Prison Violence *as* Punishment

Abstract: The United States carceral system, as currently designed and implemented, is widely considered to be an immoral and inhumane system of criminal punishment. There are a number of pressing issues related to this topic, but in this essay, I will focus upon the problem of prison violence. Inadequate supervision has resulted in unsafe prison conditions where inmates are regularly threatened with rape, assault, and other forms of physical violence. Such callous disregard and exposure to unreasonable risk constitutes a severe violation of the rights of prisoners by the state. While there have been numerous legal, political, and activist efforts to draw attention to this issue—with the goal of reforming and making prisons safer—my goal is different. I argue that inmates who are victims of prison violence should have their sentences automatically reduced. Two distinct arguments are advanced in support of this claim. First, I argue that acts of prison violence are a sort of state-mediated harm which can thus be appropriately described as punishment-constituting. Second, and more straightforwardly, I argue that the compensation owed to prisoners who are victims of prison violence may naturally take the form of a reduced sentence.

Key Words: the problem of prison violence, rights forfeiture, punishment, the problem of relatedness, mediated harms, compensation, rights reclamation

1. Introduction

The United States carceral system, as currently designed and implemented, is widely considered to be an immoral and inhumane system of criminal punishment. There are a number of pressing issues related to this topic, but in this essay, I will focus upon the problem of prison violence.[1] In many U.S. prisons, inadequate supervision and management have resulted in unsafe prison conditions where inmates are regularly threatened with rape, assault, and other forms of physical violence. According to one report released in 2019, in the span of a single week at an Alabama correctional facility, there occurred four stabbings, several incidents of sexual assault, and multiple beatings—including a sleeping man's being attacked with socks filled with metal locks.[2] Problems of

[1] Beside the problem of inhumane prison conditions, the United States' criminal legal institutions can also be criticized for overcriminalization (i.e., criminalizing conduct which should not be criminalized, e.g., drugs), and excessive punishment. Indeed, on this last point, I am of the opinion that the average American's sense of justice and proportionality (with respect to punishment) is warped and skewed in the direction of favoring excessively harsh sentences. For a helpful overview of these issues and problems, see Wellman (2017).

[2] Katie Benner and Shaila Dewan, "Alabama's Gruesome Prisons: Report Finds Rape and Murder at All Hours" *New York Times.* April 3, 2019, https://www.nytimes.com/2019/04/03/us/alabama-prisons-doj-investigation.html.

overcrowding and understaffing compound to create an environment in which inmates face daily threats of rape and physical abuse.

Such callous disregard and exposure to unreasonable risk constitutes a severe violation of the rights of prisoners by federal and state governments. While there have been numerous legal, political, and activist efforts to draw attention to this issue—with the goal of reforming and making prisons safer—my goal here is different. I argue that prisoners who fall victim to prison violence should have their sentences automatically reduced. Such a claim might be surprising given that harms inflicted upon a victim in prisoner-on-prisoner violence are not directly administered by the state (or any other proper punishing authority), and most often lack a punitive aim. However, I advance two distinct arguments in support of this thesis. First, I argue that acts of prison violence are a sort of state-mediated harm which can be appropriately described as punishment-constituting (or punishment-like enough). Second, and more straightforwardly, I argue that the compensation owed to prisoners who are victims of prison violence may naturally take the form of a reduced sentence.

The essay is divided into four sections. I begin, in Section 2, by providing a brief overview of forfeiture theory and the principle of proportionality. Specifically, I sketch out a dynamic conception of proportional punishment and sentencing practices—one that allows for proportionality calculations to be adjusted in real-time according to the conditions of one's incarceration—and outline the general contours of the main argument. Next, I discuss the problem of relatedness and introduce a puzzle which emerges in this context if one believes, as I do, that a criminal forfeits rights against only those harms which are doled out *in response* to the relevant wrongdoing. For if this is correct, then it does not appear that prisoner-on-prisoner violence can be construed as punishment—such harms are inflicted for the wrong reasons (i.e., they often have nothing to do with the original reasons for punishment), and so one may plausibly doubt whether such treatment

should be factored into a prisoner's sentence. The remainder of the essay, then, is dedicated to responding to this puzzle. In Sections 3.1 and 3.2, I develop two distinct arguments for why such harms may be factored into the relevant proportionality calculations even if the infliction of such harms is not intended as punishment. If these arguments are successful, it follows that many of the extra-judicial harms inmates suffer in prison will have *rights-reclaiming* significance.[3]

2. Forfeiture, Proportionality, and the Problem of Relatedness

For the purposes of this paper, I assume the success of a rights forfeiture theory of punishment in establishing why a criminal may be permissibly subjected to the sort of hard and stigmatizing treatment constitutive of punishment. However, this is not to say that a person who rejects forfeiture theory will automatically find the arguments presented in this paper unpersuasive. Rather, as long as one accepts that the administration of punishment must be guided by a principle of proportionality, the arguments developed below should be found compelling.[4]

2.1 Rights Forfeiture and Proportionality

The central contention of a rights forfeiture account of punishment is that the rights we possess are conditional upon our conduct and treatment of others. For instance, we typically enjoy a right to liberty, which entails a right against being held captive or coercively confined. Imprisoning someone, then, seems to violate a person's right to liberty. The forfeiture theorist, however, alleges that when we culpably violate the rights of another, we forfeit some of these rights—that is, in failing to

[3] For the sake of simplicity, I focus my attention in this essay almost exclusively upon the problem of prisoner-on-prisoner violence. Of course, much of the violence inmates experience is suffered at the hands of prison guards. However, I believe that if the claims and arguments I make concerning prisoner-on-prisoner violence are correct, they can easily and straightforwardly be applied to cases involving guard-on-prisoner violence.

[4] For instance, the main thesis can easily be transposed so that it reflects terminology belonging to the retributivist's lexicon. The proposal sketched along these lines would be something like: Criminals are *deserving* of a fitting punishment, but violence suffered while being incarcerated may sometimes reduce the amount of further incarceration *warranted*. However, because I believe a rights forfeiture theory is the best account we have for explaining the permissibility of punishment, and furthermore, that the complementary notion of rights reclamation is theoretically useful in helping elucidate those conditions under which punishment ceases to be just—I take forfeiture theory as my starting point. Defenders of a forfeiture account of punishment include Goldman (1979), Morris (1991), Simmons (1991), Kershnar (2002), and Wellman (2012, 2017).

respect another person's rights, we lose the special moral privilege we would ordinarily enjoy to be able to shape and direct our lives as we see fit without interference from others.

It is crucial to note, however, that a principle of proportionality governs the magnitude of forfeitures against punishment. In violating another's rights, a wrongdoer does not lose her moral standing altogether, such that *any* sort of punitive harms might be inflicted upon her. Rather, a criminal only forfeits rights against a *proportionate* punishment. Thus, the amount of punishment imposed upon a wrongdoer must match the seriousness of the crime.[5] To illustrate, suppose Anne steals Gabe's new iPhone. While such disrespect of Gabe's property rights makes Anne liable to some degree of punishment, she undoubtedly has not forfeited her right against capital punishment. Punishing a phone thief by administering the death penalty would qualify as an instance of egregious overpunishment—wronging the thief in much the same way that punishing an innocent person is wronged.[6] Notice, also, that forfeited rights are rarely permanently lost. Once a proportionate punishment has been exacted, the perpetrator's rights are *reclaimed*: the moral barriers that were lowered as a result of criminal conduct are now raised and restored after having received a proportionate punishment, thereby making it impermissible once more to visit any sort of hard treatment or deprivation upon the wrongdoer.[7]

Given this, it is worth emphasizing at this early juncture that most prisoners, even those guilty of committing violent crimes, still retain rights and legal protections concerning how they are treated. In fact, in the United States, criminals have a constitutional right against being subjected to

[5] Spelling out precisely how much punishment a criminal is owed for a given offense has proven to be no easy task. While nearly everyone agrees that criminal punishment should be proportional to the gravity of the committed offense, there is lively debate among penal theorists regarding how to determine what counts as a proportionate response. For a terrific overview and discussion of the challenges that a theory of proportionality faces, see Ryberg (2019).

[6] Not everyone agrees with framing things this way. For example, Saul Smilansky has recently argued against the claim that punishment of the innocent and overpunishment are morally equivalent wrongs. See, Smilansky (2022).

[7] While the notion of rights forfeiture is well-discussed in the literature, far less attention has been given to the correlative notion of rights reclamation. For a fuller discussion of this concept and whether there are multiple means by which a wrongdoer may recover forfeited rights (other than punishment), see Bell (2024).

cruel or unusual punishment. So, while I am unsympathetic to those who advocate for prison abolitionism—I grant that those who culpably violate the rights of an innocent party have no standing to complain about their own freedoms' being curtailed or the overall harsh conditions associated with incarceration—I do think there are limits to how harsh the conditions of a prisoner's incarceration are. Moreover, and crucial for my purposes here, I would allege that the harsher the penal environment, the less time a criminal should serve.[8] Hence, with incarceration primarily in mind, the following principle strikes me as fairly intuitive:

> *Equivalence*: The two elements which comprise the extent of deprivation associated with a particular punishment, the *duration* and *harshness of treatment*, stand in an inverse relation such that when the duration of punishment is increased, the harshness of treatment must be decreased, and vice versa.

For example, suppose Gabe is guilty of stealing a car. Very different sanctions or modes of punishment might be imposed upon Gabe which are nevertheless equivalent proportionality-wise. A twelve-month sentence carried out at Norway's Bastøy Prison (a minimum-security "luxury" prison) might be equivalent to a four-week sentence carried out at a North Korean labor camp because the latter involves much harsher treatment.[9] Similarly, I would allege that four months of house arrest is *not* equivalent to four months spent in solitary confinement; while both modes of punishment involve a deprivation of liberty, the latter is intuitively a much more severe sentence. In general, when considering the harshness of treatment associated with a particular punishment, I am sympathetic to Hadassa Noorda's "impact-based approach" which highlights how different punitive

[8] As Douglas Husak has noted, endorsement of a principle of proportionality "has no implications about the *mode* or *kind* of punishment that should be inflicted" and "defendants who have committed equally serious crimes may receive a different type of punishment, as long as these modes are comparable in severity" (2022: 175-176). The point made here is similar but more exact: disparate lengths of imprisonment may be considered equivalent as long as there is a significant contrast in the harshness of the conditions of one's incarceration.

[9] I do not intend to suggest that residents at Norway's Bastøy Prison experience no significant deprivations, only that the harshness of their treatment is less severe than that experienced in prisons like, for instance, Angola. To gain insight into the effects that Norway's "Prison Island" has upon inmates, see Victor Lund Shammas (2014).

measures can have varying degrees of impact upon an inmate's ability to pursue a normal life—that there is a "spectrum of kinds of state imposition that vary in their harshness, intrusiveness, and liberty-limiting scope" (2002: 706).[10] While all forms of imprisonment are liberty-depriving, these other variables ought to be considered when determining the severity of a punishment and thus what counts as a proportionate penal response.

So, *Equivalence* means that we need to actively pay attention to incarceration conditions when determining sentence length.[11] Given this, the problem of prison violence (or at least one of the problems) lies in there being a divergence between the sort of hard treatment intended by the state, and the hard treatment actually experienced by the many prisoners who fall victim to rape, assault, and other forms of abuse. I assume that the main reason horrific prison conditions plague so many U.S. correctional facilities is *not* because the state deliberately intends to expose criminals to a violent environment. Rather, an immense amount of money and resources would have to be used to overcome problems relating to overcrowding and deficient supervision. And we—taxpayers, politicians, private contractors, etc.—simply do not care enough about the plight of prisoners to fund whatever costly reform measures would need to be implemented to make our prisons safer. In brief, we do not want governmental authorities to write *that* check.

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[10] To be sure, Noorda's focus is not on how different types of punitive measures affect our proportionality calculations, but upon how those subjected to certain types of non-traditional imprisonment are still deserving of standard legal protections (2022: 20-25).

[11] Lisa Kerr has compellingly argued that imprisonment and its effects upon inmates is, by and large, a "black box" for punishment theorists (2019: 86). Philosophers typically theorize about punishment in the abstract, without paying much attention to how state punishment is carried out in practice. One particularly problematic habit of punishment theorists highlighted by Kerr is their almost exclusive focus upon the duration of a prison sentence when determining the severity of punishment: "the duration focus entails a view that imprisonment can be measured and fairly distributed by scaling particular amounts of time—the time in which liberty will be deprived—in response to wrongdoing. A great deal is often left out of this under-inclusive conception of incarceration" (2019: 102). For instance, one variable often omitted from sentencing considerations is how an identical prison sentence can have a drastically different impact on different offenders due to their differing psychological constitutions (see Adam Kolber, 2009). One of the explicit aims of this paper is to avoid the disconnect between sentencing theory and imprisonment that Kerr rightfully worries about. The principle of *Equivalence* is intended to highlight that in figuring out what counts as a proportionate penal response, more than sentence duration should be taken into account. While all prisons deprive inmates of their liberty, there are additional variables at play—such as the general harshness of one's carceral conditions—which should also be factored into proportionality calculations.

The main lines of the argument should now come into focus. Suppose the state intends and considers it proportionate to impose upon Gabe a twelve-month sentence to be carried out in a liberty-depriving but free-from-violence penal environment, yet Gabe finds himself in much harsher conditions—one in which he endures daily threats of beatings and actual injury. In this scenario, given the negative covariance between the duration of a punishment and the harshness of treatment, Gabe has a strong claim to be considered a candidate for early release. If this is correct, it implies that our sentencing practices should not be conceived of in static terms; it is not the case that once we have accurately determined what a proportionate punishment is for a particular crime, no adjustments will need to be made. Rather, an adequate theory of proportionality and sentencing will be dynamic, adaptable, and flexible; our sentencing practices should be sensitive and responsive to the actual carceral conditions inmates find themselves in, and when such conditions are more severe than what was intended, adjustments to a criminal's sentencing should be made.

2.2 The Problem of Relatedness

One of the more interesting questions the rights forfeiture theorist must address concerns the nature and scope of a wrongdoer's forfeited rights. Assuming that culpable rights-violating behavior results in rights forfeiture, the relevant question is this: Can the rights-violator be permissibly subjected to hard treatment for any reason whatsoever, or must the harms visited upon her be carried out for specific punishment-related reasons?[12] To appreciate what is at stake in posing this question, consider the following case:

> *Kidnapped Car Thief:* The proper authorities are entitled to punish Jones, a generally decent young man who has foolishly stolen Smith's car, by depriving him of up to the amount of liberty forfeited in the theft. But suppose that before any such punishment takes place, Smith, for reasons having nothing whatever to do with the theft, kidnaps Jones and deprives

[12] Richard Lippke dubbed this question as "the problem of relatedness" (2001: 79).

him of exactly that amount of liberty. In this situation it is natural to suppose that Smith not only wrongs Jones but specifically violates his right to liberty.[13]

If the forfeiture theorist adopts what Stephen Kershnar calls an "unlimited-reasons" account, then Smith acts permissibly in kidnapping Jones (2002: 77). However, if one adopts a "limited-reasons" account of forfeiture theory, then Smith's actions should be deemed impermissible because Jones only forfeited rights against being harmed *for certain reasons*.

Elsewhere, I have given a more thorough treatment of this issue, but in brief, I believe the key to addressing the problem of relatedness involves considering what sorts of hardships have rights-reclaiming significance.[14] If one thinks Jones reclaims his forfeited rights against punishment when he is kidnapped and deprived of his liberty by Smith (so that it would be wrong for the proper authorities to administer any further punishment to Jones), then one may have good reason to adopt an unlimited-reasons account. On the other hand, if one thinks, as I do, that Jones's being kidnapped has no bearing upon whether additional hard treatment may be imposed upon Jones by the relevant executive authorities, then one may have good reason to adopt a limited-reasons account. On this latter view, hard treatment only has rights-reclaiming significance when it is deliberately imposed upon a criminal in response to the relevant wrongdoing.

While a significant qualification to this glossing of the limited-reasons view will be discussed below, in general, rights-reclaiming hardship must be carried out with the proper intention—i.e., with a specifically punitive aim.[15] However, this conclusion appears to pose a problem for the overarching thesis advocated for here, that victims of prison violence should have their sentences

[13] I borrow this case unmodified from Warren Quinn (1985: 322).
[14] The most in-depth analysis of the problem of relatedness is provided by Wellman (2017: Chap. 6).
[15] While it is true that the imposition of hard treatment against a wrongdoer is only *permissible* if carried out with the appropriate punitive aims, there may in fact be some *impermissible* harms that qualify as punishment and thus result in rights reclamation despite the lack of an accompanying punitive intention. Indeed, one of the main objectives of this paper is to explore such murky waters.

automatically recalibrated and reduced. The problem is that in many cases, the violence inflicted upon a prisoner by a fellow inmate will lack any connection to the victim's past wrongdoing. How, then, can such harms have any sort of rights-reclaiming effect? It would seem that such harms are a tragic *side-effect* of punishment, but not constitutive of the state's penal response. In what follows, I aim to address this puzzle by showing that there is a very particular set of harms which, even when not intended by the relevant executive authorities, can have rights-reclaiming significance and that the harms associated with prison violence fall into this category.

3. Rights Reclamation and Prison Violence

To begin thinking about how certain unintended harms might be construed as punishment, consider the following set of cases.

> *Shark Bait:* Gabe is found guilty of kidnapping and sexual assault. In an effort to deter similar misconduct, executive authorities tie a rope around Gabe and have him lowered into a shark-infested pool. Gabe is immediately attacked by a shark and loses his left arm before being pulled back out.

In this case, it matters not that those in charge of administering Gabe's punishment do not directly inflict harm upon Gabe themselves. Because Gabe's treatment is carried out in direct response to his wrongdoing, and the harms he suffers are both readily foreseeable and intended, such noxious treatment clearly counts as punishment. The state need not directly deliver harms for such harms to count as state-punishment; *exposure to conditions involving risk of harm is enough*.

Next, consider the following case:

> *Misstep:* Gabe is found guilty of stealing several motor vehicles and is given a two-year prison sentence. While walking down the prison stairs to go outside one sunny afternoon, Gabe trips, falls, and blows out his knee.

In this case, things are different. Despite Gabe's suffering a significant injury on the state's watch, his injury should not be construed as punishment and so has no rights-reclaiming effect. Unless the prison staff is guilty of negligence, or in some other way contributed to creating hazardous walking conditions (e.g., carelessly leaving a bunch of banana peels on the floor), Gabe's misstep and resulting injury is not an injustice; it is simply an unfortunate event.

There is an important lesson here: harms which are not intended, foreseeable, or the product of systemic deficiencies should not be factored into a prisoner's sentence. Christopher Wellman captures this point well when he writes:

> A prisoner who has been raped by a fellow inmate would not necessarily have a legitimate complaint against the state; it would depend upon what measures the state took to protect its prisoners. If the state went to considerable lengths to ensure that almost no one would be subject to attack and yet one inmate assaulted another, then the state would not have violated anyone's rights…But if in an attempt to save money the state foreseeably and avoidably detains prisoners in circumstances in which they are highly vulnerable to violent attack, even those lucky enough to avoid abuse will have had their rights violated by having been exposed to unreasonable risks of such horrific harm. (Wellman 2017: 184)

Thus, not all cases of prison violence will merit a reduction in the victim's sentence. Rather, the main argument pursued here centers primarily upon those cases in which the state's gross negligence of its prison facilities leads to violence.

Finally, consider:

> *Loose Tiger:* Joe owns several wild tigers and is also the warden of a prison. So that his tigers might have some exercise, he frequently lets them out of their cages, allowing them to roam the corridors of the prison facility he supervises. Despite not intending for his tigers to

attack anyone, one of Joe's cats ends up mauling Gabe, an inmate housed at Joe's prison. Gabe loses his arm in the attack.[16]

Here, we arrive at a case which bears a closer analogy to the sort of circumstances in which some victims of prison violence in the U.S. find themselves. In brief, I would allege that given (i) the predictability of a tiger attack in this situation, and (ii) Warden Joe's special responsibility to protect the welfare of his prison's inmates, Gabe's loss of limb may plausibly be construed as punishment even though such injury was unintended. The following section of this essay will be dedicated to unpacking this claim.

3.1 Mediated Harms

To review, a "limited-reasons" account of forfeiture theory states that a wrongdoer only forfeits rights against punishment (and not harms more generally). But if the infliction of harms must be intended as punishment in order to count as punishment, then it would seem most cases of prisoner-on-prisoner violence do not qualify as punishment and therefore should not be factored into our calculations of what constitutes a proportionate penal response. However, I believe this argument moves too fast and leaves out an important class of harms: mediated harms.[17]

As is often the case when reflecting upon the subject of punishment, a good methodological strategy involves looking at analogous concepts found and developed in the literature dedicated to the morality of defensive force, and then figuring out what applications can be made to the morality

[16] This case is loosely based upon an example from Wellman (2017: 183).

[17] While Rodin's (2014) discussion of conditional threats is the main inspiration for the argument developed in this passage, I borrow the language of "mediated harms" from Helen Frowe in her discussion of Rodin's argument (2018: 126-131). It is also worth highlighting that the notion of state-mediated harms discussed here may bear some similarity to the concept of "state-mediated structures of injustice," as developed by Virginia Mantouvalou (2023: Chap. 2). Building upon the work of Marion Young, Mantouvaolu writes: "The responsibility in which I am interested is responsibility for the creation of vulnerability through law that is linked to structures of exploitation: this is why I call it *state-mediated*. It concerns responsibility for state action—the creation of vulnerability itself…The state authorities know or ought to know of the vulnerability that they create, perpetuate, and increase, along with the resulting structures of exploitation" (2023: 21). Likewise, the problem of prison violence involves placing prisoners in an environment in which they are vulnerable to violence and abuse, and which represents a type of injustice that state actors likely do not intend but should be able to anticipate.

of punishment. Following this approach then, in a wonderfully provocative essay entitled, "The Myth of National Defense," David Rodin (2014) argues that states do *not* have a right to defend their political independence when doing so will threaten the vital interests of their citizens. There is little reason to get bogged down with the details of Rodin's argument here, but his account pivots upon the notion of conditional threats. Borrowing Rodin's own example, consider the following case:

> *Baldie:* Tom has a receding hairline which he is incredibly anxious about, so much so, that when people poke fun at his balding head, it sets him off into a murderous rage. Gabe knows this, but decides to taunt Tom about his hairline anyway. As a consequence, Tom pulls out a gun he keeps hidden in his desk and shoots and kills several innocent people. (Rodin 2014: 83)

It is clear that Tom bears much more responsibility for the deaths of these innocents than Gabe does. Nevertheless, Rodin argues that Gabe also does something morally impermissible in making fun of Tom's hairline. If a person can reasonably predict that performing some action X will produce morally disastrous consequences, and performing X is not of significant interest, then there are overriding moral reasons not to do X. So, as this case illustrates, an agent does not have to directly, or even intend to, harm another person in order for her to assume some moral responsibility for the harmful effects produced by her action.

The application of such reasoning to the issue of punishment and prison violence should be fairly clear. If the state can easily foresee that placing inmates in a prison environment lacking proper management and staffing exposes such inmates to unjustified risks of harm and violence, then the state bears partial responsibility for the injuries and deaths which occur. It does not matter whether the state intends (or does not intend) for prisoners to suffer extra-judicial harms at the hands of other prisoners. Because such harms are easily predictable, the state should proceed as if it has inflicted such harms itself. Of course, as Rodin notes, mediated harms should not be considered on

moral par with harms for which one is directly responsible: "The foreseeable harmful effects of action that results from the wrongful intervening agency of others may be *discounted* for the purposes of both proportionality and the attribution of moral responsibility, compared with the harmful effects that do not result from the wrongful agency of others" (2017: 82). But such harms should not be discounted to zero. What is more, crucially, there is good reason to think that the discount which results from the fact that it is most often other prisoners who are directly responsible for assaulting their fellow inmates, is offset by the fact that the state has a special duty of care to ensure the safety of its prisoners.[18] It is the combination of these two facts which explains why acts of prison violence that the state does not intend may nevertheless be construed as state-mediated harms with the same rights-reclaiming power as ordinary acts of punishment. First, there are many cases in which the state can easily foresee that its prisoners are being placed in an environment where they are vulnerable to violence and abuse. Second, the state has a special responsibility for creating a safe penal environment, one free from the threat of systemic prisoner-on-prisoner violence.

To be sure, there are at least two options for how acts of systematic prison violence could be construed in the context of punishment. First, it may be asserted that prison violence simply *is* punishment. Despite being performed for the wrong reasons, because such harms occur within a penal context and are mediated through the relevant executive authorities and institutions, they are still punishment-constituting. While I am not unsympathetic to this view, an important point of clarification is warranted. The claim here is *not* that acts of prison violence are permissible; prisoners

[18] This move, again, parallels Rodin's own argument. Rodin argues that when the victims of conditional threats are those who are "bound to us by relationships of loyalty, community, and kinship", these associative bonds offset whatever discount would normally be applied to the harms which arise through the intervening agency of others" (2017: 83). Note, however, that there is significant debate about the status of associative obligations. Some deny that associative obligations exist; see, for example, Wellman (1997). The argument advanced above, then, is stronger than Rodin's because the assumption that the state (which claims a monopoly upon the right to punish convicted criminals) has a special duty to protect its prisoners is relatively uncontroversial compared to claims about the existence of associative responsibilities.

are *not* liable to rape, assault, or other forms of abuse. What is essential to the limited-reasons view is the notion that a wrongdoer forfeits rights only against harms carried out for the appropriate reasons, a criterion typically absent in most cases of prison violence. However, there are undoubtedly some harms that qualify as punishment and thus hold rights reclaiming significance, but which remain nevertheless impermissible. For example, suppose that Gabe kidnaps Tom and holds him captive in his basement for ten years before being discovered. Following prosecution and conviction, authorities determine that Gabe should be punished by being subjected to rape or the amputation of his arm. I imagine most will share my intuition that despite having forfeited significant rights against punishment, such barbarous treatment would be unjust. Gabe did not forfeit his rights against being raped, or against other forms of cruel and unusual punishment, yet such punitive treatment *still* results in rights reclamation. The suggestion here is that an analogous dynamic may be at play in cases of prison violence—that if such harms are truly punishment-constituting, then despite being impermissible, the victim of such harms has a right to a lesser punishment after their infliction.

The second, more modest interpretation of how acts of systematic prison violence should be regarded asserts that while such acts may not directly or straightforwardly qualify as punishment, they are *punishment-like enough* that they should accordingly be factored into the proportionality calculations involved in determining the length of a given prisoner's sentence. Figuring out which view is correct largely depends upon how one interprets a case like *Loose Tiger*. Regardless, if either interpretation is correct, it implies that certain harms can have rights reclaiming consequences, even if such harms were not intended as punishment.

3.2 Compensation

Even if one rejects the above suggestion that acts of prison violence often function as state-mediated harms which are, at minimum, punishment-resembling enough to entail a reduction in

one's sentence, a distinct argument for why acts of prison violence will often have rights reclaiming significance has to do with compensation. Typically, those who suffer rights-related harms are entitled to compensation. However, just as there are different modes of punishment which can be considered equivalent proportionality-wise, there are also different modes by which compensation might be realized. Moreover, it is important to note that at its root, the goal in providing compensation is to cancel out the harmful consequences which follow from rights-related harms. In compensating the victim of a crime, we aim to restore things, as far as possible, back to the status quo ex ante. Typically, this will be expressed through financial payment. But monetary compensation is often a poor substitute for achieving justice in this way. And in the case of prison violence, since the issue is that of inmates' receiving more hard treatment than that to which they are liable, it seems more natural for compensation to take the form of a sentence reduction. Alternatively, if the victim is a violent offender with a high likelihood of re-offending, another form of compensation could involve relocating the prisoner to a facility where fewer restrictions are imposed, or granting them additional privileges (i.e., lessening the harshness of their treatment).

An important point of clarification should be made at this juncture. The argument is not that *all* inmates exposed to unjustified risks of harm in prison deserve compensation via a prorating of their sentence. Rather, I believe that compensation is only required in response to rights-related harms. It is possible (and indeed frequent) for a person to have her rights inexcusably violated without such rights violation(s) resulting in harm. For example, if Jon drives home intoxicated, he violates the rights of the other drivers who share the road with him, since he exposes them to an unreasonable risk of harm. As a result of Jon's rights-violating conduct, he forfeits certain rights against punishment. However, if no one is harmed by Jon's drunk driving, then compensation is not owed to anyone. Only if another driver is struck and thereby harmed by Jon's reckless behavior will compensation come into play. Thus, it might be the case that under some circumstances (e.g., those

prisons which are overrun with gang activity, or those which systematically fail to protect inmates from violence), all prisoners can complain of their rights being violated given the inhumane conditions of their imprisonment. However, as it pertains to matters of compensation, the primary focus should be upon those prisoners who directly fall victim to violent attack and thus suffer actual injury.

Nevertheless, it may very well be the case that in some especially terrible circumstances, the threat of prison violence is so pervasive and systematic that all prisoners may be owed compensation. The idea is that if the threat of violence hovers like a fog that refuses to dissipate, enveloping prisoners and causing them to live in constant fear of sudden attack and assault, then the psychological trauma such conditions induce would be enough such that all might have a claim to have their sentences be modified. After all, unless such emotional damage was an intended component of the state's original sentencing, the more-than-planned-for harshness of treatment entails that a reduction is required in order for the punishment to remain proportionate.

4. Conclusions

If the arguments presented above are sound, then there are two key takeaways as it pertains to the issue of systemic prison violence. First, and more abstractly, there seems to be a special set of harms the infliction of which results in the reclamation of rights against punishment, even if such harms were not intended as punishment. For those who endorse a limited-reasons account of forfeiture theory, this is potentially quite surprising. Second, and from a more practical standpoint, we should conclude that prisoners who are subjected to avoidable but predictable unjust harms during their incarceration have a right to their sentences being reduced.

Importantly though, I wish to highlight that the right in question is a *moral* right. It is a distinct question whether there should be a corresponding *legal* right. And, as many political philosophers and legal theorists have pointed out, not all preexisting moral rights deserve legal

protection.[19] For example, it is prima facie plausible that in a pre-societal context, consenting individuals have a right to engage in lethal combat if they believe it the best way to defend their honor. Yet, there are very strong social reasons to criminalize the once-common practice of dueling.[20] That said, the existence of an antecedent moral right should inform lawmakers in their decision-making. Noting this, how might the thesis of this article be put into practice? One natural thought is that the relevant right be ratified into law by legally requiring parole boards to take victimization into account when considering whether a prisoner is a good candidate for early release (much like how good behavior is currently taken into consideration). Indeed, I believe that if we can institutionalize this right without creating a perverse incentive structure that encourages prisoners to attack each other (in hopes of being granted early discharge), we have sufficiently strong moral reasons to do so.

[19] Of particular note on this front is Allen Buchanan, who argues against what he dubs the "mirroring view"—i.e., the view that "the standard or typical justification for an international legal human right must appeal to an antecedently existing, corresponding moral human right" (2013: 50-51).

[20] I borrow the example of dueling from Daniel Callahan, who uses it to make an analogous point about euthanasia. In brief, Callahan argues that even if individuals have a private moral right to assisted suicide, this does not settle the question of whether that right should be institutionalized and protected by a system of law (Callahan 2014: 85).

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