the idea more perspicuous. Differentiating my conception from other iterations helped to further clarify the idea. I further elucidated the notion by demonstrating the compatibility of natural punishment with widely-held justificatory theories of punishment. In arguing that natural punishment is entirely natural, as opposed to supernatural, I sought to make the idea clear in a different sense. Ideas that conflict with basic tenets of science, as we currently understand it, are not unclear in the sense of being ambiguous or incomprehensible. Instead, accepting (or trying to accept) ideas that conflict with the basic tenets of science necessarily introduces confusion and incoherence into our thinking lives, since science is our best tool for navigating the world. Finally, in explaining that my attempt to define natural punishment is a practical, as opposed to metaphysical, inquiry, I sought to clarify and contextualize the debate in which this Article engages.

II. NATURAL PUNISHMENT AS CONSTITUTIONAL PUNISHMENT

Having rigorously defined natural punishment, this part of the Article elaborates on the proposal to treat natural punishment as constitutional punishment. The theoretical agenda of this part, then, is to lay out the proposal, make a few qualifications, and finally to roughly describe how the proposal might be operationalized. This mere sketch of how operationalization might happen leaves unresolved many thorny tactical questions, questions that are carefully flagged later in the Article.<sup>77</sup> Here, however, is the sketch.

A. *The Proposal*

The proposal is that we treat natural punishment as constitutional punishment. By this term, I mean that which should be considered punishment for constitutional purposes.<sup>78</sup>

The U.S. Constitution mentions or alludes to punishment in many provisions. As I have noted elsewhere, the word *punishment* and its cognates only appear a few times in the Constitution, but the concept of punishment is

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77. See *infra* Section IV.C.

78. Of course, one might use the term to denote “constitutionally permitted punishment,” but that is not what I mean. Thanks to Alice Ristroph for helpfully pointing this out to me.

ubiquitous.<sup>79</sup> The Ex Post Facto Clauses limit Congress<sup>80</sup> and the states<sup>81</sup> in their power to punish: no punishment for deeds that were not criminalized at the time of action.<sup>82</sup> The Double Jeopardy Clause,<sup>83</sup> prevents, *inter alia*, multiple punishments for the same offense.<sup>84</sup> The Fifth Amendment announces more procedural protections for defendants in criminal cases, such as the right against self-incrimination,<sup>85</sup> the right to indictment by grand jury in federal cases,<sup>86</sup> and the requirement of proof of guilt beyond a reasonable doubt.<sup>87</sup> These protections implicate punishment, since one distinguishes criminal from civil cases, in part, by claiming that the former always threaten punishment.<sup>88</sup> The Sixth Amendment, which begins with “[i]n all criminal prosecutions,” has a suite of procedural protections—the Speedy Trial Clause, the Confrontation Clause, trial by jury, and the right to counsel.<sup>89</sup> These implicate punishment for the same reason: a mark of a criminal prosecution is the threat of punishment. These various mentions and allusions together comprise constitutional punishment. Constitutional punishment is that which cannot be cruel or unusual, that which cannot be imposed through retroactive legislation, that which cannot be imposed without the safeguards of the Fifth and Sixth Amendments, and so on.

To treat natural punishment as constitutional punishment is to think that an instance of natural punishment is *subject to all constitutionally specified constraints*. For instance, if it would violate the Eighth Amendment to heap intentional punishment on a wrongdoer after she has already suffered

79. Donelson, *Cruel and Unusual What?*, *supra* note 28, at 3–4.

80. U.S. CONST. art. I, § 9, cl. 3.

81. *Id.* § 10, cl. 1.

82. See *Calder v. Bull*, 3 U.S. 386, 390 (1798) (opinion of Chase, J.) (“The prohibition considered in this light, is an additional bulwark in favour of the personal security of the subject, to protect his person from *punishment* by legislative acts, having a retrospective operation. I do not think it was inserted to secure the citizen in his private rights, of either property, or contracts.” (emphasis omitted)); see also *Weaver v. Graham*, 450 U.S. 24, 28 (1981) (“The *ex post facto* prohibition forbids the Congress and the States to enact any law ‘which imposes a *punishment* for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.’” (emphasis added) (footnote omitted) (quoting *Cummings v. Missouri*, 71 U.S. 277, 326 (1866))).

83. U.S. CONST. amend. V.

84. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106 (2003) (“Under this Clause, once a defendant is placed in jeopardy for an offense, and jeopardy terminates with respect to that offense, the defendant may neither be tried nor punished a second time for the same offense.”).

85. U.S. CONST. amend. V.

86. *Id.*

87. *In re Winship*, 397 U.S. 358, 364 (1970) (“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).

88. See, e.g., Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 780–82 (1997); Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679, 685–86 (1999) (explaining that American criminal law paradigmatically punishes).

89. U.S. CONST. amend. VI; see *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963).

considerable natural punishment, the intentional punishment should be withheld. If that intentional punishment is not withheld, the wrongdoer should receive whatever relief is proper for those who suffer Eighth Amendment violations.

B. *Qualifying the Proposal*

At this point, some qualifications are in order. While the proposal can be sloganized as “natural punishment is constitutional punishment,” this, in truth, is a little too broad. The actual proposal is that we should treat *some* natural punishment as constitutional punishment. As demonstrated below, the proposal must be qualified in several ways to make it more plausible.<sup>90</sup> For now, I focus on just two conditions: (1) the natural punishment must result from legal wrongdoing, specifically crimes, and (2) the natural punishment must be discovered by the state. Only when both conditions are met should we consider a case of natural punishment as constitutional punishment.

On the first condition, there are many sorts of wrongs. There are legal wrongs, as well as aesthetic wrongs,<sup>91</sup> moral wrongs,<sup>92</sup> prudential wrongs,<sup>93</sup> and so on. Of legal wrongs, there are torts and crimes. The proposal only concerns those natural punishments resulting from crimes. I limit the proposal to legal wrongs because it would be implausible to think that some other type of misdeed that does not contravene the law should suddenly implicate the Constitution and its protections. I also limit my proposal to the criminal class of legal wrongs. I do because my proposal ultimately asks courts to temper the amount of intentional punishment it would otherwise bestow; the proposal must concern the types of wrongs that occasion punishment meted out by courts, and those wrongs are largely crimes.<sup>94</sup>

90. See *infra* Part III.

91. See, e.g., GREEN BOOK (Participant Media et al. 2018).

92. See, e.g., *id.*

93. See, e.g., *id.*

94. There is the special case of punitive damages. Punitive damages are, as the name implies, a kind of punishment, but one that follows tortious, not (necessarily) criminal, conduct. Thus, punitive damages are another kind of punishment meted out by courts. In limiting the application of my proposal to those natural punishments that follow crimes, I explicitly do not propose that courts discount a tortfeasor’s punitive damages because of a natural punishment she might have suffered. I leave out this special case, not because of any opposition to such discounts. In fact, this Article takes no stance on whether such discounts are appropriate. Instead, that situation seems sufficiently disanalogous to the situation I consider that it just seems to warrant separate treatment. The most obvious disanalogy concerns the different effects of reducing intentionally inflicted punishment in the two cases. If the courts decide to send someone to jail for less time, in principle, no one is better or worse off. However, if the courts decide not to give a plaintiff punitive damages, that plaintiff is rendered worse. Maybe punishment discounting is still, *ultima facie*, the right thing to do in the punitive damages area, but this disanalogy should make it clear that such a situation raises new, hard questions.

As a second condition, I propose that natural punishment be discovered by the state in order to count as natural punishment. How an instance of natural punishment comes to count as constitutional punishment is elaborated below.<sup>95</sup> Suffice it to say for now that not all natural punishment, even when concerned with a crime, is automatically constitutional punishment. Rather, the proposal is that, upon *discovering* a case of natural punishment—limited to crimes, of course—the state should treat that punishment as constitutional punishment.

C. *How It Works*

The preceding has been painfully abstract. This section explains, with more concrete details, how this proposal would work on the ground. A real-life case of natural punishment will prove helpful for illustration.

Isaiah John Gellaty went nowhere fast. In Happy Valley, Oregon, Gellaty stole a car and led police on a colorful chase.<sup>96</sup> After police had flattened the car's tires, Gellaty began losing control of the vehicle.<sup>97</sup> Gellaty artfully bailed out of the car, which was still in motion, and took off on foot. However, he took an unfortunate path: he tried to run in front of the car, which was still in motion.<sup>98</sup> The car hit him, breaking his leg and pinning him against a wall. Police found him there moments later.<sup>99</sup>

If the proposal of this Article were accepted, the criminal process would proceed as normal with an initial investigation, followed by arrest, the filing of charges,<sup>100</sup> and so on. There would be the typical pretrial motions: Gellaty's attorneys would seek to exclude various things from evidence and so on. Supposing that the case progressed to trial, a trial would take place as normal with the factfinder aiming to discover whether Gellaty committed the wrongs of which he was accused.

The sentencing stage is where my proposal would make the most obvious difference. During a sentencing hearing, the defense would mention the fact that Gellaty had already faced natural punishment for his legal wrongdoing and that this should entitle him to some punishment discount. If the court is persuaded that this natural punishment did occur, it must take this into account when levying his sentence. For instance, suppose there is a maximum sentence

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95. See *infra* Section II.C.

96. *Alleged Thief Tries To Escape Cops, Gets Pinned by Car He Was Driving*, INSIDE EDITION (Nov. 25, 2018), <https://www.insideedition.com/alleged-thief-tries-escape-cops-gets-pinned-car-he-was-driving-48703> [<https://perma.cc/D7FJ-NSAS>].

97. *Id.*

98. *Id.*

99. *Id.*

100. As a small wrinkle, one might suspect that prosecutors may decline to file charges where a natural punishment has occurred, due to sympathy for the criminal or due to the likelihood that no intentional punishment will be imposed. For discussion of that latter possibility, see *infra* Section IV.C.3.

for Gellaty's crimes, car theft and resisting arrest. If that were, say, five years of incarceration, Gellaty should not receive that full sentence. Instead, he should receive some reduction because of the natural punishment.

If Gellaty does not receive a reduction, even after persuading the court that natural punishment occurred, he would have grounds for appeal. He could claim that he has received a larger punishment than the criminal statute permitted, a violation of the Ex Post Facto Clause.<sup>101</sup> He may alternatively claim that the punishment would violate his Eighth Amendment right against cruel and unusual punishment, a right implicated when, *inter alia*, punishment is excessive.<sup>102</sup>

When the process works well, without need for appeal, the sentencing court would announce that the natural punishment is part of the official sentence. This formal acknowledgement that a given instance of natural punishment shall count as punishment for legal purposes is what I call an *embrace* of the natural punishment. Only when natural punishment is formally embraced can we call it constitutional punishment. My proposal, to be clear, is that the state ought to embrace natural punishment when said punishment meets a few conditions, like that the adversity faced was caused by the defendant's commission of a legal wrong.<sup>103</sup>

In our increasingly bureaucratized world, the model of a full trial followed by an elaborate sentencing hearing where parties hash out a sentence is a little out of step, except in the most serious of cases.<sup>104</sup> In plenty of other instances, a criminal case will not make it to a full trial. Also, in plenty of jurisdictions, I imagine that the legislative and executive branches will not leave natural punishment matters to judges alone; the other branches will want to issue guidelines.

On the first departure from the full-dress trial, there will be plea bargaining. Even where there is plea bargaining, on my proposal, there should

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101. See *Lindsey v. Washington*, 301 U.S. 397, 401 (1937) ("The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer. . . . It is for this reason that an increase in the possible penalty is ex post facto . . . ." (internal citations omitted)).

102. The first Supreme Court case to hold that punishment might be excessive for a particular offense was *Weems v. United States*, 217 U.S. 349 (1910).

103. As an aside, the formal embrace of natural punishment may help it serve as a general deterrent. When someone does something bad, they suffer natural punishment, and no one hears of it, would-be offenders do not get the message that wrongdoing might have serious consequences for them. The formal embrace broadcasts the fact of natural punishment, and conceivably, this may have just as much an effect on would-be wrongdoers as hearing about a "normal" sentence.

104. NAT'L ASS'N OF CRIM. DEF. LAWS., *THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT* 5 (2018), <https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf> [https://perma.cc/A5DE-FQDB].

be an embrace of the natural punishment when the judge signs off on the sentence. Also, the bargained-to sentence should reflect the punishment discount. Insofar as there is charge bargaining,<sup>105</sup> and even fact bargaining,<sup>106</sup> present in contemporary legal practice, there will likely be bargaining over which natural punishment has occurred. This raises a number of hard questions about the integrity of the courts, but those questions are not specific to my proposal; rather, they are raised any time charge or fact bargaining is present.

On the second departure, there likely will be interventions from the legislative or executive branches to standardize the use of natural punishment discounts. Perhaps these will purport to be binding. If so, this can also raise hard questions, such as whether a binding punishment discount would unduly and unconstitutionally constrain the judiciary in carrying out its distinct constitutional duty.<sup>107</sup> This sort of concern, like the precise contours of plea bargaining under my proposal, is beyond the scope of the present effort.

### III. THREE PUZZLES

Having explained the proposal that we treat natural punishment as constitutional punishment, this part of the Article explores the consequences of that proposal by examining three puzzles: those raised by (1) the Eighth Amendment protection against excessive punishment; (2) the Due Process protections against pretrial punishment; and (3) the protection against double jeopardy. In raising and resolving the following three puzzles, I further refine the proposal and demonstrate that natural punishment can be incorporated into American law without too much disruption. The puzzles concern how one would interpret and apply three constitutional protections if natural punishment were understood as constitutional punishment.

#### A. *Excessive Punishment*

The first puzzle concerns the Eighth Amendment protection against excessive punishment. The Eighth Amendment requires, *inter alia*, that punishments be proportional, not excessive, given the culpability of the wrongdoer and the degree of the wrong.<sup>108</sup> When a punishment would be excessive, a convict merits injunctive relief or, if the punishment has already transpired, some sort of damages. Natural punishments are not typically subject to injunctive relief, and it is counterintuitive that the state should pay damages for punishment it does not inflict. The puzzle is how the Eighth Amendment protections can apply in the case of unduly harsh natural punishment.

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105. *Id.* at 25.

106. *Id.* at 26.

107. *See* *United States v. Booker*, 543 U.S. 220, 264 (2005) (holding that federal sentencing guidelines are advisory, not mandatory).

108. *Weems v. United States*, 217 U.S. 349, 380–82 (1910).

Before solving this puzzle, I first explain the meaning of excessive punishment under American constitutional law. Then, with an example, I explain how the prohibition on excessive punishment appears to cause problems for my proposal.

Without knowing anything about the law, it seems that punishment could be excessive in three ways. First, the punishment could be too much given the crime. Fifty-odd years in prison is too severe for selling a bottle of whiskey without a license.<sup>109</sup> However, fifty years may be appropriate for defrauding thousands of people out of millions of dollars.<sup>110</sup> Second, the punishment could be too much, given the person. A mandatory life sentence with no possibility of parole is too severe for a child.<sup>111</sup> However, mandatory life without parole may be appropriate for an adult.<sup>112</sup> Third, a punishment could be too much *simpliciter*. In other words, no person, no matter what they did, should receive said punishment. Some view the death penalty like that.<sup>113</sup> Others think the same of brutal forms of corporal punishment.<sup>114</sup> This third category, in a way, collapses into the other two. For all three (or two) kinds of excess, punishment involves too much of something relative to some standard set by the person or the crime committed. With this understanding in mind, let us turn to an example to illustrate how the prohibition on excessive punishment comports with my proposal.

Ernest Johnson should have left his estranged wife alone; there was protective order telling him to do as much.<sup>115</sup> In Fall 2018, Johnson violated the order and went to the home that his estranged wife shared with her new boyfriend—with a Molotov cocktail in hand. Johnson hurled the cocktail at the door, hoping to set the house ablaze, but instead, it bounced back at him, engulfing the forty-three-year-old man in flames.<sup>116</sup>

109. *O'Neil v. Vermont*, 144 U.S. 323, 340 (1892) (Field, J., dissenting).

110. Diana B. Henriques, *Madoff Is Sentenced to 150 Years for Ponzi Scheme*, N.Y. TIMES (June 29, 2009), <https://www.nytimes.com/2009/06/30/business/30madoff.html> [https://perma.cc/F4JA-BW5H (dark archive)].

111. *Miller v. Alabama*, 567 U.S. 460, 479 (2012).

112. For example, Terry Nichols, who received 161 terms of life without parole for his involvement in the Oklahoma City bombing. *Oklahoma Plotter Given Life Term*, BBC NEWS (Aug. 9, 2004, 12:09 PM), <http://news.bbc.co.uk/2/hi/americas/3549574.stm> [https://perma.cc/TAK3-DFLD].

113. See generally Arthur Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773 (1970) (arguing that the death penalty is unconstitutional because it amounts to cruel and unusual punishment).

114. See, e.g., Amanda Clift-Matthews & Parvais Jabbar, *Singapore Should Be Ashamed of Lashings*, DEATH PENALTY PROJECT (Sept. 3, 2020), <https://www.deathpenaltyproject.org/singapore-should-be-ashamed-of-lashings/> [https://perma.cc/B3QB-HFU6] (decrying Singapore's brutal use of caning).

115. Michelle Hunter, *Man Burned While Trying To Set Fire to Home of Estranged Wife's Boyfriend: JPSO*, NOLA.COM (Oct. 16, 2018, 8:15 PM), [https://www.nola.com/crime/2018/10/man\\_burned\\_while\\_trying\\_to\\_set.html](https://www.nola.com/crime/2018/10/man_burned_while_trying_to_set.html) [https://perma.cc/4U2K-3T43].

116. *Id.*

Johnson clearly received natural punishment, as all three elements were easily satisfied. First, he faced adversity, for he incurred severe burns on sixty percent of his body.<sup>117</sup> Second, the adversity was caused by his own wrongdoing, that is, violating the protective order and attempting arson. Finally, the adversity had nothing to do with anyone seeking retribution against him.

I propose that we treat instances of natural punishment as constitutional punishment. If we do so in this case, we seem to face a problem. These severe burns seem excessive under the Eighth Amendment. Violating the order and attempting arson are serious offenses, but they do not seem to warrant life-threatening burns all over one's body. Thus, if we treated Johnson's natural punishment as constitutional punishment, his Eighth Amendment rights seem to be violated. If so, he would be entitled to some relief—but injunctive relief is impossible, given that he has already been burned. Giving him a punishment credit on which he could draw for future offenses seems patently ridiculous, as the philosopher Claudia Card has observed.<sup>118</sup> The only other option seems to be damages, yet it also seems implausible to pay this man for going out and turning himself into a campfire. What to do? Must the response be to compensate this wrongdoer or to retract the proposal?

There may be a way to accept the proposal that natural punishment is constitutional punishment while limiting the application of the proposal to avoid cases with an implausible result. I begin with the suggestion to think of natural punishment's harm as divisible into parts of unpleasantness, into what one might call "disutiles."<sup>119</sup> A punishment is excessive only if there are too many disutiles for a given crime, for a given person, or for any person or crime.<sup>120</sup> I further suggest to think of our practical intuition to treat natural punishment as constitutional punishment as the practical claim that the state should embrace the disutiles of natural punishment as disutiles given by constitutional punishment. But I urge a limit. For natural punishments, the state can embrace, at maximum, the highest amount of disutility that the Constitution permits.

The burning of Johnson, let us conjecture, is one hundred disutiles. For the crimes that he has committed, the state may at most inflict fifty disutiles. Anything over the fifty disutiles is not punishment that the state can embrace as its doing and, thus, anything over the fifty disutiles is not constitutional punishment.

This solution may appear to create another problem by allowing the state to decide to embrace only five disutiles that the burning causes and then decide

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117. *Id.*

118. Claudia Card, *On Mercy*, 81 PHIL. REV. 182, 201–02 (1972).

119. For use of this terminology, see Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 229 (2009).

120. If there were totally off-limits punishments, this analysis may not work.



to inflict forty-five through intentional punishment. I would block this, for the limit should also be a floor.

At this point, I have gestured at a solution to the puzzle. For those natural punishments that are, all by themselves, constitutionally excessive, we can divide them into two portions. One portion is the limit that the Constitution allows, and the other is the excess. The state should embrace the first portion; it cannot embrace the excess. Thus, one can accept the proposal to treat natural punishment as constitutional punishment without the counterintuitive result that the state owes damages for excessive natural punishments.

Neat as this response may sound, it might also seem ad hoc. There is, however, precedent for such thinking in American law. There once was a time when Eighth Amendment suits worked very differently than today.<sup>121</sup> When, for instance, an inmate claimed that he faced some cruel punishment in prison at the hands of a prison official, courts would first figure out whether the complained-of behavior was in fact cruel punishment.<sup>122</sup> If it were, this did not mean that the inmate could sue the prison or the state. The state had sovereign immunity that may not have been waived.<sup>123</sup> Instead, it meant that the prison official was acting beyond her state-granted authority. Since the state had no authority to license the prison official to violate the Constitution, the official's behavior was not the state's act.<sup>124</sup> This left the inmate free to sue the official for the ordinary tort that occurred such as battery. When such a suit would proceed, the official could not use her position as a defense.<sup>125</sup>

This system was eventually replaced by our modern system that allows courts to see officials' illegal behavior as the state's misdeeds.<sup>126</sup> The modern system has net benefits; in particular, it helps victims recover against judgment-proof, poor government officials.<sup>127</sup> Nonetheless, the reasoning of the old system is not faulty and would be fine in a world with more insurance or without judgment-proof people. Regardless of the merits of the old system, the point is only that American legal thought has previously upheld the idea that we cannot typically attribute unconstitutional measures to the state. That thought is the

121. Raff Donelson, *Who Are the Punishers?*, 86 UMKC L. REV. 259, 279–80 (2017).

122. *Id.*

123. *Id.*

124. *Id.*

125. For a description of this process, see *id.*

126. See Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 935–37 (2019) (describing the history of constitutional torts and their rise since the 1970s).

127. See Stephen Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 607–09 (2006) (describing the widespread problem of judgment-proof defendants); Theodore Eisenberg & Stewart Shwab, *Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 643–44 (1987) (differentiating between civil rights litigation and constitutional torts litigation and identifying state responsibility for damages as one main difference).

core of my resolution of the first puzzle, and as such, it is not grossly out of step with American legal thought.

### B. *Pretrial Punishment*

The second puzzle concerns Due Process protections against pretrial punishment. Due Process requires, *inter alia*, that punishments be withheld until a court pronounces guilt upon a criminal defendant.<sup>128</sup> Natural punishments typically occur well before a court adjudicates the issue in question. This appears to violate the Due Process guarantee, and yet, like in the Eighth Amendment puzzle, no relief seems plausible.

To begin solving the second puzzle, consider a different pretrial matter. In many jurisdictions, if a person is held in jail prior to conviction and is later convicted, the time served in jail is counted against the sentence time.<sup>129</sup> For instance, suppose that someone—call her Amy—is held in jail for one year prior to her conviction for a crime. After her conviction, Amy is sentenced to five years in prison. In many jurisdictions, Amy will only have to serve four years, since she already spent one year in jail. Now, something should be very puzzling about this. The pretrial detention was not punishment while Amy was awaiting trial. If it were, the detention would have violated the Due Process guarantee that one will not face punishment before trial.<sup>130</sup> After conviction, the pretrial detention is somehow transformed into a period of punishment. If it were not so transformed, it is hard to see what would justify counting the one year of detention against Amy’s sentence.

The “mystery of credit for time served,” as some like to call it,<sup>131</sup> may prompt various sorts of responses. I rely on this situation to suggest a particular lesson, namely that the American legal system sometimes allows these *time transformations*. In such time transformations, before a certain point in time, a particular harm *is not* legal punishment, but after that point in time, that very same harm, that already happened, *is* legal punishment. I suggest that we think about natural punishment similarly.

128. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (“[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.”).

129. *See, e.g.*, 42 PA. CONS. STAT. § 9760 (2021); TENN. CODE ANN. § 40-23-101(c) (LEXIS through the 2021 1st Extraordinary and the 2021 Reg. Sess.); MISS. CODE ANN. § 99-19-23 (LEXIS through the 2021 Reg. Sess.); MICH. COMP. LAWS § 769.11(b) (2021); MONT. CODE ANN. § 46-18-403 (2021).

130. Obviously, the Bill of Attainder Clauses stand for the proposition that one will not face punishment prior to trial. U.S. CONST. art. I, § 9, cl. 3, § 10. cl. 1. But Due Process also encompasses this principle as it has been part of the Anglo-American tradition for centuries. One can find the idea expressed in Magna Carta: “No free man is to be arrested, or imprisoned, or disseised, or outlawed, or exiled, or in any way destroyed, nor will we go against him, nor will we send against him, save by the lawful judgement of his peers or by the law of the land.” MAGNA CARTA, ch. 39 (1215), *reprinted in* DAVID CARPENTER, MAGNA CARTA 53 (David Carpenter trans., 2015).

131. Adam J. Kolber, *Against Proportional Punishment*, 66 VAND. L. REV. 1141, 1149 (2013).

As highlighted above, my proposal is that we think of *some* instances of natural punishment as constitutional punishment. Above, I noted that natural punishment resulting from moral wrongs (that are not also legal wrongs) should not be considered constitutional punishment. At this juncture, I claim natural punishment, even when resulting from a legal wrong, should not be considered constitutional punishment immediately. Only after a court finds someone guilty can we say that the person has received constitutional punishment.

The justification for thinking of natural punishment in this way is immanent. We should think of natural punishment like this because it coheres with our other punishment practices, particularly our practice of counting pretrial detention against someone's official sentence. I can go one step further though. Natural punishment is not merely *similar* to that other pretrial practice; pretrial detention before a rightful conviction just *is* natural punishment, for it is (1) an adversity, (2) caused by wrongdoing and (3) not caused by an intention to exact retribution on the wrongdoer.

There might be a concern about the third element because officials detain wrongdoers prior to a criminal trial because it is thought helpful for eventually exacting retribution. This is true, but I would urge drawing a distinction here. Criminal suspects are detained, not to exact retribution, but rather to ensure their appearance at trial.<sup>132</sup> That is the intention we must impute to criminal justice officials, unless evidence suggests otherwise. Moreover, appearance at trial is a precondition for exacting retribution, but aiming at a precondition for  $x$  is not necessarily to aim at  $x$ . If it were, one would be rightly frustrated whenever one merely secures the precondition but not  $x$  itself. This is not how the criminal justice system works. The whole point of securing someone's appearance at trial is not frustrated by an acquittal.

In summary, the Due Process puzzle presents a dilemma: either think that those who receive natural punishment get their Due Process rights violated and deserve relief, which seems either impossible or implausible, or think that natural punishment is not constitutional punishment at all. I resolve this puzzle by claiming that natural punishment should not be considered constitutional punishment until Due Process requirements are met. I further explained that the American criminal justice system already accommodates such thinking.

### C. *Successive Punishment*

The third puzzle concerns the protection against double jeopardy. The Double Jeopardy Clause<sup>133</sup> prohibits, *inter alia*, inflicting multiple punishments

132. Jeffrey F. Ghent, Annotation, *Propriety of Denial of Pretrial Bail Under Bail Reform Act (18 U.S.C.A. §§ 3141 et seq.)*, 75 A.L.R. Fed. 806, § 1 (1985) ("Risk of flight, by itself, is sufficient to merit pre-trial detention.").

133. U.S. CONST. amend. V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . .").

for a single offense.<sup>134</sup> Natural punishments may conceivably occur long after an offender has served her sentence. This appears to violate double jeopardy, and yet again, no relief seems plausible. Before solving this puzzle, I first further elaborate on its dimensions with an example.

Suppose that a Florida man, Brian, commits a minor traffic offense and then, after being pulled over by police, unlawfully flees the scene. During his flight, he scales a fence into someone's yard and disturbs that person's pet alligator. Terrified of the beast, Brian opens a door in the fencing and continues his flight. Little did Brian know that the alligator escaped the yard when he opened that door. Brian is later apprehended, convicted, and duly sentenced. After Brian has paid his debt to society, he encounters the same alligator and is viciously attacked.<sup>135</sup>

Brian's case looks like an instance of natural punishment, for he faced adversity (the alligator attack), which was caused by his wrongdoing (the traffic violation, fleeing police, trespassing), and not caused by any intention to exact retribution (the alligator was not getting back at him for the criminal offenses). The puzzle comes in determining whether to treat Brian's natural punishment as constitutional punishment.

My proposal is to treat cases of natural punishment as constitutional punishment, but if this proposal were adopted, a problem seems to emerge. No one is allowed to face multiple punishments for the same underlying offense, per the Double Jeopardy Clause.<sup>136</sup> Brian was already punished once when he served his sentence, so he should not be punished a second time in the form of natural punishment. If he were punished a second time, it would seem that Brian should be entitled to damages. Of course, such relief seems implausible to provide because the state, seemingly, should not be on the hook for alligator attacks it does not cause.

Like with the previous puzzles, we can pose it as a dilemma: either provide damages, which seems implausible, or admit that the proposal is incorrect. Like with the previous resolutions, this task is to show how the proposal is consistent with no provision of damages, at least most of the time.

Solving this puzzle requires, first of all, noting the circumstances in which the practical intuition about natural punishment is most favorable to my proposal. In those circumstances, a wrongdoer suffers serious natural

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134. *Ohio v. Johnson*, 467 U.S. 493, 498 (1984) (“[The Double Jeopardy Clause] protects against multiple punishments for the same offense.” (quoting *Brown v. Ohio*, 432 U.S. 161, 165 (1977))).

135. This example draws inspiration from the real-life case of Bryan Zuniga. Zuniga really did commit a traffic offense, flee, scale a fence, and encounter an alligator. Jake Carpenter, *In Florida, Gator Takes Bite Out of Crime—and Man*, CNN (May 10, 2013, 4:21 AM), <https://www.cnn.com/2013/05/10/justice/florida-gator-arrest/index.html> [<https://perma.cc/XTL4-3AYJ>]. The key difference is that he was attacked shortly after the wrongdoing, not after he had served his sentence. *See id.*

136. *Johnson*, 467 U.S. at 498.

punishment, and the state knows about this *after* it occurs but *before* sentencing. Such circumstances activate the practical intuition that the state should take the natural punishment into account when making its determination of the proper amount of intentional punishment to bestow. Of course, in those circumstances, the state is not a but-for cause of the natural punishment. Thus, the worry in the alligator hypothetical cannot merely rest on the fact that the state did not actually cause the attack. The state does not cause many instances of natural punishment, and, at least sometimes, we still have the practical intuition that the state should offer a punishment discount.

Instead of relying on causation, maybe our practical intuition rests on time. If the natural punishment happens *before* sentencing or during someone's sentence, it seems fine to require the state to consider the natural punishment. However, when the natural punishment happens *after* a sentence has already ended, it seems unfair to ask the state to pay damages because it did not predict the future. But what if the state could have predicted the future? My suggestion is that our practical intuition about discounting does not rest on time *per se*. Instead, it rests on whether the state knew (or should have known) that the natural punishment did, or will, occur. Returning to the alligator case can help to illustrate this point.

What seems implausible about compensating Brian for the alligator attack is that, at the time of sentencing and even during the sentence, the state did not know about the attack (because it had not yet happened), and the state could not have *foreseen* the attack either. It is uncommon to be bitten by an alligator in the first place.<sup>137</sup> It is even more unlikely that the very same alligator that Brian unwittingly released would be around to attack him later. If the situation were different, such that the state could foresee the attack with perfect clarity, it seems much more reasonable to insist that the state do something. As a first matter, it should have tried to prevent the attack. Barring that, it should provide a punishment discount. Failing that, damages should have been provided after the attack.

This analysis of what should have happened is not just based on intuition; existing caselaw provides some support for this line of thinking. The Court has understood the Eighth Amendment to require prison officials to prevent certain foreseen extrajudicial harms from befalling prisoners.<sup>138</sup> The Court has tended

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137. FLA. FISH & WILDLIFE CONSERVATION COMM'N, HUMAN-ALLIGATOR INCIDENTS FACT SHEET (2019), <https://myfwc.com/media/1776/human-alligatorincidentfactsheet.pdf> [<https://perma.cc/LU8F-UL43>] ("The likelihood of a Florida resident being seriously injured during an unprovoked alligator incident in Florida is roughly only one in 3.1 million. From 1948 to 2019, 413 unprovoked bite incidents have occurred in Florida. Twenty-five of these bites resulted in human fatalities.").

138. This is a way to understand the secondhand smoke case. *See Helling v. McKinney*, 509 U.S. 25, 33–35 (1993).

to treat these foreseen harms—harms like particular instances of prisoner-on-prisoner violence—as punishment for constitutional purposes.<sup>139</sup> Because the prisoner already had a sentence, the additional imposition of punishment is deemed unconstitutional. If the state can foresee a natural punishment, just as it sometimes can foresee other sorts of harms, what justification could it possibly have for *not* discounting the punishment? It seems that no justification could be consistent with the general practical intuition that we should discount intentional punishment when the state knows about an instance of natural punishment.

In closing, the last puzzle is resolved once one recognizes that the proposal to treat natural punishment as constitutional punishment only applies in cases where natural punishment is known or reasonably foreseeable by the state. Only known or foreseeable natural punishments are those the state should have to embrace. With this condition on the proposal, the instances where double jeopardy would be violated should be relatively few. However, where double jeopardy is violated, the wrongdoer deserves damages.

#### IV. LOOSE ENDS & FUTURE PROJECTS

Even after solving these constitutional puzzles, there are several outstanding questions arising from my proposal that this Article does not resolve. For instance, will prosecutors decline to press charges in cases where natural punishment has occurred? Will such declinations, if they happen, undermine certain persuasive justifications for punishment? What does my proposal imply for those wrongdoers who receive unexpected *benefits* as a result of their wrongdoing? These are all crucially important questions, and though they all require their own systematic treatment, in this part, I flag these and other questions for future consideration.

##### A. *Vigilantism and Other Events Verging on Natural Punishment*

As a first matter, the category of natural punishment may seem artificially narrow. There are other sorts of harm wrongdoers can suffer that, arguably, should lead to punishment discounts too. For instance, my conception of natural punishment excludes all adversities resulting from someone's retributive aim. As a result, a vigilante mob that attacks a wrongdoer does not, on the proposed definition, inflict natural punishment. One might wonder why the recipient of vigilante justice should get no punishment discount while others who suffer extrajudicial harms do get such discounts. Similarly, one might wonder why the person who intentionally punishes herself for her wrongs should get no discounts.

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139. See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 832–34 (1994).

To be clear, my proposal does not hold that punishment discounts should *only* be extended to those who suffer natural punishment. Instead, it holds that punishment discounts should *at least* be extended to those who suffer natural punishment. Whether there is good reason to go further is beyond the scope of the present inquiry. I suspect there may be good grounds for giving discounts to more classes of persons, but my proposal simply does not grapple with this for two reasons.

First, natural punishment, as I employ the term, tries to pick out the familiar idea that a person might be punished even when no one sought to do so. This idea can be reflected in American law without doing too much damage to existing institutions and understandings. Whatever else one might want to say about them, vigilantism and self-punishment are simply not instances of this intuitive notion.

Second, self-punishment, in particular, raises complications such that it might be less deserving of punishment discounts. I mention two of these below.

One complication concerns how to determine the severity of self-punishment. A hypothetical may help to illuminate the problem. Suppose someone claims that she locked herself at home for six months after she shoplifted from a store to punish herself for the theft. Leaving aside the question of proof that this occurred, how should a court assess the degree of adversity? While the shoplifter might contend that this period was like six months in a jail or six months of house arrest, that seems wrong (and self-serving) in part because her sojourn at home was completely under her own control. She could release herself at any time.<sup>140</sup> Part of the adversity of a punishment, or at least incarceration, is that one must relinquish control of one's situation. To state the problem generally, it is hard to determine the degree to which one can really punish oneself, and thus, we have a puzzle that does not present for natural punishment, as defined here. This puzzle might be resolvable, but its very existence as an extra puzzle suggests a reason for a separate analysis.

A second complication of self-punishment is whether the criminal justice system should condone or incentivize this. If punishment discounts are available, wrongdoers may feel incentivized to self-punish. This incentive might be strong, especially if self-punishment is officially weighted much like other punishment. A regime rife with self-punishment, however, may not be cost-effective. To see why, consider again our hypothetical shoplifter. The shoplifter's misdeeds must reach the attention of the criminal justice system somehow. Let us assume that the cost of discovery is the same whether or not

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140. As an aside, this is also why Barbara Ehrenreich's project of going undercover as a low-wage worker, while revelatory, does not approximate the life of a low wage worker. BARBARA EHRENREICH, NICKEL AND DIMED 10–12 (2001). Being poor means you cannot suddenly decide to leave your rags and take up a jet-setting lifestyle as an internationally-renowned journalist and author.

self-punishment occurred. Cost differences will always creep in at two stages: during investigation into alleged self-punishment and during court proceedings for reaching a determination about alleged self-punishment. Sometimes these costs will be offset when self-punishment is actually proved, as a punishment discount can be cost-saving for the public. But sometimes not. If the intentional punishment was going to be a fine, punishment discounts will not be cost-saving. If the self-punishment involves serious bodily harm, the state may need to bear medical costs that far exceed costs for the appropriate intentional punishment.

In mentioning these possible inefficiencies, the point is not merely that giving punishment discounts for self-punishment might be a costly undertaking and more costly than not having such discounts. Implementing my natural punishment proposal will also be costly, and perhaps more costly than not implementing it. The difference is that natural punishments just happen, without anyone beckoning them as such. Therefore, when a natural punishment happens, society faces one question: whether to acknowledge that something has happened which can serve the purposes of punishment. With self-punishment (and vigilante justice, too), society faces that and an additional question: whether to encourage a kind of black market in punishment outside of the normal channels—a black market that may make the whole enterprise more expensive to run. Maybe the answer to that secondary question is yes, but it is not obvious.<sup>141</sup>

My argument is not that vigilante violence and self-punishment deserve no consideration from courts at sentencing time. Instead, I merely decline to advance any position with respect to them. Part of the reason for declining is that these phenomena simply lie beyond the scope of the pre-theoretical notion I seek to capture and explore. Another part of the reason is that self-punishment in particular raises hard questions that deserve separate scholarly treatment.

B. *The Flipside: Undoing Extra Benefits of Wrongdoing*

In a nutshell, this Article proposes that, when crime naturally brings added harm to wrongdoers, the wrongdoers deserve less punishment. One might wonder about the obverse situation, when crime naturally brings added benefit to wrongdoers.<sup>142</sup> An example may help to fix ideas.

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141. For argument that vigilantism should not lead to punishment discounts, see Bagaric et al., *supra* note 55, at 76–77.

142. I thank Mihailis Diamantis for this intriguing question and riveting conversation on this matter.



Mark Goodram and Jon-Ross Watson bought a winning ticket from the British National Lottery.<sup>143</sup> The payout for the winning ticket was to be four million British pounds.<sup>144</sup> However, the pair of pals purchased the ticket with a stolen bank card, allegedly.<sup>145</sup> Watson has a history of bank card fraud,<sup>146</sup> but he and his friend claim the ticket was purchased for them by a stranger named John.<sup>147</sup> Of course, they did not know John's surname. Supposing for the sake of the example that the facts are as alleged, this case presents a relatively minor crime—stealing a few pounds on a stolen bank card—which improbably leads to great rewards for the wrongdoers. One might wonder what should happen here. Is this Article committed to an answer, namely giving extra punishment to those wrongdoers, should they actually realize the winnings?

While it may seem that I should want to punish lucky wrongdoers more harshly, this Article takes no stance on the matter. If one holds a deterrence theory of punishment, indeed one may wish to heap extra punishment on Goodram and Watson because they and others may come to believe that crime pays and pays rather handsomely. By contrast, if one is a retributivist, the answer may be the opposite. The wrong done to the bank card holder is no worse because the thieves bought a winning lottery ticket than if they had bought a losing ticket or even lollipops. A couple of quid is a couple of quid. If this analysis is right, it suggests that what to do about lucky wrongdoers depends on one's justificatory theory of punishment. This Article is neutral on the justification of punishment, so I leave this matter as a subject for another day.

### C. *Thorny Quotidian Questions: Proof, Costs, and Declinations*

While this Article has begun the task of thinking through how its proposal would work on the ground,<sup>148</sup> there is still much to be decided. Here, I flag several questions of a rather practical and quotidian sort. Each of these are questions that attend various sorts of proposals for legal change; as such, they do not present special theoretical problems for my proposal. For that reason, these questions do not call out to be settled at this early stage.

#### 1. Proving Natural Punishment

The first matter concerns proving the existence of natural punishment. One might think my proposal foists upon courts an insurmountable epistemic

143. Kate Buck, *Lotto 'Winner' Denied £4,000,000 for Using 'Stolen Credit Card' Is Now Homeless*, METRO (May 5, 2019, 12:55 PM), <https://metro.co.uk/2019/05/05/lotto-winner-denied-4000000-for-using-stolen-credit-card-is-now-homeless-9414431/> [<https://perma.cc/2HFN-6BBG>].

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *See supra* Section II.C.

challenge. It should be remembered, of course, that in courts of law, finders of fact are charged with discovering all manner of things: facts about the distant past,<sup>149</sup> facts about faraway places,<sup>150</sup> facts about counterfactuals,<sup>151</sup> and facts about the inner recesses of a person's mind.<sup>152</sup> Still, it might be thought that courts will have particular trouble with this new investigative task. Perhaps courts will have trouble determining whether an adversity befell someone as a result of their crime<sup>153</sup> or have trouble determining whether retributive aims caused the adversity. Courts may even have trouble determining whether the wrongdoer suffered an adversity at all, especially when the alleged adversity is psychical as opposed to physical or pecuniary.<sup>154</sup> Just as an example, when an infant is negligently left in a hot car and dies as a result, we might think that the negligent parent has suffered a natural punishment,<sup>155</sup> but it may well be that the parent wished for this result or feels totally indifferent.

While I do not suspect it, the problem of proof may be thornier here than in other areas of law. It may well be that special rules of evidence should be devised. For instance, maybe to introduce psychical harms the defendant must have formal documentation or an expert witness. More generally, the proposal, as articulated so far, says nothing about the rules by which evidence of a natural punishment will be admitted. Will it be the free-for-all of the sentencing phase,

149. Jerry Burns was tried for the murder of Michelle Martinko, which took place a full forty years prior. *Iowa Man Guilty in 1979 Killing of High School Student*, ASSOCIATED PRESS (Feb. 24, 2020), <https://apnews.com/article/ba3b951089561596d0cefe0954765ea8> [<https://perma.cc/34R7-TDBL>].

150. *See, e.g.*, *Weems v. United States*, 217 U.S. 349, 349–50 (1910) (considering events taking place in the Philippines).

151. *See, e.g.*, *Nix v. Williams*, 467 U.S. 431, 440–50 (1984) (establishing the inevitable discovery exception to the Sixth Amendment exclusionary rule and thus calling on lower courts to determine whether some evidence would have been discovered by legal means).

152. Any crime with a specific intent requirement would fit the bill here.

153. Mirko Bagaric and his co-authors demonstrate one difficulty of the causal inquiry when they argue, tendentiously, that accidental physical injuries can never stand in the right causal relation to crime to count as natural punishment. Bagaric et al., *supra* note 55, at 75–76. They say this because they think that *the fact of criminalization* must cause the adversity, rather than thinking that the crime itself must cause the adversity. Clearly, just trying to understand the causal question as a theoretical matter is hard; finding the empirical facts that allow one to draw causal conclusions is harder still.

154. In talking about public opprobrium as a natural punishment, Bagaric and his co-authors contend “it is not tenable to measure with any accuracy.” *Id.* at 49. In a later article, Bagaric and Peter Isham claim that “public condemnation is impossible to quantify.” Mirko Bagaric & Peter Isham, *A Rational Approach to the Role of Publicity and Condemnation in the Sentencing of Offenders*, 46 FLA. ST. U. L. REV. 239, 241 (2019).

155. Sharon Otterman, *He Left His Twins in a Hot Car and They Died. Accident or Crime?*, N.Y. TIMES (Aug. 1, 2019), <https://www.nytimes.com/2019/08/01/nyregion/children-left-to-die-in-hot-cars-accident-or-murder.html> [<https://perma.cc/XRG8-8JLX> (dark archive)] (detailing the phenomenon of hot car cases and the fact that prosecutors are hesitant to charge, and judges and juries are reluctant to convict, because they feel that “[t]here’s nothing . . . that you are ever going to be able to do to that parent that is going to come close to what that parent is going to have to live with for the rest of their life”).

as it exists in most U.S. jurisdictions today,<sup>156</sup> or will something more formal be required? Ultimately, this is all fodder for future work.

## 2. Fashioning the Discounts

A second matter that must be addressed in future work is fashioning the punishment discounts that natural punishment affords those unlucky wrongdoers. It might be thought that determining the discounts will be particularly hard because the harms of natural punishment seem incommensurate with the traditional harms imposed by courts, such as imprisonment and fines. How many years in prison is a broken leg worth?

I agree that this will be a tough issue to tackle and further agree that this issue will need to be resolved prior to implementing any natural punishment proposal. Nonetheless, deferring that task is reasonable because the issue is practically, not theoretically, taxing. We can have great faith that the issue can be resolved since existing jurisdictions already have done so<sup>157</sup> and because criminal law already makes the incommensurable commensurable. While it may seem weird to compare years in prison to broken legs, we already do that when we sentence people to prison terms for breaking legs! Thus, without suggesting any particular way to address this commensurability problem, I know that the problem can be solved.

## 3. The Cost of Natural Punishment Determinations

A final matter concerns the cost of making natural punishment determinations. Implementing any proposal will have costs, and a thoroughgoing defense of a proposal should address those costs. Some readers are, no doubt, wary about my proposal because they worry that this will be expensive and may impose burdens on others in the criminal justice system (for example, longer time to a final disposition for other criminal defendants). In addition to this perennial question about proposals, there is a special cost question for natural punishment.

Coming to a clear understanding of the costs may actually shape the implementation of my proposal in at least two important ways: (1) it could help courts define what counts as a sufficiently serious adversity, and (2) it will help prosecutors decide when declining to prosecute is worth the lost benefits in terms of general deterrence, communication, and reconstituting the community.

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156. For a comprehensive outline of the many ways states address sentencing, see ALISON LAWRENCE, NAT'L CONF. OF STATE LEGISLATURES, MAKING SENSE OF SENTENCING: STATE SYSTEMS AND POLICIES (2015), <https://www.ncsl.org/documents/cj/sentencing.pdf> [<https://perma.cc/3HA8-GM9E>].

157. See *infra* Part V.

On the first score, I have claimed that natural punishment must involve a sufficiently serious adversity to warrant punishment discounts. One way to measure sufficient seriousness is to make it a function of the disutility experienced by the wrongdoer, the normal sentence for the crime, *and* how much it costs society to investigate the alleged natural punishment. To see why investigation costs matter for determining seriousness, consider the following: If an alleged natural punishment harm is small and the cost of finding out is small, this harm seems serious enough to investigate. On the other hand, if the harm is small, but the cost of finding out is incalculably large, perhaps the investigation should not proceed. To be clear, my proposal does not *require* weighing investigation costs in order to measure seriousness of adversity, but that is one reasonable implementation of the proposal, and it does require gathering cost information.

On the second score—that knowing investigation costs will guide prosecutors in declination decisions—this raises a number of issues about cost-balancing. To bring these issues into focus, let us return to one of our initial natural punishment cases, that of Brittany Stephens who lost her infant daughter in a car accident. To be honest, I was surprised that Baton Rouge prosecutors brought a case against Stephens for negligent homicide because she is very sympathetic and a jury could nullify.<sup>158</sup> Nonetheless, they decided to charge her, but how might this charging decision be different in a world with natural punishment discounts? Prosecutors might think about the fact that her natural punishment could very well completely discount any intentional punishment. Some may wish to charge and carry the process to its end, even if no punishment will ultimately be dispensed because the full, formal process of conviction followed by a formal embrace of the natural punishment will advance various objectives of the criminal justice system, such as deterring others from wrongdoing, communicating that Stephens's act was wrong, and re-stitching the social order, thereby making our traffic laws empirically valid again. Some prosecutors, on the other hand, will find the full-dress procedure a waste of money if it results in no further punishment from the state. What a prosecutor will do in any individual case or as a general strategy follows from how she balances costs. How much do we value the communicative element of embracing a natural punishment and what is the opportunity cost of that? Implementing my proposal would require both details of the costs of implementation and guidelines for prosecutors to use in balancing costs.

#### D. *Justifying the Natural Punishment Intuition*

Last, but most important, this Article devotes little space to defending the general intuition that society should offer punishment discounts to those who

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158. And maybe *should* nullify.

suffer natural punishment. The bulk of that offered concerns the compatibility of natural punishment with several well-known justifications of punishment.<sup>159</sup> This discussion was included mainly to further explain the concept of natural punishment, not to convince anyone (e.g., retributivists and deterrence theorists) that they must accept my proposal.

Where natural punishment doctrines already exist, some scholars protest them.<sup>160</sup> Some American courts have even treated natural punishment as a reason to *increase* punishment.<sup>161</sup> Another particularly troublesome worry is the thought that instituting my proposal could lead to unjust results: criminals with prestige or power to lose might, because of those advantages, be enabled to seek greater punishment discounts than their less esteemed, powerless peers. Call this the Brock Turner problem.<sup>162</sup> (While Turner did not receive his light sentence due to any natural punishment he faced, one can imagine a nearby possible world in which a natural punishment argument influences a judge who is overly sympathetic to upper-class White male offenders.) The Brock Turner problem can be addressed—we just have to think through how much discretion judges should have with respect to sentencing discounts<sup>163</sup>—but that is not to say it will be easy to do so in practice.

The Article has assumed that treating natural punishment as genuine punishment is not merely a permitted outcome, but actually a requirement of justice. This assumption will ultimately need quite a bit of justification. In detailing the proposal and explaining how it would work before offering a robust normative argument in its favor, I seem to have put the cart before the horse. That is a reasonable objection to my approach, but my approach is undergirded by the Kantian principle that *ought implies can*.<sup>164</sup> In other words, we must know what is possible, including how things work in order to know about our obligations. With this Article, we know that, without doing any damage to the American legal system, we *can* institute my proposal. In future work, we might learn more about why we ought to.

159. See *supra* Section I.C.

160. See generally Bagaric et al., *supra* note 55 (arguing that wrongdoers who face natural punishment should, by and large, receive no punishment discounts).

161. Bagaric & Isham, *supra* note 154, at 258 (discussing a time when the Tennessee Supreme Court held that natural punishment, in the form of public contempt, was “an appropriate—even desired—justification for a sentence increase”).

162. Turner was a Stanford undergraduate student convicted of sexual assault, but a judge sentenced him to just six months of incarceration. See Kristine Ruhl, *Are We Contradicting Ourselves?: How the Stanford Rape Case Illustrates the Conflict Between Mandatory Sentencing and Judicial Discretion*, 22 LOY. PUB. INT. L. REP. 28, 28–29 (2016).

163. I flagged this concern above. See *supra* note 107 and accompanying text.

164. IMMANUEL KANT, RELIGION WITHIN THE LIMITS OF REASON ALONE 43 (Theodore M. Greene & Hoyt H. Hudson trans., Harper & Row 1960) (1793) (“[D]uty demands nothing of us which we cannot do.”).

No doubt, even after scholarly work is done on the justificatory front, this proposal is likely to be controversial in America. Ours is a nation that cannot find a problem for which “more punishment” is not deemed the correct answer.<sup>165</sup>

## V. A FORAY INTO COMPARATIVE LAW

In raising and resolving the constitutional puzzles and carefully exploring the loose ends in previous parts, this Article demonstrates that the natural punishment idea can be incorporated into American law without requiring anything too revolutionary. Existing caselaw and established understandings point the way. Still, an American reader might have reservations and worry that operationalizing this sort of proposal would create chaos. In this part, I attempt to allay such worries by discussing three foreign jurisdictions that have already adopted a natural punishment doctrine into their respective bodies of law.

Germany, Sweden, and Australia—all well-ordered, prosperous nations—each offer punishment discounts where someone suffers natural punishment. To be sure, each of these nations handles natural punishment in a slightly different way, and each nation’s doctrine differs from my own proposal in important respects. This diversity in thought, however, is welcome. It highlights that there are several workable ways to operationalize the natural punishment intuition.

### A. *Germany*

German law recognizes natural punishment by statute.<sup>166</sup> The statute, Section 60 of the *Strafgesetzbuch* (or Penal Code), permits a special disposition of cases called the *Absehen von Strafe* disposition (literally, the “refraining from punishment” disposition).<sup>167</sup> When a court disposes of a criminal case in this way, the defendant is “found guilty of an offense and yet not punished” at all.<sup>168</sup> This disposition is appropriate when the defendant has already “suffered severe losses due to their own misdeeds.”<sup>169</sup>

German law differs from my own proposal most dramatically in how restricted it is. First, as noted above, the disposition is only available when the natural punishment is thought to suffice. My own proposal contemplates an embrace of natural punishment, even when the wrongdoer has not already

165. Even people complaining about the excesses of the criminal justice system seem to think the answer lies in more arrests, but arresting cops instead.

166. STRAFGESETZBUCH [STGB] [PENAL CODE], § 60, translation at <https://germanlawarchive.iuscomp.org/?p=752#60> [<https://perma.cc/ET8F-WB8E>] (Ger.).

167. *Id.*

168. Raymond H.C. Teske, Jr. & Hans-Jörg Albrecht, *Prosecution and Sentencing Patterns in the Federal Republic of Germany*, 2 INT’L CRIM. JUST. REV. 76, 94 (1992).

169. *Id.*

suffered enough. Second, the German *Absehen* is only available for “full” adults.<sup>170</sup> German law treats young adults and children quite differently from full adults; generally, punishments are less severe for youth.<sup>171</sup> Perhaps because punishments are less severe for youth in the first place, this special disposition is not thought to be necessary. My proposal does not contemplate age cutoffs. Third, under German law, this disposition “can be invoked only if the penalty that would have been assessed is imprisonment for a period of one year or less.”<sup>172</sup> In other words, the German *Absehen* is reserved for less serious crimes. Due to these various restrictions, this disposition is little used. One study found that out of 2,861 adults found guilty of robbery in Germany in 1992, only two got the *Absehen* disposition.<sup>173</sup>

#### B. *Sweden*

Swedish law also recognizes natural punishment by statute.<sup>174</sup> Section 5 of Chapter 29 in the Swedish Penal Code (“SPC”) provides several grounds for discounting intentional punishment. These include instances in which “the accused sustained serious bodily injury as a result of the offence” and cases where “the accused would suffer detriment because they would be, or it can be assumed that they would be, dismissed or given notice of termination from their employment, or suffer other impediments of exceptional difficulties in their professional or business activities.”<sup>175</sup> Explicitly, the SPC contemplates that someone who suffers natural punishment may already be punished enough.<sup>176</sup>

The Swedish approach to natural punishment is similar to my proposal in a few respects. As a first observation, both have wide application. Adults and juveniles can benefit from this provision; it is available for serious crimes and less serious crimes; and it can offer partial or total punishment discounts. Both allow many sorts of harms to count as natural punishment. From the passages quoted so far, it may seem that the SPC only recognizes physical and pecuniary harms as natural punishments, but the SPC includes a catchall phrase—punishment discounts are licensed when there is “any other circumstance [that] requires that the accused receive a lower penalty than that warranted according

170. *Id.*

171. Vincent Schiraldi, *In Germany, It's Hard To Find a Young Adult in Prison*, CRIME REP. (Apr. 10, 2018), <https://thecrimereport.org/2018/04/10/in-germany-its-hard-to-find-a-young-adult-in-prison> [<https://perma.cc/96SW-H926> (dark archive)].

172. Teske & Albrecht, *supra* note 168, at 94.

173. *Id.* at 91.

174. BROTTSBALKEN [BRB] [PENAL CODE] 29:5 (Swed.), [https://www.legislationline.org/download/id/8662/file/Sweden\\_criminal\\_code\\_am2020\\_en.pdf](https://www.legislationline.org/download/id/8662/file/Sweden_criminal_code_am2020_en.pdf) [<https://perma.cc/XTL4-3AYJ>].

175. *Id.*

176. *Id.* at 29:6 (“If, in view of a circumstance referred to in Section 5, it is manifestly unreasonable to impose a sanction, the court may remit the sanction.”).

to the penalty value of the offence.”<sup>177</sup> This catchall clause allows the SPC to approximate my thought that any sufficiently serious adversity might be natural punishment. Also, the Swedish approach resembles my own in advising courts to pay attention to past natural punishment as well as certain future, foreseeable natural punishments.

The SPC has an important difference with my own approach. The SPC, while focusing on harms that result from a crime, does not exclude harms that stem from someone’s retributive intent. My proposal does not include such harms as instances of natural punishment. In a way, the SPC is more capacious than the proposal advanced here. It should be noted, however, that this wider scope does not necessarily indicate any difference in view on any matter. The SPC is not in the business of defining natural punishment; instead, it is offering a set of conditions under which punishment discounts are warranted. Some of those are what a theorist might call natural punishment; some are not. The SPC takes no view on what counts as natural punishment, and this Article takes no view on the full set of conditions under which punishment discounts are warranted.

As a final note, both Sweden and Germany differ from my own approach in that the decision to recognize natural punishment was legislative. The proposal advanced here would understand natural punishment as genuine punishment for constitutional purposes. While the U.S. Congress and all state legislatures could pass laws saying as much, I envisioned this proposal as one that would emanate from courts. There is longstanding debate about whether courts are the proper site for instituting great changes, but it would be in keeping with established American practice for courts to determine what is, or is not, genuine punishment for constitutional purposes. It was the courts, not Congress or the President, that determined that exposing prisoners to secondhand smoke might be punishment.<sup>178</sup> It was the courts that determined that discipline in public schools is not punishment.<sup>179</sup> It was the courts that determined, against the protestations of Congress, that stripping someone of citizenship is punishment.<sup>180</sup> It was the courts that determined that deportation generally is not punishment.<sup>181</sup>

### C. *Australia*

Australian law, where it recognizes natural punishment, does so by judicial decision. Like the United States, Australia is a federal system. As such, there is no single standard for dealing with natural punishment. Instead, “[e]ach

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177. *Id.* at 29:5.

178. *See Helling v. McKinney*, 509 U.S. 25, 35 (1993).

179. *See Ingraham v. Wright*, 430 U.S. 651, 660–76 (1977).

180. *See Trop v. Dulles*, 356 U.S. 86, 101–04 (1958).

181. *See Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893).



Australian jurisdiction has its own sentencing law and process.<sup>182</sup> Like the United States, Australia is also a common law country.<sup>183</sup> That means that sentencing is a function of both legislation and judge-made law, and in Australia, “judges have considerable discretion to impose a penalty, so long as it does not exceed the maximum penalty for the offence.”<sup>184</sup> No Australian sentencing statutes expressly mention natural punishment; thus, all recognition of natural punishment in Australia “has evolved as part of the common law.”<sup>185</sup>

Many Australian jurisdictions recognize natural punishment when the adversity is (1) the wrongdoer’s physical injury accidentally sustained in the course of wrongdoing or (2) the wrongdoer’s physical injury accidentally caused by others attempting to stop the wrongdoing or apprehend the wrongdoer.<sup>186</sup> Fewer Australian courts recognize natural punishment when the adversity is (3) the wrongdoer’s reputational injury caused by detection of the wrong, (4) the wrongdoer’s pecuniary loss caused by job loss as a result of detection of the wrong, or (5) the wrongdoer’s deportation as an administrative consequence of conviction.<sup>187</sup>

The Australian system is similar to the proposal propounded in this Article in several respects. First, in being most willing to recognize natural punishment in cases like (1) and (2), Australian courts seem to stress that the adversity must be sufficiently severe. This is in accord with my proposal. Second, in at least being open to the possibility of natural punishment without physical injury, Australia’s approach has wide application, like the approach for which I advocate. Third, Australian courts place no restrictions on which offenders and which offenses can qualify for punishment discounts. This also mirrors my approach and sharply differs from that of Germany. Fourth, the Australian system, like my own, allows for a continuous discounting, as opposed to the German system of total discount versus none. Fifth and finally, the Australian system comes from the courts.

Australia differs from my own account—and the systems in Sweden and Germany—principally in its lack of uniformity. This is the blessing and curse of federalism. If just a few lower courts were to adopt my proposal, variation would mark the American system too, but this would fall short of the proposal as envisioned. As envisioned, the proposal would look like other instances in which something comes to count as constitutional punishment.<sup>188</sup> It becomes the law of the land.

182. Bagaric et al., *supra* note 55, at 50.

183. *See id.*

184. *Id.*

185. *Id.* at 51.

186. *Id.* at 55–61.

187. *See id.*

188. *See supra* Section II.A.

## CONCLUSION

In 2011, a young medical professional, by her own negligence, gave a patient the wrong blood for a blood transfusion.<sup>189</sup> The patient consequently died.<sup>190</sup> The medical professional was, in turn, charged with negligent homicide.<sup>191</sup> Following the patient's death, the young medic suffered a severe nervous breakdown, requiring medical attention.<sup>192</sup> When her trial came, she was unable to stay composed, and she had been completely unable to work for a long time.<sup>193</sup> She was duly convicted, as none of the facts were in dispute.<sup>194</sup> What should happen at sentencing?

This sad fact pattern happened in Cologne, Germany, a jurisdiction that recognizes natural punishment. Without resort to judicial chicanery,<sup>195</sup> relying on favorable charging decisions from prosecutors<sup>196</sup> or clemency from the executive, the judge was able to do the humane thing: to let the defendant walk free because she had been punished enough. If this had happened in Columbus, Ohio, a judge would not have been given the same opportunity. The American criminal justice system, which does not recognize natural punishment, has a lacuna, one that I have sought to expose and to begin to remedy.

The present Article is one of the earliest and most sustained expositions of the natural punishment idea written in English. This Article has advanced a proposal that American courts treat instances of natural punishment as genuine punishment for constitutional purposes. The case for my proposal has been a modest one. I have argued two things: First, natural punishment, understood as an (1) adversity, (2) caused by wrongdoing, and (3) not caused by anyone's intention to exact retribution on the wrongdoer, is an intuitive and coherent notion. Second, I have showed that judicial recognition of natural punishment as constitutional punishment would not disrupt the American legal system. Indeed, there are precedents and past practices that would allow this proposal to work well.

I close by taking a wider view on why one might care about natural punishment. I suspect (and hope) that cases of natural punishment are actually rare. Robbers are not shooting themselves every other day; homicidal arsonists are not routinely setting themselves ablaze; and fugitives are not often hit by their own cars. The claim that natural punishment is rare is subject to a little

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189. Amtsgericht Köln [AG Köln] [Cologne District Court] May 16, 2012, 613 Ls 3/12 (Ger.), <https://openjur.de/u/2199753.html> [<https://perma.cc/FDC6-5GTS>].

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *See supra* note 16.

196. *See supra* Section IV.C.3.

proviso: I suggested above that the idea of natural punishment may help to solve “the mystery of credit for time served.”<sup>197</sup> If it does, pretrial detention will often count as an instance of natural punishment, and pretrial detention is extremely common, maybe even too common. Besides that special circumstance, natural punishment is an uncommon phenomenon. If it is so uncommon, why should we think about it?

As a first pass, I have maintained that recognizing natural punishment is a requirement of justice.<sup>198</sup> Because I have not fully vindicated that contention, I must add something more. I suggest that natural punishment is important, not because of the magnitude of cases, but because thinking about it can reveal other looming issues within American criminal justice. For instance, while America does not recognize natural punishment, other nations do, and those same nations also happen to punish fewer people and mete out less draconian sentences, even in cases where natural punishment does not arise.<sup>199</sup> It is a small sample size, but this fact is significant. These other nations give less punishment and see more punishment in the world. This reflects something that American criminal justice apparently lacks, namely, a determination to think from the perspective of wrongdoers and to attune oneself to wrongdoers’ suffering and what that suffering means.

Consider something else that discussing natural punishment serves to highlight. Natural punishment can easily satisfy many of the classical purposes of punishment—retribution, deterrence, communication, and so on.<sup>200</sup> Nonetheless, American law fails to recognize this as genuine punishment. This suggests that American criminal practice, leaving aside theorists’ predilections,<sup>201</sup> is insufficiently attentive to the questions of what punishment is meant to achieve and which interventions or happenings help or hinder this.<sup>202</sup> In these and other ways, thinking about natural punishment tells us who we are. This Article urges that we can, with a little effort, be different.

197. See *supra* Section III.B.

198. See *supra* Section IV.D.

199. See *supra* Part IV.

200. See *supra* Section I.C.

201. I am convinced by Ristroph that legal theorists often pay too much attention to the justification of punishment. See Alice Ristroph, *Conditions of Legitimate Punishment*, in *THE NEW PHILOSOPHY OF CRIMINAL LAW* 79, 81 (Chad Flanders & Zachary Hoskins eds., Rowman & Littlefield Int’l 2016) (“With its unrelenting and myopic focus on desert and utility, punishment theory becomes increasingly irrelevant and perhaps even irresponsible.”).

202. For another legal theorist stressing this point, see Jelani Jefferson-Exum, *What’s the Point? The Missing Piece of Criminal Justice Reform Through Consensus and Compromise*, 32 *FED. SENT’G. REP.* 65, 65 (2019) (noting that in contemporary American criminal justice, we “lack a clear articulation of the purpose of criminal sentencing. In other words, ‘What’s the point?’”).

