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Punishment as Suffering

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I. INTRODUCTION

According to a critique of retributivism and some forms of utilitarianism advanced by several contemporary scholars, criminal punishment is a grand machine for the generation and administration of “subjective disutility,”¹ principally in the form of suffering.² The machine requires calibration, of course. These critics claim that the main standard we use for our machine is comparative proportionality.³ We punish more serious crimes more severely and aim to inflict the same punishment on similarly situated offenders who commit similar crimes.⁴ In these critics’ views, this focus on comparative proportionality, when filtered through a subjectivist analysis of punishment, reveals that ours is a rather crude machine. In particular, it ignores the fact that (1) different offenders may suffer differently or to a different degree when subjected to the same penal sanction;⁵ (2) different offenders have different happiness baselines, which lead to disparities in the degree of suffering among offenders sentenced to the same punishment as measured by comparing their

1. See John Bronsteen, Christopher Buccafusco, & Jonathan Masur, *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1037 (2009) (“When the state punishes a criminal, it inflicts suffering.”); Adam Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 212–13 (2009) (“[T]he subjective disutility of punishment is not some mere aftereffect of punishment. Rather, it is largely or entirely the punishment itself. Subjective disutility is a necessary component of retributive punishment and constitutes, if not the sole reason for retributive punishment, certainly a major part of it.”). This Article argues the contrary. While original, it is not alone. Among others, Dan Markel and Chad Flanders have taken a firm stand against contemporary subjectivists. See Dan Markel & Chad Flanders, *Bentham on Stilts*, 98 CAL. L. REV. (forthcoming 2010).

2. This Article uses “suffering” broadly to capture the range of subjective experiences characterized as “negative” by those who experience them. “Suffering” so defined stretches well beyond physical pain.

3. While usually credited to retributivist theories of punishment, proportionality is equally a commitment of utilitarians. See, e.g., CESARE BECCARIA, OF CRIMES AND PUNISHMENTS 73–76 (Jane Grigson trans., Marsilio Publishers 1996) (1764). Kolber expresses deep reservations about proportionality, as do Bronsteen, Buccafusco, and Masur. See Kolber, *supra* note 1, at 185; see also John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Retribution and the Experience of Punishment*, 98 CAL. L. REV. 1463, 1495–96 (2010). As is argued below, much of this discussion is a consequence either of a confusion between objective proportionality and comparative proportionality, or a mistake in attributing to the theorists they critique the view that comparative proportionality is an independent principle when, in fact, it is wholly derivative of objective proportionality. See *infra* Part IV.A.

4. See *Griffith v. Kentucky*, 479 U.S. 314, 323–28 (1987) (discussing the principle of treating similarly situated defendants the same).

5. See generally Kolber, *supra* note 1, at 235–36 (arguing that subjective experience matters in assessments of punishment severity).

prepunishment baselines to their hedonic states during punishment;⁶ and (3) offenders' self-reported states of happiness and suffering vary over the course of a sentence, revealing inaccuracies in our assessments of both the amount of suffering inflicted and its distribution over time.⁷

In contrast to scholars who endorse objective approaches to punishment, subjectivists propose that a more sophisticated and rational way to calibrate punishment would be according to the negative experiences of those punished, measured either subjectively,⁸ comparatively,⁹ or diachronically.¹⁰ Looking forward to a day when sophisticated brain mapping techniques, pain studies, and other advances in neuroscience and psychology will provide us with reliable qualitative and quantitative metrics of happiness and suffering,¹¹ these writers are setting the stage now, arguing that no matter our theory of criminal law and punishment—be we retributivists or utilitarians—we are obliged to adjust the machine according to who is in its thrall and to titer both the form and extent of punishment so as to achieve just the right amount of subjective disutility in each case.¹² By virtue of their focus on subjective experiences, these scholars may fairly be labeled “subjectivists.” As the term will be used here, subjectivists maintain that punishment is, in whole or substantial part, described, accounted for, and justified by the subjective

6. See generally Adam Kolber, *The Comparative Nature of Punishment*, 89 B.U. L. REV. 1565, 1598 (2009) (arguing that we have to measure sentence severity by comparing offenders' baseline and punished conditions).

7. See generally Bronsteen et al., *supra* note 1, at 1037 (“[N]ew findings about human adaptability unsettle the assumptions upon which the [penal] system rests. Specifically, people adapt well to negative changes in wealth and even to many features of prison life . . .”).

8. See Kolber, *supra* note 1, at 236 (arguing that any successful justification of punishment must take subjective experience into account).

9. See Kolber, *supra* note 6, at 1566 (arguing that in order to assess punishment severity accurately we must compare an offender's life in prison relative to his life in his unpunished, baseline condition).

10. See Bronsteen et al., *supra* note 1, at 1054–55 (arguing that we would need to adjust our approach to sentencing in order to create the levels of imposed harm we intend if adjustments in the size of fines and the length of prison sentences do not affect the magnitude of the negative experience of punishment in a linear fashion).

11. See Kolber, *supra* note 1, at 222–23 (noting that new technologies can be expected to help in assessing a person's distress level); see also Adam Kolber, *The Experiential Future of Law*, 60 EMORY L. REV. (forthcoming 2011) (asserting that, in the future, we will have better technologies to measure experiences such as physical pain, pain relief, emotional distress, and anxiety).

12. See, e.g., Bronsteen et al., *supra* note 1, at 1069 (arguing that punishment theory must account for different individuals' experiences of punishment).

experiences of those who are punished.¹³ The contrary view defended here is objectivism, which holds that punishment should be described, accounted for, and justified on objective grounds without reference to the subjective experiences of particular offenders.

The subjectivist's view of the criminal law may strike some readers as troubling, and so it should. Immanuel Kant long ago warned against "crawl[ing] through the windings of eudaemonism" when deciding whom to punish and what form punishment ought to take.¹⁴ All the talk of subjective disutility, suffering, and happiness engaged in by subjectivists smacks of precisely the reliance on hedonic economies to answer normative questions that Kant railed against. Nevertheless, subjectivists contend that even retributivists, who reject on moral grounds attempts to calibrate punishment by reference to subjective suffering, are obligated on pain of contradiction to look forward to a day when sensors and algorithms will identify a measurable and consistent intersubjective quantum of suffering and thereby bring order, fairness, and reason to criminal law and punishment.¹⁵ The same is true, they conclude, for those classic utilitarians who measure punishment on objective rather than subjective grounds.¹⁶

There is no doubt that these critiques, and the positive theories of punishment they endorse explicitly or by implication, are "provocative" and address "an underappreciated problem in criminal law theory," namely, "[w]hat is the relevance of the criminal defendant's subjective experience of punishment?"¹⁷ Specifically, they raise important questions for under-theorized areas of the criminal law and practice, including the proper role of mercy and nettlesome

13. See, e.g., Kolber, *supra* note 1, at 212–13, 215–16, 218–19 (arguing that any successful justification of punishment must take the subjective experience into account).

14. IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 105 (Mary Gregor trans., Cambridge Univ. Press 1996) (1785).

15. See Bronsteen et al., *supra* note 1, at 1068–73 (arguing that a necessary precondition to operationalizing the retributive theory is an understanding of the manner and degree to which fines and imprisonment actually negatively affect those who receive them); Kolber, *supra* note 6, at 1595–97 (arguing that we must recognize the subjective severity of an offender's punishment in order to adequately justify their punishment); Kolber, *supra* note 1, at 236 (arguing that retributivists should recognize that subjective experience matters in assessments of punishment severity and should take steps toward better calibrating punishment).

16. Kolber allows that those who view punishment solely as a tool for incapacitation may be excused since they, at least, are not so distracted by suffering. See Kolber, *supra* note 1, at 218 ("[I]nterests in incapacitating people are largely independent of the subjective experience of the incapacitated.").

17. Kenneth W. Simons, *Retributivists Need Not and Should Not Endorse the Subjectivist Account of Punishment*, 109 COLUM. L. REV. SIDEBAR 1, 1 (2009), http://www.columbialawreview.org/Sidebar/volume/109/1_Simons.pdf. This Article in no way denies the fact that suffering matters. See *infra* Part VI.

practical considerations relating to penal technology. However, pursuit of these important issues does not require a fundamental critique of objective theories of criminal punishment. Quite to the contrary, those theories provide ample grounds for criticizing much of what goes on in contemporary criminal punishment policy and practice.¹⁸ Nevertheless, these scholars have made undermining objective theories of punishment, including some of the most persuasive and enduring threads of retributivism and classic utilitarianism, a focus of their projects. Those efforts fail to persuade because they rely on a view of “punishment” as suffering or as some other form of “subjective disutility.”¹⁹ Retributivists and utilitarians need not endorse this subjectivist account of punishment. To the contrary, they should, as many do, draw a clear distinction between the normative concept “punishment” and its contingent effects, including subjective experiences of disutility and suffering.²⁰ Also problematic is that these scholars often treat all suffering as fungible.²¹ For example, Adam Kolber’s critique of retributivism turns on the proposition that suffering experienced by an offender as a

18. See Chad Flanders, *Retribution and Reform*, 71 MD. L. REV. 87 (2011) (arguing that retributivism does not defend contemporary conditions of excessive and harsh punishment); David Gray & Jonathan Huber, *Retributivism for Progressives*, 71 MD. L. REV. 163 (2010) (arguing that objective retributivism provides persuasive reason to reject much of our current punishment practice and criminal law policy). *But see* Alice Ristroph, *How (Not) to Think Like a Punisher*, 61 FLA. L. REV. 727, 743 (2009) (arguing that retributivism is complicit in contemporary conditions of excessive and harsh punishment).

19. See, e.g., Bronsteen et al., *supra* note 1, at 1037 (“When the state punishes a criminal, it inflicts suffering.”); Kolber, *supra* note 6, at 1595–97 (arguing that the negative experiences associated with punishment are what really matters in assessing punishment severity); Kolber, *supra* note 1, at 212 (“[T]he subjective disutility of punishment is not some mere aftereffect of punishment. Rather, it is largely or entirely the punishment itself.”).

20. See JOEL FEINBERG, DOING & DESERVING 118 (1970) (arguing that punishment is a symbolic medium for expressing moral condemnation and that “[g]iven our conventions, of course, condemnation is expressed by hard treatment” but that “[p]ain should match guilt only insofar as its infliction is the symbolic vehicle of public condemnation”); Jean Hampton, *The Moral Education Theory of Punishment*, in PUNISHMENT: A PHILOSOPHY & PUBLIC AFFAIRS READER 112, 128 (A. John Simmons et al. eds., 1995) (distinguishing “punishment,” which is a “disruption of the freedom to pursue the satisfaction of one’s desires,” from subjective experiences of punishment, which are often, but not always, painful); Carlos Nino, *A Consensual Theory of Punishment*, in PUNISHMENT: A PHILOSOPHY & PUBLIC AFFAIRS READER, *supra*, at 94, 102–05 (arguing that punishment is fundamentally a normative concept). I am in debt to Amanda Pustilnik for her revelatory work on pain, in which she elaborates on the temptations of this mistake in multiple fields of law. See, e.g., Amanda Pustilnik, *Violence on the Brain: A Critique of Neuroscience in Criminal Law*, 44 WAKE FOREST L. REV. 183, 187 (2009) (“[O]verreaching claims about the applicability of neuroscience may lead to misapplications similar to those of prior episodes of the criminal law-neuroscience story.”).

21. See, e.g., Bronsteen et al., *supra* note 1, at 1071 (arguing that punishment theory must take into account the entire array of subjective negative experiences a specific punishment will have on an offender in order to increase the prospects for achieving proportional punishments).

direct consequence of his punishment, suffering experienced by that offender if he is kidnapped and tortured by private parties before arrest,²² and suffering caused by prisoner-on-prisoner violence count equally in the subjective arithmetic of “punishment.”²³ Likewise, John Bronsteen, Christopher Buccafusco, and Jonathan Masur contend that wistful sadness during incarceration and suffering consequent of post-sentence discrimination by private parties both constitute “punishment.”²⁴

Retributivists need not accept these views. In fact, many of the most influential contributors to the retributivist canon are scrupulously objectivist and carefully avoid subjectivism.²⁵ For these retributivists, a particular punishment is justified only if, and to the extent, it is deserved. While these retributivists may recognize suffering as an experiential window into punishment, they maintain that subjective suffering is neither a necessary nor a sufficient condition of punishment.²⁶ The subjectivist critique of retributivism denies this defining feature of objectivist retributivism and then derives a set of counterintuitive outcomes, leading critics to conclude that retributivism is unworthy of defense and perhaps is self-contradictory.²⁷ For example, Kolber argues that, because different offenders experience the same penal sanction differently, retributivists must, out of faith to proportionality, impose objectively

22. Kolber, *supra* note 6, at 1587–88.

23. Kolber, *supra* note 1, at 188.

24. Bronsteen et al., *supra* note 1, at 1050–55; Bronsteen et al., *supra* note 3, at 1496 (arguing that punishment severity is based on the negative experiences associated with the punishment, which should include the typical effects that incarceration has on offenders’ lives after prison).

25. See *infra* Part IV.A. There are, as Mitchell Berman points out in a recent book chapter, some punishment theorists who identify themselves as “retributivists” who endorse suffering as a goal of punishment. Mitchell Berman, *Two Types of Retributivism*, in *THE PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW* (R.A. Duff & Stuart Green eds.) (forthcoming 2010) (manuscript at 7), available at <http://ssrn.com/abstract=1592546> (cited with permission of author). According to Berman, these theorists hold that offenders deserve to suffer for their crimes. *Id.* Berman carefully teases out the serious theoretical and practical challenges faced by these theorists, who are committed to a version of instrumentalism. *Id.* (manuscript at 8–16). For many of those reasons, and for reasons elaborated in Parts III and IV, *infra*, this Article uses “retributivist” to refer to and to promote objectivist theories of retributivism.

26. See FEINBERG, *supra* note 20, at 116–18 (arguing that social disapproval and its appropriate expression is what should fit the crime, and not the amount of subjective suffering experienced by the offender).

27. See Kolber, *supra* note 6, at 1582–83, 1600–06 (arguing that retributivism fails to adhere to one of its central features—prohibiting disproportional punishments—when it fails to calibrate punishment based on an offender’s baseline subjective state); Kolber, *supra* note 1, at 199–216 (“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.”).

weak sentences on rich and sensitive offenders and objectively more severe sentences on offenders toughened by poverty and privation, even if they commit the same crime.²⁸ However, once two distinctions are reconstituted, one between objective punishment and subjective suffering, and the other between objective and comparative proportionality, it is clear that Kolber's subjectivist critique has no bite on objectivist retributivism. Quite to the contrary, untenable results such as those discussed by Kolber serve as good reasons for retributivists to reject outright any claim that punishment severity must be determined by measuring the subjective suffering it inflicts on individual offenders. These uncomfortable outcomes, which Kolber deploys against retributivism as purported *reductio ad absurdum*, are definitely absurd. However, they derive not from premises indigenous to retributivism but from the claim that punishment is, in whole or in part, suffering. His critique therefore does not provide reason to reject retributivism, but, rather, argues strongly in favor of holding the line for objectivism.

Subjectivist critiques are also hard to square with utilitarian theories of punishment. Again, the culprit is the reduction of punishment to subjective experiences of suffering. For those who advocate rehabilitation or incapacitation, subjective suffering is purely incidental and has no theoretical role to play except, perhaps, at the far margins. As Bronsteen, Buccafusco, and Masur recognize, subjective accounts of punishment may appear at first glance to have more appeal for deterrence theorists, for whom the prospect of precisely calibrating suffering promises an elegant parsimony.²⁹ However, there is good reason to pause before indulging this intuition. Utilitarians are not behaviorists. The most serious contributors to the utilitarian tradition have much more sophisticated views of human beings, their possibilities, and their standards of reward and loss, happiness and despair.³⁰ Even a thin understanding of the views of human nature and possibility held by eudaemonists such as Aristotle, Mill, and their contemporary heirs³¹ raises serious questions for

28. See Kolber, *supra* note 1, at 183 (arguing that many retributivists would sentence different offenders to different punishments even if they commit the same crime because of the differences in the offenders' subjective experiences of punishment).

29. Bronsteen et al., *supra* note 1, at 1074–75.

30. See generally Martha Nussbaum, *Who Is the Happy Warrior? Philosophy Poses Questions to Psychology*, 37 J. LEGAL STUD. 81 (2008) (criticizing the thin account of human agents endorsed by the psychology literature of hedonic flow).

31. Richard Kraut and Martha Nussbaum are two of the most compelling contemporary voices of the ancients. See generally, e.g., RICHARD KRAUT, *WHAT IS GOOD AND WHY: THE ETHICS OF WELL-BEING* (2007); MARTHA NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* (2006) [hereinafter NUSSBAUM, *FRONTIERS*]; Martha Nussbaum,

subjectivists, and particularly for Bronsteen, Buccafusco, and Masur, who organize their critique around the literature on hedonic adaptation. Setting aside these richer accounts of utilitarianism, there is good reason to question the conclusions drawn by scholars based on the distinctive claim that punishment is, in whole or in part, the suffering inflicted upon offenders by penal methods.³² For example, deterrence turns on potential offenders' anticipated suffering if punished. For both general and specific deterrence theorists, it is hard to see how post hoc accounts of actual suffering would add to the calculus when ex ante perceptions of potential suffering are what count.³³

The foregoing suggests a far more ambitious agenda than could possibly be accomplished here. In particular, a full account of the rich traditions in retributive and utilitarian approaches to criminal law and punishment is impossible in this Article. The more modest goal here is to defend objective theories of punishment by providing credible grounds for the conclusion that subjectivist critiques indulge a key conceptual error that is not endorsed by objectivists or entailed by the mainline theories of punishment represented in the objectivist tradition. This is an agenda in equal parts rehabilitative, critical, and constructive, and is pursued with the explicit purpose of setting the stage for a more rigorous exchange going forward with contemporary subjectivists such as Kolber and Bronsteen, Buccafusco, and Masur. Part II provides an exegesis of the major subjectivist critiques. Part III engages the core claim upon which these critiques rely—that punishment is, and should be measured by, the subjective experiences of those punished. Part IV defends retributivism. Part V provides a brief defense of utilitarianism.

Capabilities as Fundamental Entitlements, 9 FEMINIST ECON. 33 (2003) [hereinafter Nussbaum, *Capabilities*].

32. While perhaps not the most nuanced, Judge Richard Posner is one of the most prominent of the contemporary technical utilitarians. Nevertheless, as Adam Kolber notes, even Judge Posner resists the idea that punishment should be measured or calibrated by reference to the subjective disutility inflicted upon individual offenders. See Kolber, *supra* note 1, at 194 n.36 (citing a specific example where Judge Richard Posner declined to adjust an offender's sentence downwards despite the offender's "high sensitivity" argument).

33. Bronsteen, Buccafusco, and Masur note this "asymmetry." See Bronsteen et al., *supra* note 1, at 1060–61 ("Deterrence . . . is an ex ante phenomenon: the important issue is what harm the prospective criminal *believes* she will suffer if she is caught and punished, not the harm that she eventually experiences."). Dan Markel and Chad Flanders discuss this asymmetry at length in an exchange with Bronsteen, Buccafusco, and Masur. Compare Markel & Flanders, *supra* note 1 (arguing that the variance in the experience of punishment is not critically relevant to the shape and justification of punishments), with Bronsteen et al., *supra* note 3, at 1467–81 (arguing that the law should account for the differences in punishment experience when deciding how, and how much, to punish).

Part VI concludes by highlighting the important contributions subjectivist critiques can make in debates about penal practice and the role of mercy in criminal law. There, I acknowledge that the fact that some punitive technologies produce excessive incidental suffering is not trivial. To the contrary, proper management of penal practices ought to minimize incidental suffering because that suffering is not “punishment.” However, this is a challenge for penal practice, and cannot be used as a lever to unseat objective theories of criminal punishment. Rather, the valid conclusions will be of a different order. For example, the empirical observations that drive subjectivist critiques may require abandoning some penal practices because they produce large and unavoidable amounts of incidental suffering. Those observations may also argue for modifying the circumstances of some incarcerated offenders who experience levels of incidental suffering beyond those we are willing to accept. Finally, demonstrations of excessive incidental suffering may provide good moral or policy grounds for acts of mercy.

Were contemporary subjectivists to pursue a careful accounting of all suffering incidental to punishment for any of these applications, they would provide valuable contributions to moral, criminal, and penal theory. However, as a logical matter, these insights do not threaten the coherency or persuasiveness of those theories of punishment which define punishment objectively. To the contrary, objectivist theories put us in the best position to condemn and remedy sadistic penal practices, prison sexual assault, and discrimination against convicts post-release precisely because those theories clearly identify these practices as *not* “punishment.” By contrast, the approach endorsed by subjectivists, which holds that the suffering occasioned by sadistic penal practices, prison sexual assault, and discrimination against convicts post-release *is* punishment, is incoherent, unpersuasive, and leads to disturbing consequences.

As this Article suggests, Kolber, Bronsteen, Buccafusco, Masur, and I probably share many of the same concerns about our modern criminal punishment practices and policies. We probably also share many of the same instincts about what should be changed and how. We differ principally on how and why we reach those conclusions. They believe that, for example, prison rape should be stopped because the suffering caused by prison rape *is* punishment. As an objectivist, I believe prison rape should be stopped because it *is not* punishment. For the reasons described below, I believe that objectivists have the better view.

II. THREE VERSIONS OF THE SUBJECTIVIST CRITIQUE

The subjectivist approaches to punishment theory evidenced in the work of Kolber, Bronsteen, Buccafusco, and Masur are inspired by a faith in the natural and social sciences as sources for public norms.³⁴ While this turn is not new to penology or the criminal law,³⁵ the science of interest to contemporary subjectivists is of more recent vintage than the psychology and sociology that inspired Bentham's panopticon³⁶ and the Model Penal Code.³⁷ Much of Kolber's scholarship draws its inspiration from present, promised, and possible breakthroughs in neuroscience, and particularly brain imaging and mapping capabilities,³⁸ which allow neurologists and psychologists to assign correlations between subjective mental states and activity in different brain centers by monitoring comparative oxygenation. Bronsteen, Buccafusco, and Masur's work focuses on social and behavioral psychology with a special interest in survey work documenting subjects' self-reporting of happiness.³⁹ While distinct in many ways, the scientific literature in these areas shares an interest in quantifying or describing subjective mental states in precise physical or psycho-social terms. What drives the subjectivist critique and linked subjectivist approaches to punishment is the intuition that

34. Bronsteen et al., *supra* note 1, at 1037; Kolber, *supra* note 6, at 1599 n.89; Kolber, *supra* note 1, at 222–23.

35. See generally MICHEL FOUCAULT, DISCIPLINE AND PUNISH (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1979) (discussing the historical impact of social normalization on criminal law).

36. JEREMY BENTHAM, THE PANOPTICON WRITINGS (Miran Bozovic ed., Verso 1995) (1787).

37. It is worth noting that the American Law Institute is poised to abandon the commitment to utilitarian concerns as the sole justification of punishment in the Model Penal Code. See *infra* note 199 and accompanying text.

38. See Kolber, *supra* note 11 (arguing that the content of the law should change to pay more direct attention to experiences because more reliable technologies to measure such experiences are becoming available); Kolber, *supra* note 1, at 222–23 (noting that emerging neuroscience technologies may allow more accurate assessments of individuals' subjective experiences in response to the argument that a system of subjectively calibrated punishments would be impossible or prohibitively expensive to fairly administer).

39. Bronsteen et al., *supra* note 1, at 1039–40, 1048 n.67. The psychology literature on happiness has been applied to other areas of law as well. See, e.g., John Bronsteen, Christopher Buccafusco, & Jonathan Masur, *Hedonic Adaptation and the Settlement of Civil Lawsuits*, 108 COLUM. L. REV. 1516, 1518, 1527–35 (2008) (reviewing recent research in hedonic psychology and applying it to the settlement of personal injury claims, arguing that procedural delays have a counterintuitive corrective function because injured parties' initial perceptions of harm suffered actually have little overall effect on ultimate well-being); Peter Huang & Rick Swedloff, *Authentic Happiness and Meaning at Law Firms*, 58 SYRACUSE L. REV. 335, 339–42, 345–50 (2008) (considering recent research applying behavioral economics and positive psychology to studies of lawyer happiness and recommending changes in law school and law firm culture and training).

this potential descriptive capacity has revolutionary normative significance.⁴⁰

As Kolber and Bronsteen, Buccafusco, and Masur rightly note, much of this science is tentative, and there remain good scientific and theoretical reasons to exercise caution.⁴¹ It is certainly beyond the expertise of this author to take sides in debates on the science. Fortunately, it is not necessary to do so. For present purposes, I join Kolber and Bronsteen, Buccafusco, and Masur in noting that much of this contemporary neuroscience and behavioral psychology research is intriguing. The concern here is to determine whether and to what extent we should endorse their claims that these early scientific results should make us question the coherency of objective theories of criminal punishment. This Part sets the stage by providing a brief exegesis of the core subjectivist critique and by examining the potential scope of the central move in that critical argument, which holds that punishment *is*, in whole or large part, the subjective experiences of those punished. Absent that premise, the critical project falls. Later on, this Article argues that, because maintaining the subjectivists' premise is the source of so much confusion and absurdity, we are left with no reason to endorse any positive theory of punishment built on subjectivist foundations.

A. *The Subjective Experience of Punishment*

In his provocative essay *The Subjective Experience of Punishment*, Adam Kolber argues that prevailing theories of criminal law and punishment must take into account subjective experiences of

40. Bronsteen et al., *supra* note 1, at 1055–81; Kolber, *supra* note 11 (manuscript at 3, 13–47).

41. Bronsteen et al., *supra* note 1, at 1041; Kolber, *supra* note 11 (manuscript at 3–4, 8, 48–50); see, e.g., John Bickle, *Précis of Philosophy and Neuroscience: A Ruthlessly Reductive Account*, 4 PHENOMENOLOGY & COGNITIVE SCI. 231, 232–37 (2005) (suggesting key neurobiological research is overlooked in the psychological literature and arguing that psychological explanations should be resigned to more heuristic roles exploring questions for which low-level cellular and molecular mechanisms of inquiry do not yet exist); John Bickle, *Psychoneural Reduction of the Genuinely Cognitive: Some Accomplished Facts*, 8 PHIL. PSYCHOL. 265, 275–77, 282 (1995) (looking at empirical developments in the brain and behavioral sciences and suggesting cognitivist and psychological theories of behavior will be increasingly supplanted by neurophysiological accounts); Huib de Jong & Maurice Schouten, *Ruthless Reductionism*, 18 PHIL. PSYCHOL. 473, 478–485 (2005) (responding to Bickle and arguing for a continuing productive relationship between psychology and neuroscience); Nussbaum, *supra* note 30, at 86–101 (arguing that psychological literature investigating subjective well-being is replete with unquestioned normative assumptions and unacknowledged conceptual ambiguity that undermine its usefulness).

punishment.⁴² He further contends that doing so produces counterintuitive results that should lead us to question, if not reject, those objective theories.⁴³ His argument gets off the ground by noting that people may experience different subjective mental states in response to the same stimulus.⁴⁴ In particular, offenders sentenced to the same punishment—ten days' imprisonment, say—may, and often do, experience qualitatively and quantitatively different “disvaluable mental states.”⁴⁵

The point is hard to contest and is not trivial. To borrow one of Kolber's examples, a prisoner who has claustrophobia will suffer more and differently in a six-by-eight foot cell than an inmate who does not.⁴⁶ Similarly, literature relied upon by Bronsteen, Buccafusco, and Masur suggests that many prisoners adapt to incarceration fairly quickly while others do not.⁴⁷ Setting aside idiosyncratic factors shaping subjective mental states, some prisoners just have a rougher time of it. Some are wrongfully convicted; others not. Some are sent to prison for the first time from relatively secure and staid lives; others are repeat offenders from rough backgrounds who have extensive experience with incarceration. Some inmates are beaten and raped; others are not. These objective differences are bound to produce different quantities and qualities of “disvalue”⁴⁸ even among individuals with similar neuropsychological makeup when subjected to the same “punishment.”

42. Kolber, *supra* note 1, at 182; see also JEREMY BENTHAM, THE PRINCIPLES OF MORALS AND OF LEGISLATION 51–73 (J.H. Burns & H.L.A. Hart eds., Oxford Univ. Press 1996) (1807) (noting the circumstances that influence sensibility); Nigel Walker, *Legislating The Transcendental: Von Hirsch's Proportionality*, 51 CAMBRIDGE L.J. 530, 533–34 (1992) (suggesting failure to account for subjective “sensibility” differences among those punished may undermine utilitarian theories rooted in personal deterrence).

43. Kolber, *supra* note 1, 184, 231.

44. *Id.* at 189.

45. *Id.* at 187 & n.5.

46. *Id.* at 190–91. While not at all trivial for practical penology, as is argued below, the example holds no sway in core theoretical debates. The suffering a claustrophobe feels in the form of severe anxiety is incidental to incarceration as a punitive constraint on liberty. There is no contest that incidental suffering secondary to objectively justified punishment may raise independent moral, constitutional, legal, or institutional questions; incidental suffering may even rise to the level that amelioration or adaptation of penal technology is required. However, these practical issues need not and do not pose a challenge to traditional theories of punishment because punishment is neither justified nor measured by its ability to cause suffering.

47. See Bronsteen et al., *supra* note 1, at 1046–49 & nn.58–67 (citing research indicating improved adaptation and a decrease of emotional trauma in many prisoners over the course of their sentences).

48. See Kolber, *supra* note 1, at 187 n.5, 213 n.88, 215–16, 220. As is argued below, this choice of words suggests that something has gone wrong in subjectivist attack on retributivism. See *infra* Part IV.

In Kolber's view, the fact that objectively identical punishments cause different kinds and quantities of subjective disvalue has obvious normative significance.⁴⁹ For example, he points out quite rightly that retributivists believe that punishment ought to be proportionate in both absolute and comparative terms.⁵⁰ That is, retributivists hold that punishment must be proportionate to the crime for which it is inflicted and to the blameworthiness of the offender. As a consequence, retributivists also defend proportionality across cases in keeping with the familiar principle that like cases should be treated alike.⁵¹

Kolber claims that the imperative of proportionality commits retributivists to some uncomfortable conclusions.⁵² In particular, he argues that retributivists must either abandon their commitments to proportionality or must adjust sentencing to accommodate differences in the subjective experiences of those who are punished, no matter the source and nature of their sensitivities.⁵³ Retributivists who refuse to adjust objective punishments to accommodate the individual sensitivities and circumstances of offenders run afoul of absolute proportionality according to Kolber because they risk producing more suffering in individual cases than is proportionate to the crime.⁵⁴ Failure to titer punishment according to subjective sensitivities also compromises comparative proportionality because offenders whose crimes are in all relevant respects identical and who receive the same punishment may nevertheless experience different quanta of suffering.⁵⁵

Depending upon the future goal they hope to achieve, utilitarians are similarly obliged to calibrate suffering on an

49. Kolber, *supra* note 1, at 184.

50. *Id.* at 199. As Kolber points out, his critical argument is agnostic as to whether proportionality in either form must or ought to be a constraint on punishment practices. Rather, his argument proceeds from the quite accurate claim that retributivists are committed to the claim that proportionality must and ought to be a constraint on punishment practices. Kolber's critical project is to leverage that commitment using the fulcrum of subjectivism. As is argued here, retributivists need not be subjectivists and, at least in light of Kolber's arguments, ought not be subjectivists.

51. See generally Talia Fisher, Comparative Sentencing 39–40 (Oct. 13, 2009), available at <http://ssrn.com/abstract=1488345> (describing proportionality across cases as a “cardinal precept in retributivist theory”). As is pointed out in Part IV, this commitment to comparative proportionality is not independent. Rather, it is wholly a consequence of the commitment to objective proportionality.

52. Kolber, *supra* note 1, at 186–87.

53. *Id.*

54. *Id.*

55. *Id.* at 187, 215–16. “Comparative proportionality” should not be confused with Kolber's critique based on the comparative nature of punishment.

individual basis when inflicting punishment on Kolber's view. Utilitarian theories of criminal justice are heirs to a robust moral theory⁵⁶ captured by John Stuart Mill in the principle "that actions are right in proportion as they tend to promote happiness; wrong as they tend to produce the reverse of happiness."⁵⁷ In terms comfortable to Kolber and other subjectivists, Mill defines "happiness" as "pleasure and the absence of pain" and "unhappiness" as "pain and the privation of pleasure."⁵⁸ As Kolber points out, this primary commitment to an economy of pain and pleasure cashes out for most utilitarians as a balancing of the pain imposed by punishment and the pain prevented through specific deterrence, general deterrence, rehabilitation, and incapacitation.⁵⁹ No matter which of these goals one sets, Kolber contends that individual calibration of punishment based on subjective experiences of disutility is called for on utilitarian grounds lest punishment produce surplus suffering and therefore suboptimal ratios of, to use Mill's vocabulary, happiness and pain.⁶⁰

Kolber contends that fealty to deterrence justifications leads to the same uncomfortable results confronted by retributivists, including a commitment to subject sensitive offenders to objectively less severe treatment than insensitive offenders lest individual punishments or penal systems more broadly inflict more suffering than is necessary to achieve specific or general deterrence goals. Nevertheless, Kolber maintains that, unlike retributivists, utilitarians are not categorically committed to proportionality and therefore may be able to defend a policy of inflicting objectively equivalent punishments on objectively similar offenders regardless of differences in subjective experiences of disutility if doing so serves external goals.⁶¹ However, Kolber maintains that this does not excuse utilitarians from recognizing potential disparities between actual subjective suffering and the amount of suffering justified by deterrence or other utilitarian goals;

56. JOHN STUART MILL, UTILITARIANISM 48 (George Sher ed., Hackett Publ'g 1979) (4th ed. 1871).

57. *Id.* at 7.

58. *Id.*

59. See Kolber, *supra* note 1, at 216–17 (discussing utilitarian theories of punishment as deterrence and the goals of optimal punishment); see also Kolber, *supra* note 6, at 1583 (further noting utilitarian balancing of pain and happiness).

60. Kolber, *supra* note 1, at 216–219; MILL, *supra* note 56, at 7. As in his critique of retributivism, the critical guidance Kolber offers to utilitarians is drawn from their own commitments. His critical agenda is carefully agnostic as to ultimately endorsing any positive theory of punishment. Kolber, *supra* note 1, at 235–36; see also Kolber, *supra* note 6, at 1608 (critiquing proportional retributivism but acknowledging "there may be other reasons to prefer retributivism to consequentialism").

61. Kolber, *supra* note 1, at 186, 216–220, 230–35.

rather, it is a cost that must be justified on a systemic level, where offenders are nothing more than means for the achievement of larger ends.⁶²

B. The Comparative Nature of Punishment

In another article, Kolber argues that “we must understand the burdens of incarceration in comparative terms.”⁶³ By “comparative” here, he does not mean to compare individuals.⁶⁴ Rather, he uses “comparative” to elaborate on the subjectivism discussed in his earlier article.⁶⁵

The central insight is that we each have different baseline conditions.⁶⁶ Kolber contends that when we punish, we intentionally or knowingly inflict harm on offenders in order to produce a negative effect on their subjective states as compared to their baselines.⁶⁷ Based on that claim, he argues that the relevant measure of severity for any particular punishment is the degree and quality of difference it is able to achieve between an offender’s prepunishment baseline and his condition during punishment.⁶⁸ Consistent with his earlier work, Kolber argues that baseline conditions, conditions during punishment, and conditions after punishment must be measured subjectively.⁶⁹ Kolber contends that criminal law theorists implicitly endorse this account of punishment.⁷⁰ He then goes on to argue that once we accept the realities of comparative assessments of punishment, we find that there is good reason to doubt our common intuitions about

62. *Id.* at 186, 198, 216.

63. Kolber, *supra* note 6, at 1573.

64. *See supra* note 55.

65. Kolber, *supra* note 6, at 1568–69; Kolber, *supra* note 1, at 196–99.

66. Kolber, *supra* note 6, at 1571–73.

67. *Id.* at 1571–75.

68. *Id.* Kolber grounds this argument in Joel Feinberg’s influential work on measures of harm in the tort context. *Id.* at 1571–72 (citing JOEL FEINBERG, FREEDOM AND FULFILLMENT 3, 7 (1992) and JOEL FEINBERG, HARM TO OTHERS 31–64 (1984)). In another important essay Feinberg analyzes the differences between comparative and noncomparative conceptions of justice and points out that noncomparative measures play a dominant role in the criminal field. Joel Feinberg, *Noncomparative Justice*, 83 PHIL. REV. 297, 300–01, 311–13 (1974) [hereinafter Feinberg, *Noncomparative Justice*]. Elsewhere, Feinberg provides a muscular rejection of subjective suffering as a goal, measure, or justification of punishment. FEINBERG, *supra* note 20, at 116–118.

69. Kolber, *supra* note 6, at 1573–75. Bronsteen, Buccafusco, and Masur’s work on hedonic adaptation may have some relevance to this account. *See* Bronsteen et al., *supra* note 1, at 1041–54. If the temporal arc of punishment finds the offender returning to his baseline in very short order, then it may turn out that, measured comparatively, many punishments we regard as quite severe are not so severe at all. *See infra* Parts II.C and V.

70. Kolber, *supra* note 6, at 1571–75.

punishment severity. The core moves in his discussion of comparative punishment echo and reinforce his earlier work on subjective experiences of punishment.⁷¹

As he does in *The Subjective Experience of Punishment*, Kolber once again focuses on retributivist commitments to absolute and comparative proportionality.⁷² If the goal of punishment is to achieve a particular subjective state, then proportionality on both these dimensions is easy enough to achieve. However, once one realizes that the true measure of severity in punishment is the difference in subjective states that a punishment achieves, we are led to the conclusion that “retributivists must calibrate the punishment of each offender by examining his baseline condition and his punished condition.”⁷³ In particular, on pain of offending proportionality, Kolber contends that retributivists are committed to the view that offenders with high baselines ought to receive objectively lighter sentences as compared to offenders with lower baselines.⁷⁴ The alternative—imposing the same punishment without regard to their different baselines—risks producing disproportionate degrees and qualities of subjective suffering and therefore disproportionate punishments of two offenders who commit the same crime.⁷⁵

The tickle of absurdity suggested by this result becomes a psoriatic itch when Kolber sketches-in some details. Take, for example, the common assumption that rich and privileged individuals generally have higher baselines and therefore may suffer a precipitous drop if subjected to imprisonment.⁷⁶ Take then the contrasting assumption that poor and downtrodden people have lower baselines and therefore will fall less far when imprisoned.⁷⁷ If all this is true, then it appears to follow that for two offenders who commit the same offense, proportionality requires retributivists to inflict only light

71. See *supra* Part II.A.

72. Kolber, *supra* note 6, at 1582–83.

73. *Id.* at 1582; see also *id.* at 1582–83, 1600–07 (arguing that retributivists abandon proportionalism at great cost and should instead adopt calibration within a comparative framework).

74. *Id.*

75. *Id.*

76. *Id.* at 1567–68, 1600. As Kolber recognizes, this generalization based on an assumption should not be given too much empirical weight, but is offered as a thought experiment to make his point. Work by Bronsteen, Buccafusco, and Masur show the wisdom of Kolber’s caution. See *infra* Part II.C. The complicated role of money in generating and modifying subjective states is also explored in a recent study where researchers found that, compared to a control group, subjects who had just counted money reported less suffering in response to painful stimuli. Xinyue Zhou, Kathleen D. Vohs & Roy F. Baumeister, *The Symbolic Power of Money*, 20 PSYCHOL. SCI. 700, 702–04 (2009).

77. Kolber, *supra* note 6, at 1567–68.

punishment on the rich and sensitive offender and relatively heavier punishment on the hard-luck single mother working several minimum wage jobs.⁷⁸ That result follows, according to Kolber, as a matter of necessity from strong commitments to proportionality, a fact which, he concludes, ought to count as good reason to reject retributivism.⁷⁹

As with his earlier work, Kolber's account of comparative punishment has critical, but not devastating, consequences for utilitarianism.⁸⁰ For example, on first look, it appears that deterrence theorists may be obliged to impose objectively lighter sentences on wealthy and soft offenders.⁸¹ However, Kolber suggests that utilitarians may find good reasons to reject this result.⁸² For example, it may turn out that reaching the threshold of specific and general deterrence for folks with high baselines may sometimes require more severe punishments.⁸³ That may be true, particularly in the case of fines, which wealthy offenders likely would be able to absorb with little or no change in comparative subjective state. Alternatively, there may be good policy grounds not to show objective favor to rich and privileged offenders so as to preserve public faith in the overall justice system and therefore to preserve the relative utility gain achieved by an objectively consistent rule-based system of punishment.⁸⁴

C. Happiness and Punishment

Citing Kolber with approval for the conclusion that “[a]ll leading theories of criminal punishment must be concerned with the way punishment is subjectively experienced by the offender,”⁸⁵ John Bronsteen, Christopher Buccafusco, and Jonathan Masur argue in their recent article *Happiness and Punishment* that a critical factor in measuring the subjective disutility experienced by offenders is their capacity for “hedonic adaptation.”⁸⁶ They draw the term and concept from behavioral and social psychological studies based on self-reports of contentedness and well-being.⁸⁷ Bronsteen, Buccafusco, and Masur

78. *Id.* at 1582–83, 1600–07.

79. *Id.* at 1600–07.

80. *Id.* at 1583–84; Kolber, *supra* note 1, at 236.

81. Kolber, *supra* note 6, at 1583–85, 1594–1600.

82. *Id.* at 1583–84.

83. *See id.* at 1583–84, 1596; Kolber, *supra* note 1, at 216–19.

84. *See* Kolber, *supra* note 6, at 1583–84, 1596; Kolber, *supra* note 1, at 187, 216–19.

85. Bronsteen et al., *supra* note 1, at 1039 (citing Kolber, *supra* note 6, at 1596).

86. *Id.* at 1039; *see also* Bronsteen et al., *supra* note 3, at 1478–81, 1482–95 (extending this argument).

87. Bronsteen et al., *supra* note 1, at 1039–41. Calling to mind Mark Twain's quip that “reports of my death are greatly exaggerated,” in 1939 J.D. Mabbott reported the common belief

report that these studies reveal interesting and sometimes counterintuitive facts about the subjective experiences of disutility experienced by offenders. In particular, they cite evidence showing that most of us tend to adapt relatively quickly to changes in our circumstances.⁸⁸ Lottery winners initially experience much higher degrees of satisfaction, but soon enough report a return to their prewinning baselines.⁸⁹ After a surprisingly short interval, people who suffer disabling injuries adapt to their new circumstances and report levels of happiness within the proximate statistical range of those who are injury free.⁹⁰

The message Bronsteen, Buccafusco, and Masur take from these studies is simple: above a relatively low baseline, differences, and even dramatic differences, in material conditions do not correlate with greater happiness. Money can't buy happiness. In addition, changes in material conditions do not correlate with greater or lesser happiness after a surprisingly short period of adjustment. We are seldom satisfied, get bored easily, and quickly tire of even the prettiest of shiny things. Good lessons to be learned knee-side all; but things get really interesting when these grandfatherly reflections are applied to prisoners.

According to Bronsteen, Buccafusco, and Masur, like lottery winners, those subjected to criminal punishment report relatively rapid adaptation.⁹¹ In particular, prisoners and those forced to pay fines turn out to be emotionally supple in the face of hardship. While initially distressed, prisoners tend to adapt fairly quickly to their new circumstances and report a significant rebound in their levels of happiness within a matter of months.⁹² Likewise, those made to pay fines report a drop in their levels of satisfaction when the fine is levied and paid, but soon adapt to changes in their economic circumstances and recount corresponding returns to their base levels of self-reported happiness.⁹³

On Bronsteen, Buccafusco, and Masur's account, these studies of hedonic adaptation reveal that most of the suffering associated with

that "the retributive view is the only moral theory except perhaps psychological hedonism which has been definitely destroyed by criticism" J.D. Mabbott, *Punishment*, 48 MIND 152, 152 (1939).

88. Bronsteen et al., *supra* note 1, at 1039–46.

89. *Id.* at 1041.

90. *Id.* at 1041–42.

91. *Id.* at 1045–49.

92. *Id.*

93. *Id.* at 1045–46; *see also id.* at 1038–39, 1058–59, 1069–70 (suggesting implications of such adaptation).

imprisonment and fines is heavily frontloaded.⁹⁴ They go on to argue that these results reveal the folly underlying the common view that longer prison sentences and larger fines inflict correspondingly more suffering.⁹⁵ In fact, the phenomenon of adaptation reveals that years—or even decades—longer terms of imprisonment inflict only marginally more suffering, and perhaps no more.⁹⁶ Similarly, so long as fines leave payers with a basic level of material security, adaptation means that the net suffering inflicted does not change appreciably as fine amounts go up.⁹⁷

Adaptation has its limits, of course. Some degenerative and cyclical diseases such as rheumatoid arthritis and chronic headache defy adaptation,⁹⁸ as do some changes in social circumstances including divorce, death of a spouse, and continued unemployment.⁹⁹ Perhaps more surprising are results suggesting that, though offenders adapt fairly quickly to prison, they do not adapt as well to post-prison life.¹⁰⁰ The authors recognize that prison provides a fairly stable and predictable environment, but that the reentry world is populated with contingencies such as social marking, exclusion from work and society, loss of family and social support networks, and limited employment prospects, all of which work along a number of dimensions to inflict suffering on ex-convicts. These travails do not diminish appreciably over time.¹⁰¹ As a consequence, ex-convicts often report lower sustained levels of happiness and satisfaction post-release than they experienced while in prison.¹⁰² This is a phenomenon familiar to those who dedicate their careers to reentry work¹⁰³ and is a frequent topic for documentary reporting.¹⁰⁴

94. *Id.* at 1053–55.

95. *Id.* at 1055–57, 1070.

96. *Id.* at 1053–55.

97. *See supra* note 84 and accompanying text. *But see* Zhou et al., *supra* note 76, at 704–05 (reporting data suggesting that threatened loss of money can enhance subjective experiences of pain).

98. Bronsteen et al., *supra* note 1, at 1043–44.

99. *Id.*

100. *Id.* at 1049–55.

101. *Id.* at 1052–54; *see also infra* note 103.

102. The authors make the quite insightful point that dramatic and sustained reductions in happiness postrelease may contribute to recidivism by reducing convicts' subjective assessments of their prospective reductions in happiness if they reoffend, are caught, convicted, and reincarcerated because, in a real sense, they have little left to lose. Bronsteen et al., *supra* note 1, at 1066–67.

103. *See, e.g.,* Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 626–32 (2006) (explaining that reentry-related services are available while noting the significant challenges formerly incarcerated individuals still face); Michael Pinard, *A Reentry-*

There is another funny quirk of hedonic adaptation identified by Bronsteen, Buccafusco, and Masur: our remarkable inability to predict future adaptation.¹⁰⁵ We always think that more money will make us happier, even though it does not—at least not for long. Criminals live in absolute dread of prison, even though they will probably end up getting along pretty well there. According to Bronsteen, Buccafusco, and Masur, this failure to anticipate adaptation is also immune to directly relevant experience. “Thus, even people with substantial previous experience with a stimulus are unlikely to remember that its hedonic impact was both weaker and shorter than predicted.”¹⁰⁶ Even ex-convicts, who ought to know from past experience that prison is not so bad, still fear it just as much as those who have never had the privilege.¹⁰⁷ Even those freshly adapted to new economic conditions after paying a fine shudder at the thought of being hit with another one.¹⁰⁸

The impact on criminal law theory and practice inflicted by the work on hedonic adaptation cited by Bronsteen, Buccafusco, and Masur is not entirely clear, but in their view it is nonetheless important to recognize and accommodate these studies. For example, they contend that both deterrence theorists and retributivists commonly regard longer prison sentences and larger fines as linearly or perhaps even exponentially more severe than shorter sentences and smaller fines. In their view, the adaptation literature challenges that assumption by showing that most of the suffering caused by prison and fines is frontloaded and therefore that the overall suffering imposed by a sentence is less than intuition might lead us to expect.¹⁰⁹

Centered Vision of Criminal Justice, 20 FED. SENT’G REP. 103, 103 (2007) (arguing for a criminal justice system more focused on reentry, to help the growing numbers of individuals with criminal records face the challenges of reentry); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 459–61 (2010) (explaining that scholars, attorneys, and others who have considered reentry issues “generally recognize that the problem of postconviction collateral consequences is rapidly becoming more severe”); Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585, 594 (2006) (“[T]he most pressing problems that the ex-offender encounters are the obstacles that interfere with the ability to make a smooth transition to being a productive member of the community.”).

104. See, e.g., *A HARD STRAIGHT* (New Day Films 2004).

105. Bronsteen et al., *supra* note 1, at 1044–45, 1060–61.

106. *Id.* at 1045.

107. See *id.* at 1061 (“People, as a general rule, do not remember their adaptive responses to negative stimuli.”).

108. See *id.*

109. *Id.* at 1048–49.

While this insight appears to be important both for deterrence advocates and for retributivists, the ultimate consequences are, as Bronsteen, Buccafusco, and Masur note, equivocal.¹¹⁰ For example, it might lead us to be skeptical of “tough on crime” demands for longer sentences because they do not actually result in more deterrence or proportionally more suffering.¹¹¹ Alternatively, adaptation might require indulging “tough on crime” demands to the extreme in order to correct for diminishing suffering returns over time.¹¹² For utilitarians, that dramatic ratcheting up of punishments may be constrained by the fact that imprisonment is quite expensive in its own right.¹¹³ Given this and other considerations, the authors suggest that the proper balance probably lies away from longer sentences.¹¹⁴

III. THE LOGICAL LACUNA IN THE SUBJECTIVIST CRITIQUE

The subjectivist critique of traditional theories of criminal law and punishment rides on the claim that “suffering,” defined broadly as negative subjective experience, is, to use Kolber’s words, “a necessary and usually substantial component of retributive punishment.”¹¹⁵ This Article argues that retributivists and classic utilitarians need not and ought not endorse this premise. Section A sets the stage with a brief overview of objectivist retributivism.¹¹⁶ Section B exposes the key role played by the claim that punishment is suffering in the subjectivist critique of retributivism. There, the simple point is that the conclusion that “retributivists must measure punishment severity in a manner

110. *Id.* at 1071–74.

111. *See infra* Part V.B (explaining the argument of Bronsteen, Buccafusco, and Masur that the phenomena of adaptation and of the human inability to predict personal future adaptation “are in tension with traditional theory and current practice because the deterrent ‘bang’ is all frontloaded,” and thus, “longer sentences . . . serve no utilitarian purpose”).

112. Bronsteen et al., *supra* note 1, at 1071–74.

113. *See id.* at 1074–75 (“If less punishment can achieve the desired end, then society gains monetarily by eschewing a more severe alternative (in particular, a longer prison sentence).”).

114. *See id.* at 1061–62 (explaining that failing to take adaptation into account will result in calculations of punishment that are higher than necessary, from consequentialist standpoint). This author does not contest this conclusion, but would argue for it on retributive grounds. *See* Gray & Huber, *supra* note 18.

115. Kolber, *supra* note 1, at 215–16; *see also* Kolber, *supra* note 6, at 1595 (summarizing the argument in *The Subjective Experience of Punishment* that “even if the disvalue of punishment consists of more than just negative subjective experiences, those experiences are at least part of what makes punishment burdensome”). Kolber makes the same claim about consequentialist theories of punishment. Kolber, *supra* note 1, at 216–17. Bronsteen, Buccafusco, and Masur explicitly endorse Kolber’s views on these key points. Bronsteen et al., *supra* note 1, at 1039 n.4, 1069.

116. As Mitch Berman has pointed out, not all theorists who identify themselves as retributivists are objectivists. Berman, *supra* note 25, at 7.

that is sensitive to individuals' experiences of punishment"¹¹⁷ depends on the claim that "[the subjective disutility of punishment] is largely or entirely the punishment itself."¹¹⁸ Section C tries to make sense of the contention that suffering is "largely or entirely the punishment itself" and concludes that there is little promise in the effort because it results in the collapsing of familiar and necessary distinctions, such as that between crime and punishment. This suggests that the more persuasive and coherent approach to punishment theory is to maintain a firm line between "punishment," defined in objective terms, and the contingent effects of punishment, including the subjective experiences of offenders. Parts IV and V offer further arguments for why punishment theorists need not, and ought not, endorse subjectivism. Part VI amplifies the position by pointing out how progressive agendas for reforming our punishment practices are better served by an objectivist approach to punishment rather than full or partial subjectivism.

A. A Quick Sketch of One Objective Theory of Punishment

The defining feature of the criminal law is its claimed title to impose state punishment.¹¹⁹ The core challenge to any theory of criminal law is its capacity to justify punishment generally and to rationalize the punishments inflicted in particular cases more specifically.¹²⁰ Retributivism is one answer to the call. While there are differences among the theories advocated by its many and various proponents,¹²¹ retributivism is defined by its core commitment to the principle that punishment can only be justified if, and to the extent, it is deserved.¹²² That commitment is often held in contrast to utilitarian

117. Kolber, *supra* note 1, at 216.

118. *Id.* at 212; see also Kolber, *supra* note 6, at 1595 (summarizing the argument in *The Subjective Experience of Punishment* that "even if the disvalue of punishment consists of more than just negative subjective experiences, those experiences are at least part of what makes punishment burdensome").

119. This is not to deny that other legal and non-legal institutions and persons impose penalties. Consider punitive damages awards, which raise their own theoretical and practical concerns, none of which need be addressed here. For a retributivist understanding and reconfiguration of such awards, see Dan Markel, *How Should Punitive Damages Work?* 157 U. PA. L. REV. 1383 (2009); Dan Markel, *Retributive Damages: A Theory of Punitive Damages As Intermediate Sanction*, 94 CORNELL L. REV. 239 (2009).

120. See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 1, 4–9 (1968) (discussing justifications for punishment as they relate to different theories of punishment).

121. See Berman, *supra* note 25, at 7.

122. See, e.g., KANT, *supra* note 14, at 105 ("Punishment by a court . . . can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society. It must always be inflicted upon him only *because he has committed a crime.*"); MICHAEL MOORE,

theories,¹²³ which generally hold that punishment is justified if, and only to the extent, it can achieve more good than ill.¹²⁴

Desert, in the sense of having committed an offense, is a necessary condition for state punishment in the eyes of retributivists.¹²⁵ That is, if punishment is not deserved, then it cannot be imposed. Desert is important not only as a threshold requirement for punishment; it also plays a determinate role in defining and limiting punishment in particular cases. Again, proponents differ in the details, but in the main they share a commitment to objective proportionality: to be commensurate with desert, punishment must be proportionate to the offense or, in more poetic terms, punishment must “fit” the crime.¹²⁶

Retributivists are not blind to context or insensitive to texture. Variations among criminals and their acts have a role to play in evaluating desert. Retributivists are particularly sensitive to the variety of mental connections criminals may have to their acts.¹²⁷ The

PLACING BLAME: A THEORY OF THE CRIMINAL LAW 83 (1997) (defining “retributivist” as “one who believes that the justification for punishing a criminal is simply that the criminal deserves to be punished”).

123. See KANT, *supra* note 14, at 105 (“*Punishment . . . can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society. It must always be inflicted upon him only because he has committed a crime.*”).

124. See BECCARIA, *supra* note 3, at 13–14 (“Punishments which go beyond the need of preserving the common store or deposit of public safety are in their nature unjust.”).

125. See Berman, *supra* note 25, at 19 (“Non-instrumentalist retributivism would bar [punishment in the absence, or in excess, of an offender’s desert].”). Some retributivists also argue that desert is a sufficient condition for punishment. See, e.g., KANT, *supra* note 14, at 105 (“The law of punishment is a categorical imperative”); MOORE, *supra* note 122, at 88–89, 153–54 (“The distinctive aspect of retributivism is that the moral desert of an offender is a sufficient reason to punish him or her”); Thomas Hill, *Kant on Wrongdoing, Desert, and Punishment*, 18 LAW & PHIL. 407, 411–12 (1999) (“[D]eep retributivists hold [that it is morally necessary that wrongdoers be made to suffer] as a *fundamental* moral principle, which can serve to justify retributive policies of punishment.”); Michael S. Moore, *The Moral Worth of Retributivism*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 179, 181–182 (Ferdinand Schoeman ed., 1987) (stating that, from a retributivist standpoint, desert is “both a sufficient as well as a necessary condition of liability to punitive sanctions”). As Nigel Walker points out, however, many “modern” retributivists have shied away from the view that there is “an obligation to punish, and substituted a mere right to punish” if and only if that punishment is deserved. Nigel Walker, *Even More Varieties of Retribution*, 74 PHIL. 595, 601 (1999). For present purposes, this Article need not take sides in this “duty” vs. “right” debate. *Id.* at 604.

126. This objective constraint frequently is interpreted as suggesting a hierarchy of crime and punishment such that more severe crimes lead to more severe punishments. As is elaborated below, this idea of a hierarchy of severity is somewhat misleading to the extent it suggests the existence of a fungible unit of seriousness in crime and a corresponding unit of severity in punishment. See *infra* Part IV.A.

127. See, e.g., KANT, *supra* note 14, at 106–07 (explaining how various acts and punishments have different significances to different individuals, depending on the respective individuals’ sensibilities); see also *infra* note 229 (providing a portion of the text of Kant’s argument

commitment to proportionality therefore has a case-specific dimension, measuring punishment not only by reference to the crime itself but also according to the connection each offender has to his crime—what we often call “culpability.”¹²⁸ This conception of guilt as a combination of bad act and culpability is familiar to all first-year law students. Indeed, requirements for *actus reus* and *mens rea* reflect the long-standing influence of retributivism in the common law.¹²⁹ In this regard, almost everyone is a retributivist, at least insofar as they indulge the deeply held intuition that guilt, as a combination of act and culpability, is a threshold qualification for punishment.¹³⁰

So, retributivists impose punishment if and only if the offender deserves it—that is, if he is culpable in a crime. Fidelity to this principle is not satisfied by the imposition of any old punishment upon a finding of guilt. Rather, retributivists maintain that the punishment inflicted in any given case must be deserved in its form and dimension—it must fit the crime and must reflect the offender’s culpability.¹³¹ From these commitments to proportionality in individual cases, it follows that retributivists are committed to proportionality between cases. If desert is determined by objective standards, then equally culpable offenders who commit the same crime should receive the same punishment in the normal course. From the retributive point of view, however, the demand for comparative

regarding the varying significances of acts and punishments to various criminals, and explaining its significance).

128. See ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 363–65 (1983) (“The punishment deserved depends on the magnitude . . . of the wrongness of the act, and the person’s degree of responsibility . . . for the act . . .”).

129. See Manuel G. Velasquez, *Why Corporations Are Not Morally Responsible for Anything They Do*, in *COLLECTIVE RESPONSIBILITY* 111, 113–14 (Larry May & Stacey Hoffman eds., 1991) (stating that the nineteenth-century common law required both an “*actus reus*” and “*mens rea*” for criminal responsibility). These same prerequisites are also important in some utilitarian systems. Herbert Wechsler’s Model Penal Code, for example, maintained in different language the common law requirements for a legal prohibition sufficient to meet legality demands, a voluntary act, and a mental connection to the crime as prerequisites for criminal punishment. See MODEL PENAL CODE §§ 2.01–.02 (1962) (requiring for criminal liability “conduct that includes a voluntary act or the omission to perform an act of which [one] is physically capable,” and purposeful, knowing, reckless, or negligent action). Inclusion of these requirements in a largely utilitarian system bespeaks the persistent influence of retributivism.

130. Omissions and strict liability crimes may seem to constitute exceptions. For reasons outside the scope of this Article, I do not think they are. See David Gray, *You Know You Gotta Help Me Out* (Oct. 28, 2010) (unpublished manuscript, on file with author).

131. See, e.g., *Taylor v. Superior Court*, 477 P.2d 131, 141 (Cal. 1970) (Mosk, J., dissenting) (“Fundamental principles of criminal responsibility dictate that the defendant be subject to a greater penalty only when he has demonstrated a greater degree of culpability.”).

proportionality is derivative of the demand for noncomparative proportionality.¹³²

B. Punishment as Suffering

The subjectivist critique of retributivist approaches to criminal law relies on a premise that retributivists need not and ought not endorse: that suffering, or some other form of subjective disutility, “is largely or entirely the punishment itself,” the imposition of which “is a necessary component of retributive punishment and constitutes, if not the sole reason for retributive punishment, certainly a major part of it.”¹³³ The centrality of this premise to the subjectivist critique of retributivism is evident if we consider in quasi-symbolic form Kolber’s argument based on comparative proportionality—like cases ought to be treated alike—from *The Subjective Experience of Punishment*¹³⁴:

1. If an offender commits crime *C*, then the offender receives punishment *D*.
2. *A* commits crime *C*.
3. *B* commits crime *C*.
4. Therefore *A* receives punishment *D*.
5. Therefore *B* receives punishment *D*.
6. *D* equals *D*.
7. Therefore, *A* and *B* receive equal punishment.
8. If *A* receives punishment *D*, then *A* experiences quantum of suffering *X*.
9. If *B* receives punishment *D*, then *B* experiences quantum of suffering *Y*.
10. Therefore, *A* experiences quantum of suffering *X*.

132. Feinberg, *Noncomparative Justice*, *supra* note 68, at 300–01, 311–13, 318–19; *see also* MOORE, *supra* note 122, at 90–91 (arguing that the noncomparative proportionality principle of retributivism allows for a determination of “which cases care truly alike,” and thus, allows like cases to be treated alike). As Feinberg points out, comparative disparities may reveal noncomparative injustice, and comparative disparities may underwrite moral sentiments of injustice—particularly immature moral sentiments—but where disparities do not reveal noncomparative injustice, claims that a wrong has been committed do not carry much weight.

133. Kolber, *supra* note 1, at 212–13. Bronsteen, Buccafusco, and Masur are fairly straightforward in their endorsement of the proposition that punishment is suffering, stating that, “When the state punishes a criminal, it inflicts suffering,” where “suffering” is a self-reported state of “unhappiness.” Bronsteen et al., *supra* note 1, at 1037–38. Kolber’s critique of retributivism is also committed to the view that retributivists must define punishment as suffering, though he is less definitive on what constitutes “suffering,” which is evidenced by his preference for the phrase “subjective disutility.” Kolber, *supra* note 1, at 212–213; *see also id.* at 197–198 (explaining the relevance of prisoners’ subjective experiences).

134. Kolber, *supra* note 1, at 215–16; *see also* Kolber, *supra* note 6, at 1600–01 (“[T]he comparative nature of punishment makes a purely objective notion of proportionality untenable.”).

11. Therefore, *B* experiences quantum of suffering *Y*.
12. *X* is not equal to *Y*.
13. Therefore, *A* and *B* do not receive equal punishment.

This argument purports to be a form of *reductio ad absurdum*. Here, the alleged contradiction is between the conclusions reached on lines 7 and 13, which hold both that *A* and *B* receive equal punishment and that they do not. The problem is that these conclusions follow from incommensurable premises. The conclusion on line 7 follows from the familiar principle that like cases ought to be treated alike. However, the conclusion reached at line 13 follows only after introducing assessments of our offenders' subjective experiences of punishment, set forth on lines 8, 9, and 12. The introduction of these subjectivist premises is not itself an argumentative foul so long as they can be independently proved. Kolber's and Bronsteen, Buccafusco, and Masur's arguments in favor of subjectivism are addressed below, but for now they shall be assumed *arguendo*. The real difficulty comes in the move made in line 13. Line 13 only follows from earlier premises and interim conclusions if we add and accept the premise that "punishment" and "quantum of suffering" are in some material way equivalent and therefore interchangeable without semantic loss.¹³⁵ If they are not, then the argument is invalid by virtue of a fallacy of equivocation and ought to be rejected.¹³⁶ Kolber and Bronsteen, Buccafusco, and Masur do not specify the extent or dimension of the logical or semantic equivalence between "punishment" and "suffering" upon which their critiques rely. The next Section therefore takes some time to explore the possibilities and the argumentative consequences.

135. Kolber makes a similar argument based on the retributivist commitment that punishment ought to be proportionate to the crime for which it is imposed. Kolber contends that an offender may experience a quantum of suffering disproportionate to his crime, a prospect that presents retributivists with a potential contradiction. Kolber, *supra* note 1, at 199–216; *see also* Bronsteen et al., *supra* note 1, at 1068–69 (crediting Kolber's argument that "different individuals' experiences of punishment must be taken into account"). Again, however, the claimed tension is between two claims—1) that an offender has received a punishment proportionate to his crime; and 2) that the same offender has received a quantum of suffering disproportionate to his crime—which are not in contradiction absent the added premise that punishment is suffering.

136. "Equivocation" is used here for its technical meaning, denoting a semantic shift within an argument that allows the proponent to draw an unwarranted conclusion. BLACKWELL DICTIONARY OF WESTERN PHILOSOPHY 249 (Nicholas Bunnin & Jiyuan Yu eds., 2004).

C. What It Might Mean to View Punishment as Suffering

In their work on punishment, Kolber and Bronsteen, Buccafusco, and Masur advance two agendas:¹³⁷

The first is largely critical. Relying on examples, thought experiments, hypotheticals, and the results of self-reported studies of happiness, they expose endemic disparities in the suffering accounts tallied by various punitive practices. Based on these disparities, they argue that long-standing theories of criminal punishment do not or cannot justify these deficits or surpluses, and therefore must modify their sentencing recommendations on pain of contradiction.¹³⁸ Where the modifications required to preserve a theory of punishment are sufficiently distasteful, they contend that the theory itself ought to be abandoned.

The second, and as yet less well-developed, goal appears to be describing a role for new observational technologies and techniques in designing and assessing punishment practices.¹³⁹ This Section targets the first of these agendas.

The subjectivist critique purports to upend traditional theories of punishment by arguing that these theories cannot bear the burden of justifying heretofore underappreciated kinds, measures, disparities, and surpluses of suffering. This leaves open the question of what suffering counts as “punishment” and what suffering does not. Closer examination of that question reveals that much of the suffering upon which the subjectivist critique relies cannot fairly be characterized as punishment and that doing so leads to absurd or incoherent results.

1. All punishment is suffering, and all suffering is punishment.

The subjectivist critique turns on the claim that negative experiences of offenders—suffering—must count when defining what punishment is and when assessing the severity of particular punishments. This leaves open the question of what suffering counts and what does not.¹⁴⁰ One possibility would be to claim that

137. Kolber, *supra* note 1, at 184–85.

138. *Id.* at 235–36.

139. See John Bronsteen, Christopher Buccafusco, & Jonathan Masur, *Welfare as Happiness*, 98 GEO. L.J. 1583, 1596 (2010) (explaining the availability of measures for gauging “the well-being that people actually feel”); Kolber, *supra* note 11, at 3–4 (explaining that “new technologies have already shifted the way we measure experiences and will continue to do so more dramatically over the next thirty years,” and arguing that these technologies “should . . . change the way we assess criminal blameworthiness and punishment severity”).

140. Kolber recognizes the centrality of this claim to his enterprise. See Kolber, *supra* note 1, at 214 (noting that “[o]nly if one believes that experiential suffering should not count at all are

punishment and suffering are perfectly coextensive. There is no ground for such a claim. Familiar counterexamples make the point. Those struck down by flu, cancer, lightening, or a bus most definitely suffer. However, none of these afflictions can fairly be categorized as “punishment.”¹⁴¹ The category of “suffering” is therefore larger than “punishment.” It follows that subjectivists cannot justify the premise they need by claiming that punishment and suffering are perfectly coextensive. The addition of “state-imposed” as a qualifier for “suffering” does not advance the cause. States impose a host of “disvaluable”¹⁴² conditions on individuals within their thrall ranging from taxes to mandatory military service to quarantines, none of which are “punishment” by any familiar use of the term.¹⁴³

we relieved entirely of the obligation to calibrate subjective experience,” which is the logical equivalent of saying that “if one believes that experiential suffering should not count at all then we are relieved entirely of the obligation to calibrate subjective experience”).

141. See Kent Greenawalt, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 344 (1983) (“God and humans can punish; hurricanes cannot.”). Some readers may cavil, suggesting that background facts will demonstrate that these unfortunate souls “deserve” disease or physical harm because they contributed to the constellation of risks that eventually led to their suffering. See, e.g., ARISTOTLE, *NICOMACHEAN ETHICS* 38–39 (Terence Irwin trans., 2d ed. 1999) (“[W]e never censure someone if nature causes his ugliness; but if his lack of training or attention causes it, we do censure him.”). While perhaps true in some cases, it is not true in all cases. *Id.* Regardless, the claim turns on another equivocation, neatly captured by Kant’s distinction between “*poena forensis*” (“[p]unishment by a court”) and “*poena naturalis*” (“in which vice punishes itself and which the legislator does not take into account”). KANT, *supra* note 1414, at 105; see also GEORGE P. FLETCHER, *THE GRAMMAR OF CRIMINAL LAW* 231 (2007) (discussing Hart’s fourth and fifth requirements for punishment, which “address the qualities required of the punishing authority”); HART, *supra* note 120, at 4–5 (defining punishment to include the following characteristics: “[i]t must be for an offence against legal rules . . . of an actual or supposed offender for his offence . . . intentionally administered by human beings other than the offender . . . imposed and administered by a legal system against which the offence is committed”).

142. “Disvaluable” states might be defined objectively, without regard to whether a particular person experiencing that state finds it pleasant or unpleasant. That is the approach to punishment advanced in a recent article by Dan Markel and Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, CAL. L. REV. (forthcoming 2010) (manuscript at 142), available at <http://ssrn.com/abstract=1587886> (“[W]hat 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.”). However, Kolber clearly means “disvaluable” states to refer to those states which actually cause a particular offender to experience some degree of subjective experience that is subjectively experienced as negative. Kolber, *supra* note 1, at 187 n.5.

143. FEINBERG, *supra* note 20, at 106. The range of such state impositions provides ready counterexamples for other attempts to refine further the claim that punishment is suffering along this general line. For example, were subjectivists to define punishment as state-imposed suffering in response to a voluntary act, they would have to distinguish income taxes, which are imposed in response to earnings, sales taxes, which are imposed in response to purchases, and registration requirements, which are imposed upon those who, for example, decide to own and drive a car. For an engaging analysis of taxes as non-punitive measures, see LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* (2002). As is argued here, the

2. All punishment is suffering, but only some suffering is punishment.

Another candidate for the missing premise is that punishment defines a wholly contained subset of suffering such that all punishment is suffering, but not all suffering is punishment. At some points, Kolber appears to hold a version of this view, suggesting that “the subjective disutility of punishment . . . is largely or entirely the punishment itself.”¹⁴⁴ Likewise, Bronsteen, Buccafusco, and Masur appear to hold that the purpose of punishment is to inflict suffering.¹⁴⁵ While certainly more conservative, this view already represents a significant concession. Specifically, it acknowledges that offenders subjected to punishment may experience not only suffering that falls within the scope of their punishment but additional, incidental, suffering as well.¹⁴⁶ Therefore, while this claim—that suffering occupies the entire field of punishment, but punishment occupies only a corner of suffering—may provide some solace for subjectivists on the level of hard logic, it highlights the fact that extraordinary care is necessary in analyzing the claim so as not to indulge in an equivocation between suffering properly within the scope of punishment and incidental suffering.¹⁴⁷

This is a rather fine but crucial point, and therefore deserves a bit more attention. The conclusion reached by subjectivist critics is that our current theories of criminal punishment do not keep an accurate tally of offenders’ suffering; and, furthermore, once a proper tally is done, at least some of the theories deployed to justify punishment are so upside-down that they are impossible to stomach.¹⁴⁸ That argument only goes through if critics such as Kolber and Bronsteen, Buccafusco, and Masur can make a conclusive argument for including in the tally the categories and cases of suffering they believe are ignored by the objectivist theories they

flow of counterexamples only abates when one recognizes desert as a necessary and defining feature of punishment; and, further, taking this constraint on punishment seriously requires measuring punishment objectively, without regard to the idiosyncratic experiences of offenders.

144. Kolber, *supra* note 1, at 212.

145. See Bronsteen et al., *supra* note 1, at 1037 (“When the state punishes a criminal, it inflicts suffering. There are limits on the amount and type of suffering that may legitimately be imposed . . .”).

146. See *Flemming v. Nestor*, 363 U.S. 603, 616 (1960) (asserting that administrative consequences, such as “bar[ring] from practice [of medicine] persons who commit or have committed a felony,” are an exercise of “regulatory power,” and do not “add to the punishment”).

147. As is argued below, the examples, hypotheticals, and thought experiments offered by Kolber as *reductio ad absurdum* against traditional theories of criminal punishment are guilty of precisely this equivocation. See *infra* notes 148–53 and accompanying text.

148. Kolber, *supra* note 1, at 184–85.

attack. If it turns out that much or all of the suffering these scholars focus on falls outside the extension of “punishment” properly defined, then the entire enterprise is constructed upon an equivocation between punishment and suffering and must be abandoned in favor of more conservative, but nevertheless important, pursuits.¹⁴⁹

Kolber concedes the distinction, noting that “not all experiential suffering in prison is imposed in a knowing or intentional way.”¹⁵⁰ However, he goes on to maintain that “even if some experiential suffering should not count, we must still consider the suffering that does.”¹⁵¹ This immediately presents the question of what suffering counts and what does not, as it does important normative questions such as why the suffering that counts does and why the suffering that does not count does not.

Bronsteen, Buccafusco, and Masur must confront the same issue. Reducing “punishment,” as they do, to self-reporting of happiness and suffering fails to distinguish among sources and causes. For example, an imprisoned offender who happens to be a life-long devotee of *The Guiding Light* may have descended into abject despair upon cancellation of the show in 2009, but the “suffering” occasioned by that loss would be incidental to his punishment. Bronsteen, Buccafusco, and Masur and others who rely on self-reported happiness to advance subjectivist accounts of punishment might argue that these incidental sources of suffering can be regressed out of the statistical results. However, they have so far not indicated an awareness of the need.¹⁵² Furthermore, acknowledging the need for regressions from the raw data of self-reported happiness still leaves unanswered the questions of what suffering counts, what does not, and why.

If it is true that some suffering is incidental and some not, then it may simply be the case that all the subjective inequalities Kolber and Bronsteen, Buccafusco, and Masur are concerned with, whether measured subjectively, comparatively, or diachronically, are incidental to punishment and therefore impose no duties of accommodation or accounting on theories of punishment. To avoid that result, these critics are on the hook for clear, plausible, and defended criteria that can distinguish between suffering that is “punishment” and suffering that is not. The criteria upon which Kolber and Bronsteen, Buccafusco, and Masur appear to rely to fulfill this burden is a

149. See *infra* Part VI.

150. Kolber, *supra* note 1, at 213.

151. *Id.* at 213–14.

152. See Nussbaum, *supra* note 30, at 86–88, 96–97 (noting that those who rely on self-reported happiness do not account for the ambiguity of incidental suffering).

modified version of proximate cause, either in the form of suffering inflicted purposely or suffering inflicted knowingly.¹⁵³ Neither is sufficient to fulfill the argumentative and theoretical burdens of the subjectivist critique.

3. Suffering is only punishment if it is purposely inflicted.

While not explicitly endorsed by Kolber or Bronsteen, Buccafusco, and Masur, “purpose” as a criterion for distinguishing suffering that is punishment from suffering that is incidental is a familiar refrain in their writing.¹⁵⁴ “Purpose” certainly appears to mark a sharp distinction between suffering that is punishment and suffering that is incidental to punishment. Unfortunately, it fails to answer three crucial questions: (1) what suffering is intended; (2) by whom; and (3) why.¹⁵⁵ Consider, for example, prisoner-on-prisoner violence. If an offender sentenced to a term of imprisonment is the target of violent assaults by other prisoners solely to fulfill the sadistic impulses of his attackers, then is the suffering caused by those assaults “punishment”? It is certainly a consequence of the offender’s imprisonment, but it is hard to imagine how it could be characterized as “punishment.” Quite to the contrary, these kinds of attacks are crimes.

Critics of retributivism and utilitarianism who base their arguments on the proposition that the severity of a punishment, and therefore punishment itself, is in whole or large part a function of the subjective experiences of offenders, must distinguish between punishment and unjust treatment, including criminal acts, as the causes of disvaluable experiences. Otherwise, they risk including in their severity tallies causes and therefore mental states that no theory of punishment needs to or should aspire to justify.

Neither Kolber nor Bronsteen, Buccafusco, and Masur carefully respect this important distinction. For example, Kolber regards prisoner-on-prisoner violence as “punishment” rather than crime, contending that “variations in [prison] conditions,” including “physical and sexual violence,” “reflect objectively observable features of

153. See Kolber, *supra* note 1, at 196–98; Bronsteen et al., *supra* note 1, at 1069.

154. See, e.g., Bronsteen et al., *supra* note 1, at 1037; Bronsteen et al., *supra* note 3, at 1487 n.99 (defending purpose as an element of proximate cause as a criterion for determining whether suffering is punishment); Kolber, *supra* note 1, at 196–98 (arguing that the primary burden of criminal theory is to justify “purposefully or knowingly inflict[ing] substantial pain or distress”); *id.* at 212–13 (“Subjective disutility is a necessary component of retributive punishment and constitutes, if not the sole reason for retributive punishment, certainly a major part of it.”).

155. See Kolber, *supra* note 1, at 195–96. This is a significant omission. See FLETCHER, *supra* note 141, at 228 (interpreting Hart); HART, *supra* note 120, at 4–5.

punishment.”¹⁵⁶ Bronsteen, Buccafusco, and Masur at least implicitly endorse the same claim, including in their tally of unaccounted suffering “prison sexual violence” and its consequences.¹⁵⁷ However, these authors offer no argument for the quite counterintuitive proposition that prison rape is “punishment.” The error is in the collapsing of two distinct moral concepts—“crime” and “punishment”—into an undifferentiated category of contingent effects—“suffering.” The consequences are far from trivial.

For Kolber, “subjective disutility” constitutes the “sole” or “major” reason for punishment,¹⁵⁸ and the suffering caused by sexual assault constitutes “punishment.”¹⁵⁹ Presumably, he does not believe that sexual assault committed outside of prison is “punishment,” which means that location is a necessary criterion such that prison sexual assault is “punishment” principally because it happens in prison.¹⁶⁰ The consequence of this account is that the “subjective disutility” inflicted by sexual assault is rendered entirely fungible with the suffering inflicted by restraints on liberty characteristic of imprisonment generally. That is, when tallying up the “punishment” that has been imposed on an offender, we are obliged on Kolber’s view to count on equal footing the subjective disutility caused by prison rape and the subjective disutility caused by loss of the opportunity to travel to Belize.

If this argument is accepted, then those who suffer at the hands of other prisoners seem to have no right to object, no claim for protection, and no right to demand the prosecution and punishment of their abusers. Quite to the contrary, if the suffering occasioned by prisoner-on-prisoner violence is “punishment,” and “punishment” is the suffering which offenders deserve as a consequence of their crimes, then the perpetrators of sexual assault in prison are by definition immune from prosecution because the suffering they inflict is “punishment.” Further, because suffering appears to be fungible for

156. Kolber, *supra* note 1, at 188.

157. Bronsteen et al., *supra* note 1, at 1050; Bronsteen et al., *supra* note 3, at 1489.

158. Kolber, *supra* note 1, at 212–13.

159. *Id.* at 188.

160. “Knowledge” or “purpose” on the part of someone may also be necessary in Kolber’s view. However, neither is sufficient. As is discussed below, agents who act knowingly or purposefully to put another person at certain risk of harm may be criminally or tortiously liable for their conduct, but that knowledge or purpose does not convert the harm into “punishment.” See *infra* note 161 and accompanying text. The story in no way changes if the person who knowingly or purposely puts his victim in harm’s way is a state official. Therefore, to maintain his claim that prison sexual assault is a component of “punishment” when it occurs, Kolber appears to be committed to the view that location is an essential criterion when distinguishing between sexual assault that is punishment and sexual assault that is not punishment.

subjectivists, victims of prison violence can be made whole by early release when the total quantum of suffering they deserve is reached and therefore would have no personal claim that abuse at the hands of other prisoners should be stopped, much less prosecuted.

This is clearly specious, and it is impossible to believe that Kolber or Bronsteen, Buccafusco, and Masur would endorse these results. Retributivists and most utilitarians certainly would not. However, Kolber and Bronsteen, Buccafusco, and Masur cannot avoid these consequences unless they take seriously the proposition that “crime” and “punishment” are fundamentally moral rather than forensic concepts that are equally comprehensible through the heuristic of suffering or other forms of subjective disvalue. The more persuasive view is that prisoner-on-prisoner violence is unlawful, is perpetrated by the wrong people (prisoners rather than agents of the criminal justice system), is inflicted for the wrong reasons, and therefore is crime, not punishment.¹⁶¹ If that is right, then any suffering occasioned by prison crime need not, and in fact cannot and ought not, be justified by any credible theory of punishment because it is not “punishment.”¹⁶² Further, critiques that purport to find a flaw in traditional theories of criminal punishment because those theories do not justify differences in suffering occasioned by prison crime proceed on an unjustified equivocation.¹⁶³

Another of Kolber’s thought experiments suggests an alternative to “punishment” as all suffering purposely inflicted: “punishment” as suffering purposely inflicted by prison authorities.¹⁶⁴ Unfortunately, this does not turn the trick. Kolber asks us to imagine

161. See FLETCHER, *supra* note 141, at 227–33. In recognition of this fact, some courts have held that where a prisoner escapes from custody out of fear of prisoner-on-prisoner violence he may claim a defense based on necessity. See, e.g., *People v. Unger*, 362 N.E.2d 319, 322–23 (Ill. 1977).

162. Respecting Hart’s prohibition, I do not mean to argue by definition. See HART, *supra* note 120, at 6 (cautioning against definitional arguments). Rather, the point is that if subjectivists want to jettison three of the five commonly identified characteristics of punishment Hart cites, its advocates must provide a robust normative argument for their departure.

163. See Kolber, *supra* note 1, at 186–88 (making just this critique). This is not to say that prisoner-on-prisoner violence is of no moral or legal significance. Prison officials are charged with protecting those under their care from unlawful assault. Failures by prison officials to provide sufficient protections from prison violence may be tortious or criminal. Mercy may also recommend early release for offenders subject to criminal violence in part as a reflection of institutional failures to provide adequate security and protection. However, none of this makes prisoner-on-prisoner violence “punishment” such that failures by retributivists or utilitarians to account for it and justify it would provide reasons to abandon their theories of punishment. To the contrary, prisoner-on-prisoner violence is a crime, and suffering occasioned by crimes committed in prison is, strictly speaking, incidental to punishment. Kolber’s contrary claim—that prison rape is an element of punishment—is troubling to say the least.

164. *Id.* at 197.

a sadistic warden who abuses his position to inflict unjustified additional suffering on his charges purposely by affirmative conduct.¹⁶⁵ Kolber argues that a theory of punishment that fails to account for differences in suffering between prisoners treated with respect and care by a virtuous warden and those abused at the hands of a sadistic warden cannot on pain of contradiction be sustained. This just repeats the core conceptual mistake. Just because a criminal wears a badge does not make him any less a criminal; neither does a position of authority end the conversation about justice in action. Out of respect for that distinction, traditional theories of punishment, including retributivism, do not endorse abuse at the hands of prison officials as “punishment.” Kolber regards this as a fatal flaw in those theories.¹⁶⁶ That perspective is unsympathetic at best. To endorse Kolber on this point would be to dissolve the distinction between crime and punishment, would promote even the worst abuses perpetrated by prison officials to the status of “punishment,” and would deny claims for protection from those who suffer at the hands of sadistic officials as long as they are released when their suffering thresholds are reached.

Kolber might respond by claiming that “punishment” is the suffering that authorities acting within the proper bounds of their official roles purposely inflict for the right reasons. While plausible, that claim needs elaboration because it raises important normative questions. Parts IV and V survey some of the possible grounds. Remaining for now inside Kolber’s critique, the impact of such a concession is simply devastating. First, it recognizes the fact that punishment is fundamentally a normative concept not, as his subjectivist critique would have it, an undifferentiated forensic phenomenon. Second, it upends his attack on retributivist and utilitarian theories that hew closely to objective rather than subjective accounts of punishment.

Kolber and Bronsteen, Buccafusco, and Masur use examples, thought experiments, and self-reporting studies of prisoner happiness to argue that there is quite a lot of unaccounted for and unjustified suffering in the criminal justice system. To use that surplus as a wedge to split objectivist versions of retributivism and utilitarianism from within, Kolber and Bronsteen, Buccafusco, and Masur must argue that those theories of punishment have the burden of justifying the constituents of the surplus. However, if “punishment” is suffering

165. Kolber, *supra* note 1, at 197; *see also* Kolber, *supra* note 11. Kolber extends his thought experiment to include omissions as well. That extension is addressed below.

166. *Id.* at 197–98.

purposely inflicted by the proper person for the proper reasons,¹⁶⁷ then no theory of criminal punishment is obliged to justify suffering purposely inflicted by the wrong people for the wrong reasons or the unintended suffering that may incidentally result from punishment.¹⁶⁸ Kolber and Bronsteen, Buccafusco, and Masur fail to respect this crucial distinction.

The point is not that severe idiosyncratic anxiety and prisoner-on-prisoner violence do not matter; they surely do.¹⁶⁹ The question is “why?” In the subjectivists’ view, these things matter because they are punishment. Objectivists think that these things matter precisely because they are not punishment. If what Kolber and Bronsteen, Buccafusco, and Masur mean when they conflate “punishment” and “suffering” is the suffering purposely inflicted by the right person for the right reasons, then any suffering that falls outside that range is by definition incidental, probably unjustified, likely subject to protest, perhaps grounds for a tort claim or criminal action against the inflictor of that suffering, and, where widespread, would require systemic reform of punishment practices. However, precisely because it is incidental, objectivist forms of retributivism and utilitarianism bear no burden to justify this additional or surplus suffering because it is not “punishment,” and therefore is not justified. This may seem like a bit of semantic sophistry. However, maintaining the distinction between “punishment” and “suffering” is critical, as is evidenced by the subjectivist critique itself.¹⁷⁰

167. HART, *supra* note 120, at 4–5.

168. As is suggested in Part I and elaborated further in Part VI, objectivist theories provide powerful tools for recognizing and condemning abuse in prison and create obligations on the part of prison officials to minimize incidental suffering. To the extent Kolber and Bronsteen, Buccafusco, and Masur want to press a progressive agenda against prison sexual assault, improvements in prison conditions, vigorous reentry programs, or other efforts designed to curb abuse and limit incidental suffering, this author has no objections. To the contrary, the point here is that objective theories of criminal punishment provide more powerful tools for advancing those agendas than the subjectivist critiques pressed by Kolber and Bronsteen, Buccafusco, and Masur. For that reason, and because their critiques do not offer any reason to reject objectivist accounts of punishment, Kolber and Bronsteen, Buccafusco, and Masur should embrace objective over subjective accounts of punishment.

169. *See infra* Part IV.

170. Consider as an example the following passage: “While some theorists purport to hold objective accounts of punishment that ignore offenders’ subjective experiences, such theories are doomed to fail. By ignoring subjective experience, they cannot justify the amount of distress that punishment inflicts on offenders, and so they cannot justify punishment more generally.” Kolber, *supra* note 1, at 184; *see also* Bronsteen et al., *supra* note 1, at 1068, 1072 n.166. The fallacy in this argument is now evident in light of subjectivism’s failure to justify the equivocation from “punishment” to suffering. If, as it now seems, the suffering these theories ignore is incidental, then punishment theory carries no obligation to justify that suffering because to do so would conflate criminal abuse with just punishment. Far from constituting a failure of theory, then,

4. Suffering is only punishment if it is knowingly inflicted.

What remains to subjectivist critics is the claim that suffering is “punishment” if it is “knowingly” inflicted.¹⁷¹ This approach also raises crucial questions. For example, is actual knowledge required, or would something akin to the Model Penal Code’s “aware[ness] of a high probability” do?¹⁷² Who must possess the knowledge? When? How can they get it? Do officials carry epistemic duties? If so, what are the outlines of those duties? These are not trivial issues. We can set them aside for now, however, because simply adverting to “knowledge” rather than “purpose” does not solve the conceptual problems elaborated in the previous subsection.

The fact that a sentencing judge is aware of a high probability that the offender before him will be the victim of violent crime while incarcerated does not convert that crime or the suffering it causes into “punishment” by some miracle of epistemic prestidigitation. Further, because prisoner-on-prisoner violence is not punishment, authorities who know it is likely to occur have a duty to stop it. They may even be liable for their failures. The consequences of holding otherwise are the same as those elaborated above in the discussion of “purpose” as the marker between crime and punishment.

The failure of the subjectivist critique to respect key normative lines is also evident in arguments that punishment is “comparative” in nature.¹⁷³ Take for example Adam Kolber’s “abducted drug dealer.”¹⁷⁴ Kolber asks us to imagine a drug dealer who, on the day he is to begin his prison sentence, is kidnapped by a rival gang and held in prison-like conditions.¹⁷⁵ If he is later found by law enforcement officials and immediately transferred to official custody where his subjective experiences of disutility are identical to those suffered while in the unlawful custody of the rival gang, Kolber concludes that the drug dealer is not being punished, and that he therefore “must be placed in an even smaller cell (or otherwise have a more liberty-constrained sentence) in order to exact the same deprivation of liberty relative to his baseline that we exact from others who commit the same crime.”¹⁷⁶

retributivists’ and utilitarians’ refusals to justify incidental suffering is a necessary, not a condemnatory, feature of their efforts to justify punishment more generally.

171. See, e.g., Kolber, *supra* note 1, at 196–98 (arguing that the primary burden of criminal theory is to justify “purposefully or knowingly inflict[ing] substantial pain or distress”); Bronsteen et al., *supra* note 3, at 1479.

172. MODEL PENAL CODE § 2.02(7) (1962).

173. See generally Kolber, *supra* note 6.

174. *Id.* at 1587–88.

175. *Id.*

176. *Id.*

Kolber admits that “[this] result seems very counterintuitive,”¹⁷⁷ and so it does. Unfortunately, he does not plumb the source of those intuitions, which are grounded in the normative distinction between crime and punishment. That Kolber’s argument does not distinguish between an unlawful kidnap, which is neither justified nor deserved, and lawful incarceration, which is both justified and deserved, raises serious questions about his description of punishment in comparative terms and his attached critique of those theories of punishment that define punishment in objective rather than subjective terms.

Bronsteen, Buccafusco, and Masur’s argument, which draws on the social science and psychology literature on hedonic adaptation, is equally problematic insofar as it defines “punishment” as suffering that a judge knows will result from conviction and imposition of sentence. As Bronsteen, Buccafusco, and Masur point out, among the more pernicious sources of suffering for felons are a variety of constraints on liberty that are consequent of conviction, including denial of the franchise, difficulty finding work, and the loss of professional licenses.¹⁷⁸ Of course, the Supreme Court routinely has held that these kinds of administrative consequences, even if inflicted by state agents, are not “punishment,” and therefore need not meet constitutional standards of criminal process.¹⁷⁹ That does not mean that government agents are liberated from any duty to justify these practices or the suffering they cause. Rather, the point is that, because they are incidental to punishment, they must be independently justified and must pass muster under the Fourth, Fifth, or Fourteenth Amendments, rather than the Eighth.

To sum up a bit, the subjectivist critique of objective theories of punishment proceeds from the premise that punishment is in whole or in large part the subjective experience of those who are being punished. That claim credits as “punishment” whole categories of suffering that cannot plausibly be counted on the tally card of “punishment,” including subjective disutility caused by criminal conduct. Rather than reflecting a mistake, the failure of criminal

177. *Id.* at 1588. Equally counterintuitive is the implied suggestion that the best way for an offender to reduce the objective severity of his punishment would be to go on a wildly pleasurable vacation right before submitting to custody.

178. Bronsteen et al., *supra* note 1, at 1049–53.

179. *See, e.g.,* Smith v. Doe, 538 U.S. 84, 105–06 (2003) (sex offender registration requirements are not “punishment”); Kansas v. Hendricks, 521 U.S. 346, 350 (1997) (administrative incarceration of convicted sex offenders is not punishment); Fleming v. Nestor, 363 U.S. 603, 616 (1960) (administrative consequences, such as “bar[ring] from practice [of medicine] persons who commit or have committed a felony,” are exercises of “regulatory power,” and do not “add to the punishment”).

theory to justify incidental suffering of this sort now appears to be both intentional and reasonable. To the extent theories of punishment are obliged to justify any suffering at all, that obligation runs only to suffering linked to and justified by the theory of punishment that is deployed. To paraphrase a great American intellectual, “punishment is as punishment does.”¹⁸⁰

This may seem circular, but it is not. Objective theories of punishment are grounded in normative principles external to punishment practices and the experiences of individual offenders. That normative dimension is what is lost in the whole or partial reduction of “punishment” to subjective experience, revealing the subjectivist critique to be what H.L.A. Hart in a similar context called “a spectacular *non sequitur*.”¹⁸¹ The next two Parts offer brief exegeses of some of the major objective theories of punishment and further expose the dangers of linking “punishment” to subjective experiences of punishment. What this discussion reveals is that a forensic account of suffering is at best a heuristic device for understanding a fundamentally normative concept.¹⁸²

IV. OBJECTIVISM PART I: RETRIBUTIVISM

The subjectivist critique of retributivism turns on the proposition that a defining feature, core purpose, and primary justification of retributive punishment is the infliction of suffering.¹⁸³ For example, Kolber asserts that “retributivists hold that offenders deserve to suffer for their crimes.”¹⁸⁴ In somewhat stronger terms, Bronsteen, Buccafusco, and Masur claim that “[w]hen a retributive

180. See MOORE, *supra* note 122, at 25 (arguing that to explain “punishment” one must explain a sanction’s punitive purpose). I refer to Tom Hanks’s eponymous character in *Forrest Gump* (Paramount Pictures 1994), but the adage traces to a proverb of much longer history: “He is handsome that handsome doth.” WILLIAM G. BENTHAM, BOOK OF QUOTATIONS PROVERBS AND HOUSEHOLD WORDS 788 (1907).

181. HART, *supra* note 120, at 19.

182. FEINBERG, *supra* note 20, at 111–18. This conceptual mistake has a long history tracing back at least to Plato. See PLATO, THE REPUBLIC, 227–31 (Francis MacDonald Cornford trans., 1945). More recently, it is a mistake common in efforts by lawyers to make sense of new knowledge and technology at the cutting edge of medicine, neuroscience, and the social sciences. See generally Pustilnik, *supra* note 20.

183. See, e.g., Bronsteen et al., *supra* note 1, at 1068–70; Kolber, *supra* note 1, at 197, 199, 212–13, 215–16.

184. Kolber, *supra* note 1, at 199 (emphasis omitted). Kolber does credit some retributivists for being objectivists. However, for reasons addressed below, he concludes that these theories either devolve into subjectivist theories or are otherwise obliged to recognize and justify differences in the subjective experiences of offenders. *Id.* at 212–13, 215–16; Kolber, *supra* note 6, at 1585–86.

theory addresses the severity of punishment, that severity is necessarily measured in terms of the harm or negative experience imposed on the offender.”¹⁸⁵ Retributivists need not and ought not endorse this view.¹⁸⁶

Retributivists use “punishment” in a precise way, referring to background theories of crime, criminal agency, and justice. Pain and suffering under these theories may be an incidental effect of punishment, but punishment is neither justified nor measured by its capacity to produce pain and suffering.¹⁸⁷ This may strike subjectivist critics and some readers as odd. That confusion is no doubt due in part to the fact that retributivism often is confused with baser sentiments of vengeance,¹⁸⁸ what Susan Jacoby has called “Wild Justice.”¹⁸⁹ While there certainly are some blustery law-and-order types who share this view—and angry calls for revenge frequently do dominate public conversations about punishment in the face of horrific crimes—the explicit task of retributivism as a theory of justice is to resist slavery to emotions like anger and bloodlust in favor of cool reason.¹⁹⁰

Retributivism is defined by the proposition that punishment can be imposed only if, and only to the extent, it is deserved.¹⁹¹ From the retributivist point of view, the failure of the subjectivist critique to distinguish between crime and punishment reveals the project’s core pathology: its failure to recognize that just punishment for

185. Bronsteen et al., *supra* note 1, at 1073 n.166.

186. See, e.g., FEINBERG, *supra* note 20, at 116–18 (rejecting this view); FLETCHER, *supra* note 141, at 228 (same); Hampton, *supra* note 20, at 128–29 (same); Herbert Morris, *A Paternalistic Theory of Punishment*, 18 AM. PHIL. Q. 263, 270 (1981) (same). As Mitchell Berman has pointed out, there are some contemporary retributivist theorists committed to a version of instrumentalism because they endorse a version of the subjectivist claim that the goal of punishment is to inflict suffering. See Berman, *supra* note 25. For these scholars, this Article should provide substantial motivation to prefer objective approaches.

187. See FEINBERG, *supra* note 20, at 116.

188. See MICHAEL E. McCULLOUGH, BEYOND REVENGE: THE EVOLUTION OF THE FORGIVENESS INSTINCT 41–87 (2008) (arguing that the revenge instinct has an almost universal appeal, from an evolutionary point of view, for creatures such as human beings, who live in cooperative communities); MILL, *supra* note 56, at 50–51 (noting roles of moral outrage and instincts of self-defense in punitive impulses).

189. See generally SUSAN JACOBY, WILD JUSTICE: THE EVOLUTION OF REVENGE (1983). One also cannot help but recall Foucault’s vivid account of the elaborate execution of Damien. FOUCAULT, *supra* note 35, at 3–6.

190. NOZICK, *supra* note 128, at 366–70; see also GEORGE FLETCHER, RETHINKING CRIMINAL LAW 417 (2000) (“[Retributivism] is obviously not to be identified with vengeance or revenge, any more than love is to be identified with lust.”); J.F. STEPHENS, GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 99 (1863) (“The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite.”).

191. See, e.g., FLETCHER, *supra* note 141, at 228; HART, *supra* note 120, at 4–5; MOORE, *supra* note 122, at 153; Hampton, *supra* note 20, at 128–29.

retributivists is essentially a deontological, moral concept,¹⁹² and that suffering describes normatively neutral experiential phenomena.¹⁹³ This semantic slippage between normative and descriptive terms is not uncommon,¹⁹⁴ but is nonetheless without foundation and the source of much confusion in the subjectivist literature and elsewhere.

Subjectivist critics' claims to the contrary notwithstanding, retributivism defines punishment as a restraint on liberty or other consequence that is determined and justified objectively by reference to a culpable offense.¹⁹⁵ Section A explains this approach to punishment, paying particular attention to Immanuel Kant's work.¹⁹⁶ Section B responds to several criticisms of objective accounts of punishment advanced by subjectivist critics. Section C returns to the subjectivist critique of retributivism to reveal that the absurd results credited to retributivism, including the apparent obligation to impose lesser sentences on wealthy, sensitive offenders than on their poor and hardened peers, are a consequence not of retributivism but of the distinctly subjectivist claim that "punishment" is "suffering." Therefore, those unpalatable results serve as reasons to reject, not objective retributive theories, but the subjectivist critique and the

192. Nino, *supra* note 20, at 102.

193. This is in contrast to most utilitarians—with the notable exception of Bentham—who maintain that suffering and happiness by their nature have a normative valence. See Nussbaum, *supra* note 30, at 92–95.

194. FLETCHER, *supra* note 190, at 396–401.

195. See, e.g., *id.* at 415–18, 461–62, 505–14; FLETCHER, *supra* note 141, at 228; KANT, *supra* note 14, at 104–09; Hampton, *supra* note 20, at 128–29. Kolber acknowledges that some retributivists are objectivists rather than subjectivists, yet argues those theorists must account for subjective experiences of punishment in their theories. Kolber, *supra* note 6, at 1585–86; Kolber, *supra* note 1, at 215–16.

196. The discussion of Kant's theory of punishment presented here is necessarily brief and as a consequence blurs over substantial debates among Kant scholars. See, e.g., Sharon Byrd, *Kant's Theory of Punishment: Deterrence in its Threat, Retribution in its Execution*, 8 LAW & PHIL. 151, 153 (1989) (arguing that Kant envisioned *threat* of punishment as a deterrent and *execution* of punishment as objective retribution); Samuel Fleischacker, *Kant's Theory of Punishment*, in ESSAYS ON KANT'S POLITICAL PHILOSOPHY 191 (1992) (bringing an interpretation of Kant's theory of punishment more in line with wider moral thought); Thomas Hill, *Kant on Punishment: A Coherent Mix of Deterrence and Retribution?*, 1997 ANN. REV. L. & ETHICS 291, 293 (1997) (arguing that the deterrence elements in Kant's view of punishment serve an important but restricted role); Jeffrie Murphy, *Does Kant Have a Theory of Punishment*, 87 COLUM. L. REV. 509, 532 (1987) [hereinafter Murphy, *Does Kant*] (arguing, in disagreement with his past self, that Kant did not create an internally consistent theory of punishment over the course of his career); Jeffrie Murphy, *Kant's Theory of Criminal Punishment*, in RETRIBUTION, JUSTICE AND THERAPY: ESSAYS IN THE PHILOSOPHY OF LAW 82, 84–90 (1979) [hereinafter Murphy, *Kant's Theory*] (defending Kant's retributivist theory of criminal punishment from utilitarian objections); Don Scheid, *Kant's Retributivism*, 93 ETHICS 262, 265 (1983) (arguing that Kant is not a thoroughgoing retributivist but a partial retributivist).

subjective approach to punishment that some of these critics endorse.¹⁹⁷

A. The Retributive Account of Punishment

While utilitarian approaches to punishment dominated the conversation amongst theorists and practitioners for years surrounding and following Herbert Wechsler's work on the Model Penal Code, retributivism has since enjoyed a revival.¹⁹⁸ In fact, the current draft of the Model Penal Code, which is in the last stages of adoption by the American Law Institute, abandons its exclusive endorsement of utilitarian justifications of punishment in favor of an approach bounded by retributivist principles.¹⁹⁹ The federal approach to punishment also cites retributivist commitments as its first principle.²⁰⁰ Retributivism therefore plays an important role not just in the history of the common law, but in contemporary punishment policy and practice as well.

"Retribution," according to George Fletcher, "simply means that punishment is justified by virtue of its relationship to the offense."²⁰¹ While retributivists vary in the details of what this relationship is,²⁰² the core of the theory was described by Immanuel

197. Kolber has not offered a positive theory of punishment and therefore has not endorsed subjectivism. Part of the purpose of this Article and the exchanges in which it participates is to persuade Kolber and others that his critique actually ought to lead him to endorse an objective theory of punishment. *Cf.* Markel & Flanders, *supra* note 142, at 111 (explaining that because they enjoyed equal freedom in making their decisions to commit crimes, criminals should get substantially, i.e. objectively, equal punishments). Bronsteen, Buccafusco, and Masur have gone further. *See* Bronsteen et al., *supra* note 3, at 104 (endorsing subjective approaches to punishment).

198. FLETCHER, *supra* note 190, at 416; WAYNE LAFAYE, CRIMINAL LAW 30 (2003).

199. *See* MODEL PENAL CODE § 1.02(2) (tentative draft Apr. 9, 2007) ("Purposes; Principles of Construction." (2) The general purposes of the provisions on sentencing, applicable to all official actors in the sentencing system, are: (a) in decisions affecting the sentencing of individual offenders: (i) to render sentences in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders; (ii) when reasonably feasible, to achieve offender rehabilitation, general deterrence, incapacitation of dangerous offenders, restoration of crime victims and communities, and reintegration of offenders into the law-abiding community, provided these goals are pursued within the boundaries of proportionality in subsection (a)(i); and (iii) to render sentences no more severe than necessary to achieve the applicable purposes in subsections (a)(i) and (a)(ii)."). At least one prominent author has criticized this revision. *See* Ristroph, *supra* note 18, at 729–745 (attacking the revision's reliance on desert in sentencing guidelines).

200. *See* 18 U.S.C. § 3553(a)(2) (2006) (stating that the law must provide just punishment for the offense).

201. FLETCHER, *supra* note 190, at 416–17; *see also* MOORE, *supra* note 122, at 83.

202. *See generally* John Cottingham, *Varieties of Retribution*, 29 PHIL. Q. 238, 238 (1979) (distinguishing nine such relationships).

Kant in *The Metaphysics of Morals*.²⁰³ The central feature of Kant's moral theory is the categorical imperative. The categorical imperative is expressed in several ways, but for present purposes the Universal Law formulation will do with its command that "I should never act except in such a way that I can also will that my maxim should become a universal law."²⁰⁴ To understand what Kant means by this it is necessary to understand what he means by "will" and "maxim."

Laying the foundation for the German Enlightenment and its heirs, including John Rawls²⁰⁵ and Jürgen Habermas,²⁰⁶ Kant draws a broad distinction between faculties of will set to a specific purpose—what one might call instrumental reason²⁰⁷—and faculties of will that operate in a reflective capacity to measure and determine the desires that lie at the heart of action—what Kant calls "practical reason" or "Wille."²⁰⁸ The line drawn is roughly between those rational processes by which we choose among means to our ends and the rational processes by which we choose our ends. Reason plays a crucial role in both fields of cogitation, but the nature of the reasons and the structures and rules of rationality in these two fields are distinct. For example, expediency, efficiency, and a balancing of costs and benefits dominate instrumental rationality generating hypothetical imperatives of a familiar "if . . . then . . ." form. However, those hypothetical considerations have no first-order role when deciding among competing goals or principles of action, where the nature of the questions is categorical, thus requiring complementary categorical answers. Similarly, contingencies of circumstance take center stage in generating hypothetical imperatives, which by definition are attached to particular problems in the phenomenal world. By contrast, categorical imperatives, while necessarily influenced by inescapable existential realities, eschew the vagaries and vicissitudes of the world

203. See John Bronsteen, *Retribution's Role*, 84 IND. L.J. 1129, 1131 (2009) (noting centrality of Kant in the punishment canon). Kant's theory of punishment is a subject of hot debate among Kant scholars. See *supra* note 196.

204. IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 14 (James Ellington trans., Hackett Publ'g Co. 1983).

205. JOHN RAWLS, *A THEORY OF JUSTICE* 251–57 (Harvard Univ. Press 2005) (1971).

206. 1 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 8–42 (Thomas McCarthy trans., Beacon Press 1984) (1981).

207. Kant uses "willkür." See KANT, *supra* note 14, at 13 (distinguishing will or choice [willkür] from a mere wish).

208. *Id.* at 12–14.

in favor of regulative ideals drawn from noumenal structures of reason itself.²⁰⁹

In Kant's system, hypothetical imperatives and categorical imperatives line up with distinctions between prudential considerations of what is possible or advisable and more purely normative considerations of what is right, just, or good.²¹⁰ So, for good instrumental reasons, one might determine that pursuit of a particular goal or desire is unwise—because doing so would impose too many limitations on the pursuit of other goals and desires, say—but that determination would go to whether it is possible to pursue a particular end rather than whether that end is in fact good. While it is not always possible to perform our duties to the good in the messy real world, duty still serves a crucial function as a regulative ideal.²¹¹

By invoking “will” in his formulation of the categorical imperative, Kant refers to categorical rather than hypothetical reason. The workings of categorical reason entail the identification and evaluation of maxims. A maxim is “[a] rule that the agent himself makes his principle [of action] on subjective grounds.”²¹² It is the postulate that describes the action without reference to either the goals that action might serve or instrumental considerations of effect and efficiency.²¹³ Kant allows that different agents may have different maxims for actions which appear identical when observed from the outside.²¹⁴ However, for normative purposes, the question is always whether the maxim of an agent's act may be made universal law. The resolution is found in a simple thought experiment. Agents considering a particular action must ask themselves whether the

209. This account of freewill is not without its critics. See, e.g., Murphy, *Does Kant*, *supra* note 196, at 523–24 (arguing that Kant did not want to remove all considerations of the criminal's mental state from analysis of their desert of punishment).

210. KANT, *supra* note 14, at 13.

211. IMMANUEL KANT, CRITIQUE OF PURE REASON 312–13 (Norman Smith trans., St. Martin's Press 1965) [hereinafter KANT, CRITIQUE]. Kant's conception of a Kingdom of Ends serves a similar role in his historical philosophy. While outwardly naïve in his hope for a society where everyone acts in a purely moral fashion, Kant is well aware that we are a “race of devils,” and therefore need the external constraint of a state writing law in the shadow of the bloodbath of history to compel us to an approximation of the ideal. Immanuel Kant, *Perpetual Peace: A Philosophical Sketch*, in KANT: POLITICAL WRITINGS 93, 105, 112–13 (Hans Reiss ed., Cambridge University Press 1991) [hereinafter Kant, *Perpetual Peace*]; see also RAWLS, *supra* note 205, at 246.

212. KANT, *supra* note 14, at 17. An agent's maxim of action is by definition available only to him, but it can be imputed to him based on his actions. *Id.* at 19.

213. Thomas Hill has a slightly different reading, concluding that maxims incorporate “rationales” in keeping with “general principles of rational choice.” As Hill admits, however, that reading sets aside “Kant's troublesome references to ‘noumenal’ causation.” Hill, *supra* note 125, at 415–16.

214. KANT, *supra* note 14, at 17.

maxim of their action can be universalized without contradiction. Therefore, the categorical imperative is a crucible, testing the logical purity of a maxim in the fires of generality where internal contradictions are revealed. If a maxim fails the test, it is the moral duty of the agent to refrain from acting upon it.

Examples are always helpful in understanding what Kant is on about here. Let us consider theft. An agent considering whether or not to take the property of another must first consider the maxim of his action. Recall that maxims are abstracted from instrumental goals and rationalizations. So, where the question is one of moral duty, the use to which an agent proposes to put the property is irrelevant, as are other reasons he might have for stealing. The essence of theft, and therefore its maxim, is taking the property of another. To determine whether that maxim is consistent with the moral law, the agent must ask whether the maxim "I take that which is not mine" may be generalized and made a universal rule of action without contradiction. Quite obviously, the answer is "no." Were all agents to act upon the maxim "I take that which is not mine," then the concept of mine and thine upon which the maxim of theft is predicated would disappear. Theft is therefore wrong because it contradicts the principal of ownership internal to and presupposed by the very concept of theft itself.²¹⁵ Because the maxim of theft cannot be made universal law without contradiction, agents have a duty not to steal.

Ideally, agents will respect their duties as determined by the categorical imperative and embrace right action as an ethical matter.²¹⁶ Kant is no Pollyanna, however. He recognizes that humans are a "race of devils," and therefore require as a condition of justice an external authority that can propagate and enforce the commands of moral duty in the form of law.²¹⁷ States, like agents, are subject to the commands of the categorical imperative.²¹⁸ Consequently, states may

215. In a purely communist society the maxim of theft, "I take that which is not mine," would be nonsensical because there is no conception of mine and thine. This reveals that, in all but a few cases, moral duty is derivative of background social practice. Two notable exceptions are murder and suicide, which, taken to their logical ends, would entail the destruction of humanity and the exercise of reason in general. It is therefore impossible as a moral matter for a society to condone or allow murder or suicide.

216. KANT, *CRITIQUE*, *supra* note 211, at 312–13.

217. IMMANUEL KANT, *RELIGION WITHIN THE LIMITS OF REASON ALONE* 87–91 (Thomas M. Greene & Hoyt H. Hudson trans., Harper & Row 1960) [hereinafter KANT, *RELIGION*]; Kant, *Perpetual Peace*, *supra* note 211, at 93, 105, 112–13; *see also* RAWLS, *supra* note 205, at 315; Murphy, *Kant's Theory*, *supra* note 196, at 87–90 (anticipating HART, *supra* note 120, at 4–9, who distinguished among three questions: (1) Why have a system of punishments? (2) Who should be punished?; and (3) What form should punishment take?).

218. KANT, *CRITIQUE*, *supra* note 211, at 312; Murphy, *Does Kant*, *supra* note 196, at 521–28.

enact and enforce only those laws that are consistent with the freedom of all and which respect the autonomy of subjects as citizens.²¹⁹ That constraint forbids the use of punishment to effect or “promote some other good for the criminal himself or for civil society”²²⁰ because to do so would contradict the concept of autonomy upon which society as a collection of free agents is constructed.²²¹ Rather, punishment can only be imposed “because [the agent] has committed a crime,” that is, because it is deserved.²²²

That punishment qua punishment can only be imposed because it is deserved by an agent who has committed a crime does not answer the question of *what* punishment is deserved.²²³ Kant’s reply is “the principle of equality (in the position of the needle on the scale of justice), to incline no more to one side than to the other.”²²⁴ That is far from illuminating until considered in light of Kant’s account of crime. By definition, a crime poses a contradiction to state-defined justice, inclining the needle. To right the needle, the contradiction must be resolved. The terms of that resolution are contained within the maxim of the crime upon which the offender himself acts. Just punishment demands no more and no less than expiation of the contradiction posed by the criminal and his crime. “Accordingly, whatever undeserved evil you inflict upon another within the people, that you inflict upon yourself. If you insult him, you insult yourself; if you steal from him, you steal from yourself; if you strike him, you strike yourself; if you kill him, you kill yourself.”²²⁵ This has the veneer of simple revenge as “an eye-for-an-eye,” but Kant provides additional, crucial, clarification, writing “But what does it mean to say, ‘If you steal from someone, you steal from yourself?’ Whoever steals makes the property of everyone else insecure and therefore deprives himself (by the principle of retribution) of security in any possible property.”²²⁶

This is the standard of justice for Kantian retributivists: the logical contradiction posed by an offense under law must be carried to its natural end and resolved for society by imposing the consequences of that contradiction on the offender. Punishment that provides this resolution is just because the offender is made to bear the logical consequences of his offense. Punishment other than what is necessary

219. KANT, *CRITIQUE* *supra* note 211, at 312.

220. KANT, *supra* note 14, at 105.

221. RAWLS, *supra* note 205, at 241.

222. KANT, *supra* note 14, at 105.

223. HART, *supra* note 120, at 24.

224. KANT, *supra* note 14, at 105.

225. *Id.*

226. *Id.* at 106.

in light of the crime is unjust, either because it fails to right the needle or because it goes too far. It is critical, however, that punishment is measured and determined by objective standards. The goal of punishment is most definitely not to cause some quantum of subjective suffering.²²⁷ Neither is the amount or degree of suffering experienced subjectively by an offender the measure of punishment.²²⁸ Rather, punishment is the objectively determined, logical consequence of a crime imposed upon an offender by the state. The maxim of theft poses a contradiction to the concept of ownership upon which the laws of property are predicated; therefore the proper legal punishment for

227. As Thomas Hill has pointed out, moral agents may well feel “discomfort” when they realize their wrongdoing and may even accept as appropriate the condemnation of others. However, those self-directed reactive attitudes are an “inherent liability in being one moral agent among others,” and “[t]here is no ground here for supposing that this suffering, or even more, should be deliberately imposed,” or that “wrongdoers *deserve* to suffer in any practical sense that entitles others to contribute to their suffering.” Hill, *supra* note 125, at 421–22, 424.

228. See Kolber, *supra* note 1, at 184 n.1 (citing Kant in a “*cf.*” footnote for the proposition that punishment must be proportional to the subjective experiences of offenders). The passage he cites reads in full:

But only the *law of retribution (ius talionis)*—it being understood, of course, that this is applied by a court (not by your private judgment)—can specify definitely the quality and the quantity of punishment; all other principles are fluctuating and unsuited for a sentence of pure and strict justice because extraneous considerations are mixed into them. -- Now it would indeed seem that differences in social rank would not allow the principle of retribution, of like for like; but even when this is not possible in terms of the letter, the principle can always remain valid in terms of its effect if account is taken of the sensibilities of the upper classes. -- A fine, for example, imposed for a verbal injury has no relation to the offense, for someone wealthy might indeed allow himself to indulge in a verbal insult on some occasion; yet the outrage he has done to someone's love or honor can still be quite similar to the hurt done to his pride if he is constrained by judgment and right not only to apologize publicly to the one he has insulted but also to kiss his hand, for instance, even though he is of a lower class. Similarly, someone of high standing given to violence could be condemned not only to apologize for striking an innocent citizen socially inferior to himself but also to undergo a solitary confinement involving hardship; in addition to the discomfort he undergoes, the offender's vanity would be painfully affected, so that through his shame like would fittingly be repaid with like.

KANT, *supra* note 14, at 106. Read incautiously, this passage may appear to endorse a subjectivist account of punishment. It mentions “pain” and “shame” after all. To rest on this surface would be to ignore the crucial reference to retribution and its role in determining the objective necessity for shaming in certain circumstances. Here, Kant recognizes that some crimes express a maxim of status entitlement. Proper punishment in these circumstances requires bringing low the prideful. Kant is democratic in this respect. He refuses to endorse class as a claim of right to do wrong. The contemporary criminalization of hate crimes reflects a similar disposition. Jean Hampton's approach to retributivism also focuses on negating unfounded claims of entitlement. See *infra* notes 255–59 and accompanying text. Thomas Hill reads this passage slightly differently, but ultimately also reaches the conclusion that it does not provide grounds for thinking that Kant is giving leave for judges to vary punishments according to subjective factors. Hill, *supra* note 125, at 434–37. For a more expansive account of status inequality in crime and potential responses, see David Gray, *A No-Excuse Approach to Transitional Justice*, 87 WASH. U. L. REV. 1043 (2010) [hereinafter Gray, *No Excuse*]; and David Gray, *Extraordinary Justice*, 62 ALA. L. REV. (forthcoming 2011).

an act of theft is to deny the offender access to property in a form and to a degree commensurate with his offense.²²⁹

Not all retributivists are pure Kantians,²³⁰ of course; but the general conception of punishment as justified only in response to a culpable criminal offense objectively determined by reference to the nature of that offense forms a common core.²³¹ Herbert Morris, for example, famously explained crime as inflicting an imbalance in the allocation of privileges and burdens central to a well-functioning society.²³² In his view, punishment should force the offender to relinquish the benefits and assume the burdens imposed by the offense.²³³ Elsewhere, Morris advances a “Paternalistic Theory of Punishment,” arguing that punishment should attend to the moral development of the offender.²³⁴ While he allows that paternalistic punishment is “generally recognized as deprivation,” he maintains that this is an objective constraint, such that punishment remains “punishment” even if the wrongdoer “desire[s] punishment.”²³⁵

Like Kant, John Rawls connects crime to moral rules, and argues that rational persons in the original position will agree that a

229. Other punishments suggested by Kant share this same intuitive appeal. For example, the punishment for murder is death. KANT, *supra* note 14, at 106. Others are more elusive. *See, e.g., id.* at 130 (“The punishment for rape and pederasty is castration . . . that for bestiality, permanent expulsion from civil society, since the criminal has made himself unworthy of human society.”). Other crimes appear anachronistic. *See, e.g., id.* at 108–09 (providing excuses for mothers who kill illegitimate children and killings perpetrated during duels). That these punishments may seem odd, anachronistic, or culturally bound is no criticism of the theory, however, because the contradiction posed by any maxim of action is in most cases determined by reference to contingent social and legal commitments. *See supra* note 215.

230. This category includes many politicians, pundits, practitioners, and others who claim the mantle of retributivism. The sad fact is that many of these folks are not really retributivists at all. Rather, they mine moral outrage to justify ever more severe punishments that are hard if not impossible to justify under any traditional theory of punishment, including retributivism. This author shares in the unapologetic belief that we ought not endorse or accept individual sentences or a system of criminal punishments that cannot be justified by a coherent and persuasive theory of criminal law and punishment. Therefore, any claim that our current punitive practices do not conform, in even a rough way, to the terms and dictates of retributivism is a non sequitur in the present context. Here, the questions at issue are whether the subjectivist critique exposes a core incoherence in retributivism or whether subjectivism offers a superior theory of criminal punishment. The answer to both questions is definitively “no.”

231. F. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* 66 (1981) (describing just deserts theory); ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 51 (1976); *see also* MOORE, *supra* note 122, at 84–92, 111.

232. HERBERT MORRIS, *Persons and Punishment*, in *ON GUILT AND INNOCENCE* 31, 34–35 (1979).

233. For a criticism of this view, see Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution* 39 *UCLA L. REV.* 1659, 1660–61 (1992), and David Dolinko, *Some Thoughts about Retributivism*, 101 *ETHICS* 537, 545–49 (1991).

234. Morris, *supra* note 186.

235. *Id.* at 264.

system of rules for public conduct is necessary, but must conform to basic principles of legality, including objectivity and prospectivity as constraints on punishment.²³⁶

George Fletcher “readily accept[s]” the proposition that “punishment ought to be imposed according to desert.”²³⁷ While his analysis of desert entails a subjective component of culpability, he too maintains that punishment ought to respect the offender as an end in himself rather than rendering him a means to social ends.²³⁸ Fletcher specifically rejects the proposition that “punishment” must be experienced as painful by the offender on whom it is inflicted.²³⁹

While not a pure retributivist, H.L.A. Hart allows that punishment “must involve pain or other consequences normally considered unpleasant.”²⁴⁰ However, as George Fletcher points out, this is an objective, or at least intersubjective, and not a subjective standard.²⁴¹ So, a masochist who enjoys confinement or a homeless man seeking incarceration so he can escape the elements are both “punished” even if their imprisonment is subjectively pleasurable or welcomed, so long as incarceration is *normally* considered painful or unpleasant.²⁴²

236. RAWLS, *supra* note 205, at 241, 314–15, 575–76. Sharon Dolovich provides a more elaborate account of a Rawlsian approach to punishment than Rawls ever did in *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307 (2004). Markel and Flanders have a different approach that also reflects shades of Rawls. See Markel & Flanders, *supra* note 1 (distinguishing between comprehensive and political conceptions of retributive justice); see also RAWLS, *supra* note 205, at 10 (arguing that punishment must be defined objectively as a restraint on liberty); John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955); Walker, *supra* note 42, at 534–36 (describing a “Rawlsian” moment of reasoning from the original position).

237. FLETCHER, *supra* note 190, at 459–60.

238. *Id.* at 461, 505–14.

239. FLETCHER, *supra* note 141, at 227–28. As Fletcher points out, the rise of imprisonment as the main form of state-sanctioned punishment opens a space of ambiguity between criminal theory and penal practice. *Id.* at 226.

240. HART, *supra* note 120, at 4. Hart’s general approach relies on utilitarian considerations when justifying systems of punishment and retributive grounds when addressing questions of distribution. *Id.* at 5–11. Kent Greenawalt offers a similar definition of punishment as involving “designedly unpleasant consequences” which “most people would wish to avoid.” Greenawalt, *supra* note 141, at 343–44.

241. FLETCHER, *supra* note 141, at 228; see also HART, *supra* note 120, at 19–20, 24–25 (rejecting on various grounds subjective approaches to punishment); Kolber, *supra* note 1, at 215 (recognizing that Hart defines punishment objectively). But see Kolber, *supra* note 11, at 34 (acknowledging that “victim subjective experiences are generally relevant”).

242. FLETCHER, *supra* note 141, at 228. Fletcher’s discussion neatly disposes of any normative significance that can be drawn from O. Henry’s famous story *The Cop and the Anthem*, in which the homeless protagonist goes to great lengths to get himself incarcerated, where he hopes he will be warm, fed, and relatively safe. Kolber, *supra* note 6, at 1580 n.42 (citing O. HENRY, *The Cop and the Anthem*, in *THE RANSOM OF RED CHIEF AND OTHER O. HENRY STORIES FOR BOYS* 143, 143 (Franklin J. Mathiews ed., 1918)); see also Kolber, *supra* note 1, at 205 (“Even though his liberty will be restricted when caught, he is not retributively punished

In his influential reconstruction of retributivism, Joel Feinberg defines punishment as “authoritative deprivations,”²⁴³ which, qua punishments, provide a material and symbolic medium for the expression of social condemnation.²⁴⁴ Feinberg recognizes that in order for punishment to express that condemnation, it must constitute “hard treatment.” However, he is clear that it is “the treatment itself [which] expresses condemnation,” and that method is what carries meaning, whether the state is “beheading a nobleman, hanging a yeoman, [or] burning a heretic.”²⁴⁵ Nothing in Feinberg’s account of punishment suggests that the public social expression of punishment is bound to the individual subjective experiences of the punished.²⁴⁶ Quite to the contrary, he unequivocally rejects the notion that “the wicked should suffer pain in exact proportion to their turpitude” as “incoherent,” in part because it would lead to absurd results with which we are familiar, including punishing “some petty larcenies . . . more severely than some murders.”²⁴⁷ What allows punishment to express official condemnation in Feinberg’s view is its intersubjective status as “hard treatment,” not the subjective experiences of those punished.²⁴⁸ This view recently was persuasively amplified by Dan Markel and Chad Flanders.²⁴⁹ By contrast, the subjectivist approach credited to retributivists by Kolber and Bronsteen, Buccafusco, and Masur makes punishment a “private language,” nullifying its communicative potential.²⁵⁰

when he is subsequently imprisoned, nor are his real-life counterparts. It is simply implausible that a person can be criminally culpable and *thereby deserve* to receive treatment that the offender affirmatively desires.”).

243. FEINBERG, *supra* note 20, at 97–98.

244. *Id.* at 98–100.

245. *Id.*; *see also* Markel & Flanders, *supra* note 1, at 107 (“[R]etributive punishment . . . serves as an attempt to communicate to the offender society’s condemnation.”); Dan Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 593 (1996) (arguing that “[p]unishment . . . is a special convention that signifies [society’s] moral condemnation” of the offender).

246. FEINBERG, *supra* note 20, at 100. For example, Feinberg analogizes punishment as a symbolic idiom for condemnation to champagne as a symbolic idiom for celebration. *Id.* It is hard to see how the message of Ron Santo’s popping the cork on a bottle of champagne after the Cubs win the World Series would be muddled for viewers if Santo actually hated the stuff.

247. *Id.* at 116–18. *But see* Bronsteen et al., *supra* note 1, at 1077 (concluding that a “thoroughgoing expressivist theory that punishment involves *only* considerations of such disapproval would be unaffected by the phenomena we have emphasized”); Kolber, *supra* note 1, at 208–10 (claiming that expressivists must link symbolic semantics to profane subjective experiences). These arguments are addressed *infra* Part IV.B.

248. FEINBERG, *supra* note 20, at 118.

249. *See generally* Markel & Flanders, *supra* note 1.

250. *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 89–96 (G.E.M. Anscombe trans., 1953).

Carlos Nino also defines punishment in objective terms as “intentional deprivation of a person’s normally recognized rights by official institutions”²⁵¹ justified by the commission of a crime.²⁵² While Nino’s consent-based conception of punishment²⁵³ is not purely retributive, his description of punishment in objective terms reflects his respect for basic Kantian commitments to legality, culpability, and respecting offenders as ends in themselves, which form the corpus of retributive theory.²⁵⁴

Jean Hampton’s theory of punishment as moral education provides yet another approach to punishment, which, out of respect for retributive principles, justifies punishment on objective moral grounds.²⁵⁵ In Hampton’s view, a just theory of punishment must respect the moral freedom of offenders.²⁵⁶ While punishment may have a secondary role in providing nonmoral reasons for conformance with law, its primary justification is as a marker at the border of public morality defined by law and a locus for moral education of the offender and the community.²⁵⁷ Elsewhere, Hampton also argues that crime asserts an unjust claim of entitlement by the criminal and diminishment of his victim’s moral status.²⁵⁸ In these circumstances, punishment provides public affirmation of the victim’s worth. In Hampton’s view, both approaches require distinguishing “punishment,” which she defines as “disruption of the freedom to pursue the satisfaction of one’s desires,” from the subjective experience of punishment, which may or may not entail “pain.”²⁵⁹

251. Nino, *supra* note 20, at 94.

252. *Id.* at 102–03.

253. Nino argues that punishment systems and punishment in individual cases represent a disparity in the distribution of public burdens and benefits that can only be justified by reference to consent. Culpability for a crime, in his view, entails consensual loss of immunity from punishment. *Id.*

254. *Id.* at 96–97, 102–03, 107–08.

255. *See generally* Hampton, *supra* note 20.

256. *But see* Deirdre Golash, *The Retributive Paradox*, 54 ANALYSIS 72, 73–78 (1994) (providing a pithy, if not entirely persuasive, critique of Hampton’s theory).

257. *See* Hampton, *supra* note 20, at 117–19 (describing the moral education theory as concerned less with punishment for societal purposes and more with benefiting the offender with moral knowledge and freedom to autonomously correct her future behavior).

258. Hampton, *supra* note 233, at 1665–85; *see also* Bronsteen, *supra* note 203, at 1151 (citing unpublished data gathered by Kenworthy Bilz supporting Hampton’s view). *But see* Walker, *supra* note 42, at 531–32.

259. Hampton, *supra* note 20, at 128–29. Hampton offers the example of a physician convicted of Medicare fraud who is sentenced to community service in a state clinic. *Id.* at 128. As she points out, attending to the sick need neither be painful nor unpleasant for the physician for his sentence to constitute “punishment” so long as his freedom is constrained and that constraint entails a moral lesson. *Id.*

Robert Nozick describes two distinct but interrelated approaches to retributivism, one teleological and the other not.²⁶⁰ Both center on the communicative potential of punishment as a path to reform. Teleological retributivists care deeply about the success of a punishment as a method of communication, but as Nozick points out, full faith to that goal requires the same objective approach to punishment bound to culpability for a crime central to nonteleological retributivism.²⁶¹

As this brief survey of the field reveals, the equivocation between suffering and punishment upon which the subjectivist critique of retributivism depends reflects an essential misunderstanding of mainline retributivism. Most serious and sophisticated theories of retributive justice are objective rather than subjective; they are not driven by revenge or the desire to inflict suffering;²⁶² and they therefore do not focus on returning suffering for harm.²⁶³ To the contrary, retributivists are, or should be, committed to rejecting the subjectivist view that punishment requires inflicting subjective disvalue precisely because to do otherwise would be to make punishment part of a hedonic economy, and therefore put justice at the whim of instrumental considerations.²⁶⁴

This does not mean that punishment cannot cause suffering.²⁶⁵ Neither does it ignore the fact that most punishments are wholly

260. NOZICK, *supra* note 128, at 363–80.

261. *Id.* at 374–80.

262. *See, e.g.*, Dan Markel, *State Be Not Proud*, 40 HARV. C.R.-C.L. L. REV. 407, 411–13 (2005) (critiquing courts and commentators who make this conflation between retributive justice and vengeance).

263. *See, e.g.*, FLETCHER, *supra* note 190, at 417 (proposing that “‘retribution’ is not in itself an argument for making criminals suffer,” but rather a means for offenders to correct the societal imbalance caused by criminal behavior); Markel, *supra* note 262, at 411–13, 437–38 (arguing that the purpose of punishment is not revenge); Morris, *supra* note 186, at 270 (positing that retributivists reject “like for like” punishment on moral grounds).

264. *See* Berman, *supra* note 25, at 8–9, 27–28 (categorizing the retributivist view as recognizing the “intrinsic value in the suffering of wrongdoers” rather than focusing on the value attributed to punishment by the plurality).

265. As Thomas Hill points out, in the ideal case an offender would experience guilt and moral suffering. Hill, *supra* note 125, at 414–23. As a solution for a race of devils, however, punishment under law is not defined or justified by the goal of inflicting guilt or moral suffering. Gray, *NoExcuse*, *supra* note 228, at 1081. First, organizing a public response to crime around the project of inspiring spontaneous subjective states would raise serious conceptional and practical concerns. *Id.* at 1048–51, 1054–55, 1062–64. Second, guilt and moral suffering are subjective and matters of private conscience. KANT, *supra* note 14, at 106. By contrast, punishment under law is a public matter, which as a practice maintains that only “the law of retribution (*ius talionis*)—it being understood, of course, that this is applied by a court (not by your private judgment)—can specify definitely the quality and the quantity of punishment.” *Id.* To lump this sort of suffering in with suffering of concern for subjectivist critics would repeat the core equivocation exposed in this Article.

undesirable and do cause most of those punished to suffer, at least to some degree. Rather, the point is that the subjective suffering of a particular offender is neither sufficient nor necessary to the justification, measure, or description of punishment for retributivists. To the contrary, punishment for retributivists is, or ought to be, justified, measured, and described solely in objective or perhaps intersubjective terms by reference to the offender's culpability in a crime.²⁶⁶

The suffering experienced by a particular offender subjected to the punishment he objectively deserves is therefore incidental, and retributivists bear no responsibility for justifying that suffering. As has been emphasized here, this does not mean that subjective experiences of suffering are without moral or practical significance. For example, suffering may be an important factor in the exercise of mercy. Suffering may also be an important consideration for penal technologists charged with the practical task of executing objectively justified sentences. However, it is a mistake to conflate the normative concept "punishment" with suffering as a contingent effect.²⁶⁷ Retributivism and other objectivist theories of punishment are attractive in large part because they are robust enough to make that distinction whereas subjectivism is not.

Closer consideration of treatments of proportionality in the subjectivist literature reveals a different but related concern. Much if not all of the subjectivist critique of retributivism is driven by the commitment to comparative proportionality: like cases ought to be treated alike. Kolber's argument from *The Subjective Experience of Punishment* outlined in Part III.B provides one example, but Bronsteen, Buccafusco, and Masur also rely explicitly on comparative proportionality in their work.²⁶⁸ For retributivists, however, the commitment to comparative proportionality is wholly derivative of the commitment to objective proportionality: that the punishment should fit the crime.²⁶⁹

As Joel Feinberg has pointed out, from a retributive point of view, most claims of comparative injustice rise or fall depending on

266. See 4 WILLIAM BLACKSTONE, COMMENTARIES *11–20 (requiring proportionality of punishment); NOZICK, *supra* note 128, at 363–65 (providing an objective formula for calculating the amount of punishment deserved by the degree of wrongness and the offender's responsibility).

267. FEINBERG, *supra* note 20, at 116–18.

268. See Bronsteen et al., *supra* note 3, at 1465–67, 1481 (arguing the importance of proportionality in punishment and the need to reform the criminal justice system to reflect that importance).

269. See MOORE, *supra* note 122, at 90–91 (proposing that while retributivism prefers that "[l]ike cases . . . be treated alike," it requires that punishment match desert).

whether there is an underlying claim of noncomparative injustice.²⁷⁰ For example, if an offender complains that his sentence is comparatively longer than his cellmate's sentence, that complaint only has merit if that comparison reveals an element of arbitrariness or objective unfairness in his sentence.²⁷¹ Deborah Hellman has made this point at length, arguing that discrimination is unjust only if objectively unjustified.²⁷² Furthermore, inverting the order of priority between objective and comparative conceptions of proportionality would lead to results far more absurd than those advanced by the subjectivist critique. For example, if the sole measure of justice was comparative proportionality, then there would be no reason to object to infliction of the death penalty for minor traffic violations so long as all similarly situated offenders were put to death.²⁷³

Just as retributivists are committed to measure punishment objectively rather than subjectively, so too are they committed to justify punishment on the basis of objective rather than comparative proportionality.²⁷⁴ To the extent the subjectivist critique of retributivism depends on a different reading of the nature and role of

270. Feinberg, *Noncomparative Justice*, *supra* note 68, at 300–01, 311–13, 318–19.

271. *Id.* at 311–13, 318–19.

272. See generally DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? (2008).

273. See Feinberg, *Noncomparative Justice*, *supra* note 68, at 311 (arguing that this analogy proves that “criminal desert is in part noncomparative,” because it is possible to have a system where all punishments are unjust due to unreasonable severity).

274. While far from determinative in the present discussion, it is worth noting that the Supreme Court's death penalty jurisprudence appears to endorse an objective rather than subjective account of “punishment.” In *In re Kemmler*, 136 U.S. 436, 447 (1890), the Court confirmed that particularly barbaric punishments, such as disembowelment, are prohibited by the Eighth Amendment because “they involve torture or a lingering death” and are therefore “inhuman and barbarous, something more than the mere extinguishment of life.” While it is not unreasonable to think that this “something more” is pain, the Court “has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment,” *Baze v. Rees*, 553 U.S. 35, 48 (2008), and when asked to rule on the constitutionality of electrocution on particularly gruesome facts, the Court held that “[t]he cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely,” *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947). When asked to determine the constitutionality of imposing death on mentally impaired and juvenile offenders in *Roper v. Simmons*, 543 U.S. 551, 568–74 (2005) and again in *Atkins v. Virginia*, 536 U.S. 304, 317–21 (2002), the Court again adopted an objective view, focusing its attention on the moral culpability of these agents and our “evolving standards of decency,” rather than the unique suffering members of these classes of offender might experience. See also *Graham v. Florida*, 130 S. Ct. 2011 (2010) (adopting the same approach in holding that the Eighth Amendment prohibits sentencing juvenile offenders to life in prison without the possibility of release). However, one should not make too much of the Court's record in these matters. The Court has never squarely addressed the question whether punishment is suffering, and as a consequence is often less than clear on where it stands.

retributivism's commitment to proportionality, that critique is a non sequitur.

Take for example, one of Kolber's arguments in *The Comparative Nature of Punishment*. Imagine two people who perpetrate the same crime. For a retributivist, the punishment for that crime is determined objectively by reference to an offender's desert. Again by hypothesis, let us assume that the objectively proper sentence for the crimes committed here is five years' imprisonment. This assessment is a function of objective proportionality. That is, the five years is the punishment that is properly proportionate to the crime. Kolber asks us to imagine that one of the offenders commits his crime while in government quarantine that imposes upon him conditions that are in all material respects identical to the conditions he will face in prison. Kolber asserts that, in these circumstances, "[t]he proportionalist must make the strange claim that the person in quarantine needs to be given especially limited liberties in prison, not to obtain additional deterrence, but simply in order to give him a sentence that is *equal* to that of everyone else who does not have especially restricted baseline liberties."²⁷⁵ That is only true if the proportionalist in question believes that comparative proportionality carries independent normative obligations, trumps objective proportionality, or both.

B. Five Objections to Objective Accounts of Punishment

Contemporary subjectivists have addressed the retributivist commitment to justify and measure punishment objectively.²⁷⁶ For example, Kolber cites John Rawls for the proposition that "punishment" constitutes not "suffering," but "legal[] deprivat[ion] of some of the normal rights of a citizen."²⁷⁷ Kolber, whose views on these points Bronsteen, Buccafusco, and Masur endorse,²⁷⁸ denies the persuasiveness of this approach to punishment for two principal reasons. First, he contends that defining and justifying punishment in objective terms fails to take account of subjective experiences of

275. Kolber, *supra* note 6, at 1591.

276. See, e.g., Bronsteen et al., *supra* note 1, at 1068–74 (describing retributivist approaches to punishment as consistently objective); Kolber, *supra* note 6, at 1585–94 (stating that "the currency of punishment is understood in objective terms."). But see Kolber, *supra* note 1, at 203–08 (acknowledging that while valuing objectivity, for punishment to be successful, the offender must have some subjective awareness).

277. Kolber, *supra* note 1, at 203 (quoting RAWLS, *supra* note 205, at 10).

278. See Bronsteen et al., *supra* note 1, at 1068–69, 1072 n.166, for a discussion of accounting for subjectivity when analyzing punishment from a retributivist perspective.

punishment.²⁷⁹ That claim seems question-begging, and so it is; a point made in Parts III and IV.A. Second, he suggests five reasons why a purely objective account of punishment would be “unattractive.”²⁸⁰ Below, each of these is addressed in turn.

1. “Contrary to Ordinary Understanding of Severity”

Kolber contends that objective accounts of punishment “deviate[] from our commonsense intuitions about why we would not want to be punished.”²⁸¹ He acknowledges that “this is hardly a knockdown objection,”²⁸² and rightly so. First, appeals to intuition are always on shaky ground in the absence of some empirical foundation; we simply may not share the same intuitions.²⁸³ Second, the purpose of criminal punishment theory is precisely to challenge common intuitions in order to determine the merits of those dispositions.²⁸⁴ It therefore begs the question to credit commonsense intuitions, particularly if they run counter to a long tradition of objectivist theory.²⁸⁵ Finally, appeals to these intuitions are entirely irrelevant to an argument that purports to address retributivism on its own grounds. These “commonsense intuitions about why we would not want to be punished”²⁸⁶ appeal to a hedonic economy familiar from utilitarian analysis,²⁸⁷ where the degree of antipathy for a particular punishment might be important, say for evaluating deterrent potential.²⁸⁸ For good reasons, only some of which are explored here, many retributivists reject that appeal and the intuitions that underwrite it.²⁸⁹ For retributivists, desert, not idiosyncratic aversion,

279. Kolber, *supra* note 1, at 196–98.

280. *Id.* at 203; *see also* Bronsteen et al., *supra* note 1, at 1069 (endorsing Kolber’s five arguments as their own).

281. Kolber, *supra* note 1, at 203; *see also* Bronsteen et al., *supra* note 1, at 1068, 1072 n.166 (agreeing with Kolber’s assertion).

282. Kolber, *supra* note 1, at 203.

283. *See* Golash, *supra* note 256, at 73 (pointing out that appeals to intuition are “unsatisfactory” in part “because some have this intuition while others don’t”).

284. *See* Dolinko, *supra* note 233, at 557–58.

285. *Id.*

286. Kolber, *supra* note 1, at 203.

287. *See* Hampton, *supra* note 20, at 115–18 (clarifying the border between utilitarian and retributive theories of punishment by reference to the role of punishment in producing pain, which provides a “nonmoral” reason for compliance with law).

288. As an example, consider Kolber’s discussion of “libertiles.” Kolber, *supra* note 6, at 1567–69. To conceive of liberty as quantified according to the comparative value of that liberty to an agent or the fruits accrued through exploitation of that liberty collapses deontological accounts of justice and liberty into utilitarianism without argument or justification.

289. KANT, *supra* note 14, at 105; *see also* Berman, *supra* note 25 (exploring the theoretical difficulties that befall suffering-focused retributivists).

is the central feature of just punishment. That punishment is unwanted, why, and how much, neither makes punishment “punishment,” nor justifies it as punishment. To claim otherwise is to switch fields from objectivism to subjectivism, again begging the question.²⁹⁰

2. “Awareness Requirement”

Kolber also argues that for an imposition on liberty to constitute “punishment,” an offender must be aware that he is being punished.²⁹¹ He offers two examples to support this claim. First, he asks us to imagine an offender sentenced to home confinement who, during the appointed period, is locked inside his home, but for reasons of his own decides to stay at home and as a consequence is blissfully unaware that he is serving his sentence.²⁹² Second, Kolber posits an offender who falls into a coma during his incarceration, and therefore is not cognizant of anything, much less his imprisonment.²⁹³ Kolber maintains that neither the naïf nor the comatose prisoner is punished because neither is aware of his punishment.

Again, it is not clear that Kolber’s intuitions on this point are either common or tied to bedrock conceptions of justice. For example, Jean Hampton, whom he cites,²⁹⁴ holds precisely the opposite view.²⁹⁵ Pressing the coma example a bit further suggests that Hampton has the better view. Imagine that an offender sentenced to ten years’ imprisonment falls into a coma during his first year of incarceration and wakes up during his last. Would the state have a credible claim that his years in the coma cannot be counted toward his time served and that his sentence must therefore be extended accordingly? It is hard to see how. Appeals to subjective experience would beg the question, and also would open the door to a host of absurdities. For example, in terms of awareness there is no clear distinction between coma and deep sleep. If awareness is a necessary feature of punishment, and Kolber is taken seriously on this point, then it follows that, over the course of a ten-year term of imprisonment, a prisoner who sleeps on average nine hours a day is punished substantially less—152 days—than one who sleeps on average eight

290. KANT, *supra* note 14, at 105.

291. Kolber, *supra* note 1, at 203–04; *see also* Bronsteen et al., *supra* note 1, at 1069 (adopting this argument).

292. Kolber, *supra* note 1, at 204.

293. *Id.*

294. *Id.* at 209 n.72.

295. *See supra* notes 255–259 and accompanying text.

hours a day. Kolber—and Bronsteen, Buccafusco, and Masur because they ally themselves with Kolber’s argument on this point—therefore seems committed to the view that offenders must be denied timely release if they are good sleepers. In a battle among intuitions, this is tough ground to defend.

Fortunately, there is no need for present purposes to see this war of intuitions to its bloody conclusion. There is certainly something to the proposition that retributivists attach importance to awareness of both the punishment and the reason for punishment.²⁹⁶ This is reflected in the substantive law on the death penalty, which prohibits executing defendants who are incapable of understanding the nature of and reasons for their punishment.²⁹⁷ However, “knowledge” does not imply “suffering.” Therefore, even if knowledge is required for punishment to be “punishment,” Kolber’s and Bronsteen, Buccafusco, and Masur’s core claim, that suffering or some infliction of subjective disvalue is necessary for a punishment to constitute “punishment,” does not follow.²⁹⁸ A brief example helps to make the point.

Imagine an offender who is initially resistant to his incarceration but over the course of several years faces the reality of his crime, assumes full responsibility, and comes to accept his incarceration as just, deserved, and an opportunity for personal reform. For the remainder of his sentence he is a model prisoner. He pursues an education, counsels fellow prisoners, makes amends with his victims, and seizes every opportunity to do good. During this period, our model prisoner achieves a deep sense of peace and contentment and comes to believe not only that his incarceration is deserved, but that it is right, good for him, the best thing that could have happened, and the cause of a much higher baseline of subjective utility than he ever would have experienced had he not been incarcerated. Even if knowledge is a necessary criterion of punishment, we are not barred from celebrating this personal blossoming. Retributivism certainly does not introduce any obstacle. To the contrary, while reformation is not a goal or justification of punishment, Kant and others hold in highest regard those who accept punishment as a perfection of their autonomy.²⁹⁹

296. NOZICK, *supra* note 128, at 368; Morris, *supra* note 186, at 264.

297. *Panetti v. Quarterman*, 551 U.S. 930, 954–60 (2007); *Ford v. Wainwright*, 477 U.S. 399, 401 (1986); *see also* R.A. DUFF, TRIALS AND PUNISHMENTS 16–35 (1986).

298. *See, e.g.*, FLETCHER, *supra* note 141, at 228; Hampton, *supra* note 20, at 128–29.

299. KANT, *supra* note 14, at 107; *see also* MORRIS, *supra* note 232, at 48–49; NOZICK, *supra* note 128, at 370–80; Hill, *supra* note 125, at 439.

Not so if “the subjective disutility of punishment is . . . largely or entirely the punishment itself.”³⁰⁰ If this foundational premise of the subjectivist critique is maintained, then prison officials are obliged to inflict additional hardship on offenders who pursue reformation and come to experience their incarceration as positive because they suffer less than their bitter and taciturn peers.³⁰¹ That call to bring out the hot pincers and molten lead³⁰² in order to inflict subjective disutility on the most virtuous and honorable offenders can only be regarded as perverse from a retributive point of view because it requires inflicting undeserved harm.

3. “Selecting Liberties to Lose”

Kolber further asserts that “one must consider subjective responses to punishment when deciding *which* liberty deprivations to use as punishment.”³⁰³ On his view, the unacceptable alternative is that a particular deprivation of liberty may not be sufficiently “aversive” to the offender to constitute punishment.³⁰⁴

For retributivists, punishment may be imposed only if, and to the degree, it is deserved. If the correct punishment is inflicted, and the offender embraces that punishment as his just deserts and an opportunity for personal reform that makes him happier, more content, and more fulfilled than he ever could have been otherwise, then it would be the grossest perversion of retributivist theory to argue that additional hard treatment that is not deserved must be inflicted solely for the purpose of achieving a threshold of subjective aversion. That result does not change if, for reasons of his own or because he is a masochist, a particular offender experiences just punishment as a source of pleasure.³⁰⁵

300. Kolber, *supra* note 1, at 212; *see also* Bronsteen et al., *supra* note 1, at 1037–38, 1068–70.

301. It is the logical implication from Bronsteen, Buccafusco, and Masur’s discussion that the same would be true of an offender who “views incarceration as a badge of honor.” *See* Bronsteen et al., *supra* note 1, at 1077 (discussing offender perception within the context of expressive theories).

302. FOUCAULT, *supra* note 35, at 3–6.

303. Kolber, *supra* note 1, at 204 (emphasis added). Again, Bronsteen, Buccafusco, and Masur fully endorse Kolber’s views on this point. Bronsteen et al., *supra* note 1, at 1068–69.

304. Kolber, *supra* note 1, at 204, 215.

305. *See* FLETCHER, *supra* note 141, at 228 (noting that substance of punishment is “always whether the sanction is typically or characteristically onerous, not whether the sanction is experienced as punishment in the particular case”).

4. “Nonarbitrary Severity Determinations”

As additional evidence that punishment requires suffering or some other form of reduction in subjective utility, Kolber claims that “[t]hose who defend an objective account of punishment must be able to describe why some punishments are more severe than others.”³⁰⁶ At the risk of being repetitive, this too reflects a basic misunderstanding not only of retributivism but of punishment theory generally. The basic sufficiency criteria for all theories of punishment are justifying punishment generally and punishment inflicted in particular cases specifically. There is no requirement for describing an ordinal array of punishments or pinpointing where on such a scale any particular punishment might fall, which is precisely what Kolber requires by demanding an account of “why some punishments are more severe than others.”³⁰⁷ Retributivism carries its burden of justifying punishment in general and in specific cases by reference to culpable criminal conduct. Because those selections are not in any way “arbitrary,”³⁰⁸ questions engaging idiosyncratic views on which of two punishments imposed in response to different crimes is the more severe are non sequiturs.

5. “Objective Punishment Calibration”

Kolber’s final argument for the proposition that punishment cannot be accounted for objectively but must be defined by subjective experiences of suffering asserts that retributivists cannot “eliminate the obligation to engage in complicated, counterintuitive punishment calculations.”³⁰⁹ Kolber does not specify what “complicated, counterintuitive punishment calculations” he has in mind. However, the notion that, where crime is defined as the abuse of liberty, the

306. Kolber, *supra* note 1, at 205; *see also* Bronsteen et al., *supra* note 1, at 1070–73 (arguing that adaptive capacities undermine the balancing of desert and punishment in pure retributivism).

307. Kolber, *supra* note 1, at 205; *see* HART, *supra* note 120, at 11 (discussing the “distribution” of punishment as who may be punished and by how much); Murphy, *Does Kant*, *supra* note 196, at 530 (discussing Kant’s views on proportionality as balancing punishment “against the offense for which [it] is administered”); *see also* Feinberg, *Noncomparative Justice*, *supra* note 68, at 311 (arguing that criminal desert is necessarily in part noncomparative). Feinberg considers the vivid example of a system where “beheading and disembowelment became the standard punishment for overtime parking . . .” *Id.* As he points out, such a punishment is objectively unjust, and “[m]oreover, it would be unjust even if it were the mildest penalty in the whole system of criminal law, with more serious offenses punished with proportionately greater severity still . . .” *Id.*

308. Kolber, *supra* note 1, at 235.

309. *Id.* at 207; *see also* Bronsteen et al., *supra* note 1, at 1069 (adopting this argument).

proper punishment is to impose a constraint on the very liberty abused is hardly counterintuitive. It certainly has more intuitive appeal than the conclusion that rich and sensitive offenders should be treated more delicately than their hardscrabble peers simply because the rich and sensitive have had the luxury of indulging delicate sensibilities.

On this point, it is worth a brief return to Kolber's comparative approach to punishment.³¹⁰ The comparative account of punishment is in essence another form of subjectivism, and is therefore equally vulnerable to earlier arguments. It does, however, raise its own concerns, which are best analyzed in the context of Kolber's discussion of objective theories of punishment. There, Kolber rightly recognizes that many prominent retributivists define punishment objectively, often in terms of deprivations of liberty.³¹¹ He then argues that even these theorists must "calibrate punishments for particular offenders" based on their subjective experiences of punishment measured by comparing their baselines before and during punishment.³¹² His argument is simply that before we can know that we have actually deprived an offender of liberty, we must know what his baseline of liberty is. Otherwise, we risk leaving him unpunished.

The easy response to this argument is that it confuses what objectivists mean by "deprivation" of liberty by adopting without warrant a subjective metric.³¹³ This is by now a familiar refrain, but, to tailor the point for present circumstances, assume that the objectively justified punishment for an offender's crime is five years' imprisonment. For an objectivist, the offender will be properly punished if he is incarcerated for five years—full stop. It simply does not matter whether that incarceration effects a change in his subjective satisfaction. To hold the contrary would make the offender's five-year term not punishment if it was served concurrently with another sentence because it would not deprive him of any more liberty than he was already being deprived of by serving his other sentence. It would also make the five-year term not punishment if it was served consecutively with another sentence because the offender would be in exactly the same condition when he woke on the first day of his next sentence as he was when he went to bed on the eve of his last. The only solution, if the comparative approach is taken seriously, would be

310. See *supra* Part II.B.

311. Kolber, *supra* note 6, at 1585–86.

312. *Id.* at 1586.

313. Retributivists must accept some portion of the responsibility here for choosing the word "deprivation," when "constraint" is probably more accurate.

to inflict additional unjustified hard treatment in order to produce a further change from baseline. Again, that consequence ought to count as good reason to be an objectivist rather than a subjectivist when it comes to justifying and measuring punishment.

There is, however, a deeper problem here. All of Kolber's arguments for subjectivism depend on his claim that "[u]nder any plausible conception of liberty, people vary in the amount of liberty they have."³¹⁴ Taken at face value, this observation does not advance the ball. It is almost tautologically true that those of us on the outside have more liberty than those in prison, that most women in the United States have more liberty than most women living under the Taliban, and, to recall one of Kolber's examples, that a person kidnapped and taken hostage has less liberty than a person at . . . well . . . liberty. That is not what Kolber means by "liberty," however. Kolber's claim is that the amount of liberty we have is calculated by reference to what we actually do or what we actually have. On this account, rich people have more liberty than poor people both because they have more stuff and because that stuff affords them the opportunity to do more and different things.³¹⁵ Bill Gates has more liberty than I do because he has a bigger house and a private airplane that allows him to head to the Maldives on a lark, whereas I do not. When Martha Stewart went to prison, "she was deprived of her liberties to private property to a much greater degree than her fellow inmates" because she had more stuff on the outside;³¹⁶ and she was deprived of her freedom of movement to a much greater degree because her houses and yards were bigger than those her fellow prisoners occupied before they were incarcerated.³¹⁷

There are a number of intersecting problems in this account of liberty. One is a failure to appreciate a distinction central to the liberal tradition between liberty and license. "Liberty" is not unfettered license. It is freedom bounded by morality, ethics, and law. To hold the contrary would be to argue that a prohibition on murder, say, is an infringement upon liberty when, in fact, it is a precondition of liberty.³¹⁸

314. Kolber, *supra* note 1, at 207; *see also* Kolber, *supra* note 6, at 1587 (describing the variety of baseline states through the analogy of the abducted drug dealer).

315. Kolber, *supra* note 6, at 1587–89, 1593–94.

316. *Id.* at 1590.

317. *Id.*

318. *Id.* at 1590 n.65.

318. *See, e.g.*, 1 BLACKSTONE, *supra* note 266, at *40 (arguing that laws, discoverable by application of reason, and by which "freewill is in some degree regulated and restrained," are necessary conditions of justice); THOMAS HOBBS, LEVIATHAN 78 (Edwin Curley ed., 1994)

Kolber's gloss of "liberty" also fails to distinguish between liberty and the material consequences of exercising or not exercising liberty.³¹⁹ If I am at liberty to own a house, but choose not to do so, then it would be nonsensical for me to complain that a homeowner has more liberty than I do simply because he exercised his liberty and I did not. So too would be my complaint that I have less liberty than a law school classmate who remained in private practice while I chose the life of a law professor simply because she makes more money and therefore drives a Maserati and takes luxurious cruises.

Yet a third possible source of confusion is a failure to distinguish between liberty and questions of distributive justice, including the practical capacity and opportunity to exploit liberty.³²⁰ There is no doubt, for example, that a child of privilege has the opportunity to leverage more easily her liberty into material comfort than does her impoverished peer. However, recognizing distributive disparities does not entail or support the conclusion that the child of privilege has greater liberty than the child of poverty because both, strictly speaking, are at liberty to pursue the same material or existential goals.³²¹ That we might regard the fact that one will have an easier time of it than the other as an injustice does not complicate the distinction between liberty and material rewards of liberty, and certainly does not provide authority to use criminal punishment "to rectify preexisting unjust distributions in society."³²²

The collection of these confusions is another iteration of the basic category mistake at the heart of the subjectivist critique: a failure to recognize the difference between the normative concept of punishment and its contingent effects, including the subjective experiences of offenders. Here the mistake is to conflate the normative concept of liberty with its material effects, including wealth. If the subjectivist critique of retributivism comes down to an accusation that

(determining that reason pushes individuals toward societal obligations or "peace" in order to protect individual liberty from all others in society who are also driven by "passions"); Immanuel Kant, *Idea for A Universal History with a Cosmopolitan Intent* (1784), reprinted in KANT: POLITICAL WRITINGS 41, 46–48 (Hans Reiss ed., 1991) (positing that freewill "unconsciously promote[s] an end," whereby being forced to relinquish freewill ensures lasting freewill for all); KANT, *supra* note 14, at 89–90 (proposing that without law, "individual human beings, peoples, and states can never be secure against violence from one another," thereby requiring prohibitions on behavior ultimately to protect individual freedom); KANT, RELIGION, *supra* note 217, at 104–05 (stating that law is required to contain the private feelings of individuals).

319. See, e.g., RAWLS, *supra* note 205, at 201–05 (clarifying "the meaning of the priority of liberty" and the loss thereof).

320. Kolber, *supra* note 6, at 1587–89, 1593–94.

321. Dan Markel and Chad Flanders make a similar point. See Markel & Flanders, *supra* note 1, at 170–78.

322. Kolber, *supra* note 1, at 232.

retributivists fail to make the same conceptual mistakes, then that is hardly persuasive.

C. The Consequences of Subjectivism

The subjectivist critique of retributivism proceeds from an indefensible premise: that punishment is suffering. This critique depends upon importing this poison pill into objective retributive theories and then extrapolating absurd or perverse consequences. Up to this point, this Part has argued that the initial move, attribution of the claim that punishment is suffering to retributivism, can and should be resisted by retributivists. Kolber and Bronsteen, Buccafusco, and Masur also have a positive agenda, built around the claim that subjective accounts of suffering ought to matter when determining, measuring, and justifying punishment.³²³ Part III suggested that this positive agenda is incoherent, at least because it cannot and does not distinguish crime from punishment. As Lon Fuller pointed out in another context, assertions that intellectual clarity is wanting often are married to claims of harmful effect.³²⁴ Subjectivism certainly treads this path. This Section returns to this catalogue of horrors to argue that the perverse results Kolber deploys as *reductio ad absurdum* against retributivism derive from the subjectivism he shares with Bronsteen, Buccafusco, and Masur, not from retributivism or other objective theories of punishment. Those unpalatable consequences therefore count as good reasons to reject not retributivism, but the subjective approaches to punishment these scholars are promoting.

One of the most compelling counterintuitive results that Kolber purports to draw against retributivism is that the commitment to proportionality in punishment requires inflicting objectively less severe punishment on the wealthy and soft because they are more sensitive and have more to lose.³²⁵ Kolber contends that this result offends our moral intuitions, and therefore should lead us to reject retributivism.³²⁶ There is no doubt that punishing differently two

323. See Bronsteen et al., *supra* note 3, at 1463–67 (arguing that evidence of prisoners' adaptability should inform the theory and practice of punishment); Bronsteen et al., *supra* note 139, at 1641 ("[G]overnments and policymakers should adopt a decision procedure based upon subjective well-being . . ."); Kolber, *supra* note 11, at 4 ("If we seek to have justified criminal justice practices, then we need to consider subjective experience more than we do now.").

324. Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 631 (1958).

325. Kolber, *supra* note 6, at 1569–70; Kolber, *supra* note 1, at 186–87.

326. Kolber, *supra* note 6, at 1569–70.

offenders who commit the same crime based on existential conditions that do not bear on their culpability offends strong justice intuitions. That offense is all the worse if those conditions reflect background distributive injustice.³²⁷ As is by now clear, however, the intuitions offended are retributivist, and reveal objective, not comparative, disproportion.³²⁸ The retributivist commitment to justify and measure punishment objectively by reference to culpability in crime without regard to hedonic economies is attractive precisely because it avoids these sorts of results. Only if one endorses the subjectivist claim that “the subjective disutility of punishment . . . is largely or entirely the punishment itself”³²⁹ does one face the prospect of basing punishment determinations on considerations other than desert. It follows that subjectivism, not objectivist retributivism, is the theory of punishment which bears the burden of justifying these perverse consequences.

Another disturbing consequence of defining punishment in subjective terms as suffering or subjective disutility is that it appears to endorse severe injustices in our current sentencing practices. Take for example the intersection of race, poverty, and crack cocaine. The statistics place beyond contest the simple fact that, on average, black children and juveniles from poor backgrounds enjoy a lower standard of living, worse nutrition, fewer educational opportunities, and are far more likely to have early interactions with the criminal justice system as compared to their white, middle-class peers.³³⁰ Parallel statistics bear out the raw fact that black persons from poor backgrounds are disproportionately affected by the disparity between sentencing practices for crack cocaine offenses and those for powder cocaine.³³¹ The coordinate impact of these phenomena on both the likelihood of punishment and the severity (defined objectively) of punishment imposed on non-violent, young, black, drug offenders is staggering and

327. For a useful discussion of the relationship between criminal justice and distributive justice, see Stuart P. Green, *Hard Times, Hard Time: Retributive Justice for Unjustly Disadvantaged Offenders*, 2010 U. CHI. LEGAL F. (forthcoming 2010), available at <http://ssrn.com/abstract=1511732>.

328. Feinberg, *Noncomparative Justice*, *supra* note 68, at 300–01, 311–13.

329. Kolber, *supra* note 1, at 212.

330. See, e.g., Green, *supra* note 327 (manuscript at 2–5) (explaining that the poor account for a disproportionately high percentage of crime victims and criminal offenders); OFFICE OF THE SURGEON GEN., U.S. DEP’T OF HEALTH AND HUMAN SERVS., YOUTH VIOLENCE: A REPORT OF THE SURGEON GENERAL ch. 4, <http://www.surgeongeneral.gov/library/youthviolence/toc.html> (last visited Sept. 10, 2010) (“Race is a proxy for other known risk factors—living in poor, single parent families, doing poorly at school, and being exposed to neighborhood disadvantage, gangs, violence, and crime.”).

331. See U.S. Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (Feb. 1995) [hereinafter *Special Report*] (recommending that Congress reduce the 100:1 ratio of sentences imposed for crack and powder cocaine offenses).

impossible to justify on retributive grounds.³³² For retributivists, this and other facts about our present punishment policy constitute persistent injustice because the individual sentences are objectively unjustified and, therefore, so are the broader disparities by which each of these “[i]njustice[s] become[s] manifest.”³³³

For those interested in defending race and class disparities in our criminal justice system evidenced in disparities among sentences for crack and powder cocaine, subjectivism provides welcome refuge. According to the logic of the subjectivist critique, lifelong experience with conditions of poverty and racism means two things. First, poor black youths enter the criminal justice system at a lower baseline position of material and environmental comfort as compared to their white, privileged peers.³³⁴ Second, by virtue of their experiences, including early contact with the criminal justice system, poor black youths are more likely to be subjectively tolerant of privation and somewhat hardened to the threats and realities of incarceration.³³⁵ Third, those same features likely make poor black youths more prone to rebound quickly from the initial unhappiness imposed by incarceration. Therefore, according to the logic of the subjectivist critique, poor black youths must receive objectively more severe punishments than their effete white peers in order to achieve the same quantum of subjective suffering, the same change in comparative suffering, and the same sustained levels of unhappiness.

Claims that sentences for crack offenses are objectively disproportionate given the nature of crack offenses as compared to powder cocaine offenses, and even claims that those disparities effect racist sentencing policy, therefore appear to be irrelevant for subjectivists. From a subjectivist point of view, the fact that those disparities disproportionately impact poor black youths actually counts as good reason for maintaining the disparities. From a retributivist point of view, this is unconscionable.

332. See Green, *supra* note 327; *Special Report*, *supra*, note 331.

333. Feinberg, *Noncomparative Justice*, *supra* note 68, at 301.

334. See Kolber, *supra* note 6, at 1567–69 (discussing how, for example, “[r]ich people have rights to use particular property that poor people lack,” which suggests that rich people have higher baseline conditions).

335. See Kolber, *supra* note 1, at 230–31 (“All else being equal, as an empirical matter, wealthy people are likely to suffer more intensely in prison than those with less wealth who are placed in the same prison conditions.”).

V. OBJECTIVISM PART II: UTILITARIANISM

The critical agenda of contemporary subjectivists is not confined to retributivism. These critics also argue that utilitarian theories of punishment err in defining and justifying punishment on purely objective grounds and must in practice and theory recognize and incorporate subjective experiences of punishment.³³⁶ The major contributors to the current subjectivist literature appear to endorse utilitarianism as having the best theoretical architecture for justifying and measuring criminal punishment, so these criticisms are in the form of friendly amendments rather than condemnation.³³⁷ Nevertheless, there are good reasons to believe that these amendments are unwelcome. Those reasons are by now familiar. As in their engagements with retributivism, contemporary subjectivist critics' discussions of utilitarianism evidence conceptual mistakes that in some cases reflect a misunderstanding of the core theory.

A. Some Common Utilitarian Themes

Utilitarian approaches to criminal punishment are nearly as diverse as retributive, but there are four dominant, nonexclusive, positive goals of punishment cited by most proponents: general deterrence, specific deterrence, incapacitation, and rehabilitation. It is not at all clear that subjective experiences of punishment have any normative impact on penal theories justified by pursuit of any of these four goals.

While goal oriented, incapacitation and rehabilitation bear some similarity to retributivism in this respect: all three reject categorically the claim that punishment is suffering. Suffering is neither an end nor immediate goal of incarceration for purposes of incapacitation or rehabilitation. Suffering may well be incidental to the technologies deployed to achieve incarceration or rehabilitation, but it is incidental. Individual experiences of suffering therefore may bear on issues of technical penology in incapacitation or rehabilitation regimes,³³⁸ but do not carry any particular normative weight for the

336. *Id.* at 219 (“[T]he only way to avoid the obligation to take the subjective experience of punishment into account is to abolish punishment entirely.”).

337. See Bronsteen et al., *supra* note 1, at 1055–68 (discussing the applications of subjectivist findings on hedonic adaptation, forecasting, and post-prison effects to utilitarian theories of punishment); Kolber, *supra* note 1, at 236 (maintaining that consequentialists are already “quite receptive to the claim that they are prima facie obligated to take account of actual or anticipated subjective experiences”).

338. See *infra* Part VI.

project of justifying punishment practices generally or in particular cases because suffering is not an essential, much less substantive, feature of punishment justified by the ends of incapacitation or rehabilitation. Kolber seconds this point, going so far as to say that “it is not at all clear that a consequentialist theory of punishment stripped of its deterrence aim should still even be thought of as a theory of *punishment*.”³³⁹ That conclusion only follows, of course, if one thinks that the infliction of suffering or some other form of subjective disutility is necessary to make punishment “*punishment*.”

General deterrence is on different footing because, as opposed to other theories of punishment, deterrence theory defines and justifies punishment in terms of suffering.³⁴⁰ Nevertheless, there seems to be no reason to take much notice of individual experiences of punishment in a general deterrence regime. General deterrence uses threats of suffering to raise the risk profile of crime for members of the general public.³⁴¹ Assuming that agents refrain from crime only when the product of risk and severity of punishment outweighs the product of promise and benefit of crime, general deterrence will still determine punishment objectively based on demographic assessments of prospective aversion, not subjectively, based on individual experiences of suffering among those actually punished.³⁴²

To extend the point, what matters to the general deterrence theorist is not how a particular offender experiences a punishment or even how most people will actually experience a punishment. Rather, the operative factor for general deterrence is the level of suffering

339. Kolber, *supra* note 1, at 219.

340. JEREMY BENTHAM, *PRINCIPLES OF PENAL LAW*, reprinted in *THE WORKS OF JEREMY BENTHAM* 365, 395–96 (John Bowring ed., Russell & Russell 1962) (1843).

341. There is good reason to doubt the model of agency implied by this model. See, e.g., David J. Pyle, *The Economic Approach to Crime and Punishment*, 6 J. INTERDISC. ECON. 1, 4–8 (1995); Paul Robinson & John Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 951–53 (2003). Present purposes do not require taking a position in this debate.

342. For an extensive discussion of these timing issues see Markel & Flanders, *supra* note 1, and Bronsteen et al., *supra* note 3. Kolber argues that we should nevertheless factor in the subjective differences among defenders because offenders sensitive to imprisonment will be more sensitive to threats of imprisonment while offenders less sensitive to imprisonment will be less sensitive to threats of imprisonment. Kolber, *supra* note 1, at 217. This is a dubious claim, particularly in light of studies cited by Bronsteen, Buccafusco, and Masur, *supra* note 1, at 1041–45, suggesting that most of us are quite bad at forecasting our actual sensitivities to stimuli. See also Kolber, *supra* note 1 at 211 & n.79, 217 (conceding that individuals may not be good predictors of their future responses to punishment). Setting those issues aside, this response is, strictly speaking, a non sequitur, both because it addresses specific rather than general deterrence and because it fails to respect the important line between ex post and ex ante that is central to deterrence policy and analysis.

most people expect, ex ante, that they would experience if punished.³⁴³ As Bronsteen, Buccafusco, and Masur note, it does not matter if that assessment is accurate.³⁴⁴ The currency of general deterrence is, then, not actual suffering, but imagined suffering determined objectively across the relevant demographic group. Subjectivist scholars have argued that titration of suffering on an individual basis is nonetheless necessary in a general deterrence regime because to do otherwise would send different messages to different offenders based on their different experiences with punishment.³⁴⁵ That argument ignores the logic of general deterrence and entails the same fallacy perpetrated by Bentham in his defense of excuses, described by Hart as a “spectacular non sequitur.”³⁴⁶

If the goal of punishment is specific deterrence, then subjective assessments of suffering at first appear to be highly relevant. That intuition ought not to be indulged uncritically, however. First, this approach to punishment would endorse the perverse results discussed above in Parts IV.B. and C. The traditional solution for utilitarians faced with such objections is to withdraw into a defense of rules. Of course, that retreat endorses objective justifications of punishment, setting aside as irrelevant differences in individual suffering.³⁴⁷

There is a deeper problem here, however, which is revealed in work by Bronsteen, Buccafusco, and Masur on the phenomenon of hedonic adaptation. According to studies cited by these authors, offenders tend to be very poor predictors of the suffering they will experience if punished.³⁴⁸ The accuracy of those assessments appears to be no better if informed by experience. So, recidivists tend to “overestimate” the level of suffering that punishment, measured as subjective changes in hedonic states, will inflict.³⁴⁹ This apparent oddity will be addressed in a moment, but these contributors to the literature surely ask the right question.

What matters in calibrating punishment in a specific deterrence regime is not how that punishment actually is experienced, but predictions of subjective experiences of punishment made

343. It is worth pointing out that the most effective contributors to these perceptions are likely not the actual, real-time, subjective experiences of prisoners, but a constellation of actual and purported reports of those experiences. Television shows, movies, media reports, etc., are probably far more influential contributors to the general deterrence effects of punishment than the actual experiences of real offenders.

344. Bronsteen et al., *supra* note 1, at 1060.

345. *Id.* at 24; Kolber, *supra* note 1, at 216–18, 218 n.101.

346. HART, *supra* note 120, at 19.

347. *Id.*

348. Bronsteen et al., *supra* note 1, at 1058–62.

349. *Id.* at 1044.

prospectively by the offender to be deterred. Thus, even in specific deterrence regimes, the actual subjective experiences of offenders assessed contemporaneously or ex post facto are irrelevant to the task of measuring and justifying punishment.³⁵⁰ This is not beyond debate, of course. For example, it may turn out that future brain studies will reveal that certain subjective experiences of suffering create or strengthen specific neural pathways implicated in future risk assessment. In that case, those subjective experiences would be relevant for predicting offenders' prospective assessments of potential hedonic change in the face of future opportunities to commit crime. We are not there yet, of course, and there is good reason to suspect that we may never get there or, if we do, that the models of agency and constructions of happiness and suffering endorsed by contemporary subjectivists will have little or no role to play. As is argued in the next Section, those reasons have their root in the rather thin descriptions of suffering and happiness endorsed by Bronsteen, Buccafusco, and Masur. When considered in light of deeper and more nuanced accounts of suffering and happiness dominant in the literature on utilitarianism, it is ever more evident that subjectivism ought to be rejected as both a critique and as a prescriptive theory of punishment.

B. Utilitarianism and Conceptions of Human Nature

At various points in their arguments, Kolber and Bronsteen, Buccafusco, and Masur treat all suffering as fungible.³⁵¹ This raises concerns for Bronsteen, Buccafusco, and Masur, who rest their arguments on hedonic adaptation. Bronsteen, Buccafusco, and Masur report two phenomena which they find interesting and which they claim raise serious normative and practical challenges to traditional theories of criminal punishment. The first is that offenders quickly adapt to incarceration and, within a relatively short period, report levels of happiness on par with those reported before incarceration.³⁵² The second is that those who have been incarcerated tend to "inflate" their assessments of how unhappy they will be if incarcerated

350. Dan Markel and Chad Flanders make this point powerfully in *Bentham on Stilts*, *supra* note 1. See also, RAWLS, *supra* note 205, at 9 ("[I]f some kind of very cruel crime becomes common, and none of the criminals can be caught, it might be highly expedient, as an example, to hang an innocent man, if a charge against him could be so framed that he were universally thought guilty; indeed this would only fail to be an ideal instance of utilitarian 'punishment' because the victim himself would not have been so likely as a real felon to commit such a crime in the future; in all other respects it would be perfectly deterrent and therefore felicitic.") (internal citation omitted).

351. See *supra* Parts I, III.C.3.

352. Bronsteen et al., *supra* note 1, at 1046–49.

again.³⁵³ Bronsteen, Buccafusco, and Masur suggest that these phenomena are in tension with traditional theory and current practice because the deterrent “bang” is all frontloaded and that longer sentences therefore serve no utilitarian purpose. That view reveals a key conceptual gap between Bronsteen, Buccafusco, and Masur and most liberal theorists in the utilitarian tradition.

As a threshold matter, the concept of hedonic adaptation reveals some rather serious question-begging in the application of results from self-reporting studies to criminal law and punishment theory. By definition, the survey data on hedonic adaptation reports *adaptation*. That is, it reports responses to changes in condition. The researchers do not claim that evidence of adaptation or failure to adapt answers ontological or ethical questions about the nature of the states of affairs on either side of the shift. That most people do or do not adapt to a particular condition does not answer the question whether that condition is good, bad, or neutral, desirable, undesirable, or barely worthy of mention.

The fact that most incarcerated offenders adapt to prison life does not mean that prison life is hunky-dory once you get accustomed to it. We would need to look elsewhere to justify that proposition. When we do, it is pretty clear that prison life is wholly undesirable in objective terms. Furthermore, in most relevant ways, prison life is objectively bad. Evidence of emotional resilience does not change that fact. What the literature cited by Bronsteen, Buccafusco, and Masur shows, then, is adaptation to bad circumstances. What they see as “inflated” assessments of future misery do not reflect inflation at all. Rather, potential recidivists are simply reporting a point so obvious it hardly bears stating: that life in prison is much less desirable than life outside of prison.

While the conclusion is obvious, it exposes a more profound gap between Bronsteen, Buccafusco, and Masur and the main mass of liberal theorists in the utilitarian tradition. Bronsteen, Buccafusco, and Masur’s argument endorses a view of human pain and suffering that is both thin and somewhat demeaning. The point is made famously by Mill in *On Utility* in his discussion of “swine.” Mill states clearly his view that “actions are right in proportion as they tend to promote happiness; wrong as they tend to produce the reverse of happiness.”³⁵⁴ “Happiness” and its “reverse” are not, however, reducible to raw sensations shared with beasts. It would be “absurd,” Mill writes, to suppose that “the estimation of pleasure should be

353. *Id.* at 1058–61.

354. MILL, *supra* note 56, at 7.

supposed to depend on quantity alone.”³⁵⁵ Rather, “pleasure” for human beings has a strongly qualitative dimension referring to the scope of capacities descriptive of the human condition. Thus Mill’s famous dictum that “[i]t is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied. And if the fool, or the pig, are of a different opinion, it is because they only know their own side of the question.”³⁵⁶

There is a deep and substantial contemporary literature exploring objective and intersubjective accounts of happiness in keeping with Mill’s fundamental insight. Martha Nussbaum, Amartya Sen, and Richard Kraut are particularly worthy of note.³⁵⁷ As Martha Nussbaum points out in her work on capabilities, it is quite common for persons denied rights and opportunities to ignore, discount, or deny the value of those dimensions of experience and pleasure.³⁵⁸ That does not make those experiences and capabilities less valuable, however. Destitute and exploited persons the world over find pleasure and happiness in small comforts, but that does not mean that their lives would not be substantially better if they enjoyed bodily security, basic material provisions, education, freedom of expression, etc.³⁵⁹ That would be true even if they adapted quickly to those new conditions, and returned to the same baseline of happiness they had when poor and oppressed. Kraut agrees, pointing out that access and opportunity to explore the breadth of human capacities provides the best definition we can have of human good as “flourishing.”³⁶⁰

While these views might strike some as elitist, most such criticisms indulge a core mistake, miss the point, or both.³⁶¹ The claim is not that one cannot report happiness if one never makes more than \$30,000 a year. The claim is not even that reports of happiness by those who make less than \$30,000 are not to be believed. The claim is most certainly not, as Kolber would have it, that those who make \$30,000 a year have less liberty than those who make \$100,000. Rather, the point is that the possibilities of what one can do in life expand and increase if you make \$100,000 a year rather than \$30,000. For that reason, most people would rather have the extra \$70,000 a

355. *Id.* at 8.

356. *Id.* at 10. *But see* HERMAN MELVILLE, *TYPEE: A PEEP AT POLYNESIAN LIFE* 178–83 (John Bryant ed., Penguin Books 1996) (1846).

357. *See, e.g.*, KRAUT, *supra* note 31; AMARTYA SEN, *THE IDEA OF JUSTICE* 225–317 (Harvard Univ. Press 2009); Nussbaum, *Capabilities*, *supra* note 31; Nussbaum, *supra* note 30.

358. *See, e.g.*, Nussbaum, *Capabilities*, *supra* note 31.

359. *See* NUSSBAUM, *FRONTIERS* *supra* note 31.

360. KRAUT, *supra* note 31, at 131.

361. *See, e.g.*, MILL, *supra* note 56, at 8–10 (discussing an example of a criticism).

year. Similarly, if you never learn French, travel to Istanbul, read Proust, come to understand John Cage, or develop the vocabulary of an oenophile, that does not mean that you cannot be truly happy; but it does mean that your life will lack the dimensionality provided by those capacities and experiences.

What is on the vast list of possibilities that constitutes the good life varies by the person, of course, but most people when given a series of “what ifs” will agree that, even though they are perfectly happy now, they would prefer a life with some of those things, experiences, or abilities. And that, of course, is the crucial bit: choice.³⁶² Even if one chooses to live in a small room for twenty-three hours a day with little substantial human contact doing nothing more than staring at the walls,³⁶³ it is by far better to choose it than to have it forced upon you.³⁶⁴ This point is missed by Bronsteen, Buccafusco, and Masur, and it remains true even if the choice has little impact on self-reported happiness.

Humans are a remarkably resilient species. A prisoner may therefore adapt to his surroundings by reducing his expectations and focusing on small pleasures. Upon release, he can afford to set aside the emotional structures of his adaptation, free now to pursue the expanded pleasures afforded by greater freedom. What Bronsteen, Buccafusco, and Masur regard as “inflation” in assessments of future misery is, on this view, nothing more than a fully rational and objective assessment of two very different environments. Happiness in prison is just incommensurate with happiness outside of prison. Any doubts on this point are quickly erased with a couple of rhetorical questions: Would you rather be in prison or not? Would your answer change if you were told that, in answer to a blunt questionnaire,³⁶⁵ you would report levels of happiness during your incarceration identical to those you report now?³⁶⁶

362. *E.g.*, Nussbaum, *supra* note 30, at 99–103.

363. Academics, for example.

364. *See, e.g.*, THE STATLER BROTHERS, *Flowers on the Wall*, on FLOWERS ON THE WALL (Columbia Records 1965) (“Countin’ flowers on the wall/That don’t bother me at all/Playin’ solitaire till dawn with a deck of fifty-one/Smokin’ cigarettes and watchin’ Captain Kangaroo/Now don’t tell me I’ve nothin’ to do.”).

365. Nussbaum, *supra* note 30, at 86–88.

366. The literature is rife with more profound questions ranging from Robert Nozick’s ethical turn on brain-in-a-vat problems to challenges posed by cultural relativists, which are topics for late-night dorm conversations at universities and colleges the world over. It is beyond the scope of this Article to take up those discussions, but the fact that they can be had comes close to proving that the point apparently is lost on Bronsteen, Buccafusco, and Masur, who attempt to draw normative conclusions from the literature on hedonic adaptation. Bronsteen et al., *supra* note 1, at 1049–55.

In closing this discussion of utilitarianism, one additional phenomenon is worth brief note. Bronsteen, Buccafusco, and Masur cite evidence suggesting that offenders experience continuing hardship upon release from prison and that these hardships are more difficult to bear and adapt to than constraints imposed by prison life.³⁶⁷ To the extent this is an argument for greater attention to reentry issues in the criminal justice system, this author has no objection—quite to the contrary.³⁶⁸ In agreeing, however, it is important to take note of the fact that Bronsteen, Buccafusco, and Masur appear to have missed the descriptive and normative significance of the phenomenon to which they refer.

Just as there is a normative distinction between crime and punishment, so too is there a normative and an experiential difference between hard structural constraints and socially constructed restraints. Limits on the pursuit of happiness imposed by incarceration are, while difficult to bear, essentially physical truths. Limits on happiness imposed by socially constructed status inequalities are just different in kind. Imprisonment imposed by a well-functioning legal system in cases where an actual crime has been committed have at least a veneer of justice. Social discrimination is, by contrast, often arbitrary, unfair, and undeserved. The disparities in adaptability and reported happiness between offenders in prison and those who are shunned upon release therefore may reflect prisoners' internalizing the very moral sensibilities which much of the subjectivist critique rejects. That is to say, ex-convicts subjected to undeserved discrimination and harm are persistently unhappy because they are subjected to undeserved harm and quite rightly resent it.

VI. CONCLUSION: WHY SUFFERING MATTERS

In battles over definitions, there is a danger that, out of “concern to assign the right labels to the things men do, [we] lose all interest in asking whether men are doing the right things.”³⁶⁹ In picking an unnecessary and ultimately unfruitful fight with traditional theories of punishment over the definition of “punishment,” contemporary subjectivists are at risk of missing the very significant opportunities their insights offer in our ongoing efforts to “do the right thing.” The observations of subjective experiences offered by these

367. *Id.*

368. *See supra* note 102.

369. Fuller, *supra* note 324, at 643.

scholars are not trivial just because they do not pose intractable objections to traditional theories of criminal punishment. There is no doubt that suffering matters. For example, judges and executive-branch officials routinely entertain pleas for mercy from prisoners who have suffered inordinately during their incarceration.³⁷⁰ Kant, for one, has acknowledged the justice of such practices, noting with approval the authority of executives to grant clemency.³⁷¹

Where clemency is granted in the face of significant incidental suffering, one might expect to hear phrases like “he has been punished enough,” but the point made by objectivists is that this common parlance obfuscates rather than reveals underlying justifications and measures of punishment. So, while excessive suffering at the hands of other prisoners, say, may well provide good reason for early release from a justly imposed term of imprisonment, the objectivist position is that it is not necessary, justified, advisable, or coherent, to convert this sort of incidental suffering into “punishment” in order to justify that early release. Rather, mercy and other important principles within the penumbra of justice are sufficient and better guides.

A similar case for relevance of suffering can be made for the practicalities of penal method. Any punishment is bound to produce some degree of incidental suffering. In some instances, a particular technology may consistently produce incidental suffering beyond an acceptable or remediable threshold. In those cases, prudence may provide normative ground for abandoning or altering the practice. For example, several litigants in recent years have raised concerns that techniques used to carry out the death penalty may inflict excessive incidental pain and suffering.³⁷² These arguments have the best hope of success if the suffering at issue is characterized as incidental, and therefore worthy of remediation, than they would if proponents argued that this unnecessary incidental pain was part of the “punishment.”³⁷³

To return to a favorite example of Kolber’s, if a severe claustrophobic is sentenced to a term of imprisonment, and the standard cell size is so small that his claustrophobia will cause him to suffer mind-crushing distress, then there is little question that prison officials should provide some reasonable remedy. However, the case for that remedy is based not on the fact that his terror is punishment,

370. Sentencing Memorandum at 14–15, *Simon v. United States*, No. CR-90-216 (E.D.N.Y. March 17, 2005), available at <http://www.nyed.uscourts.gov/pub/rulings/cr/2005/90cr216sm31705.pdf>.

371. KANT, *supra* note 14, at 107–08.

372. See, e.g., *Cooley v. Strickland*, 589 F.3d 210, 215 (6th Cir. 2009); *Emmett v. Johnson*, 532 F.3d 291, 292–93 (4th Cir. 2008); *Hamilton v. Jones*, 472 F.3d 814, 816–17 (10th Cir. 2007).

373. See *supra* note 274.

but rather on the fact that it is not. That, in the end, is the fundamental point of disagreement between objectivists and contemporary subjectivists. Objectivists think that the claustrophobic's distress matters because it is not punishment. Contemporary subjectivists think that the claustrophobic's distress matters because it is punishment. Contemporary subjectivists think that sexual assault in prison matters because it is punishment. Objectivists think that it matters, that we have a duty to stop it, and that we therefore have an obligation to provide some remedy when it does occur, because sexual assault in prison is not punishment. I think that the objectivist's view is by far the more coherent and attractive of the two.

To the incautious reader, these may seem like tremendous concessions. It is certainly true that there may not be much practical distance between some results suggested by contemporary subjectivists and those reached by proper application of traditional punishment theory and overlapping considerations of mercy and prudence.³⁷⁴ However, as in most conversations about law and morality the "why" is at least as important as the "what." In this instance, defining punishment independent of suffering and other subjective experiences of offenders offers the most coherent and persuasive account of why excessive suffering requires remediation. The alternative offered by subjectivism and its advocates leaves all concerned unable to distinguish crime from punishment, conflates a normative concept with contingent effects, commits officials to inflicting additional pain and suffering on model prisoners, paints a shallow and demeaning picture of humans and human potential, and pushes justice down the "winding path"³⁷⁵ of sadism and perversion.

374. See Gray & Huber, *supra* note 18 (arguing on retributivist grounds for progressive changes to American criminal law and punishment policy).

375. KANT, *supra* note 14, at 105.