



Alabama Law Scholarly Commons

Working Papers

Faculty Scholarship

9-21-2013

Taming Suffering

Meredith Render

University of Alabama - School of Law, mrender@law.ua.edu

Follow this and additional works at: https://scholarship.law.ua.edu/fac_working_papers

Recommended Citation

Meredith Render, *Taming Suffering*, (2013).

Available at: https://scholarship.law.ua.edu/fac_working_papers/634

This Working Paper is brought to you for free and open access by the Faculty Scholarship at Alabama Law Scholarly Commons. It has been accepted for inclusion in Working Papers by an authorized administrator of Alabama Law Scholarly Commons.

THE UNIVERSITY OF
ALABAMA

SCHOOL OF LAW

Taming Suffering

by Meredith M. Render

Working Paper

This paper can be downloaded without charge from the Social
Science Research Network Electronic Paper Collection:
<http://ssrn.com/abstract=2328755>

TAMING SUFFERING

*Meredith Render**

How does law take account of, and attend to, suffering? This is the subject of Linda Meyer's rich and insightful chapter, "Suffering the Loss of Suffering: How Law Shapes and Occludes Pain."¹ In this work, Meyer provides an intriguing account of law's constitutive power. Legally remediable suffering, she persuasively argues, "is not merely a matter of encounter, testimony, observation, or measurement" but is instead a construct of law itself.² In shaping the law, we have made choices and decisions about what "counts" as compensable suffering and what does not. For example, the pain and suffering that necessarily attends incarceration following a criminal conviction is not "remediable suffering," although it quite obviously falls squarely within our conventional concept of suffering. However, the law does provide compensation for the wanton and unnecessary pain that is intentionally inflicted on inmates. Unnecessary pain in this context is most broadly conceived of as any

* Associate Professor of Law, University of Alabama School of Law. The author would like to thank Dean Kenneth Randall, Dean William Brewbaker, and the Alabama Law School Foundation for their generous support of this project.

2

pain that extends beyond or exceeds the "background" suffering inherent in the circumstance of imprisonment.³ Yet the "background" pain of incarceration—the agonizing pain of a mother's prolonged separation from her young children, for example—can often be much more acute, excruciating, and intolerable than pain that the law is structured to remediate. Through our legal rules we have chosen to be attentive to some aspects of the suffering that accompany the circumstance of incarceration, while simultaneously deciding not to remediate others.

Meyer's project illuminates the boundaries of these decisions. She contends that "suffering appears in the eyes of the law, at least in part, as the absence of reason and norm."⁴ The absence of "reason" and "norm" she takes to be closely intertwined with the absence of "pattern" and "rule" and "therefore of lawfulness itself."⁵ Meyer reveals that law fails to be attentive to suffering qua suffering. Law is not especially attentive to the particular hedonic experience of an individual sufferer, in light of, for example, that sufferer's hedonic baseline and unique experience of loss or pain.⁶ Instead, the law makes use of normative generalizations in defining the parameters of remediable suffering, ostensibly aiming to capture what *most* people

are most likely to experience (or, perhaps more often, what we think people *should* experience) under the circumstances. Law, in this construal, applies a rule-based framework to suffering, and in so doing has a disciplining effect. Law marshals the unruly, the contingent, the potentially unknowable and certainly unpredictable experience of suffering into discrete and comprehensible categories (e.g., "background" [and therefore irremediable] loss versus "wrongful" [and therefore compensable] loss). The lack of calibration, of accuracy, and of attentiveness to suffering qua suffering that Meyer identifies is a consequence of this marshaling. It is the product of a rule-based approach that, necessarily, eschews the particular in favor of the general.

At base what Meyer is describing is the law acting as an umpire, identifying—indeed constituting—what "counts" as suffering.⁷ More accurately, the law in this context constitutes an entirely new category: "compensable suffering."⁸ Put this way, the proposition is perhaps less controversial. Law creates and constitutes most of the concepts and norms it employs. The legal concept of "person" is distinct from our conventional concept of "person."⁹ The legal concept of person is constituted by legal practice, not

4

conventional practice, and when we refer to the legal concept of person we mean "legal person." Perhaps we should not be surprised to discover that the legal concept of "suffering" is distinct from our conventional concept of "suffering." Perhaps when the law makes reference to suffering, it gives only a passing nod to our conventional concept and instead refers to the entirely distinct concept of "legally cognizable suffering."

Yet Meyer's chapter suggests that in applying this rule-based normative overlay to suffering, the law is absenting—or, to use her word, "occluding"—something important.¹⁰ Meyer demonstrates that in adhering to a rule-based model of suffering, the law neglects significant and salient categories of suffering.¹¹ In particular, Meyer identifies three categories of suffering that law fails to compensate: (1) suffering that is legally justified—for example, the suffering that follows from being imprisoned following a conviction;¹² (2) "outlier suffering"—that is, suffering that strays in some way from a normative and probabilistic baseline construct of what an average person would likely experience under the circumstances;¹³ and finally, (3) suffering that Meyer describes as "background suffering"—the suffering that is endemic to life itself (e.g., the

suffering that attends illness).¹⁴ Our conception of "remediable suffering" fails to include these types of suffering, although they fall squarely within the extension of our conventional concept of suffering.

If Meyer is correct that something significant is missing from law's account of suffering, is it accurate to say that the law's rule-based approach (and its consequent neglect of salient categories of suffering) is a *failing* of the law? Can we find fault in these places where our conventional concept of suffering and our legal concept of "remediable suffering" diverge? In mapping the boundaries of the relationship between suffering and the law, Meyer's descriptive project points provocatively toward a series of normative implications, each premised on some version of the following question: Assuming Meyer is correct in her description of how the law *is*, is this how the law *ought* to be? Meyer asks versions of this question herself, wondering, "Is law wrong to [ignore suffering `as such']? Is there some other prenormative account of suffering to which law should respond?"¹⁵ Although her piece is circumspect with respect to the normative implications of her project, Meyer's compelling account of the relationship between law and suffering

6

provides a generous jumping-off point for thinking about her description of "legally remediable suffering" as a normative failure. Given these implications, is Meyer's descriptive account of the law's rule-based approach to suffering an account of legal *failure*?

This commentary addresses the implication that law *fails* at its task when it actively "tames" (i.e., constitutes through normative constructs) our suffering rather than seeking to empirically "discover" it or otherwise faithfully attend to the reality of our lived experience. My thesis holds that the phenomenon that Meyer describes as the "will to law" is, in fact, not *willful*. We "will" to law in the face of complexity like we "will" to eat in the face of hunger. There are better and worse ways to eat and there are better and worse ways to wrangle complexity, but in the end, we are compelled by necessity to do both. We may fault the choices we have made in taming the complex concept of suffering,¹⁶ but it is nonsensical to fault them for imposing an underinclusive and overinclusive normative structure onto our concept of suffering. In other words, we cannot fault the law for "creating" the concept of "remediable suffering," rather than employing some theoretically less intrusive and more individually attentive alternative. There simply is no such

alternative. Meyer concludes that "suffering in law is normative all the way down, resistant to any simplistic reductionism or unmediated 'experience' of the other."¹⁷ This chapter, however, posits that law's encounter with suffering *must be* normative all the way down and that any alternative we may propose would replicate the same descriptive and predictive deficiencies (and strengths) that Meyer has already so skillfully observed.¹⁸

This thesis is presented in two steps. First, part I examines why a rule-based system of laws necessarily makes normative generalizations that ultimately result in the kinds of descriptive deficiencies that Meyer identifies. Part II then considers ways in which we may criticize the kinds of normative choices we have made in the context of suffering. Finally, part III presents a brief conclusion.

I. Using Rules to Tame Suffering

Meyer describes the disciplining effect of law on the concept of suffering: "Law generalizes and extends the particular into a 'theyself' against which we measure both the standards of conduct and the damage that results from their breach. Law writes and protects these expectations, hedging us against the extraordinary. . . . This very

8

human movement from repetition to regulation, practice to policy, custom to imperative, is a key part of our 'will to law.' . . . It is no wonder that damages and suffering are keyed to the 'normal,' because law is so essentially about our need for stability, consistency, reliability, and pattern in an unstable world."¹⁹

Meyer is correct in observing that our legal concept of "remediable suffering" does not account for suffering that is in certain ways extraordinary,²⁰ or in certain ways unexpected,²¹ or that otherwise strays from certain norms. When the experience of suffering falls outside of certain *legal constructed norms*, our legal practice fails to "count" it as "remediable suffering."

Initially, we may respond intuitively, almost viscerally, to Meyer's description of a rigid and insensitive approach to suffering. We may regard it as a kind of empathetic failure, as though law were a sentient entity demonstrating a deficiency of compassion. Meyer articulates this intuition: "Should not law indeed attend to the neighbor's pain, seek to alleviate it, or show concern for it, regardless of its justification or cause?"²² But upon reflection we know, of course, that law itself has no agency, no emotive capacity, and no intentionality. Just as the concept of "remediable suffering" is a

creature of law, so then is law itself a creature of us.²³ We construct its measures with our choices, and in constructing the measures of "remediable suffering" we have chosen to be insensitive and to be rigid in exactly the manner Meyer describes. We have chosen to include some categories of suffering (regardless of whether they have actually occurred—as with the case of "general damages" in contract),²⁴ and to exclude others (regardless of their salience or intensity—as with the case of the "background" suffering of prisoners). In making these choices, have we evidenced a failure of empathy?

This chapter argues that the normative implications raised by Meyer's piece cannot be sensibly reduced to a lamentation of insufficient empathy. If failure is afoot in constructing this landscape, it is not the failure that follows from the neglect of a single moral requirement. Instead, if Meyer has identified a failure in our legal system, it is a failure of *capacity*. Law's failure to attend to suffering qua suffering is a collateral, yet inevitable, feature of law's encounter with *complexity*. In other words, we apply a rule-based approach to suffering because to do otherwise—that is, to construct a purely descriptive, nonnormative assessment of what counts as

10

"remediable suffering"—is simply not possible. When a system of rules (such as a legal system) encounters a conventional concept as complex as "suffering," the system of rules necessarily devises a series of implicit generalizations (or "shortcuts") to the render the conventional concept functional within the system of rules. These generalizations necessarily exclude some of what is salient in the conventional concept, while including some of what is not.

To illustrate this point, consider, for example, a rule that prohibits driving with a blood alcohol level greater than 0.08 percent. Assume the purpose of such a rule is to increase road safety.²⁵ The factual predicate of the rule is a predictive generalization: drivers with 0.08 percent blood alcohol levels are less safe than drivers with lower blood alcohol levels. Of course, this generalization (like most) is not universal. It does not obtain in all cases: many drivers with blood alcohol levels in excess of 0.08 percent will not cause an accident, and many drivers with lower blood alcohol levels will cause an accident. In employing this generalization, the rule fails to be attentive to safety qua safety. A challenge to this goal is the fact that road "safety" is a tremendously complex phenomenon. Indeed, it is not the case that safety qua safety is the object of the rule.

Obviously, road safety could be dramatically increased by excluding cars altogether. The purpose of the rule seems to be not to make roads as safe as is humanly possible, but instead to increase safety by some nebulously optimal but underdetermined amount. Whether a particular driving episode hits the sweet spot of "safety" (that nebulous but underdetermined target) depends on innumerable variables, beginning with an individual driver's baseline of skills and limitations (e.g., vision, reaction time, knowledge of road rules, risk-taking temperament, driving experience, physical health, mental health, etc.). Add to these other variables concerning the physical condition of the roadway (e.g., weather conditions, whether the roadway is well-marked, whether it is in good repair). These factors are further complicated by the physical condition of the relevant vehicle (e.g., are the brakes, windshields, wipers, tires, tire pressure gauge, and speedometer all in good repair?). Another category of relevant variables concerns the driver's state of mind (e.g., Is the driver distracted by a phone call? Is he texting? Is he sleep deprived? Is he bored? Is he angry?). Finally, apart from the driver's baseline abilities, the condition of the road and vehicle, and the driver's state of mind on this particular occasion, we must also consider his driving

12

behavior on this particular occasion (e.g., Is the driver speeding? Is he tailgating? Is he using his turn signal? Is he driving too slow in the fast lane or too fast in the slow lane?). Now we must multiply these variables by each driver (and vehicle) that may have a causal impact on the safety of the driving episode we are considering. And finally, we add the factor of alcohol consumption: Given all the other variables, what precise point of consumption will cause this driver to cause an accident?

In very short order it becomes apparent that *accurately* attending safety qua safety is an extremely complex undertaking. To know whether a given rule about alcohol consumption accurately increases safety in any one context, we would have to know a multitude of other things about the situation. Not only is this an undertaking that exceeds the computational capacity of humans (i.e., there are far too many interdependent variables),²⁶ it is an undertaking that is constitutionally ill-suited for a system of rules.²⁷ Ronald Allen has described this phenomenon as the "taming" of complexity. In the way of background he has observed: "[T]he central, largely unnoticed, challenge of the legal system is to domesticate complexity and . . . the effort to do so is one of its

organizing features . . . [T]he twin domains of the legal system—law and fact—are immensely, almost infinitely, complex, each being bubbling cauldrons of interacting variables often too numerous to articulate and certainly too numerous to compute, often continuous rather than discrete, and often unknown to the observer. . . . Simple deductive rules are being employed to regulate infinitely complex social dynamics, and the results seem preordained to be awkward, unanticipated, and occasionally perverse."²⁸

Rules, as Allen observes, are not well calibrated to attend to complexity. Rules are best suited to "made systems such as games, and [work] less well in grown or organic systems, which typify much of the human condition."²⁹ Yet this kind of complexity is the perennial object (and obstacle) of rules in general, and legal rules in particular. Complexity inevitably attends human existence, and our legal rules attempt to regulate human behavior despite—or even because of—the complexity that surrounds even a mundane human undertaking such as driving a car. Consequently, instead of trying to attend to "safety" qua "safety", we create the *legal* concept of "safety" to accommodate the inherently limited *capacity* of rules.

14

To illuminate the inherently limited capacity of rules, let us consider again the rule about blood alcohol levels. It is literally not possible to take into account all of the relevant variables such that our rule can be attentive to "safety" qua "safety." The complexity of the situation simply precludes it. Further, even if such computation were literally possible, the resulting rule would necessarily have an imperative that was so long, detailed, and fact-specific as to be profoundly impractical (e.g., drivers of x age and x experience, and who have had x amount of sleep, and who are temperamentally inclined to risk aversion to x degree, and who on the particular occasion in question are driving within x miles/hour of the posted limit, on a roadway populated with x number of other cars driving at x miles/hour . . . may consume x amount of alcohol). Such a rule would apply in such a limited subset of circumstances that it would cease to have utility as a rule.³⁰ The burden of spreading information about the content and application of the rule would prove insurmountable.

To be useful, a rule must govern in the general case, and to govern in the general case, a rule must rely on an informational shortcut—it must use a generalization as its factual predicate.³¹

Using a generalization as a factual predicate necessarily means that the rule will be overinclusive and underinclusive, but this deficiency in accuracy is attributable not to an inadequate commitment to accuracy (or, in the case of "suffering," a concomitant lack of empathy) but instead to the limited capacity of rules in the face of complexity. There is an inherent tension in a rule's utility and its sensitivity to the complexity that attends the reality of its relevant domain.

Moreover, using a generalization as a factual predicate also means that the rule will impose a normative overlay on the relevant domain.³² The factual predicate of a rule reflects, at best, a picture of reality that provides some predicative value.³³ In the example of blood alcohol level, the rule depends on the factual predicate that *most* drivers will drive less safely if they have a high blood alcohol level.³⁴ The effectiveness of the rule lives and dies by the accuracy of this factual predicate.³⁵ If the factual predicate is a spurious generalization, the rule will not be effective. In contrast, if the factual predicate reflects an observed regularity of behavior that has a causal link to road safety, then the rule will tend to (at least partially) succeed.

16

But a rule can never completely succeed if success is measured by faithful attentiveness to lived reality. Even a rule that is highly calibrated to attend to "safety" qua "safety" (such as the belabored one partially articulated above) would still replicate the same descriptive and predictive deficiencies that Meyer has identified in the context of the legal regulation of suffering: the rule would still impose a normative construct on the concept of "safety" that deviates in significant ways from the reality of what is, actually, safe. The structure of a rule simply cannot accommodate all the contingencies that are relevant to the domain of safety. Some salient aspects of the concept in question ("safety" in our hypothetical example, or "suffering" within Meyer's analysis) will always be left out, and those aspects that are left out will always be characterizable as the "unusual and the aberrant."³⁶ By constituting a *generalized* conception of the relevant domain and eliminating outlying and marginal aspects of the complexity that must be tamed, a rule succeeds in retaining its utility (by effectively producing the desired consequence more often than not) and its general applicability.

Of course the determination of what is to be eliminated and what is to be retained in the taming of complexity is, as Meyer

observes, "normative all the way down."³⁷ Our norms determine what count as "outlier" and "marginal" aspects of any legal concept. Sometimes these norms seem to be exogenous or to precede the development of the legal concept, and sometimes the legal concept seems to constitute the relevant norm. In the example of the blood alcohol rule, the determination (presumably through the application of exogenous norms) that a 0.08 percent blood alcohol level is an acceptable benchmark for safety leads to that specific blood alcohol level becoming what "counts" as safe. The criterion transforms from an underinclusive and overinclusive generalized predictive proxy that seeks to tame the complexity of "safety" into a necessary criterion of "safety" itself: a blood alcohol level of less than 0.08 percent is a necessary condition for "safety" in all circumstances, regardless of the relevant variables (e.g., the experience of the driver, road conditions, etc.). The legal norm of 0.08 percent blood alcohol level has had a constitutive impact on the conventional concept of safety. This type of "reflective equilibrium" between legal and conventional norms is another inevitable consequence of using rules to tame complexity.

18

Meyer's analysis is focused on this interplay between the normative construction of "suffering" at law and the lived experience of "suffering" within our conventional constructs. She observes that the experience of suffering is chaotic and notes that the human response to this chaos is to create regularity and adherence to the "normal" through the application of rules. She calls this phenomenon "the will to law": "The 'will to law,' a human desire for reliability and pattern that protects a finite being from a chaotic world, seeks to normalize the unusual and the aberrant. Even when law tries to compensate for 'actual' suffering and tries to take suffering as a scientific object, the 'will to law' makes [it] difficult to measure, because sufferers adapt to the familiar, routine, and normal, and the familiar is not experienced or understood as suffering."³⁸ But by Meyer's account, the "will to law" seems almost volitional and perhaps even morally suspect. Within her narrative, the "will to law" begins to seem like a psychological phenomenon: we are driven to apply a rule-based framework to complex concepts because we fear the chaotic, the contingent, or the aberrant. Were we psychologically stronger creatures, we could fashion a better legal construct that could account for the complexity of human suffering.³⁹ It is an

appealing narrative because, ironically, it provides us a sense of control and opens the door to a specific prescriptive redress: if we fight (or at least mitigate) the inclination to the "will to law," we may succeed in creating a more sensitive and less normative (and therefore more just) legal approach to suffering.

However, as the preceding discussion has illustrated, what Meyer describes as the "will to law" is not, in fact, willful. Instead, the tendency of rules to narrow a complex domain to a set of limiting generalizations that are perceived to be predictively and causally related to the purpose of the rule, is, in fact, the task of the rule. We can lament that salient aspects of the domain are indeed "occluded" by the legal (i.e., rule-based) construction of that domain, but we cannot apply a rule to a complex domain (which, it turns out, is every domain of human existence) without observing the same result.

Of course, that is not to say that the specific and particular boundaries that we have chosen to draw with respect to the concept of "remediable suffering" are inevitable. We could make other choices. We could draw different boundaries and thereby create a new "norm" of remediable suffering. In illuminating the boundaries of our concept of "remediable suffering," Meyer's project goes far in

20

paving the way for this type of critical engagement with our concept of "remediable suffering." Such engagement could result in a *substantive* realignment of the boundaries of the concept of "remediable suffering"—we might conclude, for example, that immediately and permanently separating an incarcerated mother from her newborn baby constitutes the wanton and unnecessary infliction of pain that is redressable under the Eighth Amendment.⁴⁰ But at the end of any substantive realignment, we would be left with largely the same descriptive landscape that Meyer has already uncovered: a concept of "remediable suffering" that excludes suffering that is "abnormal."

II. Critiquing "Remediable Suffering"

Meyer's project illuminates the fact that our lived experience of suffering is perhaps infinitely nuanced. Many variables are relevant to the legal recognition of suffering because the existence and intensity of suffering is itself dependent on so many interdependent background variables. No one experience of suffering is identical to any other because each sufferer begins with several sets of unique baselines. For example, we each have a hedonic baseline. Some people are simply more sensitive to the slings and arrows of

outrageous fortune than others. Some people have cognitive or psychological conditions that make it very difficult for them to tolerate what we might consider to be "ordinary" disappointments, while others seem to be extraordinarily psychologically resilient in the face of terrible circumstances. Similarly, when facing a potentially painful circumstance, each potential sufferer brings to the circumstance a unique set of mitigating and aggregating factors that depend on a multitude of other comforts and deficiencies that may be present or absent in his or her life. Consider, for example, a well-nourished child being sent to bed without supper in comparison with a starving child going to bed without supper. Further, the experience of loss depends on the unique and complex relationship to the person or entity that has been lost, and so forth. For some people, losing the hope of a romantic reconciliation with an estranged loved one, for example, can produce more "suffering" than the loss of all their material goods. Moreover, sometimes suffering is the result not of losing something that one once possessed, but of the absence of something that one desires but has never had. One may suffer greatly from the sense that one has never received the recognition one deserves, for example, however unjustified this perception may be.

22

Thus, the existence and intensity of any one experience of suffering depend on a multitude of variables, each of which is itself independently tied to the more general complexity that attends living within the human experience.

It is clear, then, that our conventional concept of "suffering" presents a complex (and therefore challenging) domain for legal rules. Given that some aspects of what we conventionally recognize as "suffering" cannot be captured by rules of general applicability (as there are too many relevant variables to accommodate), how should we make choices about what should and should not constitute (or "count" as) "remediable suffering"? Perhaps a better rendering of this question in the context of this commentary is: In light of the descriptive landscape that Meyer has revealed, by what criteria should we judge the choices that we have already made in constituting the legal concept of "remediable suffering"?

Another way of thinking about this is to think about the legal concept of "remediable suffering" as a set of rules, each of which may be independently vulnerable to critique. When critiquing these rules (or any rules), we could at first choose a broad approach and question whether a rule-based system should even be applied in this

domain given the inherent limitation of rules and the inherent complexity of the domain (i.e., "suffering") they are tasked with taming.⁴¹ However, the concept of "suffering" cannot practically be absented from the domain of legal regulation, and therefore we require a concept of "remediable suffering" that is functional within a rule-based legal system. In terms of critiquing our concept of "remediable suffering," then, we are left with critiquing our choices to exclude some aspects of suffering from legal recognition *as compared with* our choices to exclude other aspects of suffering from legal recognition.

This is, of course, a value-dependent inquiry. To critique the choices we have made in creating certain rules, we must first have a set of criteria for establishing what constitutes a "right" choice. In the context of rules, we tend to speak in terms of justification.⁴² "When we speak of a rule being justified, we usually mean either that imperative of the rule is justified in light of its purpose, or we mean that the purpose of the rule is justified. For example, a rule that poor citizens must live in a particular district may be justified in light of its purpose (if the purpose is ghettoizing poor people), but we may still describe the rule as unjustified. In this, we mean the purpose of

24

the rule (or having a rule at all) is not morally (or otherwise normatively) justified. On the other hand, if the evil we seek to avoid is drunk driving, a rule that 'no skateboards are allowed on the street' may not be justified in light of that purpose."⁴³

We might also speak of a rule being (morally) justified or unjustified in light of its consequences, regardless of its purpose. However, the question of a rule's justification in light of its consequences is tied to the first two inquiries. For example, if a rule has a purpose we find justified and it is effective in meeting that purpose, yet we are still critical of the rule in light of its consequences, we have to situate that criticism within an evaluation of the relevant merit of competing values (e.g., the purpose successfully served by the rule as compared with the value that is imperiled as a consequence of the rule).

Finally, to complete a thorough analysis of a given rule's justification within a system of rules (that is itself situated within a complex set of human practices), we have to understand the justification of a given rule as it relates to other "layers" of justification. As Frederick Schauer has observed, "the concept of a rule may be seen to be more of a *relationship* than an isolated

entity."⁴⁴ Most rules have what Schauer describes as hierarchically ordered "background justifications" that relate to the rules' purpose. For example, the blood alcohol rule has an immediate justification (or purpose) of increasing road safety. Yet we can ask, why is road safety to be valued—or, more to the point—why is it to be valued in this instance over the other values that are at stake in this instance (liberty, for example)? To address this question, we might proceed up a "layer" of justification: road safety might increase efficiency (i.e., by decreasing the cost of accidents).⁴⁵ This leads predictably to the question: Why is efficiency to be valued in this instance as compared to other competing values (perhaps liberty again, or perhaps some other value)? This question causes us to proceed to yet another layer of justification. Schauer describes each level of justification relevant to the evaluation of a rule to be "instantiations of deeper and more abstract justifications."⁴⁶ Thus, to understand a rule's justification we must proceed up the layers of justification until we reach what Schauer describes as a "bedrock justification."⁴⁷ A bedrock justification is one that cannot be dug beneath to find a "deeper" justification. Bedrock justifications in the context of rules concerning the compensation of suffering have traditionally centered

26

on some deep notion of justice, which itself turns on constituent concepts such as efficiency (and/or welfare), fairness (and/or desert), equality, and so forth.

Thus, the relevant layers of justification for rules concerning suffering are manifold and can encompass deeply contested justice-based notions that implicate the purpose of legal regulation generally, and the purpose of regulating suffering in particular. We can critique the purpose, effectiveness, or consequences of particular rules concerning suffering, but for that critique to be meaningful we must be attentive to these important facts about not only the structure of rules (i.e., that they are necessarily normative and overinclusive and underinclusive, as discussed in part I), but about the interrelationship of various layers of rules, justifications, and norms within the exceedingly complex domain of the regulation of human behavior.

III. Conclusion

Meyer's project sheds some much-needed light on the nature of our regulation of suffering. She persuasively demonstrates the inherent normativity within our regulation of suffering, and she does this quite admirably, with considerable flourish. Her work opens the door

to many questions concerning the implications of this landscape, a few of which have been explored further here. Because Meyer is principally focused on unearthing metaphenomena concerning the normativity of the concept of "suffering" at law, her project sweeps broadly across an array of distinct rules and does not consider justificatory questions about the rules she encounters. Nevertheless, her project presents a fascinating and illuminating jumping-off point for considering the many potential implications that follow from her skillfully drawn, descriptive rendering.

Notes

1. Linda Ross Meyer, "Suffering the Loss of Suffering: How Law Shapes and Occludes Pain," this volume, 000.

2. Ibid., 000.

3. Pain that is intentionally inflicted yet serves a legitimate penological purpose (e.g., the pain that attends a punitive solitary confinement) is part of the background suffering of imprisonment. As long as the punishment is not cruel and unusual, the pain that follows from it is not compensable.

4. Meyer, "Suffering," this volume, 000.

5. Ibid.

6. Ibid., 000.

7. See Frederick Shauer, *Playing by the Rules* (New York: Oxford University Press, 1991), 6, describing constitutive rules as rules that "create the very possibility of engaging in conduct of a certain kind. They define and thereby

28

constitute activities that could not otherwise even exist." See also Meredith Render, "Gender Rules," 22 *Yale Journal of Law and Feminism* 133 (2010), explaining that "certain types of prescriptive generalizations—known as constitutive rules—tell us what types of behavior 'count' in a given context. For example, the generalization 'pitches in the strike zone are strikes' tells us which pitches count as 'strikes' and which do not."

8. In this context, the law operates as a "hard" constitutive rule, creating the very category that it constitutes. See Meredith Render, "Power, Paradigms, and Legal Prescriptions: 'The Rule of Law' as a Necessary but Not Sufficient Condition for Transitional Justice," in *Transitions*, ed. Austin Sarat (Tuscaloosa: The University of Alabama Press, 2012), describing the constitutive force of law: "[L]aw operates as a constitutive rule when it serves to distinguish which practices, objects, or people fall within a legally defined category. So, for instance, in the United States, the law operates as a constitutive rule when it determines who counts as a 'man' for the purpose of state marriage statutes that limit marriage to a 'man' and a 'woman.' A person who fails to meet the law's criteria is disabled, authoritatively, from not only engaging in the legally authorized practice (here, marriage), but from being or belonging within the legally constructed category (here, 'man'). When the law operates with 'hard' constitutive force there are no criteria by which one can contest the content of the rule, because authoritative constitutive rules do more than define boundaries—they themselves are boundaries."

9. See Meredith Render, "The Law of the Body" (*Emory Law Journal*, forthcoming) explaining:

When the law defines what "counts" as a person it is not applying our conventional concept, the law is using the same *word* to refer to an entirely different *concept*. Our conventional concept connotes an ontological engagement with the category of personhood: what are necessary and sufficient criteria to "count" as a person and so forth. The legal concept, on the other hand, connotes an engagement with what "counts" as a person in a given legal context. Generally this inquiry is pursued by using the accepted forms of legal argument, the accepted tools of statutory construction, and the accepted methods of constitutional interpretation. For example, in the context of interpreting 42 U.S.C. 1983, the Supreme Court determined that municipalities were "persons." In deciding this, the Court was concerned with whether the Congress of 1871 that passed Section 1983 *intended* the word "person" to include municipalities within the meaning of the statute and to resolve this question the Court took Section 1983's legislative history to be evidence of whether municipalities are "persons." In contrast, the legislative history of Section 1983 cannot be thought to have any bearing on the question of what counts as a person in the conventional, ontological sense.

10. Meyer, "Suffering," this volume, 000.

11. *Ibid.*, 000.

12. *Ibid.*, 000, discussing legally justified suffering.

13. *Ibid.*, 000.

14. Background suffering for Meyer includes injuries that can, in some contexts and for some people, be extremely painful, yet may not be as jarring for others. She identifies as background suffering the pain that may be caused by "being turned down for a date, experiencing condescension from a boss, being

30

teased for wearing glasses or supporting the losing team, catching another's cold . . . getting the runaround from the court clerk . . . and [being the recipient] of petty unfairness, or savage looks." "Suffering," 000.

15. Ibid., 000.

16. This discussion does not even contend with what is perhaps the most challenging aspect of "taming" suffering, which is that we have no settled conventional or technical (i.e., scientific) definition of suffering. In other words, we cannot point to readily agreed upon necessary and sufficient conditions for identifying what does and does not "count" as suffering outside the context of the law. This is obviously an aggravating factor when law is called upon to be cognizant of suffering.

17. Meyer, "Suffering," this volume, 000.

18. Meyer also seems to acknowledge that the exclusion of salient categories is inevitable within a rule-based system, noting, "We can only be attentive and humble, recognizing that allowing law to claim an area of suffering as compensable will leave in the background other forms of loss or pain." "Suffering," this volume, 000.

19. Ibid., 000.

20. Some extraordinary suffering is accounted for by law, as, for example, suffering that results from cruel and unusual punishment or the unusual suffering of the eggshell plaintiff. See Meyer, "Suffering," this volume, 000, note 25.

21. Although unpredictable suffering can be compensable in some circumstances, as in some cases of strict liability.

22. Meyer, "Suffering," this volume, 000.

23. Ibid., 000 (quoting Lon Fuller: "the things which the law of damages purports to `measure' and `determine'—the `injuries', `items of damage', `causal connections', etc.—are in considerable part its own creations").

24. Ibid., 000.

25. It is of course difficult to identify "the" purpose of any law, as laws are created by a number of different actors, each of whom may have different purposes in mind.

26. See Ronald J. Allen, "Taming Complexity: Rationality, the Law of Evidence and the Nature of the Legal System," delivered at the Thirteenth International Conference on Artificial Intelligence and Law, Pittsburgh, June 10, 2011, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1845817 (discussing the analytic and computational challenges presented when numerous variables are relevant to the question at hand), 7.

27. Ronald J. Allen, "Rationality and the Taming of Complexity," *Alabama Law Review* 62 (2011): 1048.

28. Ibid.

29. Ibid., 1060.

30. See Render, "Gender Rules," 141, explaining that "[r]ules are, by nature, over and under-inclusive. Rules govern the general case, and eschew individualized considerations." See also Frederick Schauer, *Playing by the Rules* (New York: Clarendon Press, 1991), 31–34.

31. See Schauer, *Playing by the Rules*, 27, describing a rule's factual predicate as "a generalization perceived to be causally relevant to some goal sought to be achieved or evil sought to be avoided."

32

32. Schauer states, "Generalizations are thus selective, but as selective inclusions generalizations are also selective *exclusions*. In focusing on a limited number of properties, a generalization simultaneously *suppresses* others, including those marking real differences among the particulars treated as similar by the selecting properties." *Playing by the Rules*, 21–22.

33. Schauer describes a rule's factual predicate as its "hypothesis" and states that a rule's factual predicate "represents a set of facts standing in a relationship of probabilistic causation to the [rule's] justification." *Playing by the Rules*, 23, 29.

34. Schauer demonstrates that the requisite (i.e., nonspurious) probabilistic relationship exists between a rule's imperative and its factual predicate when the likelihood of avoiding a particular evil is greater given a particular prohibition than it would be in the absence of that prohibition. *Playing by the Rules*, 27.

35. *Ibid.*, noting that "only those generalizations causally related to a rule's justification qualify as non-spurious factual predicates for that rule."

36. Meyer, "Suffering," this volume, 000.

37. *Ibid.*, 000.

38. *Ibid.*, 000.

39. To be clear, Meyer does not state that we should resist the "will to law" and thereby adopt a more sensitive legal approach to suffering. In fact, in describing the types of suffering that law fails to compensate, Meyer also describes both the difficulties and the disadvantages that would attend trying to calibrate the law to account for an individualized assessment of suffering. For example, Meyer

observes that some types of suffering provide benefits we would not want to lose, and therefore, "we do not want the law to protect us too much, or make us too safe, too complacent, too lazy." "Suffering," this volume, 000.

40. Some experts have concluded that the practice of separating incarcerated mothers and newborns is unnecessary, causes privation for the baby, and leads to poor policy outcomes in term of recidivism and other social ills. See, e.g., "Prison Nursery for New Moms Proposed," *Connecticut Post*, April 7, 2012, at <http://www.ctpost.com/news/article/Prison-nursery-for-new-moms-proposed-3466070.php>. See also Institute on Women and Criminal Justice, "Mothers, Infants and Imprisonment: A National Look at Prison Nurseries and Community-Based Alternatives," May 2009, at <http://wpaonline.org/pdf/Mothers%20Infants%20and%20Imprisonment%202009.pdf>.

41. Ronald J. Allen states, "[I]t turns out the relationship between [a] simple [legal] rule . . . and the surrounding environment is quite complex, with the 'rule' capturing only a narrow slice of the relevant domain." "Rationality," 1052.

42. A rule's immediate justification—in the simplest sense—is "the evil sought to be eradicated or the goal sought to be served." Schauer, *Playing by the Rules*, 26. However, the immediate justification is itself related both laterally to other competing justifications (goals / evils) and horizontally to other "layers" of justification, as described below.

43. Render, "Gender Rules," 136, note 8.

44. Schauer, *Playing by the Rules*, 73.

34

45. I use the term "up" here, because analytically we are proceeding to a higher level of abstraction, although Schauer's metaphor of a "bedrock" justification seems to imply a "digging down" through the layers of justification.

46. Schauer, *Playing by the Rules*, 73.

47. Ibid.<endfile>