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Retributive Justice**

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BENTHAM ON STILTS: THE BARE RELEVANCE OF SUBJECTIVITY TO  
RETRIBUTIVE JUSTICE

DAN MARKEL\* AND CHAD FLANDERS†

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*In recent work, various scholars have challenged retributive justice theorists to pay more attention to the subjective experience of punishment, specifically how punishment affects the experiences and well-being of offenders. The claim developed by these “subjectivists” is that because people’s experiences with pain and suffering differ, both diachronically and inter-subjectively, their punishments will have to be tailored to individual circumstances as well.*

*Our response is that this set of claims, once scrutinized, is either true, but of limited significance, or nontrivial, but unsound. We don’t doubt the possibility that different people will react differently to the same infliction of punishment. It seems foolish to deny that they will (although such claims can be exaggerated). What we deny, in the main, is that this variance in the experience of punishment is critically relevant to the shape and justification of legal institutions meting out retributive punishment within a liberal democracy.*

BENTHAM ON STILTS: THE BARE RELEVANCE OF SUBJECTIVITY TO  
RETRIBUTIVE JUSTICE

DAN MARKEL\* AND CHAD FLANDERS†

INTRODUCTION

Despite a genealogy extending back centuries, scholarship on the relationship between law and “happiness” seems all the rage today among legal academics.<sup>1</sup> Not content to simply encroach upon the domain of tort law,<sup>2</sup>

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1. *E.g.*, Symposium, *Legal Implications of the New Research on Happiness*, 37 *J. Legal Stud.* 1 (2008) (including contributions from, among others, Cass Sunstein, Eric Posner, Matthew Adler, and Martha Nussbaum). Some scholars have registered their concerns with the claims made by those who endorse extending the findings of the psychological literature to the design of legal policies and institutions. *E.g.*, Rick Swedloff & Peter H. Huang, *Tort Damages and the New Science of Happiness*, 85 *Ind. L.J.* 553, 570–71 (2010) (questioning the strength of adaptation to injury and return to well-being); Martha C. Nussbaum, *Who Is the Happy Warrior? Philosophy Poses Questions to Psychology*, 37 *J. Legal Stud.* 581 (2008) (defending an objective conception of happiness and criticizing subjective, psychological accounts). But other scholars advance a subjective stance towards happiness—that is, it is a psychological state of (very roughly speaking) “pleasure.” The subjectivists we review in this article largely do so as well. This is in fact a controversial understanding of happiness, to which Nussbaum offers a valuable and bracing corrective. Nonetheless, John Bronsteen, Christopher Buccafusco, and Jonathan Masur, as well as Adam Kolber—our targets in much of this Article—have recently come out with more sweeping defenses of the importance of subjective well-being in the law. *See* John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Welfare as Happiness*, 98 *Geo. L.J.* 1583 (2010); Adam Kolber, *The Experiential Future of the Law*, 60 *Emory L.J.* (forthcoming 2011) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1488444](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1488444).

2. *See, e.g.*, John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, *Hedonic Adaptation and the Settlement of Civil Lawsuits*, 108 *Colum. L. Rev.* 1516, 1519 (2008); Samuel

which has traditionally selected remedies designed to make someone injured “whole” again, some scholars recently have begun charting the implications of these “happiness” studies for the criminal justice system—in particular for punishment theory.<sup>3</sup>

Indeed, in the last two years, a number of legal academics have challenged retributive justice theorists to pay more attention to what they call “the subjective experience” of punishment: how punishment affects the particular experiences and well-being of offenders. Some of these scholars argue that an important aspect of this experiential approach also requires a close look at the offenders’ baseline conditions (that is, their well-being prior to punishment) and their psychological capacities for adaptation.<sup>4</sup> Their work seems to emphasize that because punishment either is or frequently involves *suffering* of some sort, we must pay attention to the different experiences people will have with suffering.

Thus, the general claim made by these scholars, whom we call “subjectivists,” is that retributive accounts of punishment must pay greater heed to variation in the subjective individual experience of punishment.<sup>5</sup> Their specific and stronger claim (made either explicitly or implicitly in their work) is that institutions of criminal justice ought to calibrate punishments to the ex post idiosyncratic tastes, capacities, and experiences of offenders. A failure to do so, the subjectivists argue, is at odds with retributive ideals because a key aspect of retributive theory emphasizes proportionality and this variance in the experience of suffering challenges the administration of proportionality in sentencing.<sup>6</sup>

This focus on subjective experience in punishment has old and indeed venerable roots in the philosophy of Jeremy Bentham, a debt which some of the subjectivists openly acknowledge.<sup>7</sup> By saying that they are giving us “Bentham

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R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 Vand. L. Rev. 745 (2007).

3. John Bronsteen, Christopher Buccafusco & Jonathan Masur [hereinafter BBM], *Happiness and Punishment*, 76 U. Chi. L. Rev. 1037 (2009). Related to the relationship between happiness and punishment is the overall significance of changes in the hedonic levels of offenders relative to their baselines, experiences, and preferences. These issues are similarly taken up in recent scholarship. See Adam J. Kolber, *The Subjective Experience of Punishment*, 109 Colum. L. Rev. 182 (2009) [hereinafter Kolber, *Subjective Experience*]; Adam J. Kolber, *The Comparative Nature of Punishment*, 89 B.U. L. Rev. 1565 (2009) [hereinafter Kolber, *Comparative Nature*]; Shawn J. Bayern, *The Significance of Private Burdens and Lost Benefits for a Fair-play Analysis of Punishment*, 12 New Crim. L. Rev. 1 (2009).

4. See, e.g., sources cited *supra* note 3.

5. In this respect, we are not engaged in a different dispute in criminal law theory concerning the objective or subjective prerequisites for criminal liability: whether wrongfulness is judged by what the facts are (objective) or what the defendant believes them to be (subjective).

6. See *infra* note 29 and accompanying text in Part I.

7. See, e.g., BBM, *supra* note 1, at 1590 (explaining that the account of “well-being as moment-by-moment affect evokes the account of welfare contained within the utilitarian theories of Jeremy Bentham and Peter Singer”); Kolber, *Subjective Experience*, *supra* note 3 at 184 & n.1;

on stilts,” we aim in part to highlight this debt; whether they are merely propping up flawed Benthamite arguments in the name of retributivism or making them stronger is left for the reader to decide. Indeed, several of the subjectivists have suggested their arguments are relevant to rethinking standard utilitarian approaches to punishment, an updating that would no doubt win Bentham’s approval.<sup>8</sup> But for purposes of exploiting our comparative advantages, we focus our discussion on their challenges to retributivist accounts of punishment.<sup>9</sup>

Our response to that subjectivist challenge can be stated succinctly: “subjectivity”—with its apparent concomitant requirement of ex post, individualized, and dynamic tailoring of punishment to offenders—does matter to some extent to retributivism, but much less so than the subjectivists claim it should. It would be foolish to deny that persons experience punishment differently. However, what we deny, in the main, is that this variance in the experience of punishment is critically relevant to the shape and justification of retributive punishment within a liberal democracy. Consequently, we argue that these claims are, from a policy perspective, either true but of minor significance (since most retributivists will agree with them), or else nontrivial but unsound. A lot depends, of course, on how one defines and clarifies the meanings of “subjectivity.”

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see also *infra* n.42; Kolber, *The Experiential Future of the Law*, *supra* note 1, (manuscript at 5) (citing Bentham on the importance of subjective experience while noting that Bentham “may have oversimplified our experiential palate”).

8. Utilitarians conventionally view punishment as a necessary evil only to be applied if it will serve to advance (or maximize) social welfare going forward. The primary concern of utilitarians as applied to punishment is reducing future crime through penal responses that yield deterrence, rehabilitation, and incapacitation. See, e.g., Joshua Dressler, *Cases and Materials on Criminal Law* 34–38 (5th ed. 2009) (describing utilitarian justifications for punishment). Recently, however, some utilitarians have focused on crime reduction through building compliance predicated on legitimacy-enhancing strategies that focus on gaining trust and support from the community, which often involves consistency with lay intuitions of moral desert. See, e.g., Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 Nw. U. L. Rev. 453 (1997). By contrast, what makes an approach to punishment distinctively retributivist in orientation (at least in the legal realm) is its commitment to the view that punishment for legal wrongdoing is “internally intelligible” or intrinsically good and does not rely on the achievement of external benefits in crime reduction in order to justify pursuit of that intrinsic good. Some might prefer thinking of the pursuit of retributive justice as demanded by obligations to pursue the “right” rather than the warrant to pursue the “intrinsically good.” We think there are problems with such a view but we will leave them unarticulated since, for our purposes, they are outside the scope of this paper. See *infra* note 19 & Part II. We will use the terms retributivist, retributive justice, and retributive as roughly interchangeable. But see Michael T. Cahill, *Retributive Justice in the Real World*, 85 Wash. U. L. Rev. 815, 820 (2007) (offering distinctions between “retributive” theory and “retributivist” theory that are unnecessary for our purposes here).

9. Those interested in a critique of Professor Kolber’s arguments primarily on deterrence grounds should look at Miriam H. Baer, Response, *Evaluating the Consequences of Calibrated Sentencing: A Response to Professor Kolber*, 109 Colum L. Rev. Sidebar 11, 19–20 (2009), which contends that uncalibrated sentencing does not clearly fail to achieve the goal of deterrence.

By our lights, we can locate a few “islands of agreement” between us and the subjectivists regarding the significance of individualized experience.<sup>10</sup> First, retributivists should care about the individual offender’s mental competence throughout the life cycle of a crime, from commission through punishment. In this respect, a person selected for punishment must be a fit interlocutor for the communicative message of retributive punishment, a point that the U.S. Supreme Court emphasized recently.<sup>11</sup> Accordingly, it is critical for state officials to have a good grasp of the offender’s competence during his punishment. After all, an offender who cannot appreciate *ex post* the retributive deprivations of, say, liberty or property is likely not a good candidate for punishment; instead, he probably requires treatment. We might even say this competence criterion is the most basic form of subjectivity relevant for punishment. To be punished, the offender must be an autonomous agent (a “subject”)—that is, at least capable of rationally understanding the message directed at him via punishment. But with respect to offenders above that threshold of competence, retributivists should reasonably be relatively indifferent to the idiosyncratic *ex post* preferences and varying experiences of offenders.

Second, we agree that retributivist policymakers should be sensitive to knowledge of human psychology and social norms when crafting laws and setting sentencing policy so that coercive actions or deprivations designed to communicate condemnation do not flout the social expectations of what reasonably counts as appropriate punishment, either as a floor or as a ceiling for that offense. For example, it would be a mistake for retributive institutions to throw ticker-tape parades to communicate condemnation to the offender or express condemnation to the public.<sup>12</sup> A retributive response must be convincingly viewable as a coercive condemnatory action by the polity and its citizens under prevailing social norms; a ticker-tape parade does not qualify as such a condemnatory action. A punishment also cannot be excessive or cruel; this would flout moral expectations in the other direction.<sup>13</sup> Nor, relatedly, can individuals (including both citizens and officials) take it upon themselves to impose in the name of punishment hardships beyond what the polity has authorized.

But these observations are largely unobjectionable, if not quite banal, within the realm of retributive justice theories. Consequently, our

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10. We owe the “islands of agreement” metaphor to Gabriella Blum. Gabriella Blum, *Islands of Agreement: Managing Enduring Armed Rivalries* (2007).

11. See *Panetti v. Quarterman*, 551 U.S. 930, 958–59 (2007); Dan Markel, *Executing Retributivism: Panetti and the Future of the Eighth Amendment*, 103 Nw. L. Rev. 1163 (2009) [hereinafter Markel, *Executing Retributivism*].

12. See Jean Hampton, *An Expressive Theory of Retribution*, in *Retributivism and Its Critics* 1, 15 (Wesley Cragg ed., 1992).

13. A concern for cruelty would also, under our configuration, encompass a concern for the objective medical condition of the offender such that the state could not exhibit indifference to serious medical needs of offenders.

“concessions” to the importance of subjectivity are minor and provide little basis for debate. Indeed, neither concession requires much tailoring of punishment to the particular experiences and capacities of each offender. We merely point out that for each offense there will be floors (punishment that is too tame to convey condemnation) and ceilings (punishment that is too harsh or excessive, including *any* punishment for the mentally incompetent), and that there must be some mechanism to ensure that the floors and ceilings do not crumble.

Beyond this, we find little to agree with in the work of the subjectivists, conceptually interesting though it may be (especially to the heirs of Bentham). A key point of our disagreement is the common and, for the most part, apparently unreflective conflation of *punishment* with *suffering*.<sup>14</sup> Punishment involves the causing of (physical) pain or suffering, say the subjectivists, and because individuals’ emotional reactive sensibilities differ, so too should society’s punishments. This assumption that retributivism involves exchanging or matching pain for pain—that is, the pain the offenders caused (or threatened) by their criminal actions should be balanced by the pain they will experience via punishment—may be true of some, mostly antiquarian versions of retributivism, but not of the best versions, and not, as we will explain, of ours.<sup>15</sup> If retributive punishment is not about matching pain for pain but rather serves as an attempt to communicate to the offender society’s condemnation by means of a deprivation of an objective good such as liberty, then the idiosyncratic experience of the offender will hardly matter—if at all. To be sure, some retributivists (or their critics) may have also equated punishment with suffering.<sup>16</sup> But we view this equation as mistaken in the sense that attempts to justify punishment to cause suffering cannot work as persuasive justifications for state punishment.

Moreover, we think the claims of subjectivists vis-à-vis sentencing particularism misrepresent the animating and distinctive values of retributive

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14. In a related and powerful paper, Professor David Gray drills down on this equivocation between punishment and suffering, and notes, among other things, how prominent retributivists have long rejected the suggestion that experiential results from punishment are material to the justification and amount of punishment inflicted. See David Gray, *Punishment as Suffering*, 64 Vand. L. Rev. (forthcoming 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1573600](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1573600).

15. Indeed, Kolber might be willing to concede this, though it seems to us at some cost. Kolber, *Subjective Experience*, *supra* note 3, at 203 (noting that objective theories of retribution, even if they are able to discount subjective experience, would be “unattractive” for other reasons).

16. The equation of punishment with suffering can perhaps be better understood as the attempt to justify punishment as a means to cause offenders to suffer. For some sophisticated discussion of this point, see Mitchell N. Berman, *Two Kinds of Retributivism*, in *Philosophical Foundations of Criminal Law* (R.A. Duff & Stuart P. Green eds.) (forthcoming 2010) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1592546](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1592546). For what it’s worth, we do not mean to say that those persons who identify as retributivists and who equate punishment with suffering are not really retributivists, and that they are somehow prohibited from using the concept. But we do believe that their conception of retributivism is an inferior one, for the reasons we go on to explore in this Article.



justice, particularly its commitments to equality and, relatedly, proportionality. As we will show, the focus of the subjectivists' critiques is off-target. It is not retributive (or utilitarian) justifications for punishment institutions that are the object of the subjectivist ire. Rather, their focus hinges on the difficulties of *implementing* the principle of proportionality in sentencing. That is worth noting because proportionality is a principle that is not only contested but also largely "expressively overdetermined;"<sup>17</sup> that is, proportionality is a guidepost to action that people from a wide number of viewpoints or dispositions have come to agree upon despite disagreements over why that principle is or should be operative.<sup>18</sup>

Thus, while the subjectivists might have something interesting or important to say about sentencing and proportionality, it is less clear that their message is relevant to the core claim that many if not all contemporary retributivists defend: institutions of criminal justice have a *prima facie* justification because of the internal intelligibility of retributive punishment for offenses defined and enforced by the legal order of a liberal democracy.<sup>19</sup> As

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17. The term "expressive overdetermination" was first used, so far as we know, by Dan Kahan. See, e.g., Dan M. Kahan, *What's Really Wrong with Shaming Sanctions*, 84 Tex. L. Rev. 2075, 2085 (2006) ("A law or policy can be said to be expressively overdetermined when it bears meanings sufficiently rich in nature and large in number to enable diverse cultural groups to find simultaneously affirmation of their values within it."). The idea is similar to an incompletely theorized agreement in that it is thought of as a strategy to facilitate harmony among plural worldviews but it is different in that the latter tries to avoid "going deep" or appealing to thick cultural values. See generally Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 Harv. L. Rev. 1733 (1995).

18. Compare, for example, the various discussions of proportionality appearing in the following articles: Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 Minn. L. Rev. 571, 588–98 (2005) (explaining how proportionality of government action can be understood in reference to fault, costs and benefits, and available alternative measures); Alice Ristroph, *Proportionality as Principle of Limited Government*, 55 Duke L.J. 263, 314–30 (2005) (defending proportionality as a consideration of "limited government"); Ian P. Farrell, *Gilbert & Sullivan and Scalia: Philosophy, Proportionality and the Eighth Amendment*, 55 Vill. L. Rev. (forthcoming 2010) (claiming that proportionality is not intrinsic to any one theory of punishment); see also Hugo Adam Bedau, *An Abolitionist's Survey of the Death Penalty in America Today*, in *Debating the Death Penalty* 15, 34 (Hugo Bedau & Paul Cassell eds., 2004) (discussing the principle of Minimum Invasion, which states that "[s]ociet[ies] ought to abolish any lawful practice that imposes more violation of individual liberty, privacy, or autonomy [than necessary] . . . when it is known that a less invasive practice is available and is sufficient" to satisfy the objective).

19. By "internal intelligibility," in this context, we mean simply that the intrinsic goods of retribution are independent from the goods of crime reduction or civil peace. The idea is that such goods can be realized through punishment and understood as reasons for action even if they are not "all things considered" reasons for action. See also Mitchell Berman, *Punishment and Justification*, 118 Ethics 258, 278–84 (2008) (explaining how retributive justifications for punishment can be understood as "tailored" to respond to particular doubts about the practice of punishment as opposed to "all-things-considered" justifications of punishment). Specifically, the nature of the reason for action in the retribution context is that punishing offenders for their offenses makes sense as a way to communicate and express our fidelity to the ideals elaborated in Part II, where we discuss equal liberty under law, moral accountability, and democratic self-defense. For further discussion of the internal intelligibility of punishment, see *infra* Part II.B.2.

we put it later, retributivism is a theory primarily about the *justification* of punishment, and as such, will have little of substantive interest or precision to say directly about questions of proportionality in sentencing.<sup>20</sup>

If it is true that retributivism's force can be appreciated in largely non-subjectivist terms, then the allegation that retributivists ignore or overlook the subjective side of punishment is of comparatively little significance. In other words, retributivists need not lose sleep over the apparent problem that penal institutions do not calibrate punishment to the idiosyncratic tastes and experiences of offenders.

Furthermore, although it is relatively easy to explain why retributivists *need* not take subjectivism too seriously, we try to answer the slightly harder question of why retributivists *must* reject subjectivism (and sentencing particularism).<sup>21</sup> Consequently, the Article defends the claim that retributivists, enmeshed in and endorsing a liberal democratic culture committed to rule-of-law values, should not embrace a radically individualized sentencing structure. Indeed, thoroughgoing subjectivism would support results contrary to the values undergirding not only the institutions of retributive justice, but also the institutions of distributive justice.

In sum, to the extent that the subjectivist critique reaches beyond the islands of agreement mentioned above, we think the specific claim regarding narrow tailoring of punishment for offenders warrants even more skepticism. Accordingly, one might fruitfully consider this Article as both a brief against the subjectivists based on our own understanding of retribution, and at the same time an effort to clarify what the *best* institutional theory of retributive justice should look like. If the result of the subjectivist challenge is to increase clarity about retributivism's best aims, then perhaps it will have been a salutary corrective. But it is, at most, only this. We believe that the better understanding of retributive justice rightly discounts the significance of subjective experience.<sup>22</sup>

The Article unfolds in four parts. We begin in Part I by describing the recent subjectivist critique. While many scholars have argued that legal institutions should adjust the level of punishment based on various features of subjective experiences,<sup>23</sup> we have chosen to examine three recent and

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20. We don't focus our effort here on spelling out the right relationship between retributive justice and proportionality, but we elaborate our views on this issue in Parts II and IV.

21. We are not alone in these views. Professor Simons has written a short and sharp response to Kolber. Kenneth W. Simons, Response, *Retributivists Need Not and Should Not Endorse the Subjectivist Account of Punishment*, 109 Colum. L. Rev. Sidebar 1 (2009). While we share some of Professor Simons' views, we add our own independent and elaborated arguments here. See also Gray, *supra* note 14.

22. Notwithstanding our disagreements on other matters, we do share Professors Kolber and Simons' concerns that sentencing calibration based on subjective experience might be occurring in an opaque manner and without sufficient democratic deliberation about the practice.

23. See, e.g., Dan Markel, *Against Mercy*, 88 Minn L. Rev. 1421, 1428 n.22 (2004) (identifying other scholars, like Kathleen Dean Moore, who argue for special treatment based on

distinctive iterations of this theme by Professors Adam Kolber, Shawn Bayern, and John Bronsteen, Christopher Buccafusco, and Jonathan Masur (“BBM”).<sup>24</sup>

In Part II, we furnish an overview of our favored conception of retributive justice, the Confrontational Conception of Retribution (“CCR”).<sup>25</sup> Once we have this institutional and communicative conception of retributive justice in mind, we emphasize how this conception of retributive justice can be usefully distinguished from revenge or what we call “comprehensive” conceptions of retribution that focus on the individual’s character and “global” moral desert.

In Part III, we draw upon that confrontational conception of retributive justice in order to elaborate upon our agreements with the subjectivists: ensuring that offenders are competent and that condemnatory measures are both adequate (as a floor) and neither cruel nor excessive (as a ceiling). Notwithstanding these islands of agreement, it is important to explain that these areas of agreement are somewhat (though not entirely) predictable. In this respect, the subjectivists are not really saying more than what many contemporary retributivists have already said time and again.<sup>26</sup>

The subjectivist arguments, however, do have some innovative appeal. The problem is that the novel aspects of the arguments are unsound and deeply troubling. Part IV lays out these disagreements and concerns, and culminates in our set of arguments explaining the incompatibility of retributive justice, properly understood, with sentencing calibrated to one’s hedonic idiosyncracies. We begin by describing and responding to Kolber’s, Bayern’s, and BBM’s attempts to anticipate criticism of their approaches. We argue that, while the thoroughgoing subjectivist approach might be of interest to some moral philosophers or laypersons thinking about their non-legal obligations, the subjectivist critique loses its significance and attractiveness once the focus

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the subjective experiences of offenders) [hereinafter Markel, *Against Mercy*].

24. See sources cited *supra* note 3.

25. In Part II, we draw on, amplify, and revise aspects of Markel’s earlier elaborations of this account and its significance for other criminal justice and related issues. See, e.g., Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 Harv. C.R.-C.L. L. Rev. 407 (2005) [hereinafter Markel, *State, Be Not Proud*]; Markel, *Executing Retributivism*, *supra* note 11; Markel, *Against Mercy*, *supra* note 23; Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 Vand. L. Rev. 2157 (2001) [hereinafter Markel, *Shaming Punishments*]; Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 Cornell L. Rev. 239 (2009) [hereinafter Markel, *Retributive Damages*]; Dan Markel, *The Justice of Amnesty? Towards a Theory of Retributivism in Recovering States*, 49 U. Toronto L.J. 389 (1999).

26. See, e.g., Markel, *Executing Retributivism*, *supra* note 11 (emphasizing significance of competence of offender as predicate for retributive punishment); see also Pamela A. Wilkins, *Competency for Execution: The Implications of a Communicative Model of Retribution*, 76 Tenn. L. Rev. 713 (2009) (same); Robert Nozick, *Philosophical Explanations* 372 (1981) (same).

To clarify, we do not mean to deny that there is much that is novel and nontrivial in the subjectivists. Our point is that what is novel and nontrivial in what they say is, in our opinion, false or unpersuasive.

moves from personal or theological ethics to the design of legal institutions for liberal democracies.

Second, as intimated above, we think the subjectivist critique has much less to do with retributivism than with the challenges of remaining faithful to proportionality in sentencing. This does not mean that retributivists can simply slough off the challenge, but it does suggest that the challenge is different—broader in the number of people it affects, narrower in its focus—than currently conceived.

Furthermore, we explain the dangers that thoroughgoing subjectivism poses to core retributivist commitments respecting autonomy, equality, and dignity. We argue that focusing on subjective experiences wrongly fixates on people's status as feeling beings, rather than as choosing or autonomous agents. Moreover, by emphasizing the different ways we may experience the same event, the subjectivists downplay the palpable equality that our society values and provides: the equality in the free choice made by criminals who commit the same crimes, and the equality in the shared punishment (and condemnation) that they ought to face.<sup>27</sup> In examining the equality issue carefully, we note the similarities these subjectivist critiques have with earlier debates regarding the relevance of subjective tastes and preferences to theories of distributive justice. Insofar as those subjective welfarist accounts proved embarrassing in distributive justice discussions, they are even more so in the context of criminal justice, and will likely only exacerbate existing racial and economic disparities in the criminal justice system. We then point out that by situating punishment as a matter of subjective experience, subjectivism risks denying offenders' dignity by emphasizing, to a potentially dangerous extent, how much and how precisely each offender should suffer, thus implicating the state in an enterprise dangerously approaching sadism. We close by responding to one final challenge that may be launched particularly at communicative accounts of punishment, like the CCR. Our conclusion briefly draws some lessons from this inquiry for the practical reform of our institutions of punishment.

## I

### THE SUBJECTIVIST CHALLENGE: AN OVERVIEW

In this Part, we detail the character of the recent subjectivist critiques of retributive theories of punishment. As noted in the Introduction, various scholars have recently challenged retributive justice theorists to pay more attention to the subjective experience of punishment, specifically how

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27. In this regard we note the pickle the subjectivists are in: they have little principled reason to forbear from adopting an idiosyncratic suffering approach when deciding what conduct triggers criminal liability altogether. It would seem that citizens who have an easier time with compliance to the law would presumably be given less leeway and harsher punishment than those who suffer more by virtue of their compliance. *See also infra* note 240.

punishment affects the ex post experiences and well-being of offenders.<sup>28</sup> The claim developed by these subjectivists is that retributive theorists desire to impose physical or psychological harm or suffering on offenders, and because offenders' experiences with pain differ, both intertemporally and intersubjectively,<sup>29</sup> their punishments should accordingly differ as well in order to achieve a proportionate amount of pain and suffering. The most elaborate discussion of this view appears in two recent articles by Professor Adam Kolber, but other scholars have also committed themselves to these views with varying degrees and styles of emphasis. We first describe the views of Professor Kolber, then of Professor Bayern, and finally of Professors Bronsteen, Buccafusco, and Masur.

#### A. Kolber: *The Inter-Subjective and Diachronic Critiques*

Professor Kolber has recently advanced two claims: first, retributivists must care about the subjective experience of punishment,<sup>30</sup> and second, retributivists must care about the comparative nature of punishment.<sup>31</sup> While conceptually distinct, commitments to analyzing both subjectivity and changes from one's baseline conditions entail a policy of tailoring punishment experiences to an individual's particular background, tastes, and experiences.

Kolber's claims are provocative and important for two reasons. First, while most arguments over whether an individual's subjective experience matters vis-à-vis governmental policy have historically involved questions of *distributive* justice,<sup>32</sup> Kolber says that the subjectivity issue also impinges on questions of punishment, and specifically, questions of *retributive* justice.

The second reason requires some context. Kolber's general approach to the topic of punishment bears a large (acknowledged) debt to Bentham, one of the forbears of utilitarian penology. For example, Kolber restates the Benthamite observation that in order to deter offenders it is necessary to understand what pain or suffering offenders actually feel when being punished.<sup>33</sup> If they suffer more than what it takes to deter them and others, the

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28. See generally sources cited *supra* note 3.

29. Kolber focuses primarily on variance across persons in his first piece on subjectivism. See Kolber, *Subjective Experience*, *supra* note 3, at 184–85 (arguing for calibration of punishment based on the subjective experience of punishment). BBM, Bayern, and Kolber (in his second piece on the subject) focus primarily on intertemporal issues associated with the same individual. See Bayern, *supra* note 3, at 2–3 (focusing on problems for fair-play retributivism when considering the time lapse between offense and punishment); BBM, *supra* note 3, at 1038 (arguing that the experience of incarceration becomes easier to bear as time in prison passes, thus having little lasting effect on prisoners' well-being); Kolber, *Comparative Nature*, *supra* note 3, at 1567–69 (arguing for consideration of an offender's baseline pre-punishment condition in determining the severity of punishment).

30. See Kolber, *Subjective Experience*, *supra* note 3.

31. See Kolber, *Comparative Nature*, *supra* note 3.

32. See *infra* Part IV.C (discussing distributive justice and equality).

33. Kolber, *Comparative Nature*, *supra* note 3, at 1594–95 & n.73 (citing Jeremy Bentham,

punishment is too great. By the same token, if they suffer less than what it takes to deter them and others, the punishment is too meager. This is a familiar point to anyone who has read Bentham. But Kolber's take, as we develop below, is that *retributivists* are also committed by their own principles to take into account prisoners' subjective experiences of punishment. This is Kolber's most interesting claim—and the one with which we most take issue, as we explain later.

### 1. *The Subjective Experience of Punishment*

Regarding the subjective experience of punishment, the introduction to Kolber's recent paper in the *Columbia Law Review* is instructive:

Suppose that Sensitive and Insensitive commit the same crime under the same circumstances. They are both convicted and sentenced to spend four years in identical prison facilities. In fact, their lives are alike in all pertinent respects, except that Sensitive is tormented by prison life and lives in a constant state of fear and distress, while Insensitive, living under the same conditions, finds prison life merely difficult and unpleasant. Though Sensitive and Insensitive have sentences that are identical in name—four years of incarceration—and the circumstances surrounding their punishments appear identical to a casual observer, their punishment experiences are quite different in severity.<sup>34</sup>

Kolber argues that this practice is *prima facie* problematic, and any theory that permits this practice to occur, without justification, is flawed as well. In Kolber's view, retributivists have wrongly endorsed this result by neglecting the subjective aspect of punishment.<sup>35</sup>

We can readily see why Sensitive, as his name implies, will be very sensitive to the rough experience of prison, whereas Insensitive, also true to his name, will not be.<sup>36</sup> But why should retributivists care about this experiential difference?

According to Kolber, retributivists are committed to ensuring that punishment is proportionate to the severity of the crime.<sup>37</sup> If someone suffers more than what is proportionate to the crime because of their subjective experience and tastes, then, according to Kolber, that excess amount of

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An Introduction to the Principles of Morals and Legislation 182 (Prometheus Books ed. 1988) (1789)).

34. See Kolber, *Subjective Experience*, *supra* note 3, at 183.

35. Utilitarians have been less neglectful, but even they, in Kolber's view, have not sufficiently taken into account the subjective aspect of punishment. See *id.* at 236.

36. *Id.* at 183.

37. *Id.* at 199. Kolber also briefly addresses the reality that many retributivists think prior convictions may also be relevant to the proportionality analysis. Kolber, *Subjective Experience*, *supra* note 3, at 224–25 (mentioning that dispute about whether recidivists should be punished more disregards whether offenders “adapt” to prison after their first visit).

suffering is disproportionate and therefore unjust from a retributive perspective.<sup>38</sup> Kolber's example of Sensitive's experience in prison would be a paradigmatic example.

Conversely, someone who is insensitive to the punishments imposed by the state because of their subjective makeup, experience, or pre-punishment baseline is at risk of inadequate—and therefore disproportionate and unjust—retribution. Kolber illustrates this point by way of various fantastical examples, such as *truncation*:

People sentenced to truncation are forced to stand upright while the sharp end of a blade speeds horizontally toward them at a height of precisely six feet above the ground. Those shorter than six feet merely feel the passing breeze of a blade above their heads. Those about six feet tall receive a very imprecise haircut. Those much above six feet tall are decapitated. Each person sentenced to truncation receives the same punishment in name: They are all “truncated.” Yet, in the most important ways, truncation punishments differ in severity, and they differ based on an arbitrary characteristic, namely the offender's height.<sup>39</sup>

According to Kolber, the dominant practice of incarceration is much like truncation because the experience of the punishment varies so much from individual to individual.<sup>40</sup> Consequently, Kolber contends that retributivists must retool their policy prescriptions and endorse (at least in theory) the calibration of punishment according to the individual experiences of each offender.<sup>41</sup> Given the long historical arc of retributive thought, retributivists' inattention to this problem would indeed be a striking omission—unless Kolber has

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38. Kolber, *Subjective Experience*, *supra* note 3, at 216 (“Inflicting such negative experiences is a harm that requires justification. In order to meet the proportionality requirement, retributivists must measure punishment severity in a manner that is sensitive to individuals' experiences of punishment or else they are punishing people to an extent that exceeds justification.”).

39. *Id.* at 188; *see also id.* at 235 (describing the punishment of “boxing”).

40. *Id.* at 188. For the most part, we address the subjectivists conceptually, choosing to stipulate to their empirical claims even though one could plausibly be skeptical of such claims. For example, perhaps people do not differ all that much in how they experience certain events. There is a further question about whether people's *reports* of suffering correspond to the suffering they actually subjectively feel. *See also infra* note 75.

In any event, suppose that our subjective variances are rather significant. Would it be a mistake for the law to assume that people—with the exception of certain outliers—are roughly the same? *Cf.* H.L.A. Hart, *The Concept of Law* 191 (1961) (noting “approximate equality” between all people); Morris, *infra* note 54, at 476 (supposing people to have a “rough equivalence in strength and abilities, a capacity to be injured by each other and to make judgments that such injury is undesirable”). Insofar as rough equality of experiences is a fiction, it may be a benign one, because its inaccuracy only affects a very small percentage of the overall population—those convicted and punished for their crimes. *Cf.* Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 *J. Crim. L. & Criminology* 1 (1984) (discussing the rather low floor of competence necessary for citizens to comply with most criminal laws).

41. Kolber, *Subjective Experience*, *supra* note 3, at 236.

mischaracterized what we take to be retributivism's proper goals and justification.

As we mentioned earlier, Kolber's analysis owes a larger debt to the utilitarians—and particularly Bentham—than to any version of retribution. In Bentham's mind, providing the greatest specific and general deterrence requires keen attention to how punishment would affect individual offenders. In *An Introduction to the Principles of Morals and Legislation*, Bentham writes a passage that finely sums up Kolber's descriptive point—a passage which Kolber himself quotes:

[O]wing to the different manners and degrees in which persons under different circumstances are affected by the same exciting cause, a punishment which is the same in name will not always either really produce, or even so much as appear to others to produce, in two different persons the same degree of pain.<sup>42</sup>

Kolber's main innovation is to apply these Benthamite principles to retributive punishment. Kolber's application of subjectivity to retribution, in a nutshell, is this: when Sensitive and Insensitive have committed the same crime and receive the same punishment, insofar as the punishment causes Sensitive *more* pain or suffering than it does for Insensitive, Sensitive's punishment is disproportionate and unjust, on retributivism's own terms. Sensitive is no longer being punished fairly because he is experiencing more hardship than someone else punished for committing the same crime. Indeed, as Kolber claims, insofar as we punish Sensitive more than necessary for his just punishment, we are punishing the innocent—not in the sense that Sensitive has not committed a crime (he has), but in the sense that, by causing him that additional suffering, we are punishing him beyond what his guilt merits. So too, by logic, do we punish Insensitive insufficiently and unjustly if, by dint of his adaptation to prison, he suffers not at all—or much less than socially desired—from his term of years. After all, under-punishment is also an injustice according to Kant, among others.<sup>43</sup> Kolber's claim is, in short, that more punishment might be needed for some and less punishment for others in order for them to be punished (i.e., suffer) equally.

This is a clever argument, but it is flawed. Indeed, Kolber's critique may not amount to much more than just “Bentham on stilts.”<sup>44</sup> We especially resist

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42. Bentham, *supra* note 33, at 182; Kolber, *Subjective Experience*, *supra* note 3, at 184 & n.1 (noting that Bentham “staked out a clear subjective position more than two hundred years ago”).

43. See, for example, Kant's views on the death penalty. Immanuel Kant, *The Metaphysical Elements of Justice* 102 (John Ladd trans., 1965) (arguing that the death penalty should be the penalty for each murder and that to fail to punish murder with death would be an injustice). For a different elaboration of the concern for reducing both Type I (over-punishment) and Type II (under-punishment) errors, see Markel, *Retributive Damages*, *supra* note 25, at 265–66.

44. Bentham is famous for, among other things, his dismissal of natural rights discourse as



Kolber's attempt to craft a Benthamite refashioning of retributivism since retributivists were never thoroughgoing Benthamites who strictly endeavor to optimize the state of affairs in which society calibrates the specific "disutils" an offender subjectively experiences. In so doing, Benthamites otherwise disregard the causal connections between human agency and states of affairs, and the values implicated by such causal connections. For reasons we later elaborate, we think Kolber has mistakenly taken Bentham's point as an insight that reaches deep into punishment theory.

## 2. *The Comparative Nature of Punishment*

In a more recent paper, Kolber has taken another bite at the retributivists' apple.<sup>45</sup> This time, however, he tells retributivists to focus also on the comparative nature of punishment. By this, Kolber means that "[t]o assess punishment severity accurately . . . we must . . . examine[] an offender's life in prison relative to his life in his unpunished, baseline condition."<sup>46</sup> This argument places the emphasis on subjectivity in a slightly different spot, but the upshot remains the same: retributivists are bound, by their own principles, to look at the distinct, idiosyncratic aspects of offenders.

Kolber argues that faithfulness to proportionality requires retributivists to look at an offender's baseline to determine the just amount of punishment. For example, soldiers and wealthy people have different baselines with respect to freedom and purchasing power than civilians and poor persons; to punish these different people proportionately, the method of punishment must adequately take into account their different baselines.<sup>47</sup> After all, Kolber notes, we use baselines of this sort in tort and contract—why not also in criminal law?<sup>48</sup>

One of Kolber's examples illustrates the general point he tries to establish about the comparative nature of punishment:

[I]magine a very peculiar fine that is absolute in nature. We could punish offenders by setting their wealth to a particular level. People punished by "wealth setting" would have the total value of their assets reset to a certain dollar amount, say \$10,000, and then they could do with the money as they wish. The punishment would make no reference to an offender's assets before punishment. A billionaire who is wealth-set would end up with \$10,000, as would a person of very modest means. Even stranger, a wealth-set person with no assets or

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nothing so much as "nonsense upon stilts." Jeremy Bentham, *Anarchical Fallacies*, in 'Nonsense upon Stilts': Bentham, Burke and Marx on the Rights of Man 53 (Jeremy Waldron ed., 1987). For our use of this phrase, see *supra* text accompanying notes 7–8.

45. See Kolber, *Comparative Nature*, *supra* note 3.

46. *Id.* at 1566.

47. *Id.* at 1567–68.

48. *Id.* at 1568. Kolber relies on Joel Feinberg's work on tort law for this point. However, as David Gray points out, Feinberg elsewhere distinguishes criminal law from tort on grounds that the criminal law is a largely "non-comparative" enterprise. See Gray, *supra* note 14.

with debt would have his wealth rise to \$10,000. Clearly, the absolute approach to punishment strikes us as bizarre. Many people would find it unfair to punish a billionaire, a person of modest means, and a debtor who are equally culpable by setting their assets to the same level.

If wealth-setting seems like an absurd, unjustified form of punishment, know that we do, in fact, punish people with something very much like wealth-setting. The reason is that wealth-setting is part of the punishment of incarceration. For the period of incarceration, we restrict prisoners' rights to use personal property to just the bare essentials. Prison officials wealth-set all inmates to more or less the poverty level for the duration of their sentences. Inmates sentenced to life imprisonment are permanently deprived of most of their baseline property rights. If incarceration is to be justified, we must be able to justify all of the burdens associated with it, including the absurd-seeming, absolutist practice of wealth-setting.<sup>49</sup>

As in his earlier paper, Kolber deploys imaginative hypothetical examples.<sup>50</sup> But here, too, we are not convinced. To be sure, Kolber is not entirely alone in emphasizing the need for retributivists to tailor their punishments to the actual experience of suffering by individuals. Besides the other subjectivists we address in this Part, some courts, lawyers, laypersons and academics think retributive ideals encourage or require a world where the offender should *suffer* in response to his wrongdoing,<sup>51</sup> although the extent to which these persons

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49. *Id.* at 1576. Note that Kolber risks overstating the way prison limits a prisoner's property rights. While in prison, some sticks in the bundle of property rights are removed (for example, the ability to quietly enjoy the views of one's parcel of Blackacre), but others remain, such as the ability to sell or divide Blackacre or make plans to pass it to one's heirs. The value of those sticks might differ immensely across offenders.

50. *See, e.g., id.* at 1591 ("When a person, through no fault of his own, contracts a contagious illness, he may be lawfully confined against his will for a long period of time. Suppose that while under quarantine, he commits a crime over the internet [sic]. Because his baseline liberty is already quite restricted, proportionalists have to severely curtail his liberties in order to achieve a liberty deprivation that is equal to the deprivation that applies to others who commit the same crime but who do not have unusually restricted baseline liberties.") (footnote omitted).

51. Kolber cites, for example, Herbert Fingarette, *Punishment and Suffering*, 50 Proc. & Addresses of the Am. Phil. Ass'n 499, 499 (1977) ("I would like to expound a retributivist view of punishment—one that shows why the law *must* punish lawbreakers, *must* make them suffer, in a way fitting to the crime."). Kolber, *Comparative Nature*, *supra* note 3, at 1582 n.43. He also cites John Kleinig, *Punishment and Desert* 67 (1973) ("The principle that the wrongdoer deserves to suffer seems to accord with our deepest intuitions concerning justice."); A.M. Quinton, *On Punishment*, 14 Analysis 133, 136–37 (1954) (stating that punishment is "infliction of suffering on the guilty"); John Rawls, *Two Concepts of Rules*, 64 Phil. Rev. 3, 4–5 (1955) (describing retributivists as embracing the view that "[i]t is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing"); Kolber, *Subjective Experience*, *supra* note 3, at 199 n.48. Kolber notes the distinction between the focus by some on "deserved suffering" and by others on "deserved punishment." *Id.* It is important to see that the term "suffering" may be ambiguous here. Some may be taking the word to mean that offenders should suffer (i.e., endure) some objectively measured sanction. We are inclined charitably to read some of the philosophers in this way. But to the extent subjectivists or others who identify as retributivists connect suffering to physical pain or mental anguish, we believe they are focused on things for reasons we elaborate

actually are retributivists is disputable. In any event, to the extent that self-identified retributivists emphasize these things, we break ranks with them and join others<sup>52</sup>—although we prefer to see ourselves as charitably clarifying what retributivists should have meant all along, at least in the context of institutional design within liberal democracies.

*B. Bayern: The Private Burden and Lost Benefits Critique*

Like Professor Kolber, Professor Shawn Bayern has emphasized the variability of individual experience in two ways that also would work against the relatively objective nature of distributing retributive punishment.<sup>53</sup> In a recent article, Bayern analyzes punishment along the lines of Herbert Morris's venerable "fair-play" theory of retributive punishment: when someone breaks the criminal law, that person unfairly takes advantage of the rest of the community in that he benefits from operating outside the law while others are burdened by operating within it.<sup>54</sup> By punishing that person, according to Morris, the political community rights the balance of benefits and burdens.

Bayern maintains that this calculus of benefits and burdens should include whether a person has *already* suffered, prior to her being punished.<sup>55</sup> Specifically, he examines two situations where the otherwise full measure of punishment may be unjust. The first is where the offender has already suffered a private hardship "as a result of the crime from a source other than punishment by the state."<sup>56</sup> The second scenario calls for mitigation where the offender "does not retain any 'benefit' from her crime at the time punishment would be imposed,"<sup>57</sup> for if she has, the full measure of the punishment may be excessive. Bayern's question seems to be: Hasn't she suffered enough?

One of Bayern's examples here is illuminating. He writes:

X commits a negligent homicide with Y, the victim's brother, as an

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later.

52. John Finnis has sounded the warning against too easily conflating punishment with the experience of pain. See John Finnis, *Retribution: Punishment's Formative Aim*, 44 Am J. Juris. 91, 97–98 (1999) ("To understand [the 'retributive shaping point of punishment'], it is necessary to set aside the assumption made all too casually by Nietzsche, but also by Bentham, Hart, and countless other theorists—the assumption that the essence of punishment is the infliction of pain. Putting punishment on the level of the sensory, sentient, and emotional is an efficient way of blocking all understanding of its real point and operation, which is on the level of the will, that is to say of one's responsiveness to the intelligible goods one understands. . . . The essence of punishments, as Aquinas clearly and often explains, is that they subject offenders to something contrary to their wills—something *contra voluntatem*. This, not pain, is of the essence.") (footnote omitted). See also *infra* note 85.

53. Bayern, *supra* note 3, at 2.

54. See Herbert Morris, *Persons and Punishment*, 52 The Monist 475, 478 (1968), reprinted in Herbert Morris, *On Guilt and Innocence: Essays in Legal Philosophy and Moral Psychology* 31, 33–36 (1976). See also *infra* note 109.

55. Bayern, *supra* note 3, at 2, 10.

56. *Id.* at 2.

57. *Id.*

eyewitness. Because *Y* is not the most reliable character, he fears the police will not believe him when he reports the crime. . . . Unable to tolerate the possibility that *X* may escape with his crime, *Y* immediately subdues him. Being an accomplished criminal lawyer, *Y* knows precisely what the penalty would be if *X*'s crime were established in court. He goes to great lengths to construct a private prison in his basement that mirrors the conditions of the public prison in which *X* would have been held had he been convicted for his crime, and he keeps *X* there precisely as long as the state would have done. After the sentence expires, *Y* flees the jurisdiction to avoid being punished for his vigilantism. The police capture *X* and, because it turns out that he left evidence other than an eyewitness about which *Y* was never aware, *X* is subsequently convicted of negligent homicide.<sup>58</sup>

In other words, Bayern, like the other subjectivists, asks retributivists to consider personal aspects of the offender's prior experience to identify whether the punishment imposed by the state would be redundant. In this respect, he stands shoulder to shoulder with Kolber, whose paper on the comparative nature of punishment demands that retributivists pay attention to "an offender's life in prison relative to his life in his unpunished, baseline condition."<sup>59</sup> Indeed, Kolber uses a similar hypothetical example involving an abducted drug dealer.<sup>60</sup> Additionally, Kolber's extension of his position to include an offender's socioeconomic status in his pre-offense baseline is consistent with Bayern's belief that the state, in deciding how much to punish the offender, should look at the particularity of the offender's situation vis-à-vis lost benefits or private burdens.

It is possible, however, that Professor Bayern might resist being grouped with Kolber or other subjectivists. Bayern could plausibly argue, for example, that his appeal for sentencing adjustments based on an offender's experience of lost benefits or private burdens could be determined in relatively objective terms—for example, did this offender experience a privately imposed false imprisonment for four years, or did this offender lose the material benefit of his crime shortly after it was committed? In such scenarios, Bayern's analysis would not require a presumptive reference to an individual offender's

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58. *Id.* at 11.

59. Kolber, *Comparative Nature*, *supra* note 3, at 1566.

60. *Id.* at 1587 ("Consider an extreme case: A drug dealer is abducted by a rival gang. The drug dealer is then held against his will in a walk-in closet for a year. During this time, the drug dealer obviously lives in a state of severely restricted freedom. Suppose that police eventually find the drug dealer, remove him from his rivals' hideout, and take him into custody. The drug dealer is subsequently tried and convicted for his prior drug trafficking crimes."). For a less extreme example taken from the headlines, see Douglas A. Berman, *You Be the Judge: What Sentence Would You Give to Gilbert Arenas Following His Plea?*, *Sentencing Law & Policy* (Jan. 16, 2010), [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2010/01/you-be-the-judge-what-sentence-would-you-give-to-gilbert-arenas-following-his-plea.html](http://sentencing.typepad.com/sentencing_law_and_policy/2010/01/you-be-the-judge-what-sentence-would-you-give-to-gilbert-arenas-following-his-plea.html) (asking whether the sentencing outcome for [basketball player Gilbert] Arenas should turn on the fact that he is also suffering a "multi-million dollar 'punishment'" in the form of a fine by the NBA).

sensitivity to suffering or his capacity to adapt to his circumstances. We think this is a fair point.

But our main reason for identifying Bayern with the other subjectivists is that he endorses as retributively desirable or obligatory the ex post narrow tailoring of sentencing based on the offender's prior lost benefits or private burdens.<sup>61</sup> In this respect, Bayern and Kolber, like Professors Bronsteen, Buccafusco, and Masur (discussed below), emphasize the relevance of an offender's peculiar baseline or experiences. At the same time, they express indifference to whether the hardships the offender endures either previously or subsequent to the punishment are authorized and imposed by the state or privately imposed, perhaps through the result of criminal activity. Moreover, by looking at what a person has suffered independently of the state, and how the state should factor that independent suffering into deciding how much to punish, Bayern shares with the other subjectivists a focus on what we might call pre-institutional or global-desert judgments. In these respects, Bayern's analysis—viewing the person and his past suffering in all his particularity—is similar, though not identical, to the others who emphasize that the amount of punishment imposed must be calibrated to the particular sensitivities, experiences, and capacities of an offender.

*C. Bronsteen, Buccafusco, and Masur: The Hedonic Adaptation Critique*

The third subjectivist critique of retributivism we explore is in the recent paper, *Happiness and Punishment*, by Professors Bronsteen, Buccafusco, and Masur ("BBM").<sup>62</sup> Unlike the largely intuition-driven papers of Bayern and Kolber, BBM draw upon recent empirical findings in psychology related to hedonic adaptation, a term used to describe the phenomenon by which people tend to maintain their level of happiness over the long term, notwithstanding short spikes up or down that result from major life events such as winning the lottery or becoming disabled. In other words, hedonic adaptation refers roughly to the general tendency over time for people to revert to their mean level of reported happiness.<sup>63</sup>

BBM employ this research to generate claims similar to those of Kolber and Bayern, namely, that retributivists must pay greater heed to the subjective experiences of punishment if they are to be faithful to retributivist values.<sup>64</sup>

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61. Remember that for Bayern, the false imprisonment an offender experiences after his crime but before his state punishment is a relevant consideration to the amount of state punishment. See *supra* notes 58–60 and accompanying text.

62. BBM, *supra* note 3.

63. See generally Shane Frederick & George Loewenstein, *Hedonic Adaptation*, in *Well-Being: The Foundations of Hedonic Psychology* 302 (Daniel Kahneman et al. eds., 1999) (discussing how hedonic adaptation allows people to become happier by adjusting their sensitivities to various stimuli).

64. BBM, *supra* note 3, at 1069–70. As with Kolber, we do not intend to register a substantial quarrel with the accuracy of the empirical work cited and relied on by BBM or the

They argue that “[i]n designing a system of punishment, scholars and policymakers need to account for the ramifications of hedonic adaptation to the extent that penal regimes should reflect the actual experience of punishment. This holds for both retributive and utilitarian theorists.”<sup>65</sup> Moreover, they contend that retributive theorists must reflect upon “the actual experience of punishment” because for retributivists “it is of core importance to understand the actual amount of harm that punishment inflicts.”<sup>66</sup>

BBM early on declare their allegiance to Kolber’s equation of punishment and subjective suffering by stating, in the very first sentence of their article, “When the state punishes a criminal, it inflicts suffering.”<sup>67</sup> They also concur with Kolber’s assertions that “[a]ll leading theories of criminal punishment *must be* concerned with the way punishment is subjectively experienced by the offender,”<sup>68</sup> and that “the actual experience of negativity is *central* to punishment theory.”<sup>69</sup> Citing Kolber on several points relevant to retributivist thought,<sup>70</sup> and generally referring readers to his argument,<sup>71</sup> BBM attribute to

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controversial assumption that one can effectively translate lessons from human psychology associated with lottery winners and those rendered paraplegic to the context of punishment. Rather, our aim is primarily limited to questioning the usefulness of these claims to reshaping punishment policy in light of retributive justice values. *But see infra* notes 75 & 77, and *supra* note 40.

65. BBM, *supra* note 3, at 1039.

66. *Id.* at 1039, 1069; *see also id.* at 1070 (“[I]f increasing the amount of a fine or the length of a prison term does not increase the harm imposed on an offender to the degree expected, then any quantum of punishment carries less retributive force than has been supposed.”); *id.* at 1071 (“[I]n order to deliver the deserved punishment, the state needs to be able to adjust the amount of *imposed harm* . . .”) (emphasis added); *id.* at 1072 (“Even more so than utilitarianism and expressive theories of punishment, which place at least some importance on the severity that a given punishment is perceived to have, pure retributivism concerns itself with the *actual severity of punishment*.”) (emphasis added).

67. *Id.* at 1037.

68. *Id.* at 1039 (emphasis added).

69. *Id.* at 1069 (emphasis added).

70. *Id.* at 1039 n.4, 1068 n.148; *see also id.* at 1069 (“Kolber has argued that the actual experience of negativity is central to punishment theory, *and we credit his position*. According to Kolber, different individuals’ experiences of punishment must be taken into account. His arguments to that end support our contentions as well, and we refer readers to those arguments.”) (emphasis added). Prior to publication of this article, BBM informed us that they did not intend in their earlier article to take a position (one way or the other) on the desirability of ex post tailoring of sentences based on variance of individuals’ capacity for hedonic adaptation. We thought the language we have cited and quoted indicated otherwise—that they cared about “actual” variance among offenders as much as the “typical” experience of offenders as a class. Nonetheless, if we are wrong about conveying the intended meaning of their article, we still do not think it is a mistake to address the issues of the relevance of hedonic adaptation at the ex post stage. One reason for that is because we could discern no explanation offered by BBM as to why hedonic adaptation is relevant only at the wholesale (legislative) level but not the retail level of sentencing particular offenders. For example, it is possible that BBM believe other considerations (financial or administrative costs associated with individualized tailoring for example) could counsel against using hedonic adaptation at the ex post stage. Our point, however, is that, bracketing pragmatic considerations, we could not discern a principled basis for thinking that if hedonic adaptation mattered ex ante it would not matter ex post. Of course, even if BBM correctly reject the views or

retributivists the desire to impose an amount of suffering that is proportionate to the severity of the defendant's offense.<sup>72</sup> To their credit, BBM, like Kolber, consider some other views of retribution, which we address later in Part IV.A. At the same time, their emphasis is on a version of retributivism that emphasizes the infliction of subjectively experienced pain or mental anguish.

As a result of this emphasis on suffering, BBM argue that retributivists have overlooked the significance of hedonic adaptation for designing punishments. Consider, for example, the use of fines. BBM claim that people adapt similarly well to varying losses of income, even substantial amounts.<sup>73</sup> Indeed, in one study cited by BBM, those who lost "at least half a standard deviation of their annual income . . . over a period of nine years" were not unhappier than people whose incomes remained level or increased—in fact, the study suggested that those who lost money actually ended up happier.<sup>74</sup> BBM contend that this finding, when extrapolated to fines as criminal sanctions, creates proportionality problems for retributive programs of punishment that seek to tie punishment severity to offense severity by increasing levels of monetary deprivation in order to *harm offenders more*.<sup>75</sup> On their view, if all fines, after sufficient time, trigger roughly the same difference to one's happiness, how can retributivists speak meaningfully of "proportionate" financial sanctions? Indeed, if people simply adapt without ultimate consequence to their hedonic well-being, there may not be any meaningful financial *sanction*.<sup>76</sup>

Relatedly, BBM consider the effects on an offender's life both in and after prison. According to BBM, people who enter prison experience an initial drop in quality of life, but then over time their reported sense of well-being tends to level out. Eventually the prisoners approach, without ever really quite meeting,

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implications we ascribe to them, our addressing those views seems relevant and important because we think others might nonetheless be tempted to think hedonic adaptation's variance among offenders should matter for sentencing *ex post*—for example, it would seem important to Kolber and persons sympathetic to his critique of retributivism. Finally, to the extent we were mistaken to read BBM as caring about the significance of hedonic adaptation both *ex ante* and *ex post*, we elaborate upon the significance of this issue (exegetical and otherwise) in a subsequent exchange scheduled to occur later in the *California Law Review*. See BBM, *Retribution and the Experience of Punishment*, 98 Calif. L. Rev. (forthcoming Oct. 2010); Chad Flanders, David Gray, & Dan Markel, *Beyond Experience: Getting Retributive Justice Right*, 99 Calif. L. Rev. (forthcoming 2011).

71. *Id.* at 1069.

72. *Id.* at 1068–69.

73. *Id.* at 1045–46.

74. *Id.* at 1046.

75. One might legitimately question the extrapolation of studies that show loss of income resulting in no net loss of happiness to cases where the loss of income is the consequence of a fine. Given the social meaning of a fine, as well as the fact that a fine is perhaps easily avoidable, the resulting unhappiness may be greater than if you simply "lost" the money, say, because your job was downsized or because you didn't know the stock market was going to tank.

76. *Id.* at 1070 ("Adaptation dulls the punitive effect of fines and incarceration, thereby changing the calculus by which a retributive theory must assign amounts of punishment.").

their originally reported levels of well-being.<sup>77</sup> Thus, although someone may enter prison as a Kolberian Sensitive, she may emerge as (more or less) Insensitive.<sup>78</sup> Given the phenomenon of adaptation, then, the differences between inmates may not be that great, at least to the extent that all inmates will tend to adapt to the conditions of prison life.

BBM also raise the issue that once offenders are released from prison, they experience a wide range of harms, such as struggles to acquire gainful employment or maintain a semblance of normal family life.<sup>79</sup> To BBM, retributivists inexcusably ignore these harms to offenders' well-being when analyzing how much suffering an offender must endure to match properly the severity of their offense. Yet these are harms that offenders suffer, and for which the state is responsible, according to BBM. Indeed, they contend, these harms are some of the most devastating for offenders.<sup>80</sup>

According to BBM, all of these issues together create sentencing problems for retributivists. As with fines, it is harder to achieve proportionate sentencing given the inferences BBM draw from the hedonic adaptation literature—that “increasing or decreasing the amount of a fine or the length of a stay in prison” will do little to affect “adjustments in the amount of harm felt by the offender. Although an offender will expect a longer incarceration to decrease her happiness far more severely than a shorter one, her expectation will mistakenly ignore her own adaptive skills.”<sup>81</sup> In sum, from BBM's perspective, hedonic adaptation produces two effects of significance to retributivists: “First, the workings of our adaptive capacities mute the differences between long and short prison sentences, at least to some degree. And second, adaptation decreases the level of harm that an offender sustains from virtually any fine or period of incarceration . . . .”<sup>82</sup>

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77. *See id.* at 1048–49 (“Interviews conducted six years later revealed additional decreases in negative affect and improvements of positive affect such that, on at least one scale, prisoners' reports fell within the normal range.”). Of course, one can reasonably challenge the kind of well-being or happiness level at stake here. *See* Simons, *supra* note 21, at n.13 (distinguishing among hedonic, desire-satisfaction, and objective list conceptions of well-being). Moreover, someone's reports of well-being may not be the best basis for formulating government policy. We prescind from wading into this dispute since, for us, the well-being of offenders, or the measured decrease in their quality of life, is not our *primary* focus as retributivists. *See infra* Part III.B.

78. *See also* BBM, *supra* note 3, at 1061 (“Having once experienced punishment (and the attendant adaptation), the criminal might understand that she will learn to accommodate the punishment she receives and that the initial shock of being thrown into prison or fined a large amount will soon dissipate.”).

79. *Id.* at 1038 (“Prisoners are often abandoned by their spouses and friends, face difficulty finding and keeping employment, and may suffer from incurable diseases contracted during their incarceration.”); *id.* at 1062–67.

80. *Id.* at 1049 (“Researchers have discovered that any amount of incarceration creates a significantly higher likelihood that ex-inmates will suffer a variety of health-related, economic, and social harms with substantial negative hedonic consequences that will make adaptation extremely difficult.”).

81. *Id.* at 1071–72.

82. *Id.* at 1070–71. Note that BBM aims this conclusion at *pure* retributivists, as



BBM add an empirical richness to their explanation of the importance of subjectivity, which is absent in Kolber's account,<sup>83</sup> although BBM recognize and acknowledge a debt to Kolber's analytical framework. At the same time, Kolber's and BBM's discussions of subjectivity have slightly different implications. Kolber, at least in the first article, focuses on the initial subjective capacities of offenders: Sensitive, since he has a greater sensitivity to punishment initially, will constantly suffer more in prison than Insensitive will. Under a regime of yielding equal objective deprivations, Sensitive will likely suffer from punishment more than Insensitive will; this is unjust on retributivist terms, Kolber argues. On the other hand, BBM are concerned less with starting points than with how people adapt to prison—how prison may become *more bearable* over time. Whereas Kolber is likely to conclude that Sensitive's experience will be much worse *throughout* his time of punishment than Insensitive's, the research BBM cites seems to indicate that Sensitive may start out much worse than Insensitive, but he will in time adapt—in a way by becoming more like Insensitive. Of course, Sensitive's initial suffering suffices to make Kolber's point: Sensitive's overall suffering will be worse than Insensitive's. But given BBM's argument, Sensitive's overall suffering may not be much worse.

This difference between Kolber and BBM is minor compared to the similarities in the way they understand retributive justice or punishment more generally.<sup>84</sup> We think this understanding is largely misguided, at least with respect to most "prevailing" contemporary accounts of retributive justice.<sup>85</sup> Importantly, at least as against our preferred account of retributive theory, we view their argument as having very little bite. Accordingly, in the next Part we explicate and defend one of these institutional accounts of retributive justice, after which the inadequacies of these subjectivist critiques will become more

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distinguished from other schools of retributivist thought.

83. To be sure, Kolber believes his argument rests on an intuitively plausible supposition—that different people will have different responses to pain. *But see supra* note 40 (raising some questions about Kolber's assumptions).

84. *See supra* text accompanying notes 65–72.

85. Kolber intends to address only "prevailing" accounts of retributive theory. *See* Kolber, *Subjective Experience*, *supra* note 3, at 187. For what it is worth, we think Kolber's intellectual history of retributive theory is largely incorrect. While there have been some moral philosophers who identify the goal of retributive theory as justifying the infliction of suffering, the leading retributivists have not taken that path. *See, e.g.,* Finnis, *supra* note 52, at 91, 97–98; *see also* Jean Hampton, *The Moral Education Theory of Punishment*, in *Punishment: A Philosophy and Public Affairs Reader* 112, 128 (A. John Simmons ed., 1995) (describing "punishment" as a "disruption of the freedom to pursue the satisfaction of one's desires" and distinguishing it from the contingent pain or suffering subjectively felt by the offender). *See also* Gray, *supra* note 14, at 53–60 (citing, among others, Joel Feinberg, George Fletcher, Immanuel Kant, Herbert Morris, and Carlos Nino, all of whom reject the suggestions that punishment can be conflated with suffering, an "equivocation" at the heart of Kolber's and BBM's accounts). We also give our own very brief sketch of retributivism in Part II.B.3 (tracing evolution from accounts which emphasized causing physical suffering to accounts which focused on liberty deprivation and communication), *infra*.

apparent, at least as against this sort of justification for state punishment. In the Parts that follow thereafter, we explain what areas of agreement and concern we have with these subjectivist claims.

## II

### WHAT RETRIBUTIVE JUSTICE IS AND WHAT IT IS NOT

There are many conceptions of retributive justice. The following Part is designed to articulate and defend a particular kind of retributive justice, one that we call the “Confrontational Conception of Retributivism,” or the CCR. This particular conception is political, not comprehensive, and thus is interested in defending the claim that *state* punishment is, as a general matter, warranted as a response to *legal* wrongdoing. Accordingly, the focus is on the legal manifestations of punishment, particularly within a liberal democracy; it is not concerned with justifying punishment in other spheres such as parent-child relations. Related to this account of state punishment is that its contours should be devised principally *ex ante* and that such punishment should be distributed through actors upon whom there are checks with respect to their remaining discretion.

#### A. The Confrontational Conception of Retributivism

On our view, retributive punishment is a form of humane but condemnatory communicative state action directed at the offender.<sup>86</sup> Action is communicative when directed to a designated recipient, in a way “meant to convey thoughts done through means reasonably recognizable as serving that end.”<sup>87</sup> The action is undertaken in a way the *sender* of the message *thinks* will make sense to the recipient, and is performed in a way that the thought conveyed can be made sense of, or effectuated, through the free will of the recipient.<sup>88</sup> This communicative goal is distinct from the goals of more familiar instrumental approaches to punishment, which include, but are not limited to, the government’s “expression” of messages through the medium of an offender’s punishment to an undefined public at large.<sup>89</sup>

86. See generally R.A. Duff, *Punishment, Community, and Communication* (2001).

87. John Greenman, *On Communication*, 106 Mich. L. Rev. 1337, 1341 (2008). Greenman calls this a “useful” but “coarse” and “overinclusive” definition. *Id.* We believe it is sufficient for our (limited) purposes here.

88. *Id.* at 1344–45.

89. For our purposes, the term “expression” signifies that an action (including speech) may emit certain views or attitudes but does not require that a particular member of the audience for the action understands the basis for or purpose behind the action. The actor may intend the expression to benefit other members of the audience or even only the actor herself. To illustrate the expression-communication distinction, consider, for example, the following: when Mariah calls her brother, Nathan, at home and speaks in a language Nathan can understand to tell him, “Dad is coming home for dinner at 8 p.m. tonight,” that is a *communication*. When Nathan writes an entry in his private diary, he is *expressing* his opinions without *communicating* them to anyone. Similarly, when the Blues Brothers drive around a neighborhood with a giant speaker strapped to

The discussion below sketches an account of this communicative understanding, one that explains and justifies the intrinsic goodness of retributive punishment independent of the external social ends it might serve. It also justifies *punishing* mentally competent offenders for their *crimes*, as opposed to *treating* the offenders or ignoring them in search of cheaper measures of harm reduction. That said, for reasons we advance below, such a view does not entail indifference to the consequences and costs of retributive punishment.<sup>90</sup> Once we have explained retributive punishment as justified communicative state action, we will demonstrate how it differs from an interest in inflicting suffering on the offender.

While this account builds upon prior accounts of retributive justice, it also departs from them in various ways. The point here, however, is not to trumpet or explicate these differences or claim complete originality. Rather, we aim first to present a sketch of retributive justice that illustrates the basis for a non-instrumental, communicative conception of punishment, and then to explain the implications of such an account for whether or how much retributivists should be interested in an offender's subjective experience. Our bare claim is that states are justified in and have positive, though not inflexibly demanding, reasons for censuring and punishing legal wrongdoing in a manner shaped by law. We now turn to elaborating what underlies this claim, that is, to describing what retributive punishment seeks to communicate.

John Rawls once proffered the view that retributive justice rests on the idea that

wrongdoing merits punishment. It is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing . . . and the severity of the appropriate punishment depends on the depravity of his act. The state of affairs where a wrongdoer suffers punishment is morally better than the state of affairs where he does not; and it is better irrespective of any of the consequences of punishing him.<sup>91</sup>

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their car rooftop, broadcasting details of their upcoming show to all and sundry, that too is *expression*. State punishment can communicate messages to offenders and express messages to the public too. The message to the public may be "do not do X," or "we are keeping our promise to punish X." But when punishments emit messages to the public, the messages have an unspecified target; it is not important that one person in particular have a rational understanding of that message. For that reason, we call those signaling goals to the public "expressive" goals instead of "communicative" goals.

90. The polity's pursuit of retributive justice is a *prima facie* obligation. Such duties cannot be denied as obligations, but since the determination of how and when to discharge those obligations is a prudential matter, these obligations may be set aside when other duties of justice supersede them. Phrased differently, the obligation to create and maintain institutions of retributive justice must be balanced against other social obligations and moral duties. For an instructive elaboration on reconciling competing obligations, see generally Cahill, *supra* note 8; Berman, *supra* note 19. See also *infra* Part II.B.2.

91. John Rawls, *Two Concepts of Rules*, 64 *Phil. Rev.* 3, 4–5 (1955). Rawls later changes his focus from suffering to punishment. See *id.* at 10 ("[A] person is said to suffer punishment whenever he is legally deprived of some of the normal rights of a citizen on the ground that he has

Similarly, Professor Michael Moore once summarily described retributivism as the “view that punishment is justified by the moral culpability of those who receive it.”<sup>92</sup> Underlying this description is a sense that imposing punishment for moral wrongdoing is a self-evidently attractive obligation.<sup>93</sup>

The problem with this capsule characterization, however, is that the nature of this obligation requires further explication. Imagine Jack. He has spitefully run over Jane, his neighbor’s child. If the state seeks to punish Jack on account of his purported moral desert, several questions arise. First, why does Jack deserve *punishment*? And is that the same thing or different than deserving suffering? Why shouldn’t Jack undergo some form of treatment that can cure or ameliorate his antisocial condition?<sup>94</sup> Skeptics might also ask why one *should* embrace the pursuit of retributive justice through authorized coercive condemnatory deprivations, and not just solemn declarations of denunciation. Even if one agrees that Jack deserves to endure some punishment in the form of a coercive condemnatory deprivation, it does not follow that the state has a right or a duty to punish Jack. Why is the state, rather than the victim or her allies, adjudicating and punishing Jack? Liberal democracies must understand what it is about Jack’s past offense that might entail the state’s *prima facie* right and obligation to punish him. These issues animate the following account, which tries to describe retributive justice as a socio-legal practice whose value is internally intelligible when the state inflicts some level of coercion upon an offender whose violation of an extant legal norm has had fair and reasonable adjudication. In other words, the preconditions for this account’s attractiveness are that the laws being vindicated are reasonable and democratically enacted, and the adjudicative procedures are appropriately conceived and reliably applied.

### 1. *Holding Agents Responsible for Choosing Unlawful Actions*

Retributive punishment for legal wrongdoing is justified in part because, in treating the offender as a responsible moral agent, it communicates to him a respect for his dignity as an autonomous moral agent.<sup>95</sup> When the state adjudicates and punishes a person’s unlawful wrongdoing, it affirms his moral agency through that process because he can express remorse, recognize his wrongdoing, and endeavor to avoid that conduct in the future. Or, in the

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violated a rule of law[.]”).

92. Michael S. Moore, *The Moral Worth of Retribution*, in *Responsibility, Character and the Emotions: New Essays in Moral Psychology* 179, 179 (Ferdinand Schoeman ed., 1987). For Moore, moral culpability is the same as desert. *Id.* at 181–82.

93. See, e.g., Robert Blecker, *Rethinking the Death Penalty: Can We Define Who Deserves Death?*, 24 *Pace L. Rev.* 107, 123–24 (2003) (providing an example of retributivist intuitionism).

94. E.g., Karl Menninger, *The Crime of Punishment* 19 (13th ed. 2007) (discussing scientific prevention approach to criminal activity); cf. N.B. Sen, *The Wit and Wisdom of Mahatma Gandhi* 68 (1960) (“All crime is a kind of disease and should be treated as such.”).

95. Morris, *supra* note 54, at 46–49.

alternative, during the adjudicative process the offender may give reasons why the conduct was not wrongful under the circumstances.<sup>96</sup> The retributive encounter of adjudication and punishment involves a cognitive process possessing moral weight.<sup>97</sup> The public, through the state, conveys respect for an offender by holding him responsible as a moral agent capable of choosing to act unlawfully and thus in a blameworthy manner. In maintaining credible institutions of criminal justice, the state communicates to offenders that their unlawful actions matter to this community of shared laws, and that it will hold them responsible for these actions.<sup>98</sup>

Recall Jack, who maliciously killed Jane's child. If the state, in its ordinary course of business, knowingly did nothing to respond to Jack's unlawful action, its inaction here could convey two messages: first, a statement signaling the polity's indifference to the legal rights of its citizens; and second, a statement of condescension by the polity toward Jack, suggesting that the public does not take his actions seriously, even though Jack chose to commit the wrongdoing, *arguendo*, without excuse or justification.

Through retributive punishment, the public holds Jack responsible for his unlawful choices and blames him for that choice. When the state creates credible legal institutions to advance retributive justice, it expresses certain commitments *ex ante* to the public and communicates these commitments *ex post* to the offender through retributive punishment.<sup>99</sup> In this way, punishment—the censure manifested through coercive sanction—communicates to offenders that they are autonomous agents capable of responsibly choosing between lawful and unlawful actions, and that they can and must be held responsible for the actions they choose and blamed for them. To borrow from C.S. Lewis, retribution “plants the flag of truth within the fortress of a rebel soul.”<sup>100</sup> The punishment of a competent criminal instantiates a belief in the ideal that one is morally responsible, that is, blameworthy, for one's unlawful actions; importantly, to punish someone is to say that flouting the law cannot simply be fixed by compensation or an acknowledgement of causation alone. There is a communication of condemnation by the polity that attaches to the punishment against an offender who is a worthy interlocutor.<sup>101</sup>

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96. See Andrew von Hirsch, *Penal Theories*, in *The Handbook of Crime & Punishment* 659, 666–67 (Michael Tonry ed., 1998).

97. Cf. Michael Moore, *Placing Blame* 133 (1997) (“Voluntariness of action, accountability, intentionality, causation, justification, and excuse are the primary categories in terms of which we judge someone as morally responsible and thus legally punishable.”).

98. See Philip Pettit, *Responsibility Incorporated*, 117 *Ethics* 171, 176 (2007) (discussing conditions of responsibility in context of punishment).

99. Cf. Warren Quinn, *The Right to Threaten and the Right to Punish*, 14 *Phil. & Pub. Aff.* 327 (1985) (making this claim in the context of theory of punishment grounded in the right to self-defense).

100. C.S. Lewis, *The Problem of Pain* 95 (1944).

101. Importantly, on this view, one cannot say that the obligation to respect another as a morally responsible agent ceases as soon as a court has rendered a (correct) judgment; it must

We noted earlier our view that retributive punishment is justified as a communicative practice. In other words, the value of retribution lies in the criminal's ability to understand rationally the state's desire to repudiate his wrongful claim to be above the law. Imagine a perpetrator who is mentally impaired, such that during his last dinner before execution he tells the prison guard, "I want to save my dessert for tomorrow night."<sup>102</sup> Would retributive punishment make sense in this context? In our view, it would not. The retribution would not be internally intelligible if the offender could not understand the meaning of the state's condemnatory action. Importantly, though the offender must be able to rationally understand the communication, he need not be persuaded by it. For example, he may proclaim his innocence notwithstanding the evidence to the contrary. However, if he cannot comprehend that he is being punished for his offense, then the punishment is not retributive but merely a coercive deprivation whose condemnatory character is lost on the offender.

Although this argument may seem similar to a justification for punishment based on moral desert alone, it is not the same. First, moral desert may stand outside the law. Thus, a theorist focused strictly on moral desert may oppose punishing someone who is proven to have eaten on the subway (absent justification or excuse) and thus in violation of a law prohibiting eating on the subway. The account of retribution here distinguishes between moral and legal desert in this way in that: one might oppose as a legislator criminalizing silly things but nonetheless proceed (as a judge or corrections official) with punishing someone who violates a democratically enacted law that is not itself illiberal (or otherwise unconstitutional) but simply unwise. One does this out of respect for the idea of democratic authority, about which more will be said later.

A second way this account differs so far from traditional or familiar notions of moral desert is that it emphasizes the significance of communication over expression, which itself illuminates how we should think about punishing persons across a timeline. For example, imagine that on Monday, Jack kills Jane's child but then on Tuesday, he bangs his head in a horrible accident, thereby losing the capacity to understand why he would be punished. Even though the question whether to punish him may arise on Wednesday, arguably nothing has happened to change his moral desert, which according to some, may have "congealed" on Monday.<sup>103</sup> However, what we take to be the retributive point of punishment would be lost if he were punished on

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continue throughout the retributive encounter.

102. Cf. Christopher Hitchens, *Fool Me Thrice*, Slate, Jan. 28, 2008, <http://www.slate.com/id/2182938> (discussing Governor Clinton's execution of Ricky Ray Rector).

103. See Stephen P. Garvey, "As the Gentle Rain from Heaven": Mercy in Capital Sentencing, 81 Cornell L. Rev. 989, 1030 (1996) (claiming that, from a retributivist perspective, one only looks backward because an offender's desert is "fully congealed at the time of the crime").

Wednesday, not because he has already suffered a trauma and thus deserves leniency, but rather because he could no longer comprehend the punishment's communicative significance, even if the state might still realize its expressive goals to others.<sup>104</sup> In other words, the good achieved by retributive punishment is internal to the practice of punishment itself, though the state must weigh the pursuit of that good in all situations and contexts against the pursuit of other goods.<sup>105</sup> In making these claims, however, we can still see that the point of retributive punishment is not to achieve psychological satisfaction for victims or their allies, nor is it to reduce private violence, or to educate the public about norms of rightful conduct; all of these are contingent goals attainable through a variety of means.<sup>106</sup>

Notwithstanding the internally intelligible value of retribution's *communicative* practice, retributive punishment also performs important coinciding *expressive* functions. That is, when the state creates institutions to communicate reprobation of the offender, the existence of these institutions signals that individuals' actions and interests matter to the state and its citizens. The expressive function of punishment (i.e., sending signals to the public), however, derives its legitimacy only when the state has properly achieved its primary communicative function to a culpable, competent offender.

Of course, in some instances one might think punishment could be unnecessary to communicate to particular offenders the value of being held responsible. For example, think of an offender who, immediately after committing her misconduct, comes forward, attempts to make restitution, and evinces her awareness of this ideal of moral accountability through her own sincere repentance. Such a situation, where an offender has ostensibly internalized the significance of the ideal of moral responsibility, illustrates that the justification for state sanction needs to run deeper. As we develop next, this is because part of the way one actually manifests her acceptance of responsibility and repentance is through a willingness to endure punishment to help secure the regime of equal liberty under law.<sup>107</sup>

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104. Of course, if Jack lobotomized himself intentionally after the crime, the state might have a deterrence-based reason to punish him for his self-created condition of ill-repair notwithstanding that the punishment would at that later point lack communicative significance. Cf. Paul H. Robinson, *Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 Va. L. Rev. 1 (1985). We treat this as an open question, however. We are admittedly unsure to what extent concerns about making sure people aren't able to "escape" their punishments can trump the fact that communication with the offender was no longer possible. This is, of course, an extreme case.

105. See *supra* note 19 (explaining that retributive theory might better be understood as offering a "tailored" justification rather than an "all things considered" justification).

106. See Moore, *supra* note 97, at 90.

107. Kant put the point somewhat differently; he thought someone who endured punishment for his wrong was perfecting his autonomy. See Immanuel Kant, *Metaphysics of Morals* 105, 107 (Mary Gregor ed. & trans., Cambridge Univ. Press 1996) (1785). Our claim that even a repentant offender should experience equal punishment with a defiant but otherwise similarly situated offender runs contrary to the views of some other punishment theorists. Cf.

## 2. *Effectuating Equal Liberty Under Law*

Even against a quickly repentant offender, retributive punishment is warranted to effectuate a liberal democracy's commitment to the principle of equal liberty under law. In a liberal democracy, punishment serves to fulfill part of the promise of equality, because each citizen is burdened by an obligation to obey those laws that have been reasonably crafted, enforced, and applied. When someone flouts a legitimate law, he elects to untether himself from the common enterprise of living together peaceably under a common law. He is not merely flouting a particular law with which he may disagree, but rather he is also defecting from an agreement about the basic structures of liberal democracy that he (would have) made as a reasonable person in concert with other reasonable people. By his act, the offender implicitly says, "I have greater liberty than you." He cuts himself off from the social order and elevates himself above his fellow citizens, notwithstanding that all should enjoy equal liberty under the rule of law in a liberal state.<sup>108</sup> Note that it does not matter that few people, if given the chance, would seek to steal, rape, or murder.<sup>109</sup> All that matters is that, *ex ante*, the offender can be seen as defecting from a legitimate legal order to which she has good reason to give allegiance,<sup>110</sup> and that in defecting she demonstrates that she has taken license to do what others are not entitled to do. If the state establishes no institution to threaten punishment credibly, the offender's implicit or explicit claim to superiority over others commands greater plausibility than it would if the state had created such an institution.<sup>111</sup>

By making credible its threat to impose retributive punishment, the state makes its best reasonable efforts to reduce the plausibility of individuals' false claims of superiority over their specific victims, if there are any,<sup>112</sup> or claims of

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Jeffrie G. Murphy, *Legal Moralism and Retribution Revisited*, 1 *Crim. L. & Phil.* 5, 10 (2007) (noting that Joel Feinberg, Jean Hampton, and Herbert Morris embraced idea of lower punishments based on true repentance). Hampton was focused on repudiating false messages emitted by offenders toward victims; our concern expands the focus to the false messages of superiority emitted by the offender against the polity through a disrespect for democratic authority.

108. See Jeffrie G. Murphy & Jules L. Coleman, *Philosophy of Law: An Introduction to Jurisprudence* 124 (1990).

109. Some have expressed this concern regarding Herb Morris's account. See, e.g., Murphy, *supra* note 107. For a discussion of how this account sidesteps the criticisms of Morris's "fair-play" theory of punishment, *Persons and Punishment*, *supra* note 54, see Dan Markel, *Misguidedly Merciful? A Reply to Professor Meyer* (Sept. 3, 2009) (unpublished manuscript) (on file with authors).

110. Or, at least, so we will assume for purposes of this Article.

111. A lack of at least a *threatened* state response would leave the offender's claim to superiority unchallenged, a situation that a society committed to equality should wish to avoid.

112. On the point of diminishing the plausibility of an offender's claims to superiority, see generally Jean Hampton, *The Retributive Idea*, in *Forgiveness and Mercy* 111 (Jeffrie G. Murphy & Jean Hampton eds., 1988); Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 *UCLA L. Rev.* 1659 (1992).



superiority vis-à-vis the public. In other words, the state's coercive measures against an offender communicate society's fidelity to the norm that all enjoy the same package of liberties under law.<sup>113</sup> Moreover, these sanctions communicate to the person most in need of hearing that message of condemnation—the offender who violated the law. This rationale helps explain both the notion of equal liberty under law and the subsequent personal obligation of self-restraint.

### 3. *Democratic Self-Defense*

The two rationales we discussed so far—effectuating responsibility and instantiating equal liberty under law—address why punishing an offender for his unlawful action is internally intelligible. However, they do not explain why the *state* should decide and implement matters of punishment. In this sub-section, we examine why the state should play the central role in meting out retributive justice.

One reason for the state's role here has to do with the notion of *democratic self-defense*. Recall from the previous sub-section how an offender's misconduct implicitly or explicitly serves to substantiate a claim of superiority. That claim of superiority is not merely a claim against his victim—indeed, for some offenses there may not even be an identifiable victim. Rather, the claim of superiority is also against the *political order* of equal liberty under law. Each time an offender commits an offense, he effectively tries to shift where the rules of property, liability and inalienability lie, at least with respect to him.<sup>114</sup> In doing so, the offender in a sense revolts against both society's determinations of what those primary rules are, and against the secondary or meta-rules governing who gets to adjust the primary rules. In other words, the offender usurps the sovereign will of the people by challenging their decision-making structure.<sup>115</sup> The misconduct, then, is not merely against the victim but also against the people and their agent, the state, whose charter mandates the

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113. See Gerard V. Bradley, *Retribution: The Central Aim of Punishment*, 27 Harv. J.L. & Pub. Pol'y 19, 25–26 (2003); see also Finnis, *supra* note 52, at 99–101. Of course, this does not assume that in fact everyone has the same likelihood of enjoying the same liberties; clearly, tastes and various constraints—economic, geographic, etc.—influence the patterns resulting from the provision of equal liberty under law.

114. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089, 1126–27 (1972) (discussing the need for punitive sanctions to discourage the flouting of property and inalienability rules).

115. See Murphy & Coleman, *supra* note 108, at 116. It could be argued that violations of all legal norms (i.e., both civil and criminal) would be sufficient to trigger the democratic self-defense argument, making it seem that this argument proves too much in the context of a justification for punishing violations of criminal laws. It is a plausible argument. But democratic authorities get to decide which rules will be criminal or civil in nature. Consequently, one might see the violation of a criminal law as a greater and more salient form of rebellion than a violation of a rule simply establishing potential exposure to tort liability when a plaintiff brings a claim on his own volition.

protection of not only the persons constituting the political order, but also the decision-making authority of the regime itself.<sup>116</sup>

The principle of democratic self-defense is embodied in the oath that federal officers take, which obligates them to protect the nation's decision-making structure.<sup>117</sup> The oath illuminates the idea that these officers must defend the Constitution against attack by those who shift the rules unlawfully, and thus reveals offenses as, to some degree, a form of rebellion.

But one might ask: why *democratic*, rather than simply *political*, self-defense? As mentioned earlier, this account does not purport to justify punishment for all laws broken under all regimes. Its appeal lies in, and for now is restricted to, trying to understand what is condemnable about breaking reasonable laws passed fairly in liberal democracies that are generally respectful of persons' rights and liberties.<sup>118</sup> If we replace "democratic" with a broader word, such as "political," the principle could lend itself to justifying punishment even for breaking laws that reinforce tyranny or oppression.

One might also wonder if the account of democratic self-defense might seem inaccurate, even grandiose, with respect to the state of mind of most offenders. Surely, the typical offender who commits a "smash and grab" would deny that he is making any implicit or explicit "claim" against the victim or the state. He might further deny that he is trying to shift the rules or usurp the will of the democratic apparatus. Rather, he might assert that he is merely violating the law and hoping to get away with it because he wants the money. Consequently, there might be something implausible about imputing to criminal conduct a greater rebellion against the state or one's fellow citizens.

It only looks implausible, however, if retributivists are expected to justify punishment to a person who already knows he is an offender. Such an expectation is misplaced because it lacks impartiality and a commitment to reasonableness. Instead, retributivist theory must explain the attractiveness of punishment to one who is reasonably trying to secure the conditions for human flourishing *ex ante*. At that point, such a person knows he will be punished only for misconduct proscribed by law and subject to his control, but does not know whether he will be rich or poor, an offender or a victim.<sup>119</sup> It would seem

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116. *See id.* at 124.

117. *See* 5 U.S.C. § 3331 (2006) (setting forth the requirement that public officials swear to support and defend the Constitution).

118. In this, we rest upon accounts of democratic authority similar to those espoused elsewhere. *See, e.g.,* Tom Christiano, *Authority*, in *Stanford Encyclopedia of Phil.*, <http://plato.stanford.edu/archives/spr2010/entries/authority> (last updated July 2, 2004) ("To the extent that the democratic assembly's claim of authority is grounded in the public realization of the principle of equal respect, the authority would run out when the democratic assembly makes law that undermines equal respect. This establishes, at least for one conception of democratic authority, a substantive set of limits to that authority.").

119. *Cf.* Jeffrie G. Murphy, *Kant's Theory of Criminal Punishment*, in *Retribution, Justice, and Therapy: Essays in the Philosophy of Law: Essays in the Philosophy of Law* 83, 100 (Wilfrid Sellars ed., 1979) ("The criminal himself has no complaint, because he has rationally consented to

plausible that a person in this position would understand such misconduct as warranting punishment because it is a rebellion against the public order.<sup>120</sup>

Of course, prior to imposing sanctions, the state must also decide whether such sanctions are appropriate as against a particular defendant. The modern liberal democratic state serves to regulate and thereby to permit the pursuit of diverse ends by citizens within a heterogeneous society. Accordingly, what justifies the state's involvement over some alternative private ordering arrangement? Because private citizens rarely know who will violate their rights—and thus cannot decide *ex ante* upon a dispute resolution mechanism—the state has a strong coordinating claim to be an impartial authority in resolving disputes among its citizens, acceptable to them as the judge over disputes, and impartial in both imposing and enforcing sanctions against wrongdoers. Moreover, the state also establishes, through its deliberative bodies, the scope of one's protected rights and interests; that also cannot be left up to private asseveration. So, the state not only has a strong claim, but the *sole* claim to be able to do these things with some degree of legitimacy in a “social union of social unions.”<sup>121</sup> The state's involvement in both the adjudication and the sanction of wrongful misconduct is thereby warranted—so long as the judiciary is independent and capable of reviewing abuses.

Taken together, commitments to the ideals of moral responsibility, equal liberty under law, and democratic self-defense explain why certain individuals should be punished and not others, and why some people (authorized officials) and not others should do the punishing. Importantly, we can see why—without reliance upon mere intuitions or emotions of vengeance, anger, or hatred—the state must take care to punish only the guilty, and not the innocent. After all, only a convicted offender has been judged to have made claims through his criminal actions that deny his responsibility, his status as an equal under the law, and his proper role in the chain of democratic decision making. Those found guilty *should* be punished. A willful failure to punish the putatively guilty signals that the state does not care about the offender's misconduct, the rights and interests justifying the breached rule, or the integrity of the democratic decision-making structure. Such inaction wrongly conveys a lack of concern for reducing Type II (false negative) errors of non-punishment for

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or willed his own punishment. That is, those very rules which he has broken work, when they are obeyed by others, to his own advantage as citizen. He would have chosen such rules for himself and others in the original position of choice. . . .”).

120. Furthermore, to see the offense as a rebellion is not to say that all rebellions need be quashed with maximum resources. We might wish to empower private citizens to address some rebellions through tort and to empower the public to address other rebellions through criminal law and the administrative state. Importantly, the scarcity of social resources in a society committed to pursuing various projects of moral significance requires a principle of frugality in the use of retributive punishment, such that the state pursues and punishes only those acts that are necessary for securing the conditions conducive to human flourishing. *See supra* note 18 (discussing Bedau's principle of minimum invasion).

121. We borrow the phrase here. *See* John Rawls, *A Theory of Justice* 527 (1971).

those laws whose underlying values we have committed to protect through punishment.<sup>122</sup> And it is only the breach of those laws, and not simply generic moral vices such as smugness or a nasty demeanor, that alone warrant punishment under law.

Seeing the practice of punishment through a political lens helps us also see that the framework above further explains why the innocent should *not* be punished, for they have not made claims of legal superiority through their actions, nor can they plausibly be deemed to have usurped power from the decision-making structure, which they have good reason to obey *ex ante*. Knowingly punishing the innocent presents a classic false positive, or Type I error, within the criminal justice system.

Finally, the framework here explains why to under-punish or over-punish relative to comparable offenders in the same jurisdiction exposes the state to (rebuttable) claims that it favors some people and disfavors others, thereby violating basic liberal commitments to equal concern and respect under the law, and to consistent application of the law. One of the principal reasons we punish, as we just saw, was to maintain the regime of equal liberty under law. The way in which we punish must also cohere with that set of principles, ensuring that the values of consistency and even-handedness are respected to the greatest extent reasonably possible. And that means evidencing some concern for ensuring the reduction of errors involving under- and over-punishment relative to comparable offenders. These errors frequently arise from institutions permitting excessive and unreviewable discretion, rather than making officials stay within some roughly proportionate band of sanctions for the particular misconduct.<sup>123</sup> Retributive theory provides good reasons to reduce errors both of under- and over-punishment in a liberal democracy. Balancing the reduction of one sort of error against that of another obviously involves difficult, even tragic, choices, but at the very least retributive theory

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122. In a recent article, Alice Ristroph accuses retributivists of a “circularity” in their argument, though it is better termed a non sequitur. Retributivists, per Ristroph, “assert that responsible agents must be punished, and that failure to punish is failure to recognize the criminal as a responsible agent.” Alice Ristroph, *Respect and Resistance in Punishment Theory*, 97 Calif. L. Rev. 601, 627 (2009). Ristroph continues that we can recognize a person as a responsible agent without punishing him. *Id.* at n.132 (citing Markel, *Retributive Damages*, *supra* note 25, at 260–61). Of course this is correct and has never been denied. Our point is not that *failing to punish necessarily means failure to acknowledge as a responsible agent*. Instead, we note that one way of acknowledging someone’s legal responsibility is by holding him responsible, and one way of holding a person legally responsible is to punish him. This does not exclude other ways of dealing with offenders that are compatible with treating them as responsible, such as in tort cases. But at the same time, reliance upon such alternatives might mean forsaking some important goods. So while we are not committed to the thesis that punishment is the *only* way to hold someone legally responsible, we do defend the claim that punishment realizes many goods, and that other ways of holding an offender responsible (such as tort liability) may not realize these goods.

123. See generally Markel, *Against Mercy*, *supra* note 23. As explained there, the more discretion over sentencing one confers on victims (or juries, or trial judges), the greater the likelihood of creating Type I and II errors based on vindictiveness or unwarranted compassion.

clarifies the deficiencies associated with both kinds of errors. This is a point that has been largely lost on those courts and commentators who try to understand retribution strictly through a victim-vindication or social denunciation model of punishment.

#### 4. *Retributivism's Internal Limits*

Understanding retributivism as communicative action presents reasons not only for imposing punishment, but also for limiting the availability, amount, and kind of punishment. Obviously, the real world of retribution poses significant risks of error and abuse by authorities. Occurrences of errors or abuses stand at odds with the animating principles of retributive justice and the rationales for reducing Type I and II errors. Consequently, retributive punishment is commendable only when authorities take reasonable and sufficient measures to reduce substantially or eliminate those risks.<sup>124</sup> In other words, this means the state must conduct its rites of retribution with a degree of modesty, and with assurances that those risks of error and abuse are tolerably minimal.<sup>125</sup>

Additionally, embedded in our account of retributive justice is a particular requirement of communicative intent on the part of the state's punishing agents. To insist only on the offender's perception of his defeat, to the exclusion of the *potential* internalization of correct values that the confrontation encourages, would stand in tension with our first interest—affirmation that society recognizes its members as autonomous dignity-bearing agents. To realize this vision in the concrete practice of punishment, the state should carry out its denial of the offender's false value claims in a manner conducive to fostering the internalization of the values that the retributive encounter is meant to uphold.<sup>126</sup> To be clear: the retributive punishment need not *guarantee* the offender's internalization of those values, but the state ought not to take measures that, in the course of punishment, directly *preclude* the opportunity for internalization. In other words, the state must strive for a punishment that not only denies the offender's false claim of superiority, but also invites his

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124. As Professors Allen and Laudan demonstrate, however, an “innocentric” social concern eliminates only Type I errors, i.e., those false positives involving mistaken punishment. As a matter of social policy, we have very strong reasons, on retributive and non-retributive grounds, to be concerned with Type II error reduction—that is, reducing the false negatives associated with failing to punish the guilty—as well. Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 *Tex. Tech. L. Rev.* 65, 81–84 (2008); cf. Daniel S. Medwed, *Innocentrism*, 2008 *U. Ill. L. Rev.* 1549, 1558–72 (2008) (providing a qualified defense of the “innocence movement”).

125. While invoking a principle of modesty may seem theoretically vague, it actually has substantial policy implications. Elsewhere, for example, Markel has argued that a commitment to modesty entails forbearing from the death penalty or shaming punishments. See Dan Markel, *State, Be Not Proud*, *supra* note 25; Markel, *Executing Retributivism*, *supra* note 11; Markel, *Shaming Punishments*, *supra* note 25.

126. See Hampton, *Correcting Harms*, *supra* note 112.

transformation.<sup>127</sup> To borrow philosopher Robert Nozick's memorable and apt phrase, "The hope is that delivering the message will change the person so that he will realize he did wrong, then start doing things because they are right. . . ."<sup>128</sup>

### B. Five Key Contrasts

This concludes our primer on our favored version of retributive theory. In the next few pages, we will further clarify and deepen what we take to be the essential commitments of retributive theory, and in doing so, help set up our critique of the subjectivists' arguments. Our aim, then, is not merely to illustrate that the subjectivists' positions are mistaken; rather, by showing what is misguided in the emphasis on subjectivity, we hope to show the attractions of our own version of retributivism. Our retributivism focuses on the *punishment* of the offender, and not on his *suffering*—that distinction is the key to understanding our principal difference with the subjectivists. Moreover, our focus is on the legal aspect of punishment, as opposed to its possible moral or private meaning.<sup>129</sup> For us, justified retributive punishment entails a legal institution, one that exists to enforce reasonable legal rules (fairly generated and applied), and not to assess the moral goodness or badness of an offender in toto. Enough by way of preface: on to the contrasts.

#### 1. Retributivism as Distinct from Revenge

Contrary to various courts and commentators,<sup>130</sup> we can see how retributive justice, especially once accounted for in its institutional form, might usefully be contrasted with revenge—at least as an ideal type.<sup>131</sup> To begin with, what induces retributive punishment is an offense against the legal order.

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127. Markel, *Shaming Punishments*, *supra* note 25; *cf.* *Ezekiel* 33:11 ("I have no pleasure in the death of the wicked, but that the wicked turn from his way and live."). A similar point is developed in R.A. Duff, *Trials and Punishments* 27–30, 79–82 (1986).

128. See Nozick, *supra* note 26, at 377.

129. Thus, we are not concerned, say, with a parent's punishment of his or her child, or with God's punishment of sinners.

130. See Markel, *State, Be Not Proud*, *supra* note 25, at 410 n.13 (providing citations to Supreme Court cases that crudely equate retributivism with revenge, the desire to make criminals suffer, or both). See also James Fitzjames Stephen, *Liberty, Equality, Fraternity* 152 (R. J. White ed., Cambridge Univ. Press 1967) (1873) ("[T]he feeling of hatred and the desire of vengeance . . . are important elements of human nature which ought in such cases to be satisfied in a regular public and legal manner."); see also Oliver Wendell Holmes, *The Common Law* 41–42 (1881) ("If people would gratify the passion of revenge outside of the law, if the law did not help them, the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution.").

131. We qualify this discussion by reference to ideal types because there have often been cultures or social norms involving revenge that fall somewhere in between. For an illuminating and entertaining discussion of this cultural history, see William Ian Miller, *Eye for an Eye* (2006). See also Chad Flanders, *Retribution and Reform*, 70 *Md. L. Rev.* (forthcoming 2010) (distinguishing ideal accounts of retribution from the practice of retribution).

Therefore, where the law runs out, so must retribution. By contrast, revenge (and perhaps also other conceptions of what we call “comprehensive” retributivism) may address slights, injuries, insults, or nonlegal wrongs. Nozick identified five other distinctions between retribution and revenge: (a) retribution ends cycles of violence, but revenge fosters them; (b) retribution limits punishment so that it is in proportion to the wrongdoing, whereas revenge is not necessarily limited by this principle; (c) the state administers retribution impartially, while revenge is often personal; (d) retributivists seek equal application of the law, whereas the avenger is not attached to such a principle; and (e) retribution is cool and unemotional, while revenge (often) has a particular emotional tone of taking pleasure in the suffering of another.<sup>132</sup>

There are a few other important distinctions. Retributivism, on our view, always seeks to attach the punishment to the offender directly, because it is the offender who makes the claims the state seeks to reject, whereas revenge may target an offender’s relatives or allies.<sup>133</sup> Our account of retributivism, distinct from revenge or some forms of comprehensive retributivism, is uninterested in making the offender experience unvariegated suffering, that is, negative experiences as such;<sup>134</sup> it instead seeks to communicate certain ideas through the state’s power to coerce the offender.<sup>135</sup> Furthermore, accounts like the CCR are interested in, and speak to, the moral autonomy and dignity of the offender, whereas revenge may be indifferent to those qualities. This indifference accounts for the crucial fact that certain defenses—justifications and excuses—might limit retribution but fail to stem revenge. Finally, the CCR’s communicative intent requirement, discussed above, requires that the punishment not preclude the offender’s internalization of a “sense of justice” that would allow her to demonstrate her respect for the norms of moral responsibility, equal liberty under law, and democratic self-defense, whereas revenge has no such requirement. Often enough, it is sufficient for an avenger to have the target suffer or die without receiving a message of moral reconstruction. (Obviously, this is not always true as some avengers want that suffering to be known to the target as the result of his prior actions.) The CCR by contrast encourages the offender to buck up and engage in moral recon-

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132. Nozick, *supra* note 26, at 366–68.

133. This is not to deny that retributive punishment may result in third-party harms, nor to suggest that revenge is *always* targeted at third parties close to the offender. The point is narrow: retributive punishment does not aim to harm third parties, and in some cases, the kind of retribution imposed should take into account innocent third-party harms. *See, e.g.*, Dan Markel, Jennifer M. Collins & Ethan J. Leib, *Criminal Justice and the Challenge of Family Ties*, 2007 U. Ill. L. Rev. 1147 (2007) (urging greater use of time-deferred incarceration to mitigate innocent third-party harms).

134. As we note later, *see infra* Part IV, the subjectivist’s interest in suffering may make her position more closely aligned with an interest in revenge.

135. An avenger who sees his antagonist experience suffering from some other source, such as disease, may decline to follow through on the revenge, whereas the state’s retributive interest would not be satisfied merely by having an offender suffer.

struction—even if the offender were to spend the rest of his days in a prison.

The value of retributivism, on this account, is realized when the state attempts to communicate its commitment to these ideals through the use of its coercive power against the offender. In contrast to those who might be tempted to view retributivism as merely an “expressive theory” reducible to its success at projecting norms onto society, our account reveals retributivism’s intelligibility even if we focus strictly on the relationship between state and offender.<sup>136</sup>

An important aspect of this type of retributivism is the emphasis placed on the distinction between punishing the *acts* of a person and the *person* herself.<sup>137</sup> Revenge, we might think, makes no such fine distinction: it is directed not just against a particular act done by a person, but rather against the *person* herself—the person must suffer ideally through the agency of those wronged or their allies.<sup>138</sup> On our view, the appropriate punishment for a person is the appropriate punishment for the culpable *act* committed; the CCR does not take that action to represent something deeper, something corrupt, about the personhood of the offender.

Nor does the CCR necessarily aim at the *rehabilitation* of the offender for society’s future and contingent benefit. The CCR limits how much the state can punish; it cannot continue to punish an offender beyond his sentence, even if he refuses to internalize society’s message of condemnation. But the CCR also represents a key shift in emphasis. If our focus were on rehabilitating the offender, or on deterring him, we might have to take into account the kind of person he or she was in order to fix the person. If our focus is on acts, however, the offender’s offense and adjudicated criminal history and match the legislatively appropriate condemnatory sanction for that. We do not need to tailor our punishments to the bad *offender* and the unique sensibilities he or she might possess. That said, there might be a range of social self-defense mechanisms the polity should undertake to a range of persons to reduce the risk of crime, such as subsidized drug or alcohol addiction treatment or skills training. But these programs could theoretically be made available to all

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136. This notion might be enhanced for some through the thought experiment of the “secret and fair punishments.” See Markel, *Shaming Punishments*, *supra* note 25, at 2211–12. Cf. Moore, *supra* note 97, at 90.

137. For discussions of this principle, see Martha C. Nussbaum, *Hiding From Humanity: Disgust, Shame, and the Law* 233 (2004) (“Punishments may treat the act very harshly, while still expressing the sense that the person is worthy of regard and of ultimate reintegration into society.”); James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide Between Europe and America* 51 (2003) (discussing Beccaria’s view that punishment should focus on acts, not offenders); James Q. Whitman, *Making Happy Punishers*, 118 *Harv. L. Rev.* 2698, 2711 (2005) (reviewing Nussbaum, *Hiding from Humanity*, *supra*, and noting Christian and liberal roots of person/act distinction).

138. Recent debates over the propriety of “shaming punishments” have also centered on this distinction. With shaming sanctions, it is hard not to convey the impression that the whole person is tainted, corrupted, and “lower,” rather than that he has just done a bad thing, which must be condemned. See generally Markel, *Shaming Punishments*, *supra* note 25.



persons regardless of a criminal past.

## 2. *The CCR as Distinct from Utilitarianism*

A second contrast exists, one that focuses on juxtaposing the CCR with “thoroughgoing utilitarianism” in punishment. Thoroughgoing utilitarianism in punishment focuses on realizing states of affairs that are theoretically indifferent to communicating particular messages to the offender. On the conventional and perhaps overly simplistic utilitarian account, the state punishes a person merely to prevent him and others from committing crimes in the future. The “pure” utilitarian will be indifferent to whether this deterrence comes about through communicating to the offender the wrongness of his action, through holding him responsible, or through some other means. The goal of deterrence is compatible with treating the offender not as an *autonomous agent* but rather, as Hegel contended, like a dog, which responds to threats and incentives but not to reasons.<sup>139</sup> While we do not think deterrence discourse must be crudely understood as impervious to reasons for action, utilitarians are principally indifferent to choices among the various manners, or causes, of harm reduction. Thus, on the utilitarian view, one could simply administer shock treatment to competent offenders if that would better prevent them from committing crimes in the future.

By contrast, the CCR finds its intelligibility and attractiveness through its effectuation of certain intrinsic goods associated with the practice of communicating condemnation to those found guilty of offenses against the legal order: treating the offender as a responsible agent, effectuating the offender’s equal status under a democratic legal system, and most important, communicating to him that he has broken the law. In other words, the goods of democratic self-defense, moral accountability, and the maintenance of equal liberty under law are goods *intrinsic* and integral to the (correct and fair) punishment of an offender; they are not goods achieved merely by means of his punishment. To borrow Alasdair MacIntyre’s useful notion, these are goods that are internal to the practice of punishing.<sup>140</sup>

That said, because the CCR is less concerned with maximizing “just deserts” above all else than it is with developing the claim for retributive punishment’s internal intelligibility, it is better able than many prior retributivist accounts to pay heed to the important costs and consequences of institutions of retributive justice.<sup>141</sup> Furthermore, the CCR recognizes that punishing offenders may realize many goods,<sup>142</sup> For one thing, there are hard

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139. This may be unfair to dogs. Georg W.F. Hegel, *Philosophy of Right* 71 (1821).

140. Alasdair MacIntyre, *After Virtue* 188–89 (2d ed., U. Notre Dame Press 1984).

141. See Cahill, *supra* note 8, at 834.

142. See Friedrich Nietzsche, *On the Genealogy of Morals* 80–81 (Walter Kaufmann ed., Walter Kaufmann & R.J. Hollingdale trans., Random House 1989) (1887) (discussing the multitude of purposes punishment can serve).

choices within the criminal justice system: how much to spend on policing, on prisons, on the court system, and so forth; and of course more hard choices arise between criminal justice and other moral priorities, such as health care or national security. There are choices within the criminal justice system: how much to spend on policing, on prisons, on the court system, and so forth; and of course between criminal justice and other moral priorities, such as health care or national security. No comprehensive theory of punishment will be, or should be, ignorant of the real-world trade-offs that our democratic institutions inevitably have to make.<sup>143</sup> Punishment realizes many goods—while also of course causing some bads—but these goods (accountability, equality, etc.) are not always the most important goods that a society will seek to ensure. In other words, as Professor Mitch Berman has appropriately noted, the justification an account like the CCR provides is a “tailored” justification to the “demand” claim that punishment is an intentionally imposed sanction that requires justification.<sup>144</sup> It need not and ought not be relied upon to justify the unsound proposition that every last unit of scarce social resources must be applied to the pursuit of retributive justice.

### 3. *The CCR as Distinct from a Retributivism of Balancing Pain and Suffering*

Third, although the CCR fits snugly within the family of retributive theories, it has disagreements with various elders within that larger family. As alluded to earlier, some older versions of retributive punishment directed attention at the causing of suffering in the offender—in some cases, emphasizing that such inflictions of suffering should follow *lex talionis* and thus be equal to the pain and suffering he has caused or threatened against his victim.<sup>145</sup> Those accounts, however, have often stumbled on explaining *why* the offender deserves pain and suffering.<sup>146</sup> Hand-waving references to intuition or “fittingness” were often the only support that the pain and suffering version of retribution could muster.<sup>147</sup> Thus, relying on cultural leitmotifs dating back to the Bible, it somehow made cosmic sense that the wicked should suffer and that the good be made happy.<sup>148</sup> Even some modern retributivists, as Kolber is keen

143. This point has been trenchantly emphasized by Cahill, *supra* note 8, at 820.

144. Berman, *supra* note 19, at 278–84.

145. See sources cited *supra* note 51.

146. See Jacob Adler, *The Urgings of Conscience: A Theory of Punishment* 80 (1991) (discounting the view that punishment’s defining characteristic is pain); see generally Ted Honderich, *Punishment: The Supposed Justifications Revisited* 28 (1969) (noting objection that merely saying punishment is fitting or deserved is not to give anything “that *could* count as a reason for punishment”).

147. Cf. Berman, *Punishment and Justification*, *supra* note 19, at 270 (rehearsing the objection that “the proposition that wrongdoers deserve to suffer on account of their blameworthy wrongdoing is mere ipse dixit,” but concluding that “this charge does not stick”).

148. See, e.g., W.D. Ross, *The Right and the Good* 57–58 (1930) (“Most intuitionists would take the view that there is a fundamental and underivative duty to reward the virtuous and to punish the vicious.”).

to point out, use the language of inflicting pain and suffering on offenders.<sup>149</sup>

Regardless of intellectual genealogy, it is worth noting that “pain and suffering” accounts of retribution made some progress in specifying the appropriate form retribution should take. Some of them helpfully distinguished retribution from revenge, because it would only be fitting that the offender should suffer the *same* amount of pain as he inflicted, or on some views, threatened, and no more. Even more usefully, these theories emphasized the ways in which causing harm or suffering need not be a bad in itself; it could be that suffering that responded to the harm offenders caused was a good that could be justified without reference to other goods. Pain and suffering were not, on this view, bad per se; they depended on the uses to which they were put.<sup>150</sup> As BBM note, this is not so for the utilitarian: suffering is a bad, and “a significant check on the degree of punishment is the cost associated with the punishment itself.”<sup>151</sup> Those who saw punishment as fitting and even *good* obviously depart from this point of view.

More recent developments in retributive theory illustrated that the goal was not to cause suffering for its own sake, but rather to communicate condemnation to the offender, and, simultaneously, to express society’s shared disapproval. Where the older versions obscurely referred to the fittingness of retributive punishment, the more modern accounts of state retribution, including the CCR, note the intrinsic goods that retributive punishment may secure under the right conditions. In these modern versions the goal is not to cause the offender unvariegated suffering, but to communicate to the offender the wrongness of his action, using particular deprivations to signal that condemnation. In other words, these versions treat the offender as an agent who can understand the point of his punishment, not merely as a body that can suffer pain in return for the pain he has caused or threatened. Punishment is a good, then, not because it is fitting in some cosmic sense that pains be balanced out between victim and offender, but because punishing the offender treats him as an agent, equal to the other members of society, and communicates the polity’s disapproval of his actions *to* him. Consistent with this reduced focus on the offender’s suffering as the goal was a corresponding defense of *objective liberty deprivations*, and not physical pain per se, as the means of communication.<sup>152</sup>

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149. See *supra* note 51; see also Douglas Husak, *Holistic Retributivism*, 88 Calif. L. Rev. 991, 994 n.15 (2000) (“I am not confident that what wrongdoers deserve is *punishment*. What wrongdoers deserve is to suffer some hardship or deprivation for their wrongdoing that may or may not be achieved *by* punishment.”).

150. See the discussion in Ross, *supra* note 148, at 56. See also Mike Jay, *The Day Pain Died*, Bos. Globe, June 7, 2009 (Ideas), at 1 (explaining the nineteenth-century view that expressed skepticism toward the introduction of anesthesia because the experience of pain was thought critical to a life well-lived).

151. BBM, *supra* note 3, at 1056.

152. See, e.g., Morris, *supra* note 54; A.J. Skillen, *How to Say Things with Walls*, 55 Phil.

The CCR, we believe, continues in this spirit. How much someone suffers as a result of a punishment may vary. But what retributivists ought to care about foremost is the imposition of the punishment as a communication directed at the offender, not the offender's idiosyncratic and variable reaction to the coercive condemnatory deprivation. This means that, in the aggregate, the state should ensure that punishments are understood as condemnatory. Doing so requires some understanding of human psychology, but it does not require calibrating punishments to what each individual may suffer because, for reasons elaborated in Part IV, that metric would actually be offensive to what we take as the animating ideals of retributive justice properly understood.

#### 4. *The CCR as Political, Not Comprehensive*

The fourth contrast we offer is that the CCR's version of retributive justice is political, not comprehensive. We mean here to invoke John Rawls' famous distinction between a political conception and a comprehensive (or metaphysical) conception of justice.<sup>153</sup> Political values, according to Rawls, are those that are universally, or at least very widely, shared in a liberal political culture.<sup>154</sup> Comprehensive values, by comparison, are those that are tied to a "controversial" metaphysical system and therefore could not be the basis by which the state legitimately exercises coercive power over a heterogeneous population.<sup>155</sup>

For example, the idea that the wicked should suffer because they are wicked or have what Kant called "inner viciousness" is a metaphysical conception of "divine" or "poetic" justice.<sup>156</sup> This is a comprehensive conception of retributive justice that is predicated on a desert commitment that proves to be a controversial ideal. To our mind, it doubtless could not be the political basis of the institution of punishment, if only because so many people might disagree with what counts as wickedness, or with the measure of suffering, or even whether the wicked should endure suffering or therapy.

Moreover, though there is a rich philosophical literature about the nature of moral desert and its relationship to punishment,<sup>157</sup> our sense is that we need

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509, 521–22 (1980); Simons, *supra* note 21.

153. See generally John Rawls, *Political Liberalism* 9–15 (1993). The point here is not to fully defend Rawls's distinction between the political and the metaphysical or comprehensive, but rather simply make the more modest point that CCR is not "comprehensive," something which may help to distinguish it from other, more metaphysically fraught versions of retributivism. This is something we see as an advantage, but others may not.

154. See *id.* at 155–56.

155. See *id.* at 154–56.

156. E.g., Kant, *supra* note 43, at 102–03 ("[I]t is possible for punishment to be equal in accordance with the strict Law of retribution only if the judge pronounces the death sentence. This is clear because only in this way will the death sentence be pronounced on all criminals in proportion to their inner viciousness . . .").

157. See, e.g., Russ Shafer-Landau, *Retributivism and Desert*, 81 *Pac. Phil. Q.* 189, 189 n.1 (2000) (providing citations to the relevant philosophical literature); Owen McLeod, *Desert*, in

to look elsewhere to understand why punishment against legal wrongdoers is justified in liberal democracies. Someone who is industrious, wise, and kind may *deserve* plaudits, after all, but liberals (among others) tend not to believe that it is the state's responsibility to bestow those plaudits as a matter of social programming. Conversely, one might be miserly and indolent, but one's inner viciousness in this regard is generally not a compelling reason for the state to condemn that person through punishment. A person's moral desert, whether negative or positive, is generally insufficient by itself to motivate state action in a liberal democracy.

Recall the values at the core of the CCR: accountability for unlawful choices, equal liberty under the law, and commitment to protecting the channels of democratic decision making in the impartial administration of justice. All of these are properly political values and can be the basis of an overlapping consensus among diverse groups of citizens of a liberal democracy.<sup>158</sup> At its heart, the CCR does not rely on a controversial and comprehensive notion of global just deserts; rather, it insists that retributive punishment against those who offend against the liberal legal order is internally intelligible and attractive in a *prima facie* sense. The state holds people responsible through punishment for what they do, but only for those actions that constitute offenses against reasonably enacted laws. All of this stays (much more) on the surface, philosophically speaking, in Rawls's useful phrase, and avoids the metaphysical puzzles associated with linking political institutions too closely with any controversial comprehensive notion of desert.<sup>159</sup>

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Stanford Encyclopedia of Phil., <http://plato.stanford.edu/entries/desert> (last updated Nov 12, 2008).

158. These political values are, of course, also moral values. But they are moral values that are thought to be implicit in the public political culture of a democracy. In this respect, we update the familiar distinction between moral retributivism and legal retributivism so that it now signifies the difference between political versus comprehensive forms of retributivism.

159. See John Rawls, *Justice as Fairness: Political not Metaphysical*, 14 Phil. & Pub. Aff. 223, 230 (1985) (“[J]ustice as fairness deliberately stays on the surface, philosophically speaking.”). Rawls is quite clear even in his earlier work that such metaphysical ideals of desert are not the appropriate basis for exercising the coercive power of the state. John Rawls, *A Theory of Justice* 273 (1971) (“There is a tendency for common sense to suppose that income and wealth, and the good things in life generally, should be distributed according to moral desert. Justice is happiness according to virtue. . . . Now justice as fairness rejects this conception. . . . A just scheme . . . answers to what men are entitled to; it satisfies their legitimate expectations as founded upon social institutions. But what they are entitled to is not proportional to nor dependent upon their intrinsic worth.”).

The account in the text, albeit brief, stands as a short summary of our position regarding the debate between Professors Jean Hampton and Jeffrie Murphy, among others, over the precise character of punishment in a liberal democracy. It also points to a compromise of sorts for persons torn between perfectionist and anti-perfectionist liberal worldviews. Agreeing with Murphy, we see punishment as needing to have a political, and not a comprehensive, justification and shape. Jeffrie G. Murphy, *Retributivism, Moral Education, and the Liberal State*, 4 Crim. Just. Ethics 3, 3–11 (1985). Agreeing with Hampton, we see this account as unproblematically retributive—our emphasis remains, after all, on the core claim that punishment for legal offenses is internally intelligible assuming that the content and application of the laws is suitably liberal and fairly

### 5. *Retributivism as a Theory of Justification, Not Primarily of Sentencing*

There is a further distinction that is largely overlooked in the subjectivists' descriptions and critique of retributive theories. This distinction involves their failure to distinguish two questions, and thus their failure to ask how retributivists might answer them separately. One question is: What might justify the state's creation of legal institutions of punishment? This is what we call the "justification" question. The second question is: Once the state has determined someone's liability for a crime, how much and what kind of punishment should the state mete out in response? This is the "sentencing" question. That a retributivist theorist gives a retributive (or, specifically, communicative) answer to the justification question does not require her to offer a *precise* answer for each sentencing question. Instead, she can simply say that the precise answer to a sentencing question should not be inconsistent with the values underlying her answer to the justification question. Thus retributivists may offer a range of permissible modes and amounts of punishment without committing to one specific pre-political or moral notion of the correct punishment for each specific offense.<sup>160</sup>

Importantly, the punishment imposed reflects a *choice of the public* exercised through the state's democratic institutions, implemented through law, and most reasonably done in a way that resonates with rule of law values that facilitate the evenhanded treatment of similarly situated offenders and offenses. That doesn't mean there ought not be judicially enforced limits that reflect concerns about cruelty, incompetence, or gross disproportionality, but it does mean that the discussions about these sentencing issues should be addressed with more modesty. Moreover, because of the concerns of error and abuse

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enforced. But *pace* Hampton, retributivists need not be thoroughgoing perfectionists and need not abandon their commitment to a Rawlsian-style political liberalism that emphasizes reasons for punishment that are grounded in the state's legal grievances against offenders who flout the reasonable legal norms established and enforced fairly by the polity. *See generally* Jean Hampton, *How You Can Be Both a Liberal and a Retributivist: Comments on Legal Moralism and Liberalism* by Jeffrie Murphy, 37 Ariz. L. Rev. 105 (1995).

Indeed, at least one of us would say that given the risks, costs, and consequences associated with error and abuse in the criminal justice system, it might be permissible or desirable to promote a greater intolerance of perfectionism within the criminal justice system while giving the state more democratic (or perfectionist) flexibility outside the criminal justice system. By this logic, criminal law and enforcement (including sentencing) must hew closer to the core liberal values of individual liberty and equality under the law (e.g., not discriminating on the basis of family status or religious affiliation) than, say, tax law or social policy, which might be used to create a civic culture that promotes certain values (related to, for example, patriotism, volunteerism). An illustration of this perspective can be viewed in Dan Markel, Jennifer M. Collins & Ethan J. Leib, *Privilege or Punish: Criminal Justice and the Challenge of Family Ties* (2009) (taking the view that use of family status in the criminal justice system should be viewed with greater caution than in other areas of social policy).

160. Indeed this should help dislodge any quick sense of a natural relationship between retributive justice and *lex talionis*. We are not committed at all to *lex talionis* but it is worth noting how capacious even the *lex talionis* approach can be. *See generally* Jeremy Waldron, *Lex Talionis*, 34 Ariz. L. Rev. 25 (1992).

adverted to earlier, the state should itself punish with modes of punishment that are both consistent with the underlying values of the CCR and that reflect a modest understanding of the state's power, for example, by not punishing in a way that renders impossible the state's ability to apologize to the offender when the offender was mistakenly punished. But a retributive perspective should give relatively little consideration to the preferences, experiences, and capacities of the offender vis-à-vis her punishment (regardless of hedonic adaptation skills) because, after all, the nature of punishment is *coercive*. No doubt, most offenders would choose no punishment if they could. They might alternatively be willing to have two pinkies cut off to avoid having to spend a year in prison away from their family. Such preferences neither necessitate that the state must punish people by cutting off fingers nor signify that such punishments are inherently less cruel than incarceration. The polity has to make its decisions on how to punish based on the values and considerations the public's representatives deem vitally important,<sup>161</sup> not on the tastes, preferences, and individual baselines of the offenders who come into the system.<sup>162</sup>

Pure theorizing might lead to the abstract question of "what is the proper punishment for X crime?" Proportionality is often invoked and yields the bland assertion that the punishment should "fit" the crime. Indeed, the answer is often indeterminate without greater context. Some might even suggest it is an empty principle. To our mind, we should not confuse indeterminateness with emptiness, as the concern of "emptiness" is misleading in two respects.

First, of course, retributive theory has something to say about the question of sentencing. At the lower end of the scale for any offense, retributivists may plainly criticize punishments that do not adequately and sufficiently communicate and express any condemnation, such as the ticker-tape parade example discussed earlier. Such punishments would be retributively inadequate because they are disproportionately lenient, or not at all punitive. So too would punishments that communicated and expressed too much condemnation in proportion to the crime. To be sure, calibration on *this* end is more difficult: it is relatively easy to understand that a parade is too little punishment to adequately communicate societal disapproval to an offender, but how much is too much condemnation for a given crime? Is our only benchmark that the death penalty for parking violations is objectively disproportionate?

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161. Anthony Duff makes a related point about punishment being concerned with crimes as primarily wrongs implicating public concern: "What matters about crimes is not just their seriousness but their character as public wrongs. What matters about punishments is not just their severity but their character as responses to such wrongs." R.A. Duff, *Punishment, Communication, and Community* 139 (2001).

162. As we argue below in Part IV, there may not be a meaningful difference between allowing offenders to "choose" their punishment and tailoring punishments to meet their various subjective tastes.

Such questions bedevil proportionality analysis both theoretically and as a matter of constitutional praxis.<sup>163</sup> Moreover, it seems that adjusting punishments on the high end is the more practical problem, given the practical “hydraulics” of punishment: sentences, over time, tend to get longer rather than shorter.<sup>164</sup> Suffice to say here that in principle, retributivism can lay out the outer limits for punishment, both on the high and the low ends, in accordance with its interest in properly communicating condemnation to the offender.<sup>165</sup> But beyond this, a retributive conception of proportionality need not have much in the way of precision to say about the particular details of punishment’s implementation, consistent with its greater concern with justifying the institution of punishment within and by the liberal state.<sup>166</sup> That principles of proportionality cannot give us a certain answer in every case does not mean we can say that proportionality (or retributive justice) is never able to give answers about what is too little or too much. But the better way to approach this substantive question is one that squarely appeals to ideas of democratic authority limited by liberal constraints.

Indeed, the question of whether proportionality is empty, we are tempted to answer in a Bickelian vein: “no answer is what the wrong question begets.”<sup>167</sup> In other words, the main problem in determining proportionality is

163. For some initial thoughts on the relationship between the CCR and the Eighth Amendment; however, see Markel, *Executing Retributivism*, *supra* note 11, at 1205–21.

164. See Chad Flanders, *Shame and the Meanings of Punishment*, 54 Clev. St. L. Rev. 609, 631 (2006) (“Once there is a certain baseline understanding as to what is an appropriate punishment, citizens work off that baseline and view any punishments below the baseline as condoning the crime. Furthermore, when a particularly egregious crime occurs and citizens believe it deserves a harsh punishment, they will again consult the baseline and demand that the crime be punished in a way that is greater than the typical sentence. Over time the baseline naturally creeps upward, as more people demand that a particular crime be punished more severely than others. Eventually, the baseline gets redefined, so that the next time an egregious crime is committed, citizens will seek a punishment that exceeds the new baseline.”); *but cf.* Darryl K. Brown, *Democracy and Decriminalization*, 86 Tex. L. Rev. 223, 248 (2007) (“There appears to be little other empirical work examining legislatures’ action on criminal law bills, but these data suggest legislatures routinely decline to enact proposals that fit the stereotype of politically irresistible proposals for expanded liability and harsher sentences.”).

165. Accordingly, banded or limiting retributivism is a possible structure for establishing sentencing floors and ceilings with respect to punishing one person. But once we’re in the business of meting out condign punishment across persons, the legislature must protect the regime of equal liberty under law. And to do that well, some use of structured sentencing that helps establish both objective and comparative proportionality is important also. To be clear, we do think comparative proportionality is normatively derivative of objective proportionality, but we are realistic enough to see that getting agreement on objective proportionality (even banded or limiting objective proportionality) is difficult in pluralistic democracies and so there will still have to be substantial attention paid to the issues of comparative proportionality too—to help ensure that similarly situated offenders are treated even-handedly by the state.

166. Cf. Gabriel J. Chin, *Unjustified: The Practical Irrelevance of the Justification/Excuse Distinction*, 43 U. Mich. J. L. Reform 79, 86 (2009) (speaking of defenses, “at a certain level of specificity, the force of the theory stops dictating details, which can and must be supplied by courts or legislatures”).

167. See Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the*



not to figure out what the absolute “right” punishments are for each crime, but to figure out who is in the most legitimate position to determine the sentence based on a range of considerations. In this respect, there is a good argument that legislatures in conjunction with accountable commissions may be better positioned to reach these decisions than an array of individual and unconstrained judges or parole commissions, whose untrammelled discretion often creates risks of random, arbitrary, or discriminatory punishment choices. So a better answer may be to determine the right institutions to fix proportionality. As John Finnis has emphasized, punishment presents a good example of “the need for *determinatio*, a process of choosing freely from a range of reasonable options none of which is simply rationally superior to the others.” The problem with discretion is not in how to eliminate it entirely (for in this case it is ineliminable), but in finding out *who* it is in the best position to wield it.<sup>168</sup> Our sense is that these kinds of challenges are more fairly and often better worked out (subject to outer and somewhat deferential constitutional limits) through democratic authorities, a point we will return to more in Part IV.

### III

#### ISLANDS OF AGREEMENT

In this Part, we identify the islands of agreement we have with the subjectivists. We begin in Part III.A with an examination of the significance of offender competence. We then turn, in Part III.B, to how the state must select measures of punishment that adequately register with the public’s *ex ante* predictions of their aversion to certain hard treatment while at the same time avoid crossing a threshold of cruelty that violates both individuals’ and the polity’s dignity. While we are happy to find areas of agreement with our subjectivist colleagues, we think these matters do not implicate any need to dramatically overhaul our systems of punishment so that each punishment is calibrated dynamically to the evolving idiosyncratic experiences, capacities, or baselines of offenders. Indeed, for reasons we adverted to briefly in Part II and that we expand upon in Part IV, we think there are compelling arguments against doing so.

#### A. Competence

We believe that, in order for punishment to be legitimate *qua* retributive punishment, the offender must be competent throughout the crime and punishment cycle. Initially, the offender must have been morally and cognitively competent at the time of the crime.<sup>169</sup> Once the prosecution has

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Bar of Politics 103 (2d ed. 1986).

168. See Flanders, *supra* note 131.

169. In other words, the offender had to have been in a position where he did understand (or could have understood, based on conditions within his control) his actions and their moral risks vis-à-vis unlawfulness.

committed itself to accusing the offender, he must rationally understand that the state is accusing him of a certain crime and thus stand in a position to aid in his defense against these accusations. Finally, upon conviction, the offender must rationally understand that he is being subjected to a coercive condemnatory deprivation *for* his offense against the public.<sup>170</sup>

In nearly all cases, the societal condemnatory stigma associated with conviction and prison is sufficient to create awareness of condemnation, *even if* the prisoner would prefer to be incarcerated. This communication of condemnation is why the poor man in the O. Henry story discussed by Kolber *is being* punished.<sup>171</sup> He may desire a warm bed but he does not desire (or should not, if he is competent) the societal disapproval that comes with it. If the criminal cannot rationally understand that the state is trying to communicate condemnation (perhaps because he is mentally incompetent), then there are actually strong grounds for thinking that the retributive punishment is unwarranted, although perhaps some form of coercive *treatment* is warranted, *without* condemnation.<sup>172</sup> When retributive punishment serves, at bottom, as a communicative enterprise, it thus entails a critique of anyone applying sanctions against those who cannot understand that they are facing sanction. The punishment of someone who, because of a mental disability, does not understand that he is being punished provides a real-world analogue to Kolber's "unknowing confinee" who is unaware that he is, in fact, in prison.<sup>173</sup>

Because, on our view, retributive punishment involves a socio-legal practice of coercive sanctions through which the state communicates its condemnation of the offender's misconduct, it is important that the offender understand he is being condemned. If a punishment were a message of condemnation delivered in a language the offender could not understand, the punishment would lack any internal intelligibility because the offender literally *could not make sense* of the nattering directed at him. This is not to say that for the retribution to have internal intelligibility the offender must *accept* its message; rather, he must be competent to understand both that he is being spoken to and that the state expects him to understand what is being said or done to him and why.

So at least with respect to post-conviction competence, we think retributive justice institutions must consider the actual subjective experiences of offenders. But few retributivists today would deny that proposition (or so we

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170. These questions trigger matters of appropriate procedure that we leave for another day, and that other scholars have begun to contemplate. *See, e.g.,* Wilkins, *supra* note 26.

171. O. Henry, *The Cop and the Anthem*, in *The Ransom of Red Chief and Other O. Henry Stories for Boys* 143 (Franklin J. Mathiews ed., 1928); Kolber, *Subjective Experience*, *supra* note 3, at 205. In the story, an impoverished man positively sought out incarceration as punishment because at least it would provide him with a warm meal and a place to stay for the night.

172. *See* Duff, *supra* note 127, at 27; Nozick, *supra* note 26.

173. Kolber, *Subjective Experience*, *supra* note 3, at 204.

think).<sup>174</sup> And it is certainly not a neglected point; even the Supreme Court has paid some attention to it, most recently in the context of executing the “presently incompetent.”<sup>175</sup>

We emphasize, however, that this concession to the importance of ex post subjective experience is slight. To justify imposing punishment, retributivism requires that an offender possess enough competence to understand rationally that he is being punished on account of adjudicated legal wrongdoing, and that it is not just some random exercise of coercion or deprivation. Kolber recognizes that retributivists think competence and awareness are significant.<sup>176</sup> But our shared recognition of a competence requirement does not extend to the precise calibration that Kolber thinks retributivists should necessarily embrace. Retributivism treats competence as a threshold condition for whether to *consider* punishment, not as a factor governing the *nature* of the punishment.

### *B. At the Extremes: Ensuring Adequacy and Avoiding Cruelty*

There are two other aspects of human experience that also merit retributivists’ consideration. As we argue below, retributive punishment must exhibit sensitivity to human experience by reference to, first, the legislative choice regarding the adequacy (or floor) of punishment, and second, the cruelty or excessiveness (or ceiling) of punishment.

#### *1. Ensuring Adequacy*

On our view, legislatures must authorize sentencing options.<sup>177</sup> To achieve the goal of ensuring adequacy in punishment, legislatures have incentives to act with an eye toward the reasonable public perception of what constitutes adequate condemnatory treatment. There is not much in it for them to bestow rewards instead of punishments. To be sure, awareness of hedonic adaptation or expected subjective preference patterns of the public at large may conceivably

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174. It is possible that Garvey, *supra* note 103, was speaking for some retributivists, but we cannot discern from the context who, among any contemporary retributive theorists, would deny the significance of present competence as a prerequisite for the legitimacy of retributive punishment. Various contemporary retributive theorists recognize that in fact retributive justice is not solely “backward-looking.” Rather, as John Finnis, and Gerard Bradley have noted, *supra* note 113, institutions of retributive justice play an important role in maintaining regimes of equal liberty *over time* in states.

175. *Panetti v. Quarterman*, 551 U.S. 930, 973 (2007) (Thomas, J., dissenting). Of course, competence is not an all-or-nothing feature of people. There will be gray areas and tough cases. But we feel it is within the competence of the legislature and the courts, as assisted by experts in human psychology, to draw these lines—to decide who is fit for the communication punishment provides and who is not.

176. Kolber, *Comparative Nature*, *supra* note 3, at 1596.

177. More specifically, the nature of the punishment for a particular offense should also be determined *ex ante* through legislative deliberation or ratification of expert-agency decision making. There should be opportunity for legislatures or sentencing commissions to revise punishment levels or methods if a previously unconsidered factor is now at stake.

inform the ex ante selection of sentencing ranges or penal techniques approved by legislatures. But our agreement with subjectivists about the way in which human psychology is relevant to determining what counts as an objective condemnatory deprivation (or sanction more generally) does not require ex post narrow tailoring of punishment to particular offenders based on their capacities, preferences, or experiences. In other words, the state should not forbear from punishing masochists, who might take a perverse pleasure in receiving punishment, nor should the state worry (for competent offenders) that prison for poor people or soldiers will somehow be less of an infringement vis-à-vis the previous baselines of the offender, contrary to Kolber's more recent paper.<sup>178</sup> For example, legislatures are able to use imprisonment, and the associated deprivation of certain freedoms, as a clear signal in this society that clearly communicates disapproval. The longer that period of deprivation, the more permissible the inference that such conduct is more egregious. If it turns out a particular offender does not understand the punishment as something to avoid, then perhaps the person is not competent for punishment and might warrant a different social response.<sup>179</sup> In this respect, we as a society make a permissible and legitimate assumption about projected human experience based on social norms and social meanings.

If subjectivists limited their claims only to the anodyne observation that criminal sentencing should consider how people as a general matter might react to a given punishment, then we would agree—to that extent, human experience matters, in terms of figuring out what counts as an objective condemnatory deprivation. It would be an agreeable observation, but, to our mind, obviously so, and no retributivist should deny that in the first instance. As we suggested before, our social world would be unlikely to register a ticker-tape parade as the kind of hard treatment that would adequately or effectively communicate condemnation to the offender and express condemnation to the public of the offender's misconduct. But to predict that prison would signal condemnation is a banal observation: it shows only that prison is an adequate vehicle for communicating society's condemnation for certain offenses; it does so because for a period, it objectively strips offenders of certain liberties otherwise available to non-offenders. While the state may adjust the level or duration of condemnation based on factors such as the severity of the offense or the offender's criminal history, it does not follow that an individual's idiosyncratic reaction to or experience of punishment should be relevant.

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178. See Kolber, *Comparative Nature*, *supra* note 3, discussed *supra* Part I.A.2. Recall that, by Kolber's logic, placing Wealthy Offender in the same size cell as Poor Offender constitutes a harsher punishment for Wealthy than it does for Poor. See *id.* at 1566 ("It is the amount by which we change offenders' circumstances that determines the severity of their sentences.").

179. Of course, if the offender is not a fit interlocutor for punishment, that would not preclude some other form of social self-defense mechanism or rehabilitative experience.

More importantly, if the subjectivists' claim amounted only to urging retributivists to do nothing more than design sentences in accordance with social norms and social meaning about what counts as punitive, they are not telling us anything new or especially interesting. Indeed, the idea that punishment ranges or modes should draw on generalizations informed by human psychology would not even really be about subjectivity, which varies ex post person to person. Rather, the claim would be about effectively matching policy to social conventions and social meaning. After all, if people understand that prison or fines communicate condemnation for their adjudicated offense, then those penological tools are registering in a relatively invariant way across competent persons.

Thus, while we agree that penal techniques must be scrutinized for their capacity to condemn adequately and be scaled to, among other things, offense severity, we reject the suggestion that this is somehow relevantly or interestingly subjective in nature. In other words, attention to penal technique does not mean the state must tailor punitive responses to each offender's unique psychological profile so that the "right amount" of harm, suffering, or negative experience is endured by the offender.

Perhaps a different way to understand our position is this: the state-imposed deprivation must register ex ante and ex post as a condemnatory measure, but if the defendant finds that as a result of or even during his punishment he is better able to live a more virtuous or happy life, we would still not view the retributive punishment as a failure. We do not *begrudge* the joy an offender might experience from falling in love in prison or the convenience of prison food or the time to write poetry and get in better shape. What matters is the offender's *understanding* that he is being coerced to endure some hard sanction not otherwise imposed on innocent persons; his hedonic outlook is, more or less, his own business.

To be sure, this does not mean the adequacy of existing punishment cannot be debated in some contexts. Fines provide a good example. States sometimes use fines in either static or dynamic relation to an offender's wealth. If they are static, the state charges, for example, \$200 for each infraction. As many have observed, the problem with a static determination is that for the wealthy, fines, especially standing alone, appear to be no more than a luxury tax on the prohibited activity.<sup>180</sup> Thus many jurisdictions around the world employ dynamic wealth- or income-sensitive fines such as day fines, which strip an offender of a certain number of days' worth of income based on the severity of the underlying offense.<sup>181</sup> Such sensitivity to wealth or income helps

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180. Both Professor Kolber and one of his critics, Professor Simons, agree that more gradation in fines is a desideratum. See Kolber, *Subjective Experience*, *supra* note 3, at 226; Simons, *supra* note 21, at n.11.

181. Such jurisdictions are typically found in Western Europe. U.S. Dept. of Justice Bureau of Justice Assistance, *How to Use Structured Fines (Day Fines) as an Intermediate Sanction* 3

the state better achieve its commitment to making the punishment serve as a condemnation register rather than as a luxury tax.<sup>182</sup> Notice, however, that even with the use of wealth- or income-contingent fines, the state need not inquire into the offender's uniquely subjective utility curve regarding the value of money. Rather, even dynamic fine setting can be based on ex ante rule-based distributions of retributive punishment, making them objective across persons.

## 2. Avoiding Cruel and Excessive Punishment

A more difficult issue concerns the set of retributivist limits upon how and how much a person can be punished ex post. We will discuss a few such limits.

Suppose first that an offender was so physically abused in prison by other inmates that he *became* incapable of understanding his punishment as a punishment. To punish him in this state would certainly be an impermissible punishment under the version of retribution we have offered in Part II. If a person's mental condition—no matter if he has been convicted and tried—is such that it prevents the realization of those goods we believe the practice of punishment is *for*—holding a person accountable, communicating to him the values of the democratic polity, etc.—then punishment of that person cannot be justified. Indeed this point has led one of us to argue elsewhere that the death penalty is a prohibited punishment for this reason as well: once a person is dead, he can no longer internalize any values, thus defeating the communicative hope underlying the retributive punishment.<sup>183</sup>

There are also punishments that violate the dignity of the offender. CCR adopts limitations on these punishments, partly by way of its commitment to the dignity of the individual.<sup>184</sup> Indeed, we are concerned not only with the offender's dignity, but also our own. As Jeffrie Murphy pointedly observes in the context of torture,

[s]ending painful voltage through a man's testicles to which electrodes have been attached, or boiling him in oil . . . are not *human* ways of relating to another person. [The offender] could not be expected to understand this while it goes on, have a view about it, enter into discourse about it, or conduct any other characteristically human

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(1996), available at <http://www.ncjrs.gov/pdffiles/156242.pdf>.

182. See 4 William Blackstone, *Commentaries on the Laws of England* 377 (1807) ("The *quantum*, in particular, of pecuniary fines neither can, nor ought to be ascertained by any invariable law. The value of money itself changes from a thousand causes; and, at all events, what is ruin to one man's fortune, may be matter of indifference to another's."); Ronen Perry, *The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory*, 73 *Tenn. L. Rev.* 177, 188 n.57 (2006) ("Imposing a \$1,000 fine on a hard working proletarian may be enough as punishment for accidentally injuring the property of another, but it will not be enough if the injurer is a very wealthy man who will not feel the loss of \$1,000.").

183. See Markel, *Executing Retributivism*, *supra* note 11, at 1206–12; Markel, *State, Be Not Proud*, *supra* note 25, at 460–62.

184. Markel, *State, Be Not Proud*, *supra* note 25, at 464–68. We recognize that one might value dignity of persons independent of one's retributive commitments.

activities during the process—a process whose very point is to reduce him to a terrified, defecating, urinating, screaming animal.<sup>185</sup>

Using punishments like torture that reduce a person to “a terrified, defecating, urinating, screaming animal” eliminates the possibility that punishment will comport with the respect for dignity qua autonomous personhood that animates—at least in part—retributive punishment. Thus, we believe that subjective experience matters in that individual “breaking points” might vary; the point of punishment is not, we think, to break a person. To literally or psychologically break or destroy a person under the aegis of retributive punishment would violate the offender’s dignity, and, in a democracy, our own.<sup>186</sup>

To say that institutions must be mindful of the variance associated with “breaking” individuals is a concession to subjectivity, but a minor one. That is because the concern for breaking a person operates as a limit on what the state may do, but this emphasis is different from one that focuses on what the offender may or must suffer. By contrast, the subjectivists think calibration based on peculiar experiences or capacity for adaptation is appropriate *all the way down, from start to finish*. Kolber, for instance, does not merely want to test whether people can understand their punishment—the competency threshold—or whether they are undergoing sufficient or cruel punishment. He thinks retributivists must calibrate each punishment for each offender based on his particular psychological makeup. BBM, similarly, do not offer any principled argument for why punishment should not vary based on individuals’ varying capacities for hedonic adaptation. And Bayern, like the others, thinks adjustments in punishment for the offender’s private burdens or lost benefits are important even when those burdens occurred outside of state-sanctioned punishment.

These peculiar adjustments are not only unnecessary from the standpoint of retributive justice but indeed also antithetical to that vision of the moral self in political society. Retributivism as we understand it accepts and tolerates the fact that prison will be more or less psychologically taxing for different offenders. The subjectivists embrace this point, but think retributivists should recraft punishment so that no one suffers more than anyone else who has committed the same crime (or shares the same level of blameworthiness). We think this view is misguided for reasons we sketch out in the next Part.

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185. Jeffrie G. Murphy, *Cruel and Unusual Punishments, in* Retribution, Justice, and Therapy: Essays in the Philosophy of Law 223, 233 (1979). Murphy’s concern was the violation of the dignity of the offender, not the polity’s; our own view would consider both—but our reasons for disagreement are not germane to the general thrust of this Article, so we will leave it at that.

186. To clarify, however, we believe the state may use measured physical force or restraints to protect its agents and others from an offender whose words and deeds signal a readiness for violence.

#### IV A SEA OF DIFFERENCES

Although we have just laid out some similarities between our position and that of the subjectivists, we have already hinted at a number of our differences. Our burden in this Part is to articulate why the subjectivists' agenda of matching suffering to wrongdoing is inimical to our conception of retributive justice. In what follows, we first deal specifically with the subjectivists' attempts to anticipate retributivist objections to their position. We believe that their attempts ultimately fail. We then proceed more abstractly, addressing our disagreements with the subjectivists under several broad headings: autonomy, equality, and dignity. Our elaboration of these points illustrates that the subjectivists' agenda is off-target in part because it conflates retributive punishment, properly understood, with "hot" talionic payback, or revenge, or victim vindication, all of which we think can be and should be conceptually separated. By the time we are done, we will have provided a set of arguments for why retributive justice does not require a focus on subjective suffering and why such a focus is actually inconsistent with or prohibited by a commitment to retributivism. To be clear, while other people with differing views, such as those that emphasize suffering of the offender, may invoke retributive justice labels, our view is that such views are unpersuasive justifications for state punishment. The references in the text to retributivism here are to our preferred way of seeing retributivism (i.e., as described in Part II). We close by considering a possible objection to our argument.

##### *A. The Subjectivists' Attempt to Anticipate Non-Subjective Retributivism*

To their great credit, the subjectivists anticipate some of the challenges retributivists like us might raise in response. Here, we spell out those efforts and explain why they are unavailing.

##### *1. Kolber*

We begin again with Professor Kolber, who staunchly defends his views against conceptions of retributive punishment that emphasize objectively tracked losses of liberty or property. Retributivists typically distinguish deliberately imposed condemnatory state sanctions, which they try to justify, from pangs of suffering that result independently of the state's purposeful response. Professor Kolber calls this distinction, and the work it is supposed to perform, the "deliberateness" argument.<sup>187</sup> In response, Kolber argues that retributivists cannot permissibly rely on this distinction to disclaim moral responsibility for the reasonably foreseeable hardships an offender endures after committing an offense, even if some of these hardships are not purposely

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187. Kolber, *Comparative Nature*, *supra* note 3, at 1602–03.



imposed during their punishment. On Kolber's view, it would be morally untenable to focus only on the intended liberty deprivation without caring about any unintended ancillary distress. To illustrate the point more carefully, he offers the following hypothetical:

If we could knowingly or intentionally inflict substantial distress without justification, then we would have no moral grounds to criticize prison wardens who purposely or knowingly cause distress. A sadistic warden could put a chemical into prisoners' drinking water that makes half the inmates feel intense anxiety and distress, and we would have no grounds to complain. Similarly, an uncaring warden could discover that such a substance was already in the prison drinking water and do nothing about it. The warden would have no obligation to fix the water supply, even if he could do so costlessly by closing a valve that feeds the contaminant into the plumbing. If we need not justify the experiential distress we knowingly or intentionally cause people, we have no moral grounds to criticize sadistic or uncaring wardens.<sup>188</sup>

Kolber's conclusion, however, does not follow from this illustration.

First, if an agent of the state sought, *sua sponte*, to cause directly the physical or mental illness of the inmates, then that would clearly be at odds with the custodial responsibility of the state—and the warden—to ensure adequate but not excessive condemnation through punishment.<sup>189</sup> Institutions holding persons are commonly responsible for satisfying their basic human needs.<sup>190</sup> Thus, a rational retributivist would condemn a sadistic or reckless act or omission that imposes a burden outside the warden's proper discretion. The risks the warden imposes would have to be measured against her reasons for imposing them. Moreover, if the warden's sadistic or reckless act or omission were performed *ultra vires*, that is, without proper deliberation and authorization by the polity, then he would be subject to civil and potentially criminal sanctions. As we are properly reminded by Professor Gray, it is not the burden of retributive theorists to justify criminal actions or torts committed by the state's agents or other private persons.<sup>191</sup>

If Kolber's argument here is that retributivists should not disclaim moral responsibility for the reasonably foreseeable bad effects proximately caused by the actions and omissions over which they have control, we agree.<sup>192</sup> But taking

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188. *Id.* at 1596 (footnote omitted).

189. On the nature of the "carceral burden" a state must carry in the context of confinement and intolerable conditions, see Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. Rev. 881, 911–23 (2009).

190. *See generally id.*; *cf.* *Farmer v. Brennan*, 511 U.S. 825, 826 (1994) (holding that prison officials have a duty under the Eighth Amendment to provide humane conditions for incarcerated prisoners).

191. *See* Gray, *supra* note 14, at 38.

192. Kolber, *Comparative Nature*, *supra* note 3, at 1603 ("Similarly, the sophisticated state actors who establish and administer the criminal justice system are aware of many of the liberty deprivations and inflictions of emotional distress associated with incarceration. They know about

moral responsibility does not necessarily entail punishment adjustments, a point elaborated below. All the variance in experiential distress associated with retributive sanctions is not the same problem because the variance does not necessarily present a bad state of affairs for which the state bears responsibility. In part, this is because an offender, like the rest of us, is frequently able to shape his personal response to a liberty deprivation (or a retributive sanction more generally): he might take the sanction as a useful teaching experience, making lemonade from lemons, as it were, or he might curse his entire existence from the day he committed the crime.

Second, if the ancillary burden the inmate experiences during his imprisonment lacks authorization, then we cannot *equate* that burden with justified, authorized punishment; thus, it does not necessarily warrant relief from otherwise justified and authorized punishment. If a retributivist bears moral responsibility for bad effects proximately caused by the state—for example, the acts of a sadistic or negligent warden—it does not follow that the solution is to adjust the offender’s sentence, say, by releasing him early. If an unconstitutional tort occurs during the punitive encounter, the state’s obligation may reasonably take the form of compensation, apology, injunctive relief, or administrative reform. Such harm to the offender does not necessitate the remission of the offender’s balance of punishment; there are other currencies the state can use.<sup>193</sup>

Importantly, while retributivist institutions bear responsibility for what their agents proximately cause, the same maxim or principle applies to *offenders*. To that end, it is reasonable to hold offenders responsible for the bad and reasonably foreseen effects they cause. If a person has sensitivities to punishment that he can reasonably foresee or investigate, then he should be extra cautious about avoiding behavior—criminal conduct, for example—that will likely result in punishment and concomitant negative experiences.

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these harms, even if they are unintended. Retributivists who seek to justify imprisonment cannot artificially carve out foreseen harms from the scope of harms that require justification.”). BBM, by calling attention to the foreseeable difficulties associated with an ex-prisoner’s reentry to society, are implicitly making the same kind of claim. We deal with their version of the objection later in the paper. *See infra* Part IV.A.3. As the quotation above shows, Kolber considers the differing experiences offenders face *in prison*, and the state’s responsibility associated with knowing about this.

193. We could imagine exceptions of course. To borrow Professor Sharon Dolovich’s helpful term, if the state’s “institutional cruelty,” that is, its failure to discharge its carceral or punitive obligations in a humane and safe manner, led to the “breaking” of the offender (a result we condemned in Part III), we could imagine that the state has an obligation to try to repair or restore the offender to some normatively acceptable baseline condition before it can proceed with the initially intended and authorized justified punishment. *See Dolovich, supra* note 189, at 924–28. Indeed, we could imagine egregious and irreparable situations of “breaking” an offender such that if the state did so, it loses its warrant to permissibly continue punishing that person. And if the polity breaks offenders regularly through its policy or practices, then the state could plausibly be viewed as badge-wearing criminals.

Kolber also anticipates this retributive response, which he calls the “forewarned is forearmed” argument.<sup>194</sup> He finds this response unavailing, however, because he thinks it would countenance the infliction of any disproportionate punishment so long as the offender receives fair notice.<sup>195</sup> Kolber argues, for example, that a requirement of fair notice alone would seem to allow punishing left-handed murderers more than right-handed murderers if that factor were legislated. According to Kolber, retributivists committed to proportionality principles should reject such a scheme.<sup>196</sup>

The problem with Kolber’s counterargument is that it misunderstands the proper structure of proportionality as a check on governmental action. Understood in its full richness, proportionality is not a reflexive adherence to *lex talionis*. Rather, proportionality can be assessed according to fault, the rationality of means used by the government to promote reasonable ends, and the availability of alternatives to achieve those goals.<sup>197</sup> Retributivists are often thought to care only about matching punishment severity to offense severity (or more loosely, the offender’s fault). But it is not hard to see that such a formulation can be question-begging and might require some attention to the other ways in which proportionality is often described in the law, that is, whether the means used are sufficient to promote a legitimate state objective and whether other (less restrictive or severe) alternatives suffice.

Thus, to a retributivist, a policy of different punishments for lefties and righties fails any obvious kind of means-ends analysis (or rational basis scrutiny) because there does not seem to be any defensible reason to justify the selection of handedness as a basis for punishment enhancement. One can describe this in terms of traditional fault analysis, too: there is nothing differentially blameworthy about one’s handedness that could justify an enhanced sanction. But importantly, one need not be a retributivist to object to this example of differential punitive treatment. To oppose arbitrary distinctions in the law like this, one need simply be a reasonable person trying to act in concert with other reasonable people.

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194. Kolber, *Comparative Nature*, *supra* note 3, at 1601 (“One might grant that there are substantial variations in people’s baseline conditions that we ignore at sentencing. Nevertheless, one might argue, we are permitted to deviate from proportionality because people have advance notice of the sorts of punishments they face. People are aware or should be aware of their baseline conditions as well as the conditions that they would likely face in prison. So, even though a wealthy person may be punished more harshly than a poor person when they commit crimes of equal blameworthiness and receive sentences of equal duration, the wealthy person foresaw or could have foreseen his augmented penalty.”).

195. *Id.*; compare Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 Harv. L. Rev. 1662, 1668 (1986) (stating that all that matters vis-à-vis the fairness of the death penalty is that the sanction was announced in advance as a possible sanction in response to certain crimes); with Larry Alexander, *Consent, Punishment, and Proportionality*, 15 Phil. & Pub. Aff. 178, 179 (1986) (noting that fair notice or consent arguments cannot obviate concerns of proportionality).

196. Kolber, *Comparative Nature*, *supra* note 3, 1601–02; Kolber, *Subjective Experience*, *supra* note 3, at 210.

197. See generally Frase, *supra* note 18.

The disproportionality concern raised in response to the “forewarned is forearmed” argument is misplaced for another reason. At the very least, the “forewarned is forearmed” argument works up to the point of a justified proportionate amount of punishment, and that amount has to be, in the context of a liberal democracy, a product of complex political dynamics wherein citizens deliberate over the comparative needs for various responses to wrongdoing. As mentioned before, any excess that arises because of unauthorized burdens proximately caused by the state or its agents—for example, the warden’s unauthorized imposition of injury—is grounds for potential relief through the equivalent of tort remediation; it does not follow, however, that it is grounds for remission of punishment through leniency toward the offender. This is something the subjectivists never properly address, let alone appreciate.

To be sure, what counts as proportionality is a difficult subject, a point we noted earlier.<sup>198</sup> Our view is that in a liberal democracy proportionality is also a function of reasonable reason-giving for matching appropriate means with appropriate ends. A more precise description is properly left to democratic decision making. The offender qua member of a democratic society can contribute his input. But qua offender, he has no special standing to ask society to tailor punishments to his individual taste—putting aside the floors or ceilings related to aspects of his competence or (medical) sensitivities outside his control.<sup>199</sup> In the sentencing context, the complex political dynamic in which citizens come together to devise appropriate punishment levels meant to achieve adequate but not cruel denunciation means that offenders should not have unique standing, or obligation, to challenge proportionality in the amount of punishment. As we explain below, where citizens have freedoms to shape and form criminal justice policy, as with other areas of policy, their complaints about what counts as disproportionate cannot be a ready bypass around established democratic laws. Challengers ought to bear a substantial burden to show that the mode or amount of punishment lacks a reasonable connection to the severity of the crime, its concomitant social costs, and the culpability of the offender.

Turning back to Kolber, the striking thing about his two responses to objective deprivation-focused retributivists like us is his failure to address the implications for offenders.<sup>200</sup> His response to the deliberateness argument chastises retributivists for apparently failing to take responsibility for the reasonably foreseeable harms that befall offenders during or after their punitive

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198. See also *supra* Part II.B.5.

199. Thus, if an offender is having a kidney transplant tomorrow, and will die if sent to prison today after being convicted, there is a reason to put off his sentence compared to a co-defendant who is healthy. The different treatment is responsive, however, to objective medical conditions, not differences in temperament or a goal to produce a certain amount of suffering.

200. This is an oversight BBM replicate by uncritically incorporating Kolber’s analysis (a point we elaborate shortly). See BBM, *supra* note 3, at 1073 n.167.

encounter, regardless of whether such harms are actually *authorized, intended, and proximately caused* by the state.<sup>201</sup> Oddly, neither Kolber nor BBM explicitly obligate offenders themselves to bear responsibility for the unintended but reasonably foreseeable effects their criminal misconduct might have on themselves or others. If offenders were laboring under such a duty, they would have to shoulder blame for the predictable responses they and others might have in response to their criminal misconduct.

It is similarly odd that in Kolber's response to the "forewarned is forearmed" argument there is no expectation that would-be offenders reasonably foresee how and to what extent they might be averse to the punishments advertised by the state. If offenders react to punishments more sensitively than they anticipated because of their deficient "affective forecasting" of their happiness during and after punishment,<sup>202</sup> then, for Kolber, this deficiency is a problem retributivists must ameliorate. But when an offender bears a burden that the state has not proximately caused or intended, Kolber believes the offender must be relieved of the resulting excess of state punishment. Per Kolber, retributivists should account for the harms that *contingently* befall offenders through the imposition of punishment; by contrast, some offenders should receive leniency if it turns out they are sensitive to the deprivations of punishment, while other offenders should be punished more if it turns out they can stomach punishment more easily. It would be puzzling indeed if retributivists were caught in this bind.

Succinctly, the problem with Kolber's arguments here is that if the state is responsible for the actions and effects it reasonably foresees and proximately causes, then so too are offenders. And since foreseeability is relevant to his analysis of the deliberateness critique, it should also be relevant to his response to the "forewarned is forearmed" argument.

## 2. *Bayern*

Professor Bayern also tries to anticipate arguments from retributivists by claiming that *state* punishment is not necessary for retributive punishment; all that is required is state *acknowledgment* of an offender's suffering, regardless of the source of that suffering. So, for instance, if someone commits a crime and then experiences some misfortune prior to being punished by the state, Bayern indicates that it is unnecessary for the state to

do anything more than convict and acknowledge these prior burdens in order to communicate the correct norms and prevent offenders from claiming a false superiority over others. In other words, state concern

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201. Kolber, *Comparative Nature*, *supra* note 3, at 1602–03.

202. See generally Jeremy A. Blumenthal, *Affective Forecasting and Capital Sentencing: Reducing the Effect of Victim Impact Statements*, 46 Am. Crim. L. Rev. 107 (2009); Timothy D. Wilson & Daniel T. Gilbert, *Affective Forecasting*, 35 Advances In Experimental Soc. Psychol. 345 (Mark Zanna ed., 2003).

is state concern, regardless of whether the state is the source of hard treatment. And suffering can be sufficient to eliminate impunity and unfair dominance, even if the suffering doesn't come from the state.<sup>203</sup>

We begin by noting some practical problems that such attention to private burdens or lost benefits prior to state punishment would encounter. First, by countenancing the dispersion of punitive treatment *ex post*, Bayern's approach would disrupt the values associated with the state's *ex ante* efforts to secure a monopoly on violence and coercion. Put differently, if the state equates the offender's private burden with the distinctive social meaning of the punishment it metes out *post-conviction*, then it risks legitimating private violence—that is, *more crime*—upon the offender.<sup>204</sup>

Indeed, there would be odd dynamic effects from a policy allowing sentencing discounts to offenders based on their lost benefits or private burdens borne *post-crime* but prior to state punishment. The policy would invite offenders to tolerate private burdens or lost benefits in the hope of later mitigating the normal sentence. Responding to such incentives, an offender might wish his brother to jail him for two years in his basement. But even assuming his brother agreed to do so, the state would have trouble knowing whether the conditions of confinement were in fact similar to those of state imprisonment.

Perhaps the information costs involved in verifying the comparability of private and public incarceration are negligible compared to the public costs of incarceration. Still, there would be little basis for understanding what kinds of private burdens endured as “a result of the crime”<sup>205</sup> would suffice to forestall or mitigate punishment. Say, for example, a robber breaks his arms and legs as he escapes from a tangle with a wily victim. Should the victim's justified self-help measures serve to mitigate the robber's ultimate sentence? We think the answer is quite obviously no, because the private burden endured by the offender “as a result of his crime” is lacking the distinctive features of state-imposed and authorized punishment.

The social meaning of retributive punishment is distinctive from private burdens borne by the offender in that, like all social meanings, the results of the retributive actions must track the intentions attached to those actions. To use Nozick's phraseology, if the punishment is hitting the offender over the head with the intention of sending the message “this is how wrong what you did was”<sup>206</sup> (*by the lights of the polity*), then the fact that the state neither

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203. Bayern, *supra* note 3, at 13–14 n.21 (challenging Markel's communicative account of retribution).

204. If suffering is suffering, why shouldn't private citizens go ahead and inflict “punishment” on the offender, saving the state its time and resources? Cf. James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 *Yale L.J.* 1055, 1087–92 (1998) (noting various difficulties with putting punishment in the hands of citizens).

205. Bayern, *supra* note 3, at 2; *see also* text accompanying *supra* note 56.

206. Nozick, *supra* note 26, at 370–71.

authorized nor intended earlier beatings or harms is significant for maintaining the special language of communicative retribution. Nozick's point is an elaboration of a view one might have about a person who has been sentenced to death. If the offender commits suicide before his formal punishment, one might think he has "cheated" the state because he has *escaped* his punishment. His punishment was not merely to *die* at the hands of anybody or at his own hand, but to be *executed* by the *state* because it was the state's laws that he violated.<sup>207</sup>

For reasons we have spelled out in Part II, retributive justice in the form of state punishment is not properly concerned with a person's overall desert or justice in some holistic sense. It is not about making the wicked suffer and the virtuous prosper. Rather, in its most persuasive form, it is about altering the offender's relationship to the state. Inasmuch as the offender has violated the state's reasonable and fairly enforced commands, it is the state's job to diminish his implicit or explicit claims to being above the demands placed on his fellow citizens. He may suffer to some degree en route to his punishment, including at his own hands, but these sufferings cannot substitute for his punishment because, as Alon Harel argues, "[p]rivately inflicted sanctions are grounded in the private judgments of those who inflict them," and thus they "sever the link between the state's judgments concerning the wrongfulness of the act or the appropriateness of the sanctions and the infliction of the sanction."<sup>208</sup>

Moreover, subjectivists' concerns for shifts from baselines are not really relevant to the institutional design of a legal system. This approach is more relevant to philosophers or theologians thinking abstractly about punishment or theodicy.<sup>209</sup> While such global "blameworthiness" inquiries may be vulnerable to some of the talionic matching of pain-for-pain analysis that the subjectivists think some retributivists embrace, we think that such inquiries should not affect any retributivist in the legal academy contemplating actual sentencing practices.<sup>210</sup> Put differently, legal retributivists, who contemplate institutional

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207. Thus it does not matter that private imprisonments might be cheaper (or even more effective at deterring the offender). The point is that privately imposed hardships communicate a *different* message than state-authorized punishment does. Indeed, in many such cases, the privately inflicted sanction is a *crime* that should itself be prosecuted.

208. Alon Harel, *Why Only the State May Inflict Criminal Sanctions: The Case Against Privately Inflicted Sanctions*, in *Criminal Law Conversations* 129, 133 (Paul H. Robinson, Stephen P. Garvey, Kimberly Kessler Ferzan eds., 2009).

209. Cf. Alan H. Goldman, *Toward a New Theory of Punishment*, 1 *Law & Phil.* 57, 61 (1982) ("[I]f the purpose of the state were to proportion reward and suffering to moral merit, to be fair it would have to do so over entire lifetimes, and not in reaction to specific criminal acts.").

210. In some respects, we might say that if you think what the Supreme Court did in *Williams v. New York*, 337 U.S. 241 (1949), is permissible (i.e., permitting allegations of misconduct not proven beyond a reasonable doubt to serve as the basis for the execution of an offender), then you by definition are not a (legal) retributivist, since the predicate for enhanced punishment is not proven in a manner consistent with the criminal law's fact-finding process, which requires a higher threshold of reliability. Of course, we do not doubt that there are legal

design, do not embrace the idea that the state might use the criminal trial or plea agreement as a vehicle for extramural tourism by which the state may enhance or diminish punishment based on the morality of the offender in spheres unrelated to proven offenses.<sup>211</sup> Rather, what gives the state warrant to punish are offenses against the legal order.

### 3. *Bronsteen, Buccafusco, and Masur*

As noted above, Kolber and Bayern appear to reject the claim that state action in the context of punishment is a distinctive type of action not to be confused or conflated with other types of suffering. Thus, for Kolber, the limitations on liberty a soldier experiences by virtue of her service in the military is retributively relevant to the shape or length of her sentence for a crime.<sup>212</sup> Moreover, when comparing a private actor's false imprisonment of X to the state's imprisonment of X, Kolber thinks there is no reason to distinguish between the kinds of harms inflicted on X based on the identity of the person or entity imposing the burden on X.<sup>213</sup> Similarly, Bayern thinks that retributivists should award sentencing discounts to offenders based on the lost benefits or private burdens they bore prior to state-imposed punishment even if those burdens or lost benefits were caused by non-state actors.<sup>214</sup>

Professors Bronsteen, Buccafusco, and Masur are no different in their view that individuals' negative experiences imposed via punishment should be calibrated to their capacity for hedonic adaptation.<sup>215</sup> But as we noted in Part I, BBM also think retributivists who care about proportionality should factor into their punishment calculus those harms that befall persons upon reentry to society—after their completion of state punishment—even if the state neither intends nor proximately causes those harms.<sup>216</sup> In other words, BBM also

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scholars who think good deeds or unproven misconduct ought to count for non-retributive reasons. We also readily admit that some might try to invoke a "just deserts" type of argument to suggest that features of a person's life unrelated to crime or criminal history should weigh in at sentencing, such as military service or charitable giving. See generally Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. Rev. 1109 (2008) (providing citations and overview of the literature on prior bad acts with discussion of retributivists both for and against consideration of past deeds).

211. For an outstanding discussion, see Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 Stan. L. Rev. 523 (1993). In this respect, we think Professor Simons did not go far enough when he argued that, per retributivism, the state "need not" engage in global character judgments. We think the state *ought* not do so. See Simons, *supra* note 21, at 4 ("[The state] need not monitor the flow of burdens and benefits in the offender's life and make appropriate corrections so that when he meets his maker, cosmic justice has been done.").

212. See Kolber, *Comparative Nature*, *supra* note 3, at 1591.

213. See *id.* at 1574–75.

214. Bayern, *supra* note 3, at 13–14 n.21 (critiquing Markel's communicative account of retribution and suggesting that the state's communication of condemnation can be decoupled from the experience of hardship endured).

215. See also *supra* note 70.

216. BBM, *supra* note 3, at 1073 n.167.



consider the social effects on offenders *after* they have been released from prison.

As BBM summarize, “virtually any period of incarceration, no matter how brief, has consequences that negatively affect prisoners’ lives in ways that resist adaptation, even after they have been released.”<sup>217</sup> But they mistakenly locate blame for those effects on the state, even if the effects *contingently* result from independent choices by third parties (for example, reduced marital or job prospects) made in response to the offender’s violation of the law.<sup>218</sup> In this respect they seem to go beyond the concerns of Kolber and Bayern. We want to explain why retributivists should reject this particular line of argument.

As we see it, retributive justice has in some respects strikingly limited ambitions. As we explained earlier, it is best understood as a theory about the proper justification of punishment—not a comprehensive theory of sentencing, nor a theory of what people “deserve,” all things considered. Rather, retributive theories stand at their tallest when they explain why we punish, through the state, certain people for certain actions. As for what people might contingently and speculatively suffer *after* the state has appropriately punished them, retributive justice has very little to say, for reasons connecting back to our responses to Kolber and Bayern. Those harms are simply not state punishment and thus are not part of what retributive justice theories have to justify. Why should this be?

First, many of the effects of post-imprisonment life that concern BBM are not effects that the state intended, authorized, or proximately caused the offender to endure; in some cases, however, the effects are reasonably foreseeable, a point we address below. Retributivism, on our view, does not seek suffering for offenders *after* punishment. Rather, the point of retributive punishment lies in the communicative sanction the legislature or sentencing commission sets, the judge imposes, and the bureau of prisons oversees. The state thus bears responsibility for what it does and authorizes during the term of punishment—including probation, parole, other release conditions, and authorized collateral consequences. But the retributive punishment does not include whatever difficulties—economic, physical, psychological—the offender may suffer after release from supervision of the criminal justice system. That is because under our communicative conception of retributive justice, that communication *ends* when the state stops speaking to the offender via state-sanctioned punishment. When the state releases the offender and extinguishes any remaining conditions, it has said all it had to say. There is nothing it needs to or even tries to communicate after the offender has served

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217. *Id.* at 1038.

218. *See id.* at 1073 n.167 (“[I]t would seem irrational as a matter of policy, and perhaps indefensible on normative grounds as well, for the state to choose to ignore what it knows will follow from its acts. The post-release effects of imprisonment are at least known to juries, judges, and legislators, even if those parties do not incorporate them into their own calculations.”).

his sentence and related release conditions.

To this point, BBM raise Kolber's argument in response to the "deliberateness attempt."<sup>219</sup> Namely, retributive institutions can anticipate the reasonably likely aftereffects of punishment, and thus, if these are reasonably foreseeable, the state should be held morally responsible for them.

We still disagree. We think the state is morally responsible for what it does and does not do while the offender is in the state's control, that is, while the state is punishing. The state is not morally responsible vis-à-vis punishment calibration for what might happen after it has spoken through punishment just because the offender experiences harm that the state might reasonably foresee. For example, the harms that the offender experiences because of choices by family members or employers are largely the contingent result of private decisions, not public ones.<sup>220</sup> Additionally, to say that the polity should be held morally responsible does not entail that the currency through which such responsibility is cashed out is one of remitting or extending punishment. It might be that the proper remedy involves compensation, injunctive relief, apology, or other forms by which we recognize moral responsibility. BBM (and the other subjectivists) never provide an argument for thinking that re-calibration of punishment is the necessary way to address whatever incidental and proximately caused harms may have contingently befallen upon the offender.

Moreover, the harmful effects of prison in post-prison life are also reasonably foreseeable to competent would-be offenders and they are in the best position to avoid those harms, since they can avoid criminality altogether.<sup>221</sup> And because the state is not imposing those post-punishment harms, the subjectivists' view of the state as obliged to act in a way that is bounded by proportionality proves flawed because those harms cannot properly be called punishment. That is not to say the state should do nothing to prepare offenders for successful reentry into society as productive and law-abiding citizens. The state may offer various opportunities for prudential reasons of social self-defense to reduce recidivism, or out of a sense of humanity. But the measures have little basis for support—or for that matter, criticism—in retributive theory.

Given our focus on the idea of *communicating* wrongness to the offender,

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219. As we noted earlier, Kolber makes this same point. Kolber, *Subjective Experience*, *supra* note 3, at 211–13.

220. To be sure, the state cannot disclaim responsibility for unconstitutional torts that occur during supervised release conditions or other deprivations imposed on offenders outside of prison, but we don't think any retributivist would deny that either.

221. We do not mean to be glib here. Clearly, too many crimes have punishments that exceed any rational analysis. And insofar as states impose collateral consequences *retroactively*, we agree that this would undermine our foreseeability claim. Needless to say, we do not endorse the retroactive imposition of collateral consequences, nor their uncritical extension into all walks of life for offenders. *See infra* note 222. But whatever our disagreements with current practice, and there are many, they don't necessitate or even suggest that the best strategy for amelioration is through thoroughgoing focus on individual idiosyncrasies or experiences.

and, in the case of prison, using the custodial period to signal in part the degree of societal condemnation, the offender's post-supervision experience is less important. Because the polity did not intend, authorize, or proximately cause these contingent and speculative (even if foreseeable) post-punishment experiences or effects, they cannot plausibly carry any communicative message on behalf of the polity.<sup>222</sup> Put simply, they are not retributive punishment.

In other words, in equating the infliction of punishment with the suffering of non-punitive harms imposed by third parties such as employers or family members, BBM follow Kolber,<sup>223</sup> and thus reveal obliviousness to the distinctive social meaning of state punishment.<sup>224</sup> As Professor Gray points out, this leads to a situation where the subjectivists have difficulty telling the difference between crime and punishment.<sup>225</sup>

BBM's apparent indifference to social meaning is problematic because their concern, like those of Kolber and Bayern, could easily cut in the opposite direction, leading to absurd results. For example, what about the unintended benefits a prisoner reaps during or after his prison experience? Imagine that upon release he marries his former prison guard and experiences bliss thereafter.<sup>226</sup> Theoretically, should the state countermand that post-incarceration benefit so as to adjust the offender's "pain" levels

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222. Of course, we think the state emphatically cannot abjure its share of moral responsibility for the various ways in which its archipelago of imposed collateral sanctions affect the well-being of offenders. Many of these residency, voting, occupational, educational, and registration restrictions (or requirements) are unduly onerous and poorly conceived, reasonably leading one to conclude that a sizeable share of the offender's post-prison hardships might fairly be characterized as authorized and intended burdens that the state must account for, just like the propensity of some states to impose unduly long sentences. Importantly, though, our disputes with current practices here do not affect our argument related to the bare relevance of offenders' idiosyncratic subjectivity or prior baselines or capacity for hedonic adaptation.

223. See, e.g., BBM, *supra* note 3, at 1039 n.4 (citing Kolber, *Subjective Experience*, *supra* note 3).

224. This is odd because BBM carve out space for addressing the implications of their claim for "expressive" theories of punishment, under which heading they recognize that the state's interest in punishment is "not just a way to make offenders suffer; it is a special social convention that signifies moral condemnation." BBM, *supra* note 3, at 1076 (quoting Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. Chi. L. Rev. 591, 593 (1996)). But of course, that second clause is the nub of retributive theories, a point well-made in Ken Simon's reply to Kolber. See Simons, *supra* note 21, at 8 (noting that retributivists might view incarceration as a distinctive way to deny offenders from enjoying outside relationships, in which case whether the offender experiences "suffering" or harm is beside the point.). As Professor Simons notes regarding Kolber, "Prison excludes the inmate from valuable experiences and opportunities that he might otherwise have had on the outside. Such punishments are not primarily *designed* to cause pain or negative psychic reactions, though these effects may occur as a consequence of the deprivation." *Id.*

225. Gray, *supra* note 14.

226. Or consider the story of Shon Hopwood, who used his time in prison to become an "accomplished Supreme Court practitioner." Adam Liptak, *A Mediocre Criminal, But an Unmatched Jailhouse Lawyer*, N.Y. Times, Feb. 8, 2010, at A12 (discussing successful jailhouse lawyer who flourished in the prison law-library and now plans to attend law school).

appropriately?<sup>227</sup> That some bad side effects are reasonably foreseeable does not mean they will eventuate; the state cannot know what *will* happen to any specific prisoner after his release. Some criminals may suffer, some criminals may reform; some go on to lead happy lives, others have miserable ones. The implication that the state should adjust punishment lengths or conditions of confinement for those who turn out to benefit personally from their punishment seems so bizarre that we find it good evidence of the flaws in taking into account the converse—when prisoners suffer after their time in prison.

Indeed, this issue about which harms and benefits the state bears responsibility for requires further careful analysis. On our view, the state does *not* bear moral responsibility for at least two different kinds of harms that may arise indirectly during or after the state's punishment of offenders: the *spillover effects* to third parties that arise from an offender's crime and punishment, and the harms offenders endure as a result of private choices by third parties.

The contingent harms third parties may experience as a result of the offender's actions that culminated in state punishment—sometimes called spillover effects on the offender's family or loved ones—are, in our view, morally attributable to the offender as reasonably foreseeable consequences arising from the offender's criminal conduct. That said, for prudential reasons (for example, social self-defense against criminogenesis) and humanitarian reasons (benevolence to morally innocent persons), the state ought to recognize and do what it can to minimize the extent of harms on innocent third parties.<sup>228</sup> But that is different than saying the state is morally *obligated* to abandon or disregard the retributive reasons for state punishment against offenders.<sup>229</sup>

Furthermore, per the concerns of BBM regarding the contingent harms an offender may experience after his state-imposed punishment due to choices of third parties, our view regarding where to place moral blame for those harms is similar: on the offender—or, if the harms are unreasonable, on the third parties making those choices. The state's punishment might be an event along the chain of harms an offender experiences after his crime. It may even be that but for the state's punishment of the offender, the offender would not experience those harms, but more likely those harms are responses to the offenders' criminal choices and not the state's punishment. Regardless, our view is that the state is not the proximate cause for the post-punishment harms when they result from a *choice* by a third party in response to actions (criminal activity) brought about and properly attributed (that is, proximately caused) by the offender.<sup>230</sup> Thus, the offenders either should shoulder entirely or share with

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227. See Simons, *supra* note 21.

228. See *supra* note 133.

229. In other words, the claims of potential spillover harms do not serve as “cancelling” reasons, to use Joseph Raz's terminology. Joseph Raz, *Practical Reason and Norms* 27 (2d ed. 1990) (describing the difference between conflicting reasons and cancelling reasons).

230. See H.L.A. Hart & Tony Honore, *Causation in the Law* 114–15 (2d ed. 1985)

the third parties the responsibility for the bad effects they endure subsequent to official state punishment.

Before moving on, we should stress that BBM, during a brief survey of various retributivist approaches, acknowledge that their arguments leave some “expressivist” theories of retribution somewhat untouched insofar as those theories emphasize exclusively the expressive aspect of punishment, and focus “less on actual harm to an offender.”<sup>231</sup> This is an important point, but BBM write that they doubt that anyone cares *just* about expression to the exclusion of the offender’s negative experience.<sup>232</sup> Unfortunately, BBM do not delve sufficiently into this area of punishment theory; by failing to explore the expression-communication divide, they miss an opportunity to limit properly the scope of their argument.

If, as we believe, punishment is principally justified as a matter of communication, and not as a matter of simply expressing sentiments into the public or causing suffering or physical pain, then certain concerns of BBM matter much less. In other words, whether an offender adapts to his prison conditions or whether he endures harms caused by others after his punishment are issues of less importance under our rationale for punishment.

In addition, instead of caring only about expression as if the sole point of punishment were to vent society’s anger,<sup>233</sup> we also care about communicating to the offender the wrongness of his action. The greater the wrong, all other things being equal, the greater the need for a harsher sentence to effect that communication of condemnation. This choice of sentence undoubtedly has an expressive aspect: punishment expresses society’s condemnation to the public. But on our account, how much punishment is warranted should have little to do with how much society wants a particular offender to *suffer*.

BBM more accurately address liberty deprivation theories. Liberty deprivation retributivists, they write, “could try to disconnect punishment from criminals’ actual experience of it by focusing only on objective facts such as

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(discussing the need to select the proximate cause from an otherwise “infinite series of necessary conditions”). For what it is worth, we think that diseases or disabilities contracted by an offender during punishment on account of poor or squalid conditions of confinement raise different issues. They are not authorized punishments but repair for these conditions might be necessary under tort principles and injunctive relief if the state failed to carry its carceral burden in a safe and secure manner.

231. BBM, *supra* note 3, at 1077. BBM are referring to “expressivist” theories of punishment. The CCR is not an expressivist theory, which is largely an instrumental view of punishment. Instead it is, as described earlier at the outset of Part II, communicative. Retributive punishment thus both communicates condemnation to the offender and in so doing it expresses society’s disapproval to others, but not merely for the sake of expression to the public.

232. *See id.*

233. *See* Patrick Devlin, *The Enforcement of Morals* 66–82 (1965). H.L.A. Hart characterized Lord Devlin’s view that punishment may be used for “venting” as “uncomfortably close to human sacrifice as an expression of religious worship.” H.L.A. Hart, *Law, Liberty, and Morality* 65–66 (1963).

the amount of liberty deprived.”<sup>234</sup> They claim that this will not work, however, because even liberty deprivation is used as punishment because it is a “negative experience” by the offender. “If it were not a negative experience, then it would not be retributively appropriate or meaningful and indeed would not be punishment at all.”<sup>235</sup> But this proposition merely approximates one of our areas of agreement with the subjectivists: society should choose punishments *ex ante* that capably signal society’s condemnation.

It does not, however, follow from this that the purpose or aim of punishment is to make the offender suffer negative experiences, or that punishment should be adjusted to ensure that equally blameworthy offenders endure the same amount of hedonic effect. Indeed, if someone comes to a place of contentment through the experience of his punishment, we would have no quarrel with that resulting “happiness.” The idea of retributive justice is not intrinsically tied to the embitterment or immiseration of offenders.

Unless there is some reason to believe that hedonic adaptation will likely (and systematically) make either extra prison time or larger fines viewable as a *benefit* to the offender, society is justified in believing that more (objective) punishment communicates a stronger message of condemnation. Indeed, there is an endogeneity problem related to social meaning that merits attention. A fit interlocutor for punishment will recognize that the social meaning of condemnation conveyed to the prisoner becomes more pronounced as the punishment grows longer or stiffer. Retributive punishments are not, on our view, about negative experiences. They are about creating the conditions through communicative actions to get the offender to *understand* that his actions are being condemned as violating the rule of law.<sup>236</sup> Put differently, what a punishment *means* may be more (or less) than what the particular prisoner *feels*.

Having surveyed why we think the subjectivists’ arguments are not required by retributive justice, we now turn to explain our view that retributive justice is in fact not properly compatible with and indeed prohibits the use of suffering or negative experience as a punishment metric. Some of what follows has already been foreshadowed, but we want to be clear about the values threatened by use of such a metric to affirmatively and systematically calibrate punishment to the subjective individualized experiences, baselines, and adaptive capacities of offenders. The source of our disagreements with a scheme committed to such calibration runs deep. In the next three sections, we spell out the CCR’s deeper commitments—to autonomy, equality, and dignity—and how these commitments frame its response to subjectivist challenges. We also want to defend, or at least sketch, the underlying theoretical commitments that lead us to be retributivists of the sort that we are. In doing

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234. BBM, *supra* note 3, at 1068.

235. *Id.*

236. *See supra* note 52 (adverting to John Finnis’s view on the matter).

this, we try to connect both the critical and positive threads of our project.

*B. Autonomy*

Our position begins with the familiar Enlightenment ideal of the person as a choosing being, able to exercise his autonomy, which the liberal state is committed to securing—within limits. When someone crosses those limits by voluntarily disobeying the law, we respect his autonomy by treating him as someone responsible for his actions. If, however, the offender was not a competent agent—for example, if he was insane—then there is no meaningful choice to respect, and so the legitimacy of retributive punishment against that person is lacking.

While we would assume that the subjectivists would favor some account of free choice as a prerequisite to just punishment, this is not where they focus their arguments; this shift in attention is significant. The subjectivists stress the effects of punishment on the offender, treating the offender as mainly a feeling being. This is in line with the subjectivists' overall debt to Bentham. He famously pleaded in relation to our treatment of animals that the key question was not whether animals could think or reason or choose, but whether they could feel—that is, whether they could suffer.<sup>237</sup> The subjectivists share this emphasis. They ask: how much does the offender suffer, as a feeling being, by his punishment or other negative consequences of his crime?

This is a much less pressing question for retributivists like us. Retributivists emphasize the moment of choice at the time of the crime, the meaningfulness of later responding to that choice through punishment, and thus, the way in which punishment is respectful of the offender who made that choice. Furthermore, retributivists care whether the offender remains competent to understand his punishment as the appropriate sanction for his actions because it was devised through democratic political institutions in which he has both a stake and a voice. As mentioned above, if the offender lacks this level of rational autonomy, even if he remains a feeling and suffering being, retributive punishment would be inappropriate.

As we saw earlier, the institutional retributivist interested in communication does not seek a certain level of suffering that the offender must endure; desiring someone else's suffering is much closer to a revenge-focused account of victim vindication or social ventilation. Instead, retributivists want to communicate condemnation of the offender's wrongful choice and misconduct. And again the focus of this condemnation is autonomy. Because the offender has abused his autonomy through his misconduct, society communicates disapproval to him by imposing something intended to cause him a coercive deprivation. In the case of liberty deprivations, the state reduces his autonomy to act, move, and interact with others. Whether he suffers more or

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237. Bentham, *supra* note 33, at 283.

less than another person is less important than the content of the message sent through the removal of or restrictions upon his liberty or property. Sentencing judges and prison officials might allow marginal exceptions to general rules regarding sentencing in order to account for the previously articulated concerns of adequacy, competency, and cruelty. The subjectivist errs in seeing these minor adjustments to sentences as somehow disclosing the key to just punishment rather than imposing some limits operating at the boundaries of legitimate state action.

### C. Equality

Because, on our view, offenders are largely responsible for the foreseeable effects of their punishments on themselves and those they love, we emphasize that retributivism's aversion to fine-tuned levels of idiosyncratic sentencing calibration connects with another principle that retributivists like us hold dear: equality under the law.

#### 1. Equality in Choice and Capacity

Consider how different and how unequal people are as *feeling beings*. Early childhood and adolescent growth each leaves a unique and probably indelible mark on a person's life. People desire, fear, and suffer from different things.<sup>238</sup> As feeling beings, people are simply, irreducibly distinct. Accordingly, some subjectivists allege, the state must accommodate these differences in its theory of punishment; otherwise people's status as feeling beings supposedly translates into unjust treatment by the state.

Retributivism does not deny that people are different as feeling beings—they undeniably are—but instead focuses on relative equality. Insofar as most everyone reaches a certain level of autonomy and rationality, that is *equal enough*, in terms of our capacities, for the purpose of living together as members of a liberal state.<sup>239</sup> In other words, above that threshold of competence, everyone is equally subject to the law and, after violating a law—fairly passed, administered, and enforced—equally deserving of the state's sanctions. The subjectivist account, if not outright denying this equality, downplays it. By focusing on how people are different and how the state not only can but *must* take this variability in the experience of suffering into account, subjectivists nearly deny that competent persons in society are all to

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238. Indeed, even the very term *suffering* proves too ambiguous in this context. Someone may "suffer" from paper cuts or basketball injuries. One might suffer from all sorts of causes. See, e.g., George Orwell, 1984 286 (1949) ("The worst thing in the world . . . varies from individual to individual. It may be burial alive, or death by fire, or by drowning, or by impalement, or fifty other deaths. There are cases where it is some quite trivial thing, not even fatal.")

239. See, e.g., Morse, *supra* note 40 (discussing the minimal competence required to be a law-abiding member of society).



be treated as equal and autonomous dignity-bearing individuals.<sup>240</sup>

Focus on variance in suffering or negative experience is wrong because it distorts the proper way in which equality matters. For example, Sensitive robs a bank, and because of his sensitivity, he gets three months in prison. Insensitive robs a bank, and, *because of his apparent insensitivity*, he gets three years in prison. Whatever this policy may capture in terms of making Sensitive and Insensitive suffer equally as a subjective matter, it also obscures that Sensitive and Insensitive both made the same choice, both broke the same law, and both were convicted for the same offense. Supposing that both Sensitive and Insensitive were competent agents who freely chose to rob a bank, the law should look at them as similarly competent and free, whatever their individual subjective variability, to avoid the anticipated and actual pains of sanction. If there is injustice that lingers notwithstanding the fair notice associated with the misconduct and penalty, then it is an injustice regarding the rationality between the means and ends used; this is not, strictly speaking, an injustice that Sensitive and Insensitive have unique standing to challenge. In other words, if three months is thought to be legitimately or objectively proportionate to the offense as a ceiling, then three years is too much, period. And if three years is thought to be the minimum floor for adequate communication of condemnation of the offense, then three months is objectively too little to do the job.

Thus, if the state must make *ex post* adjustments based on Sensitive's consciously acquired sensitivities, then it is basically treating both offenders unequally, that is, without equal concern and respect for their autonomy and standing before the law. It would communicate, wrongly—and to the retributivist's mind, arbitrarily—that somehow Insensitive's choice was deeper and more weighty than Sensitive's. But if they made the same choices, they should have to answer equally to them. So in fact, in the name of equality of suffering, the subjectivists propose instituting a grave inequality. They propose to treat equals in choice unequally.

Diminishing these differences in subjective well-being may be the charge of our distributive justice obligations.<sup>241</sup> But the relevant equality for a liberal society when it comes to retributive justice is the equality of citizens in their capacity to comply with laws that are fairly and reasonably developed and enforced. Everyone must obey the law, and as Herbert Morris spelled out long ago, every citizen benefits from the restraint others show through their compliance.<sup>242</sup> Significantly, enjoying this benefit does not hinge on material equality; nor do people have to be *materially* equal to be subject to this

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240. We might note here that this emphasis on the objective equality of persons is not unique to the punishment phase, as several friends have noted to us. Ideas of the “reasonable person”—ubiquitous in the substantive criminal law—are for the most part objective, relying on a standard of competence and knowledge to which citizens are expected to adhere.

241. For reasons we explain below, however, we are skeptical about such claims.

242. Morris, *supra* note 54, at 478.

obligation to comply with the law.<sup>243</sup>

## 2. *Equality Before the Law*

In the context of punishment, the relevant equality is equality before the law, not equality all things considered. By punishing an offense against the laws with a publicly authorized penalty, retribution enacts this message of equality before the law. A privately imposed hardship, without lawful jurisdiction, does not serve equality before the law. Indeed, such “self-help” may simply be just another instance of crime. Subjectivism thus risks muddying the message of equality by offering the possibility that the rich, the powerful, and the sensitive may escape equal treatment of the law by virtue of their social status or varying baselines.<sup>244</sup> CCR avoids this counterintuitive, and indeed unappealing, result; in fact, it need hardly be emphasized how subjectivist principles could exacerbate existing racial and class disparities in the criminal justice system.

The CCR also holds that those who are more insensitive do not, on that account, have to suffer more in the name of “equality.” When the criminal laws are democratically established for the common benefit, capable of passing a threshold of substantial basis review, and administered fairly, then everyone (above a threshold level of competency) is expected to live up to them, absent some otherwise compelling defense. Punishment for similar crimes will be similar; sentences would not be longer or more arduous for poor persons or soldiers merely because the change in baseline conditions seems more pronounced.<sup>245</sup>

The literature on distributive justice can help us explain why retributivists should reject an approach that focuses on achieving equality in suffering or negative experience. As Kolber himself recognizes, his subjectivist critique has a parallel in debates about how to distribute resources; indeed, part of the appeal of Kolber’s essay is that he does not flinch from considering some of the implications his position may have in other areas of political philosophy. Some distributive justice theorists believe that the state has an obligation to allocate

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243. For an updated and deep look at the relationship between distributive and retributive justice, see Stuart P. Green, *Hard Times, Hard Time: Retributive Justice for Unjustly Disadvantaged Offenders*, 2009 U. Chi. Legal F. (forthcoming Oct. 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1511732](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1511732).

244. See George Orwell, *Animal Farm* 118 (1945) (“All animals are equal, but some are more equal than others.”).

245. This version of equality may seem excessively formal, like the liberty that the rich and the poor share in both being forbidden from sleeping under a bridge. We disagree. To be sure, the political community envisioned by retributive justice is in one sense a formal community: it is a community organized around securing the conditions for human flourishing in part by deliberating, legislating, obeying, and enforcing the law. But it is also substantive, because underneath the laws is a vision of autonomous people united in support of an ideal of equality under the law. We think it is worth embracing, and trying, however imperfectly, to live up to this a substantive, “thick” version of community and equality. See also Christiano, *supra* note 118.

resources (money, food, etc.) on the basis of individuals' personal "tastes."<sup>246</sup> These theorists—"subjective welfarists"—define a person's welfare by how well his subjective preferences are satisfied.<sup>247</sup> Subjective welfarism has fallen out of favor in the distributive justice debates over the years, and the reasons for its failure are illuminating for our debate with subjectivists in punishment. Very few contemporary philosophers defend without substantial qualification the view that the state has an obligation to make sure everyone's subjective welfare is the same. Rather, the trend in distributive justice discussions seems to be towards measuring welfare according to some more "objective" metric—for example, equality of resources or equality in facilitation of capabilities.<sup>248</sup>

The reasons for this trend are many; for example, it is difficult to define a subjective "preference," and more critically, it is a challenge to discover what a person's "true" preferences are.<sup>249</sup> Listing them all would take us too far afield. But, for our purposes, the most important objection to subjective welfarism is the objection from "expensive tastes."

Here is a short version of the objection. Some people have very ordinary, pedestrian tastes: they are satisfied with a meal consisting of a burger, washed down with a beer. Other people have very expensive tastes: they are only sated, to take Ronald Dworkin's well-known example, by "plovers' eggs and pre-phylloxera claret."<sup>250</sup> Now, a problem arises when we introduce the principle that everyone should have *equality* of subjective welfare. If this is the relevant metric, then the person who is content with his burger and beer will get far fewer resources than the person who is happy only with much finer things. As the late G.A. Cohen put it, a person with expensive tastes simply

*needs* more resources than the average person does to achieve an average level of fulfillment . . . . [A] person has expensive tastes if, for example, ordinary cigars and plonk wine which give pleasure to the general leave him cold, and he can get something like that pleasure . . . only with Havana cigars and Margaux.<sup>251</sup>

So subjective welfare, in the name of equality, yields a very unequal distribution of resources, at least when considered in objective terms. This has

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246. For a particularly sophisticated statement of the subjectivist view, see L.W. Sumner, *Welfare, Happiness, and Ethics* (1996). For a basic overview and contrast between various subjective and objective theories, see Derek Parfit, *Reasons and Persons* App. I (1984).

247. See, e.g., Cass R. Sunstein, *The Partial Constitution* 164–67 (1993) (providing an overview and critique of subjective welfarism); Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* 116–17 (2000) (describing subjective welfarism).

248. For a discussion of various objective views, see Amartya Sen, *The Idea of Justice*, chs. 11–12 (2009) (comparing equality of resources with equality of capabilities).

249. For a good survey of objections to subjective welfarism, see Nussbaum, *supra* note 247, at 119–21.

250. Ronald Dworkin, *What is Equality? Part I: Equality of Welfare*, 10 *Phil. & Pub. Affairs* 185, 229 (1981).

251. G. A. Cohen, *Expensive Tastes and Multiculturalism*, in *Multiculturalism, Liberalism, and Democracy* 80, 84–85 (Rajeev Bhargava et al. eds., 1999).

struck many as intuitively implausible: why should the person with expensive tastes get more resources than the person of average tastes? It seems rather *unfair*, especially in cases where an individual *chose* to acquire those more expensive tastes. Now, some will simply conclude that we must distribute resources this way.<sup>252</sup> Others have looked for ways out: focus, instead, on what each person's basic needs are; or simply give everyone an equal share of resources, no matter their subjective tastes; or ensure each person has resources sufficient to develop their capabilities to function in certain specified ways. All of these are more objective measurements of well-being than the satisfaction of subjective preferences. All of them, in other words, do better at capturing our refined judgments about distributive justice. Of course, subjective welfarists have responses to this objection, one of which is that if expensive tastes are not the person's fault, then it is not fair to deprive her of what she needs to achieve happiness.<sup>253</sup> We will return to this point.

But first, note that the problem of expensive tastes seems easily transposed onto the subjectivist position in punishment. Imagine that Person A and Person B have committed the same crime. Person A, however, has very expensive tastes: he is used to silk sheets and fancy soaps, and not to life behind bars. Certainly he will suffer more in prison than Person B, who usually sleeps on a beat-up mattress in a run-down apartment. The subjectivists would say that proportionality in suffering requires that Person A be punished less than Person B.

Here it would seem our non-subjectivist views are even stronger than in the case of distributive justice. We resist the idea that a person's acculturation to finer things should matter to how much he is punished; at the very least, he could foresee his sensitivity to punishment and can avoid this suffering through compliance with the law. Thus the context of punishment makes expensive tastes irrelevant, and corroborates a deep and wide view that the length of a person's sentence should not change simply because he is wealthy and used to a high standard of living—or used to living in large rooms rather than in small cells.<sup>254</sup>

As we mentioned earlier, Kolber is aware of this possibility,<sup>255</sup> and he spends several pages discussing it. We think his analysis is unsatisfactory,

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252. Interestingly, in a footnote, Kolber indicates that he may be willing to bite the bullet. Kolber, *Subjective Experience*, *supra* note 3, at 233–34 n.144 (“One may think that equality of distribution should be understood on grounds of subjective welfare. . .”).

253. See G. A. Cohen, *On the Currency of Egalitarian Justice*, 99 *Ethics* 906, 923–24 (1989) (distinguishing between chosen and unchosen expensive tastes).

254. See Douglas N. Husak, *Already Punished Enough*, 18 *PHIL. TOPICS* 79, 82 (1990) (“Few suggestions are more distasteful to the public than that the privileged, in virtue of their elevated status, should be punished less severely than the disadvantaged.”).

255. It may be misleading to call this an objection to Kolber's position, because it is unclear what Kolber's affirmative commitments ultimately are. He may simply be drawing out the implications of a view he believes others may be committed to once they take subjectivity seriously.

however, and shows the problems associated with an overemphasis on subjective experience. Kolber contrasts “Hoity-Toity,” who is a “well-to-do man of leisure,” with Insensitive, “a man who has lived his whole life in cramped living conditions with meager financial resources.”<sup>256</sup> The subjectivists, Kolber acknowledges, would seem to be committed to the position that Hoity-Toity should indeed be punished less than Insensitive if they are both found guilty of the same crime because this would be the only way their punishments would be “equal” in terms of units of suffering or negative experience.<sup>257</sup> Kolber acknowledges that this will strike many as counterintuitive. What can the subjectivists say in response?

Kolber attempts to escape the implications of his hypothetical by means of two stratagems. The first is to suggest that despite appearances, Hoity-Toity is actually more morally blameworthy than Insensitive. We should assume he has had more life opportunities and a better chance to avoid crime than Insensitive has had.<sup>258</sup> Therefore he deserves the same amount of punishment as Insensitive; the fact that Hoity-Toity will have a harder time of it is fine because he really *deserves* to suffer more.

But this is a weak reply. First, it would be odd if Hoity-Toity’s greater moral blameworthiness would mean that he would have to serve *exactly* the same number of years as Insensitive.<sup>259</sup> Second, we could strip out the greater moral blameworthiness if we stipulate that Hoity-Toity, with the same amount of wealth and comfort, actually has not had more opportunities—perhaps having been ruthlessly raised to embrace only one goal: to succeed in his father’s business. Now, according to Kolber’s theory, since he would not deserve to suffer more than Insensitive, he should not receive as much punishment. Yet we would still say that his greater wealth does not mean he should receive a lesser punishment.

Most urgently, the idea that the rich might be more inherently “blameworthy” relies upon an idea with which, as we have repeatedly indicated, we are very uncomfortable: the idea that criminal punishment is somehow about judging people’s *lives as a whole* rather than their discrete acts proven beyond a reasonable doubt.

Kolber’s second stratagem is to raise the notion that wealthy people who are punished are the ones who are *really guilty* because rich people tend to have better representation than poor people: “[i]f a rich person and a poor person are given the same term of incarceration, one might plausibly believe that the rich

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256. Kolber, *Subjective Experience*, *supra* note 3, at 231.

257. *Id.* (“Giving Hoity-Toity a shorter sentence or better accommodations than Insensitive is not favoritism but rather is precisely what is required to treat them *equally* . . .”).

258. *Id.* at 231–32.

259. Kolber concedes as much. *Id.* at 232 n.142 (“Yet, it would be very coincidental if Hoity-Toity’s augmented blameworthiness . . . make[s] him deserve augmented experiential distress that ends up giving him his just deserts when he serves the *same* term as Insensitive.”)

person is more blameworthy, since he ended up with the same sentence as the poor person despite having better advocacy.”<sup>260</sup> Again, this seems a jerry-rigged reply. Suppose that the rich and the poor person have the same quality of advocacy; we would still not think that the rich person should get a lesser punishment because of his previous (comfortable) life. Our belief that the punishments should be equal is not based on some overall judgment that the rich who are found guilty are more blameworthy than the poor. It is, rather, based on a judgment that those who commit similar crimes merit similar punishments.

The basic problem with Kolber’s answers, again, are that they are indirect and ad hoc ways to a result that we can get more directly, and more satisfactorily, by an appeal to our non-subjective views about punishment. Per the CCR, and in contrast to Kolber, if the two offenders have committed the same crime, then Hoity-Toity’s punishment should communicate the *exact same message* as Insensitive’s.<sup>261</sup> Both Hoity-Toity and Insensitive freely chose to violate the same *conduct rule*, and that explains why the same set of *decision rules*—and resulting punishments—should apply. Although Kolber is clear that he does not endorse retributivism, he believes that those who do, and who also find subjectivism plausible, must conclude that “Hoity-Toity deserves a subjectively equal but objectively less severe punishment than Insensitive, given plausible assumptions about their relative sensitivities to punishment.”<sup>262</sup> We think this provides a good reason to abandon subjectivism.

But what about the harder case where Hoity-Toity has expensive tastes or a more refined sensibility through no fault of his own? This parallels cases in distributive justice where people simply are “stuck” with un-chosen expensive tastes. For example, think of people who are only interested by expensive hobbies: shouldn’t they get the resources they need to be as happy as everyone else?<sup>263</sup> Intuitions about the wealthy stem from a general assumption that they have *chosen* their comfortable lifestyle: if they chose it, then they should suffer the consequences of it. However, these intuitions may produce skewed results in cases of wealthy individuals who did *not* choose their “expensive” circumstances.

Regardless of the distributive justice perspective, the fact remains that even offenders who did not choose their expensive tastes still chose their

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260. *Id.* at 232.

261. We recognize, of course, that many jurisdictions entrust sentencing judges (or in some cases, parole boards) with vast discretion to make widely disparate judgments for similarly situated offenders. In this respect, we acknowledge that our account is in no way interpretive of our current institutions but rather provides a critical guidepost against which to measure our occasionally benighted institutions of criminal justice.

262. *Id.* at 235.

263. See Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 *Ethics* 287, 293 (1999).

crimes.<sup>264</sup> They are adequately forewarned that there will be consequences to their choice to commit a crime. If Hoity-Toity has more expensive tastes it is no injustice vis-à-vis the state because, after all, he could have chosen otherwise. This does not relieve the state of being able to explain why Insensitive who commits a theft is punished by a term of P years and not P-minus-one years, but it does remove the claim of special standing Hoity-Toity might otherwise invoke to challenge P by virtue of his subjective experiences, capacities, or baselines.

By committing the crime, Hoity-Toity at the very least took the risk that punishment will be tougher for him than others. The more the state calibrates punishment based on idiosyncratic features of the offender, the further it gets away from the equality ideal that should govern punishment. The subjectivists, by contrast, would allow the offender to call the shots, in a significant way, about how much he will be punished. But that is not his choice. His choice was his criminality, not his punishment.<sup>265</sup>

#### *D. Dignity and Sadism*

The argument against tailoring punishment to subjective experience and capacity has another philosophical source: a concern with the dignity of the offender. This point is partially conceptual and partially practical. The CCR respects the dignity of the offender by holding her responsible and accountable for her free choice to do wrong; it respects that choice by taking it seriously and then condemning it. Retributive punishment addresses the crime, not as a random act by a physical being, but as a freely willed choice by an autonomous agent. It was in this connection that Herbert Morris, and before him, Hegel, famously adverted to the *right* to be punished for violating the law.<sup>266</sup>

But there is also a practical concern with the offender's dignity that drives the CCR's emphasis on equality or evenhandedness in punishment. An intimate concern with how much an offender suffers and, more to the point, that he suffer a precise amount, could easily tend towards sadism. As we learned (again) from the Abu Ghraib incident, prisons and other detention facilities can easily slide into breeding grounds for sadism.<sup>267</sup> When this occurs, prison guards and wardens adopt a condescending attitude toward their wards,

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264. Or so we will assume here. Our interlocutors do not take up this issue, so we will assume that the criminal offenses leading to punishment required some voluntary action and culpable state of mind.

265. Of course, there are limits to what punishment offenders can be subject to, even when they have chosen their crime. These limits include, among other things, those we have already discussed previously in this article.

266. Morris, *supra* note 54, at 486.

267. Cf. Philip Zimbardo, *The Lucifer Effect: Understanding How Good People Turn Evil* 30ff & 352 (2007) (describing the infamous "Stanford Prison Experiment," where individuals role-played as prisoner guards and inmates; invariably, the "guards" became brutal and abusive to the "inmates").

permitting themselves to be cruel to inmates because “they deserve to suffer.”<sup>268</sup> Happily, not all prisons are run in such a fashion.<sup>269</sup> But consider how much this sadistic tendency would be reinforced if the mandate from the criminal justice system were to be *harder* on Insensitive because he tends to adapt to prison more easily. There is a certain, often unrecognized, good in forbearing from calibration so that penal institutions do not become too intimately concerned with apportioning the *right* amount of suffering for each offender. That is not their purpose.<sup>270</sup> Indeed, too much emphasis on making the offender suffer *just the right amount* starts to make punishment look less like retribution and more like a personalized vendetta—again showing the deep similarity between hot revenge and the subjectivists’ account of punishment.<sup>271</sup> Orwell highlighted this problem at the end of *1984*, where O’Brien exploits Winston’s fear of rats: O’Brien seems to take delight in finding the exact thing that he knows will cause Winston to suffer.<sup>272</sup> At the end of the day, subjectivists have little to prevent the O’Briens from appearing in every case where state—or, for some subjectivists, private—agents feel empowered to mete out global desert judgments.

To be sure, overreliance on incarceration as a penal technique may be averting our eyes from the moral costs of our penalty because offenders who are out of our sights are also more easily out of our minds.<sup>273</sup> But the risk with subjectivist tailoring is our becoming too intimately involved with ensuring an offender is suffering to the right degree. The CCR abjures this meddling; if, at the conclusion of his prescribed sentence, the offender rejects the state’s message, the state cannot keep him past his term of years in an attempt to continue driving the message home to him.

Moreover, punishment focused on causing a certain subjective reaction or experience, sadly, aims not to communicate to the offender, but to make him feel something. If we must *tailor* to ensure that the prisoner really “feels” it, then this is bad news: this is not only unhealthy for *officials*, who administer

268. Cf. Lawrence H. Davis, *They Deserve to Suffer*, 32 *Analysis* 136 (1972).

269. Cf. Whitman, *Harsh Justice*, *supra* note 137, at ch. 3.

270. Here we might usefully examine the policy of Captain Frank Townshend, as reported by Robert Blecker:

[Inside Lorton Central Prison] a man’s crime is virtually ignored. Officers routinely deny that they treat a prisoner with an eye to his record, to his crime, to his “evil” choice that brought him to prison. Captain Frank Townshend . . . insisted that he never looks at a man’s record when he deals with him lest he be “prejudiced. Everyone is entitled to the same treatment here, regardless of what they did to get here. What a man is in here for is not our concern.”

Robert Blecker, *Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified*, 42 *Stan. L. Rev.* 1149, 1171 (1990).

271. To be clear, we do not think that any subjectivists of the sort we engage would necessarily endorse this result. We only flag it as a risk that seems more likely to arise with subjectivist accounts of punishment than with other ones.

272. Orwell, 1984, *supra* note 238, at 283.

273. See Kolber, *Subjective Experience*, *supra* note 3, at 213.



the punishment and must therefore take a keen interest in what each offender “feels,” but also for the offender herself, who has no choice but to suffer as much as it takes for her to experience the “right” amount of suffering. By contrast, the CCR sends the offender a message through its punishment, but then leaves the offender free to reject that message. Subjectivism takes away that freedom, and with it, some of the offender’s dignity.

#### *E. Communication and Culpability*

This interest in protecting the offender’s dignity—even his ability to reject the message society is trying to send him via punishment—enables us to answer what may be a residual doubt about the CCR’s response to the subjectivists: whether the CCR’s goal of communication requires attention to a subjective aspect of punishment, namely, whether the offender actually internalizes and lives the message that the state is trying to communicate through its hard treatment and adjudication of guilt.<sup>274</sup> If so, would people who *get* the message right away (perhaps the genuinely remorseful) need less severe punishment, while others who resist the message (perhaps the genuinely defiant) need exposure to harsher treatment for longer periods of time? On that view, the state would in fact need to tailor punishments, not in the interest of getting people to suffer a negative experience equally, but rather in the interest of ensuring that every offender internalized the message eventually.

This potential subjectivist objection to the communicative aspect of retributive punishment, while superficially tempting, is predicated on a misunderstanding of the CCR’s aim qua communication. Our goal as retributivists is for the state to make its best reasonable effort to communicate a particular kind of message. Part II explained why *that* is our goal, and why that goal is achieved through retribution against persons determined to be guilty. Importantly, our goal is not to maximize the involuntary internalization of the message and the values underlying that message; indeed, such a goal, which could hypothetically be administered by a little pill or a “negative experience machine,” would be an *instrumental* and therefore non-retributive way of thinking about punishment.

In this regard, it might be helpful to think back to Part II.A.2, where we explained why, under the equality banner, even the remorseful offender warrants punishment. Punishment is an important communication device by

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274. See Kolber, *Subjective Experience*, *supra* note 3, at 208 & n.71 (“Those punished by disapproval are not successfully punished unless they are at least aware of their community’s disapproval. Furthermore, the extent to which they are punished will vary based on their different reactions to expressions of disapproval. Some are prone to react strongly to feelings of shame, while others are not.”). Again, it bears repeating that the offender who is incapable of receiving any message (because he or she is incompetent) is not a fit subject for punishment. Interpreted this way, we have no quarrel with Kolber’s claim that successful punishment requires that the offender be “aware” of his punishment, or more precisely, that he or she be capable of rationally understanding it as a punishment for a prior crime.

which we signal our condemnation and its relative severity. We explained that an offender's demonstration of remorse immediately after criminal misconduct is not a basis for relieving the state of its positive reason for retributive punishment. Holding the offender responsible through the ordinary measure of punishment for the offense effectuates the idea of equal liberty under law. On this view, it is not redundant to punish the remorseful offender. To grant relief of punishment on the basis of contrition alone is to grant special favors, such that one can act unlawfully without the repercussions that the state threatened to apply to all. Granting such a request for leniency disrupts the idea that retributive justice helps maintain a regime of equal liberty under law. Indeed, the offender better *manifests* his remorsefulness by willingly undergoing the state-authorized punishment reasonably imposed on similarly situated offenders.<sup>275</sup>

Conversely, and following on the point we made in the previous section, the defiant person who rejects the values underlying the communicative punishment is not to be punished *longer* than ordinary. Doing so would undermine the retributivist emphasis on both equality before the law in the realm of punishment and fair notice with reasonable specificity as to the state's responses to particular offenses. Through democratic institutions, society announces the appropriate punishment range for each offense; offenders who have committed that crime must receive a punishment within that range.<sup>276</sup> If, for subjectivist reasons, one wanted to punish above that range, that would be to fail to communicate what society has decided to communicate: that *this crime*, looking at the nature of the wrong and the culpability and perhaps criminal history of the offender, is deserving of *this range*—and not a higher one or lower one—of punishments. An offender who commits a crime is reasonably on notice, not that he will be punished for however many years it takes for him to understand the message, but that he will be punished for his wrongs in

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275. If the punishment is designed to perform communicative work, then whatever apparent "internalization" that happens prior to the completion of the punishment cannot be relied upon as an aspect of intentional punishment. That is logically no different than Nozick's example of the murderer in the canyon killed by the avalanche accidentally started by a witness to the murder. Nozick, *supra* note 26, at 376. The death of the murderer in that situation is not a form of state retribution. The situation in prison (or death row) is only different in that there *has* been an adjudication that involves some judgment of guilt. But there has not yet been the completed punishment called for by the legislature in conjunction with the court. Because the state's intentions have to line up with its causal actions to convey the correct social meaning, it cannot use the defendant's post-conviction but pre-punishment completion attitude as evidence of the success of the communicative punishment; after all, the punishment intended to be used as a communicative device has not yet been fully imposed and completed.

276. For what it is worth, we think that range should be relatively narrow because of our fear that broad ranges, coupled with unchecked discretion, will create various Type I and Type II errors compared to other offenders, for reasons that might be random, arbitrary, or discriminatory, and thus also in violation of certain constitutional norms. See generally Dan Markel, *Luck or Law? The Constitutional Case Against Indeterminate Sentencing* (unpublished manuscript) (on file with authors).

accordance with society's fair and best understanding of how severe that offense is, as reflected in a discrete and relatively narrow punishment range.<sup>277</sup>

Even when the defiant offender rejects the message undergirding retributive punishment, the state should not punish him more for that fact alone because doing so would violate both the fair notice and the equality commitments. Nor should the polity seek to brainwash the offender or torture him into submission. Rather, society announces its standards, enforces them, and then the offender is free. He can choose not to agree with the state's message. The polity may regret this result, but to do more to achieve involuntary internalization of the values animating retributive punishment would be contrary to an adequate respect for the dignity of the offender, which includes the ability to dissent, even from a just and justly administered punishment.

#### CONCLUSION: THE NATURE OF PUNISHMENT REVISITED

Earlier in this Article, we discussed Professor Kolber's example of "truncation" as a way of explaining his subjective theory of punishment.<sup>278</sup> In the same piece, Kolber discusses the example of "boxing."<sup>279</sup> Suppose, he says, that an offender is put into a box for his punishment.<sup>280</sup> The trouble is, the boxes are all of uniform dimensions: the tall offender, no less than the short offender, has to fit into the same box.<sup>281</sup> Surely, Kolber reasons, the tall and short offender are being punished differently.<sup>282</sup> The tall offender, who has to squeeze his way into the punishment box, is being punished more than the short offender, who enters easily and perhaps can even stand. How could it possibly be the case that retributivists speak of "the same" or "proportionate" punishment for both of them, if both have committed the same crime but experience the punishment so differently? Kolber's truncation example makes the same point, although much more graphically; wealth-setting, discussed earlier too, is one more example.<sup>283</sup>

Needless to say, the state would not employ fanciful punishments like truncation or wealth-setting in part because they could be predicted to fail to register as punishments *ex ante* against short or poor people, respectively. Kolber does not mean to suggest them as examples of punishments that the

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277. *But see supra* note 261. To be sure, we have been assuming throughout that society can plausibly establish a reprehensibility scale that reflects severity of the offense, criminal history, and other related sentencing factors, and then match that scale to a different scale encompassing and ranking various punishment options.

278. Kolber, *Subjective Experience*, *supra* note 3, at 188; *see supra* notes 39–40 and accompanying text.

279. Kolber, *Subjective Experience*, *supra* note 3, at 235.

280. *Id.*

281. *Id.*

282. *Id.*

283. *See supra* note 49 and accompanying text.

state should adopt. He raises them only to prove his point, which is that punishment must be thought of as subjective.

In our view, aside from consulting subjectivity to determine whether the offender is incompetent or ineligible based on other medical conditions, or whether he is being broken by the punishment because of its cruelty as applied to him, we find it difficult to embrace the idea that considerations of subjectivity should play much of a role within a retributive conception of punishment. Various state-imposed condemnatory sanctions—fines, restrictions on where and how one can move or live in particular ways—these can largely be measured in terms of length or amounts that are relatively objective; the amount imposed need not vary based on a particular person’s reaction to the deprivation. This is important. After all, from the perspective of the CCR, the punishments (and the institutions) we would endorse are not meant simply to cause a specific number of disutils of pain or displeasure.

As long as persons are sufficiently competent to understand what is at stake with punishment, then it is clear what they will miss if they are in prison. They will miss their autonomy. They will miss their ability to take a walk when they want to or simply to go outside and breathe in the open air. They will miss being *free* to see their family and friends on a regular basis, whenever they are able and choose to. Even a loner, who may not desire regular contact with others, will find it hard to feel truly “alone” in prison. These things are not too different from person to person, regardless of wealth or social status. Thus, we do not think there is much point in debating how, given an inmate’s cell size, he might be able to do more or less—like “trac[ing] the contours of a . . . squash court” in a large cell, or “climb[ing] up the walls” in a small cell.<sup>284</sup>

To be sure, and as we have said, the state must factor in considerations of non-humiliation and simple humanity when designing punishments; it can deprive certain liberty or property rights but it may not eliminate all care for basic human needs and dignity. And so, if a state legislature decided to give longer beds and longer pants to taller people, and shorter beds and pants to smaller people, then that would be fine with us as long as the rationales for such determinations were made publicly, in advance, and administered fairly; it would not be much different than scaling fines to objective metrics of wealth or income, which we would also support. But such alterations, it bears mentioning, are not subjective in nature because there would not be any need, or desire, to consult offenders’ individual reactions or past baselines to ensure the retributive goals were met. Instead, they are variations based on human needs the state must consider to carry its “carceral burden.” They are not responses to the chosen tastes and preferences of offenders.

By emphasizing this set of norms for punishment, the CCR reinforces people’s sense as equals: everyone is equally responsible for his choice and

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284. Kolber, *Subjective Experience*, *supra* note 3, at 206–07.

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equally in need of condemnation if his choices are criminal ones. While the subjectivists' general claims about the boundaries of punishment are instructive, their more particular claims on behalf of radically individualized calibration are distractions from the difficult tasks involved in creating a just legal order. We hope that our account here, while critical, also proves constructive, lending promise to that vision and that enduring task.