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## Objective Punishment

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## OBJECTIVE PUNISHMENT

*Anthony M. Dillof\**

### INTRODUCTION

The punishment, it is commonly said, should fit the crime.<sup>1</sup> The question addressed by this Article is to what extent the punishment should also fit the criminal.

For decades, criminal law scholars have endorsed the goal of proportionate sentencing.<sup>2</sup> The basic idea of proportionate sentencing is that perpetrators of worse crimes should get harsher sentences. One might imagine an equation in which sentences are expressed as a monotonically increasing function of increasingly serious crimes. Crime severity, in turn, is defined by a range of factors: the harm caused (if any), the actor's mental state and mental capacity, the provoking circumstances, the beneficial and harmful side-effects of the act, the nature of the causal connection between the act and the harm, and so on. What is the nature of these factors and how do they make the crime worse? The extensive literature addressing these topics can be understood as exploring the crime side of the crime-sentencing proportionality equation.

In contrast, much less attention has been paid to the sentencing side of the crime-sentencing proportionality equation. Criminal offenders have different backgrounds, tastes, perceptions, sensitivities, and adaptive abilities. Because of this, different offenders will experience penal sanctions, such as incarceration, differently. Some will find these sanctions harsher and more oppressive than others; some less. How closely should the law tailor its sanctions to the psychological and other specific features of offenders? For example, should an offender's prison

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\*Professor of Law, Wayne State University Law School. I am grateful for the insightful comments and helpful suggestions of Vera Bergelson, Mitchell Berman, Stuart Green, Adam Kolber, David Moss, Alice Ristroph, Brad Roth, Vincent Wellman and Steven Winter. Any criticism—objective or subjective—should be directed solely at the author.

1. See, e.g., W.S. GILBERT & ARTHUR SULLIVAN, *A More Human Mikado* (1885) (“My object all sublime / I shall achieve in time / To let the punishment fit the crime / The punishment fit the crime”).

2. See, e.g., JESPER RYBERG, *THE ETHICS OF PROPORTIONAL PUNISHMENT* 5 (2004) (noting the “wide acceptance” of the proportionality principle among theorists); Andrew von Hirsch, *Proportionate Punishments*, in *PRINCIPLED SENTENCING*, 195-200 (Andrew von Hirsch & Andrew Ashworth eds., 1992); George P. Fletcher, *Reflections on Felony Murder*, 12 SW. U. L. REV. 413, 426, 427-28 (1981-82) (asserting that punishment is just only insofar as it is proportionate to fault and that basic principle of just punishment is that it must be proportional to wrongdoing). See also MODEL PENAL CODE § 1.02(2) (“The general purposes of the provisions on sentencing, applicable to all official actors in the sentencing system, are . . . 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”). Scholarly interest aside, proportionality in punishment has adopted as a goal in countries throughout the world. See RYBERG, *supra*, at 4.

sentence be lower than average because, due to post-traumatic stress disorder (“PTSD”) or claustrophobia, he will subjectively suffer more in prison than the average incarcerated? Should an offender’s sentence be greater because she has been incarcerated multiple times in the past and does not mind greatly the average sentence? Relatedly, incarcerated persons will have different experiences in prison due to external factors. For example, an inmate might be seriously assaulted by another inmate or miss out on an unusually rich and satisfying life outside of prison. Should that person’s prison sentence be reduced on the grounds that that person has suffered more in prison or has been deprived of more than the average offender?

Of course, before giving an affirmative answer to these questions, due attention must be paid to the many practical and administrative concerns that such close sanction-tailoring would raise. These concerns include contrived sensitivities, costs of evaluation, privacy interests of offenders, bias of decision makers, reduced deterrence, and public perceptions of fairness. Some trade-off between these concerns and close sanction-tailoring may well be called for. However, before trying to determine the appropriate trade-off, it is first necessary to decide whether such close tailoring would even be desirable in theory. *Practical and administrative concerns aside, do we want the punishment to fit the criminal?*

This Article contends that criminal punishment generally should be objectively measured and not take into account subjective and idiosyncratic features of the criminal like those discussed above. This position runs contrary to some recent writing in punishment theory. This Article argues that insofar as punishment is a function of the desert of the offender for committing a crime (1) criminal penalties should be based only on wrongs recognized by the criminal law; (2) the wrongs recognized by the criminal law are largely defined in objective terms; (3) punishments for wrongs should mirror, to the extent possible, the wrongs the offender is being punished for; (4) thus, criminal offenders are justly punished by deprivations of objectively defined rights; and (5) because they are secondary consequences of otherwise just penalties, incidental subjective and idiosyncratic harms experienced by offenders are justified, although in some cases reasonable mitigative measures may be appropriate.

The Article is structured as follows. Section I considers some of the existing literature on the problem of proportionate punishment, focusing on the writings of Professor Adam Kolber. This Section reviews Kolber’s writings on subjectivity and baseline-relevance in the criminal law. It considers Kolber’s argument that a subjective and comparative version of retributivism is the only reasonable form of retributivism, and this form, coupled with a commitment to proportionality, leads to some intuitively

unacceptable results. Therefore, retributivism must be rejected. Section II presents and critiques some of the arguments that have been raised against Kolber's position in favor of an objective theory of punishment. Finding these arguments unpersuasive, Section II concludes that a superior theory of objective punishment is needed.

The second half of the Article attempts to meet that need. Section III presents a five-step argument (summarized above) for objective retributivism. It then elaborates its implications and defends it against some possible objections. Section IV considers the place of retributivism in punishment theory in light of the theory of objective retributivism. This Section argues that the objective form of retributivism set forth in this Article can satisfy the relatively modest ambitions for a retributive theory of punishment. This Article briefly concludes by situating its arguments for objectivity both narrowly and broadly.

### I. THE CASE FOR INDIVIDUALIZED RETRIBUTIVISM

This Section considers what I shall refer to as the theory of "individualized retributivism." The case for individualized retributivism was made by Professor Adam Kolber in a series of three articles.<sup>3</sup> These articles portray individualized retributivism as the most faithful or natural version of retributivism. Unfortunately for retributivism, individualized retributivism is, all things considered, an unappealing moral theory. Thus, Kolber presents a *reductio ad absurdum* challenge to retributivism. Since retributivism is a leading theory of punishment among contemporary scholars,<sup>4</sup> whether this *reductio* is sound is of considerable import.

In brief, Kolber argues for the claims that (1) the sorts of harms that punishment theory must justify include both the intended and unintended harms that offenders may suffer as a result of their sentences; (2) among these unintended harms are the negative subjective experiences of the offender; (3) furthermore, the severity of these unintended harms,

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3. See Adam J. Kolber, *Unintentional Punishment*, 18 LEGAL THEORY 1 (2012) (hereinafter Kolber, *Unintentional Punishment*); Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182 (2009) (hereinafter Kolber, *Subjective Experience*); Adam J. Kolber, *The Comparative Nature of Punishment*, 89 B.U. L. REV. 1565 (2009) (hereinafter Kolber, *Comparative Punishment*). Besides the three articles focused on herein, Kolber has further elaborated his views in *The Experiential Future of the Law*, 60 EMORY L.J. 585 (2011), and *The Subjectivist Critique of Proportionality* (on file with author). See also Ryberg, *supra* note 1, at 102-09 (discussing the "sensitivity challenge"); John Bronsteen, Christopher Buccafusco, & Jonathan Masur, *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1068-72 (2009) (making similar arguments).

4. See Alice Ristroph, *Just Violence*, 56 ARIZ. L. REV. 1017, 1038 (2014) ("For the past three or four decades, retributivism has been especially prevalent among academic philosophers"); David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1623 (1992) ("[R]etributivism . . . has enjoyed in recent years so vigorous a revival that it can fairly be regarded today as the leading philosophical justification of the institution of criminal punishment.").

whether objective deprivations of liberty or negative subjective experiences, must be assessed relative to the offender's historical or counterfactual baseline; (4) in order to achieve proportionate punishment when harms are so assessed, factors such as the offender's economic class and social background must be taken into account in a manner that offends our normative sensibilities; (5) therefore retributivism should be rejected.

Kolber's arguments are presented below in subsections A through C. I elaborate them in some detail so the reader may appreciate their strong pull and the commensurate need for a defense of retributivism.

*A. A Retributivist Theory of Punishment Should Justify Unintended Harms.*

In "Unintentional Punishment,"<sup>5</sup> Kolber challenges the traditional view that the punishment suffered by an offender is limited to harms that were *intentionally* inflicted. This view may be traced to H.L.A. Hart, who canonically defined punishment as pain or other consequences normally considered unpleasant that are intentionally imposed on an actual or intended offender by an authority of the relevant legal system for an offense against legal rules.<sup>6</sup> Once this intentionality limit is removed, the door is opened to a range of harms which Kolber later argues retributivism cannot well account for.

Kolber believes that an offender's punishment, properly understood, is not limited to harms intentionally imposed. Rather, punishment also includes certain unintended harms; or at least such harms are relevant in assessing a punishment's severity and justness.<sup>7</sup> Kolber argues for this conclusion by imagining two like offenders sentenced to identical prison terms in identical facilities by different judges, one whose purpose is to make the offender experience the full range of prison hardships (for example, deprivations of liberty and severe ostracism within the prison community), the other whose purpose is to make the offender experience a narrow range of hardships (for example, only deprivations of liberty), but who is aware that the offender will experience the full range of hardships. According to Kolber, the judges' different intents are irrelevant. The two offenders (both of whom are deprived of liberty and are severely ostracized) receive equally harsh punishments.<sup>8</sup> Kolber

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5. Kolber, *Unintentional Punishment*, *supra* note 3.

6. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 4 (1968).

7. Kolber, *Unintentional Punishment*, *supra* note 3, at 12 ("[W]e count at least certain foreseen inflictions as part of the severity of a sentence.")

8. *Id.* at 7-10.

contends the same analysis would apply even if the intentions of some other state actor, or collection of state actors, were thought to be relevant in determining the scope of intended harms.<sup>9</sup>

Kolber then advances what he called the justification-symmetry principle. According to this principle, whatever harms a private person would have to justify inflicting, the state is also required to justify. Kolber explains:

The principle derives from the very reason we seek to justify our punishment practices. A justification must tell us the moral distinction between a just punishment practice and similar-seeming criminal or immoral behavior. When we can demand a moral justification from you or me for harming someone, then we can make a symmetrical demand of those who cause the same kind of harm in the name of just punishment.<sup>10</sup>

The justification-symmetry principle implies that the state must justify not only the harms it intentionally causes through imposing penal sanctions, but also the harms it knows it causes, the harms it is aware it risks causing, and the harms it should know it risks causing.<sup>11</sup> This is because persons must also justify known, risked, and foreseeable harms, or else be judged culpably indifferent, reckless, or negligent. Furthermore, the state must justify not only the harms it imposes on offenders while they are in prison, but also the harms that it causes after the offender's sentence is over.<sup>12</sup> Finally, Kolber asserts that even harms that are not proximately caused may need to be justified because "it is hardly clear that a moral justification of punishment should have any proximate-cause limitations at all."<sup>13</sup>

The upshot of all of this is that a valid theory of punishment must justify a lot of harms beyond simply the harms intended by the state actors responsible for the sanction. Kolber claims that scholars of punishment have largely failed to try to justify the unintended aspects of punishment.<sup>14</sup> This failure is particularly salient when it comes to retributivism. Retributivism, in the context of criminal law, is a theory that purports to justify the imposition of criminal sanctions. As discussed in greater detail later in this Article,<sup>15</sup> according to retributivism, an actor's culpability for wrongdoing requires, provides a reason for, or at least licenses punishment of the wrongdoer for the wrongdoing. Kolber argues that since classic retributivism only attempts to justify intended

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9. *Id.* at 10-12.

10. *Id.* at 14-15.

11. *Id.* at 16-19.

12. *Id.* at 21.

13. *Id.* at 19.

14. *Id.* at 13.

15. *See infra* subpart III.A.

harms, it does only a slice of the needed justificatory work. Retributivism cannot by itself justify the full practice of punishment since this practice, like any real-world practice, will inevitably have intended and unintended consequences.<sup>16</sup> Believing that there are obstacles to supplementing retributivism-for-intended-harms with either a desert-based or a consequentialist theory for unintended harms, Kolber concludes that traditional retributivism is an “extraordinarily anemic” theory.<sup>17</sup>

*B. Retributivists Must Justify the Subjective Experience of Punishment*

Assuming that any satisfactory theory of punishment must account for both intended and unintended harms, the question remains what sorts of unintended harms must be accounted for. In his article “The Subjective Experience of Punishment,”<sup>18</sup> Kolber argues that the subjective experience of those subject to criminal sanctions must be taken into account. This Article focuses on his arguments as they concern retributivism.

Kolber’s argument for the relevance of subjective experience is closely related to the justification-symmetry principle. According to Kolber:

Any justification of punishment that ignores subjective experience . . . is incomplete and doomed to fail. The reason is simple: One should not purposefully or knowingly inflict substantial pain or distress on a person without some justification for doing so. This principle applies to us in our daily lives, as well as to state actors who sentence offenders or run prison facilities.<sup>19</sup>

Subjective experiences, such as pain, distress, anxiety, loneliness, and depression, turn out to be a challenging class of harms to justify. Kolber observes that individuals’ experiences of punishment will differ. Some will have a more negative experience to a given sentence than others.<sup>20</sup> It follows, Kolber argues, that retributivists must justify not only the typical negative experiences, but those that are greater than typical as well. Indeed, unless retributivists equalize the negativity of subjective experiences for those who have committed offenses of equal seriousness, they will have failed to punish proportionately.

Kolber draws an analogy to corporal punishment. If electric shocks

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16. Kolber, *Unintentional Punishment*, *supra* note 3, at 24.

17. *Id.*

18. Kolber, *Subjective Experience*, *supra* note 3.

19. *Id.* at 196-97.

20. *Id.* at 185 n.2. Bentham lists thirty-two factors that vary from person to person and that may affect a person’s experience of a given penal sanction. JEREMY BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* ch. 6, § 6 (1781) (mentioning, among others, health, education and rank).

were imposed as punishment for crimes, as some have advocated,<sup>21</sup> and the severity of the shock for a given voltage varied with the physical size of the subject, a retributivist would presumably require that smaller offenders get smaller voltage shocks to preserve the proportionality of the punishment. A smaller person being shocked at the voltage level of a typical person would not be justified.<sup>22</sup> Likewise, Kolber imagines the punishment of “dieting.” When dieting is imposed on an offender, their calorie intake for the day is limited to 1000 calories. Given differences in metabolism and size, some offenders would find this punishment tolerable; others debilitating. Given this variation, Kolber claims that offenders subjected to dieting would not be punished equally in a morally relevant respect.<sup>23</sup> Kolber argues that under retributivism, differences in personality and psychology that lead to negative experiences of prison should be treated the same as physical differences when it comes to electric shocks and dieting. Just as punishment should be tailored to physical differences, so should they be tailored to psychological differences. Kolber notes that what people principally find adverse about the prospect of incarceration are the feelings of loneliness, isolation, anxiety, intimidation, loss of autonomy, and so on.<sup>24</sup> Thus, it is these subjective responses that really must be equalized if actors of equal blameworthiness are to receive equal punishments.

Kolber acknowledges that sentencing based on individualized, subjective calibrations may have counterintuitive consequences. For example, Paris Hilton, who has enjoyed a very high standard of living, may plausibly have a harder time adjusting to prison conditions than the average person.<sup>25</sup> A person like Paris Hilton, citing principles of proportionality and retributivism, would seem to have a claim to a shorter prison sentence because of the atypically great negative subjective experience they would have in prison.<sup>26</sup> Noting the counterintuitive nature of this conclusion, Kolber remarks, “So much the worse perhaps for proportional retributivism.”<sup>27</sup>

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21. See GRAEME NEWMAN, *JUST AND PAINFUL: A CASE FOR THE CORPORAL PUNISHMENT OF CRIMINALS* (1983).

22. Kolber, *Subjective Experience*, *supra* note 3, at 201.

23. *Id.* at 190.

24. *Id.* at 203.

25. See Sharon Waxman, *Paris Hilton Ordered Back to Jail*, N.Y. TIMES (June 8, 2007), <https://www.nytimes.com/2007/06/08/us/08cnd-paris.html#:~:text=LOS%20ANGELES%2C%20June%208%20%E2%80%94%20The,for%20an%20unspecified%20medical%20problem>.

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

27. *Id.* at 231. See also *id.* at 236 (“If one finds unacceptable the implications of proportional, retributive punishment when subjective experience is taken seriously, then my claims can be viewed as providing a *reductio*-style argument against certain forms of retributivism.”)



*C. Retributivists Must Take Baseline Differences Into Account*

Finally, in “The Comparative Nature of Punishment,”<sup>28</sup> Kolber again considers the question of how to understand the harms that must be justified when the state imposes penal sanctions like incarceration. Having previously argued that the subjective effects of sanctions must be considered,<sup>29</sup> Kolber further contends that the offenders’ baseline liberty, as well as baseline subjective well-being, must be taken into account. According to Kolber, “The true severity of incarceration depends on the ways in which prison changes an offender’s life.”<sup>30</sup> Specifically, it is the change between (a) the offender’s historical or counterfactual baseline, and (b) the actual state of affairs resulting from the imposition of penal sanctions which determines punishment severity for proportionality purposes.

Kolber begins by observing that harms are measured comparatively in the context of torts and contracts. In torts, a claim for negligent damage to property is based on the difference in value of the property before and after the negligent act. Likewise, in an action for breach of contract, damages are based on the difference between the defendant’s actual condition and what it would have been if the contract had not been breached.<sup>31</sup> Turning to punishment, Kolber argues that an individual suffers the same harm while involuntarily confined by an abductor or imprisoned by the state. The justification for each would require the justification for the same set of comparatively understood harms.<sup>32</sup> Kolber also appeals to our practice of monetary fines, which are comparative insofar as they move a defendant a fixed distance from one wealth level to another rather than uniformly reducing a defendant to a given wealth level. According to Kolber, “Those who would defend the absolute conception of punishment severity must explain why our method of assessing harm changes depending on the method of punishment at issue.”<sup>33</sup> Kolber also observes that, for the most part, compensation for erroneous conviction is determined by traditional comparative measures.<sup>34</sup> This also supports his thesis that harm severity for punishment justification purposes should be measured comparatively.

Measuring punishment comparatively has implications for both the objective and subjective aspects of punishment. Consider first the

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28. Kolber, *Comparative Punishment*, *supra* note 3.

29. See Kolber, *Subjective Experience*, *supra* note 3, at Part I.A.

30. Kolber, *Comparative Punishment*, *supra* note 3, at 1566.

31. *Id.* at 1572-73.

32. *Id.* at 1574-75.

33. *Id.* at 1575.

34. *Id.* at 1577-79.

objective component of punishment—deprivation of liberty. Kolber argues that whether the liberties are assessed in factual, legal, or idealized terms, some persons (depending on resources, jurisdiction, or status) have more liberty than others.<sup>35</sup> “Civilians have liberties of movement that soldiers and people in quarantine lack. Eighteen-year-olds have rights to vote that seventeen-year-olds lack.”<sup>36</sup> Likewise, “Rich people have rights to use particular property that poor people lack.”<sup>37</sup> Incarceration uniformly denies these liberties to all offenders. From this it follows that “all else being equal, civilians are punished more severely than soldiers or people in quarantine, eligible voters are punished more severely than those who are ineligible (in jurisdictions where inmates lose their voting rights), and rich people are punished more severely than poor people.”<sup>38</sup>

Kolber extends his argument from objective liberties to subjective experiences. Kolber believes that, in like manner, offenders who start off on a higher subjective baseline of satisfaction and receive a sentence resulting in a given level of unhappiness,  $U$ , receive a more severe sentence than those starting at a lower level who end up at  $U$ .<sup>39</sup> Kolber concedes that taking baseline subjective experiences into account generally makes less of a difference than taking baseline liberties into account due to “hedonic adaptation”—the psychological tendency for changes in environment to have a negative effect on happiness level over time.<sup>40</sup> However, he argues that even if not as significant as objective differences, differences in subjective baselines must be taken into account by any satisfactory justification of punishment.

Once again, these considerations place the retributivist in an uncomfortable position. Desert-based theories like retributivism, Kolber claims, cannot punish proportionally unless they adopt penal practice such as lengthening sentences for defendants with lower liberty baselines, for example, those subject to general curfews. Such practices are foreign to our penal system.<sup>41</sup> Furthermore, the “Paris Hilton Problem” rises again in another guise. Not only is a celebrity like Paris Hilton abnormally sensitive to prison conditions but incarcerating her deprives her of more liberty than others because of her higher baseline level. The rich, generally speaking, enjoy a greater range of freedom and a higher level of contentment than the poor. Therefore, jailing Paris Hilton for a fixed time probably harms her more in the comparative sense than placing a

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35. *Id.* at 1567-68.

36. *Id.* at 1567.

37. *Id.*

38. *Id.* at 1567-68.

39. *Id.* at 1598.

40. *Id.* at 1599.

41. *Id.* at 1592.

poor person in jail. Noting that “many people are understandably troubled by the idea that the better-off offender should get a shorter prison sentence than a worse-off offender who is equally blameworthy,”<sup>42</sup> Kolber concludes that “the comparative view of punishment challenges the notion of punishment proportionality that underlies the retributive justification of punishment.”<sup>43</sup>

In sum, between the claims that (1) retributivists must account for unintended aspects of sentences, (2) these aspects include deprivations of subjective happiness as well as liberty, and (3) the severity of these deprivations is to be measured from the offender’s baseline, the retributivist who wants to maintain proportionality in punishment is backed into tight corner.

## II. SOME (UNPERSUASIVE) OBJECTIONS TO INDIVIDUALIZED RETRIBUTIVISM

Under individualized retributivism, a punishment’s severity is to be assessed based on the offender’s subjective experience of incarceration as well as his objective deprivation of liberty, and both are to be measured against the offender’s historical or counterfactual baseline. This Article will now review some objections in the literature to Kolber’s arguments that individualized retributivism is the most faithful and natural form of retributivism. This Article views these criticisms as unpersuasive.

### *A. Simons’ Objections*

Professor Kenneth Simons, in his article “Retributivists Need Not and Should Not Endorse the Subjectivist Account of Punishment,”<sup>44</sup> responds to Kolber. According to Simons, “the state is not morally responsible for all hypersensitive, or for all hyperinsensitive, reactions to punishment, even if those reactions are entirely predictable and indeed predicted. . . . The state’s responsibility is simply to ensure that the punishment that it directly inflicts is proportionate to desert.”<sup>45</sup> Simons explains that “causal structure of action and consequences matters to responsibility.”<sup>46</sup> For example, Simons likens causing an offender atypical subjective harms to depriving an offender’s family of emotional and financial support, the latter of which he assumes the state is not morally responsible for. But

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42. *Id.* at 1569.

43. *Id.* at 1570.

44. Kenneth W. Simons, *Retributivists Need Not and Should Not Endorse the Subjectivist Account of Punishment*, 109 COLUM. L. REV. SIDEBAR 1 (2009).

45. *Id.* at 4.

46. *Id.*

Simons does not explain what causal structure associated with the production of an offender's subjective harm renders the state not responsible for the harm. Granted, if an offender felt anxiety and guilt from learning of the setbacks their family experienced due to their incarceration, such feelings might be ignored as an unduly indirect effect of incarceration. These feelings, after all, are a step removed from the setbacks themselves. However, the general feelings of separation and isolation experienced by offenders are much more direct results of incarceration. Likewise, Simon postulated that religious conversion resulting in a net positive conviction experience might be ignored by a proportionate retributivist since such a conversion would likely be triggered by an intervening event. In contrast, the causal linkage between the conditions of confinement and the experience of confinement—the focus of Kolber's argument—seems as close a connection as any. Causation cannot justify ignoring the subjective experience of punishment.

Simons also argues that subjective experience is not relevant by considering an "experience machine."<sup>47</sup> Hooking up an offender to such a theoretical machine would produce in the offender the illusion of having spent ten years in prison and of not having seen his family or friends for ten years. Simons argues that under such circumstances, the offender would not have been duly punished, the offender's subjective experiences notwithstanding. But that intuition can be explained on the ground that experiencing an illusory ten-year deprivation of liberty for five minutes is not as bad as a subjective experience of liberty deprivation that is actually endured for ten years, especially because after being released from the machine, the offender would presumably learn that the experience was an illusion and retrospectively minimize the experience.

Finally, Simons argues that subjectivism cannot account for the view that the death penalty is the harshest punishment since it is implausible that the death penalty caused more subjective suffering than decades in prison serving a life sentence.<sup>48</sup> But the subjectivist view need not be narrowly construed as measuring punishment based on actual experience. An executed person is deprived of potentially decades of subjective experience that, while possibly including many negative elements, is usually a net positive experience.<sup>49</sup> A broader theory that takes into

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47. *Id.* at 4-5.

48. *Id.* at 6.

49. Simons also argues that a subjective form of retributivism suffers from difficulties such as unclarity about what subjective states matter and uncritical reliance of the notion of disutility. But these points only support Kolber's larger argument that retributivism in any form—whether objective or subjective—is flawed.

account such subjective deprivations both explains the intuitive harshness of the death penalty and is properly characterized as subjectivist.

### *B. Markel's Objections*

Professors Daniel Markel and Chad Flanders responded to Kolber in “Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice.”<sup>50</sup> In this article, Markel and Flanders present a version of retributivism called “the Confrontational Conception of Retribution.” Under this version, “the value of retribution lies in the criminal's ability to understand rationally the state's desire to repudiate his wrongful claim to be above the law.”<sup>51</sup> Thus, “what retributivists ought to care about foremost is the imposition of the punishment as a communication directed at the offender, not the offender's idiosyncratic and variable reaction to the coercive condemnatory deprivation.”<sup>52</sup> Markel and Flanders recognize certain subjectively-based limits to punishment: “To literally or psychologically break or destroy a person under the aegis of retributive punishment would violate the offender's dignity, and, in a democracy, our own.”<sup>53</sup> Therefore, sanctions would be adjusted in light of the offender's particular psychological make-up in order to not breach dignity. Markel and Flanders also recognize that to be an appropriate subject of state punishment, offenders must have the mental capacity to understand they are being punished. But Markel's and Flanders' concessions to subjectivism extend no further.

Markel and Flanders fail to blunt the force of individualized retributivism. According to them, “What matters is the offender's understanding that he is being coerced to endure some hard sanction.”<sup>54</sup> But what if the offender is aware that the coercing authority recognizes the offender does not experience the sanction as a hardship; or even that the coercing authority is uninterested in whether the offender experiences the sanction as harsh? Rather than understanding the sanction as a message of condemnation, the offender would understand the authority as simply going through the motions, unconcerned with the message conveyed. A telegram to the offender stating “You are hereby most severely condemned,” would equally fail to deliver. Communicative intent is inferred from expected impact along all relevant dimensions. Likewise, Markel and Flanders write, “In the case of liberty deprivations,

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50. Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CALIF. L. REV. 907 (2010).

51. *Id.* at 933.

52. *Id.* at 947.

53. *Id.* at 958.

54. *Id.* at 956.

the state reduces [the offender's] autonomy to act, move, and interact with others. Whether he suffers more or less than another person is less important than the content of the message sent through the removal of or restrictions upon his liberty or property."<sup>55</sup> But surely the content of the message cannot be divorced from the degree of suffering.<sup>56</sup> The message the state should be conveying on Markel's and Flanders' version of retributivism is not simply that the offender's conduct was wrongful, but also how wrongful it was. To do this requires a more carefully calibrated message. There must be proportionality. When it comes to proportionality, Markel and Flanders comment, "Our view is that in a liberal democracy proportionality is also a function of reasonable reasoning for matching appropriate means with appropriate ends. A more precise description is properly left to democratic decision-making."<sup>57</sup> They note that proportionality based on suffering would draw prison officials too deeply into sadism. But practical issues aside, they do not explain why proportionality should be objectively rather than subjectively calibrated. Markel and Flanders write that "offenders are largely responsible for the foreseeable effects of their punishments on themselves,"<sup>58</sup> but do not explain why the state does not at least share responsibility, given that negative psychological effects of incarceration are readily foreseeable and result directly from imprisonment.

### *C. Gray's Objections*

In his article "Punishment as Suffering,"<sup>59</sup> Professor David Gray rejects an individualized account of punishment in favor of an objectivist one. Gray believes Kolber's notion of punishment is flawed insofar as it asserts that a wide range of factors is relevant to assessing a punishment's severity. Gray takes issue, for example, with Kolber's view that a retributivist theory of punishment justifying our actual punishment system would give a retributivist justification of the suffering that an inmate might experience from an assault by another inmate. Under such an account, the offender's suffering may or may not be deserved. According to Gray, such suffering is not punishment and, thus, a retributivist account of punishment need not address it. For Gray, "retributivism defines punishment as a restraint on liberty or other

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55. *Id.* at 974-75.

56. See RYBERG, *supra* note 2, at 106-07 ("[I]f what matters . . . is that a means is used which makes it possible to reach the criminal . . . then it certainly seems reasonable to expect that it is the actual impact on the person that matters.").

57. Markel, *supra* note 50, at 963.

58. *Id.* at 975.

59. David Gray, *Punishment as Suffering*, 63 VAND. L. REV. 1619 (2010) (hereinafter Gray, *Punishment as Suffering*).

consequence that is determined and justified objectively by reference to a culpable offense.”<sup>60</sup> Although Gray appeals to our intuitions about punishment, he recognizes that his disagreement with Kolber regarding the nature of punishment—whether it is a matter of liberty deprivation or subjective suffering—has a large “semantic” element to it.<sup>61</sup> For example, both Kolber and Gray agree on the substantive issue that having sentences turn on the offender’s wealth is normatively distasteful. They disagree, however, on whether that is a strike against retributivism generally (Kolber’s claim) or just the individualized version of it (Gray’s claim) because of a largely definitional disagreement about the nature of retributivism. Gray defends his understanding of retributivism, asserting that “[m]ost serious and sophisticated theories of retributive justice are objective rather than subjective.”<sup>62</sup> His assertion, however, is unsupported by his citations.<sup>63</sup> Retributivists for the most part have not directly addressed the merits of objective versus individualized punishment.

The writings of Immanuel Kant are the only works that Gray examines

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60. *Id.* at 1658.

61. *Id.* at 1653.

62. *Id.* at 1669.

63. Gray cites Robert Nozick, Herbert Morris, George Fletcher, John Rawls, Joel Fineberg, Carlos Nino and Jean Hampton as retributivists holding an objective view of punishment. Gray, *supra* note 59, at 1664-65. To the extent Nozick takes a position on the objectivity of punishment, he appears to reject objectivism in favor of a view that takes into account the economic situation of the offender. See ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 363-65 (1981) (implying poor offenders for whom providing compensation would be more burdensome should face a lesser penalties). Morris rejects the notion that the purpose of punishment is to realize retributive justice, and, to the extent he may be characterized as a retributivist, appears to deny that only that the “desire [for] punishment” is irrelevant in determining the appropriate degree of deprivation. Herbert Morris, *A Paternalistic Theory of Punishment*, 18 AM. PHIL. Q. 263, 264, 270 (1981). Fletcher endorses an objective view of punishment, but only as a conceptual truth about the term “punishment,” not as a normative matter of retributive justice. GEORGE P. FLETCHER, *THE GRAMMAR OF CRIMINAL LAW: AMERICAN COMPARATIVE AND INTERNATIONAL VOLUME ONE: FOUNDATIONS* 228 (2007) (following HART, *supra* note 6, at 4). Rawls, no retributivist, understands penal sanctions as a “stabilizing device” for society, rather than an element of a retributive scheme, and does not consider whether objective or individualized punishments would have a greater stabilizing effect. JOHN RAWLS, *A THEORY OF JUSTICE* 241 (1971). Joel Feinberg rejects the core principle of retributivism that punishment should be a function of blameworthiness. JOEL FEINBERG, *The Expressive Theory of Punishment*, in *DOING AND DESERVING* 116-17 (1974). Furthermore, his expressive theory of punishment appears to contemplate that the hard treatment constitutive of punishment will be cashed out in subjective terms, such as pain. *Id.* at 118. (concluding, “Pain should match guilt only insofar as its infliction is the symbolic vehicle of public condemnation.”). Nino too can hardly be described as a retributivist since he explicitly disavows the blameworthiness of the offender as a condition or factor relevant to the justification of punishment. See Carlos Nino, *A Consensual Theory of Punishment*, in *PUNISHMENT: A PHILOSOPHY & PUBLIC AFFAIRS READER* 94, 105 (A. John Simmons, et al. eds., 1995). In any case, his consent-based theory seems equally compatible with objective and individualized theories of punishments. Finally, Hampton, by defining punishment as “disruption of the freedom to pursue the satisfaction of one’s desires,” makes the existence and degree of punishment a function of the offender’s desires, and thus appears to adopt, or at least not to reject, an individualized theory of punishment. Jean Hampton, *The Moral Education Theory of Punishment*, in *PUNISHMENT: A PHILOSOPHY & PUBLIC AFFAIRS READER* 112, 128 (A. John Simmons, et al. eds., 1995).

in any depth to support his claim that the best understanding of retributivism implies an objective theory of punishment. Gray's reliance on Kant for a substantive defense of objective retributivism, however, is unpersuasive. Exactly what Kant's theory of punishment is, or whether he even has such a theory, is a matter of scholarly controversy.<sup>64</sup> On Gray's view, Kantian punishment theory starts with Kant's general theory of morals. According to Gray, wrongdoing for Kant is a matter of engaging in conduct that violates the categorical imperative, i.e., cannot be universalized. For example, theft—taking property without permission—is not conduct based on a maxim that can be universalized because, if everyone were to steal, the very institution of property would crumble. Thus, there would be no property of another for the thief to take and make their own. This contradiction must be resolved through punishment, and “[t]he terms of that resolution are contained within the maxim of the crime upon which the offender himself acts.”<sup>65</sup> Thus, carrying the logical contradiction to its natural end requires society to “impos[e] the consequences of that contradiction on the offender.”<sup>66</sup> For example, “the proper legal punishment for an act of theft is to deny the offender access to property in a form and to a degree commensurate with his offense.”<sup>67</sup>

The problem here is that similar Kantian reasoning can be applied subjectively and comparatively. Acting in a manner that significantly decreases another's subjective sense of material security by, for example, stealing is also a maxim that cannot be universalized. If all people significantly decreased others' subjective sense of material security, there would exist no sense of material security left to be decreased. In response to such conduct, society would be compelled to decrease the offender's sense of material security to a proportionate degree through, for example, a penal environment of the appropriate type. For the environment to have the requisite effect on the offender, individualized features of the offender relevant to his response to the environment would have to be taken into account. While Gray asserted that for Kant, “punishment is the *objectively* determined, logical consequence of a crime imposed upon an offender by the state,”<sup>68</sup> Gray presented no argument for limiting Kantian retributivism to objectively defined wrongs and punishments. Subjectivism and objectivism are equally compatible with Kantianism.

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64. See, e.g., Jane Johnson, *Revisiting Kantian Retributivism to Construct a Justification of Punishment*, 2 CRIM. L. & PHIL. 291 (2008) (discussing standard, limited and revised accounts of Kant's views on punishment); Jeffrie G. Murphy, *Does Kant Have a Theory of Punishment?*, 87 COLUM. L. REV. 509 (1987) (questioning whether Kant's views are coherent and consistent enough to qualify as a theory).

65. Gray, *supra* note 59, at 1663.

66. *Id.*

67. *Id.* at 1664-65.

68. *Id.* at 1664 (italics added).



This, however, is only half the story when it comes to the consequences of penal sanctions. Having concluded that, under retributivism (properly understood), subjective suffering is not part of the punishment, Gray admits that “suffering matters.”<sup>69</sup> While not punishment per se, suffering is incidental to punishment. Gray spends little time discussing how it is justifiable to cause such suffering, even if incidentally, but allows that the existence of such suffering “may well provide good reason” for a reduced prison sentence if, for example, it is excessive.<sup>70</sup> The key, according to Gray, is not to conceptualize such results in terms of desert-based limits on punishment. Rather, “mercy and other important principles within the penumbra of justice are sufficient and better guides.”<sup>71</sup>

The difficulty with Gray’s argument here, however, is that mercy seems inappropriate to invoke in this context. A judge sentencing an offender for a technical violation of the law, for example, should refrain from imposing the highest possible sentence within the permissible sentencing range not out of mercy, but simply on the ground that such a sentence is not deserved given the technical nature of the violation. Likewise, legislators should not refrain from establishing a penalty of ten years in prison for a traffic violation based on mercy. Such a penalty is simply unjust and unjustified. As a conceptual matter, mercy seems appropriate to invoke only in the face of an otherwise permissible punishment.<sup>72</sup> Thus, until Gray explains how the state might justifiably cause offenders a given level of subjective suffering, the invocation of mercy to reduce subjective suffering is premature.

Nor does Gray identify the “the important principles within the penumbra of justice” that might alternatively explain why the sanctions called for by objective retributivism need not be imposed.<sup>73</sup> Gray admits that “a particular technology may consistently produce incidental suffering beyond an acceptable or remediable threshold.”<sup>74</sup> In such cases, “prudence” may provide normative a ground for modifying the practice. But Gray provides no suggestion for determining such a threshold, nor for elaborating the content of prudence. In short, Gray fails to respond to Kolber’s challenge for a retributivist justification of our punishment practices, which inevitably produce suffering and differential deprivations of liberty.

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69. *Id.* at 1692.

70. *Id.*

71. *Id.*

72. See Heidi M. Hurd, *The Morality of Mercy*, 4 OHIO ST. J. CRIM. L. 389 389 (2007) (defining mercy as “a properly motivated suspension of just deserts”); John Tasioulas, *Repentance and the Liberal State*, 4 OHIO ST. J. CRIM. L. 487, 500 (stating mercy “is a source of pro tanto (or defeasible) reasons for punishing [offenders] less harshly than they deserve”).

73. Gray, *supra* note 59, at 1692.

74. *Id.*

In sum, neither Simons, Markel and Flanders, nor Gray present a retributivist theory of punishment that adequately meets Kolber's challenge to retributivism.

### III. AN ARGUMENT FOR OBJECTIVE PUNISHMENT

This Section presents the argument for an objective, non-individualized version of retributivism. This Section presents the argument in five steps. In parts A through D, I present an affirmative vision of retributivism which entails an objective theory of punishment. In part E, I present a derivative justification and a residual justification for the individualized aspects of punishment not accounted for in my affirmative theory.

#### *A. Retributivism*

The first step of the argument for an objective, non-individualized version of retributivism involves characterizing retributivism generally and presenting a paradigmatic version of it.

##### 1. Generally

Retributivism is many things to many people. At its core is the proposition that wrongdoers deserve punishment for their wrongdoing; or equivalently, that the wrongdoing of the wrongdoer justifies the wrongdoer's punishment.<sup>75</sup> In contrast, consequentialist theories of punishment are theories about the relation of punishment to its consequences, e.g., punishment is justified if the cost associated with it outweigh the benefits that flow from it.

The characterization of retributivism as a theory about the relation of wrongdoing to punishment has the virtue of remaining neutral among different versions of retributivism. Different versions might entail different explanations of why wrongdoing justifies punishment or how much punishment is appropriate for a given offense. Since punishment is to be justified by wrongdoing, it is a short step to the view that punishment is to be proportionate to wrongdoing—the greater the wrongdoing, the greater the punishment that is justified. But such a step is not necessary. A theory that all wrongdoing should receive the same punishment because

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75. It has been suggested that retributivism can be stated without the "mysterious" term "desert" by appealing to the concept of intrinsic good: It is intrinsically good that wrongdoers are punished proportionately to their wrongdoing. See Mitchell Berman, *Two Kinds of Retributivism*, in *PHILOSOPHICAL FOUNDATIONS OF THE CRIMINAL LAW* 438-39 (discussing retributivism in the context of suffering theories of retributivism).

“a wrong is wrong” would still be a retributivist theory, albeit a highly counterintuitive one.

Retributivism also leaves open the nature of wrongdoing and punishment. Most retributivists hold that wrongdoing is a matter of harm-causing or harm-risking conduct (or rights violating or rights-risking conduct) coupled with some form of culpability or responsibility for the conduct. Retributivism, however, implies no specific theory of wrongdoing. Retributivists are, *qua* retributivists, not committed to a view on whether abortion, prostitution, suicide, insider trading, or blackmail is wrongful conduct that might permit or require a retributive response.<sup>76</sup> Of course, without a theory of wrongdoing, retributivism could never be operationalized. Applying retributivism thus necessitates a theory of wrongdoing even though the theory does not encompass one. In like measure, retributivists are not committed to a view of what constitutes punishment. Retributivists need a theory of punishment that establishes what counts as punishment and how it is to be measured. Retributivism, however, no more includes any such theory than it includes a theory of wrongdoing. Thus, a particular brand of retributivism might be understood as saying, “whatever acts constitute wrongdoing and whatever impositions constitute punishment, those acts and impositions should be related in this particular way.”

## 2. Lex Talionis

On one hand, one particularly pure expression of retributivism is the *lex talionis* version. According to *lex talionis*—literally “the law of retaliation”—the punishment a wrongdoer should receive is the very harm that wrongdoer imposed on the victim. The relation between wrongdoing and punishment is some form of identity. Like other moral theories, retributivism has its roots in emotions and intuitions, as well as in reason and principle. To the extent we have retributivist emotions and intuitions, they follow *lex talionis*. There is a satisfaction in the thought of the wrongful blow delivered by the actor ultimately falling on the actor himself. To the extent that retributivism has a basis in reason (for example, Kant's arguments for punishing wrongdoers<sup>77</sup>), the basis

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76. See Jeremy Waldron, *Lex Talionis*, 34 ARIZ. L. REV. 25, 44 (1992) (hereinafter Waldron, *Lex Talionis*) (“[T]he proponent of [lex talionis] is no more committed than the rest of us to the view that punishment is appropriate for an action like blackmail”). Likewise, a retributivist is not committed to particular theory of culpability or excuse. Indeed, it would not be a contradiction for a retributivist to accept an expansive theory of excuse, such as “rotten social background,” under which only light penal sanctions were deserved, or even a maximal theory of excuse under which all wrongdoing was excused on the ground of physical determinism.

77. See IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (1792), in *PRACTICAL PHILOSOPHY* 353 (Mary Gregor ed. & trans., 1996).

supports *lex talionis*.<sup>78</sup> Or perhaps the more general principle of reciprocity underlies retributivism, and the purest form of reciprocity is *lex talionis*.<sup>79</sup>

On the other hand, no retributivist today defends a “full blooded” version of *lex talionis* in either its traditional or negative versions.<sup>80</sup> No one advocates for a literal application of “an eye for an eye.” First, there are obviously practical, utilitarian considerations that limit the principle of *lex talionis*. Burning down an offender’s home as punishment for an act of arson might be suggested by *lex talionis*, but actually implementing such a punishment might risk the destruction of nearby homes or the entire neighborhood. All things considered, it would be a bad idea. As Jeremy Waldron has recognized, imposing a sexual attack on a sex offender as punishment may encourage “nasty sadism and sexual corruption . . . of the officials involved.”<sup>81</sup> Likewise, torturing the torturer violates the dignity of both offender and the state agent. Dignity is valuable and, therefore, considerations of dignity act as a counterweight to *lex talionis*.<sup>82</sup> More generally, there has been a movement in our penal system away from punishing by inflicting harms, for example, through corporal punishment. Instead of imposing harms, our system places offenders in circumstances that dramatically limit their potential for achieving value in their lives. This movement may be understood as based on dignity concerns that qualify a literal interpretation of *lex talionis*.<sup>83</sup>

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78. Jeremy Waldron has theorized that *lex talionis* may rest on Kantian universalization, stating “[r]espect for the criminal’s agency is thought to require us to act toward him in light of the universalization of what we take to be the maxim of his action in committing the crime.” Waldron, *Lex Talionis*, *supra* note 76, at 33.

79. Reciprocity might seem to require that “rightdoers” be rewarded for their good deeds. But insofar as doing right implies being motivated by the desire to do right, the fulfillment of that desire may be understood as the due reward. In contrast, punishment is appropriate for wrongdoers who obtain satisfaction from having engaged in their intended wrongful conduct. Rightdoers deserve the smiles on their faces; wrongdoers deserve to have their smiles wiped off.

80. Under a traditional version of retributivism, wrongdoing justifies punishment. Under a negative, or limited version, wrongdoing licenses punishment, but nonretributive considerations, such as deterrence or reformation, justify it. See Alec Walen, *Retributive Justice*, THE STANFORD ENCYCLOPEDIA OF PHIL., June 18, 2014, § 3, available at <https://plato.stanford.edu/archives/win2016/entries/justice-retributive/>.

81. Waldron, *Lex Talionis*, *supra* note 76, at 38.

82. Accord Walen, *Retributive Justice*, *supra* note 80, § 4.3.3 (“[P]roportionality should rule out certain punishments on the ground that they are disproportionately large. But there is no reason for retributivists not to look to other criteria, such as respect for human dignity, to prohibit those forms of punishment that seem cruel or degrading.”).

83. I do not see the qualifications discussed above as a repudiation of the intuitions and principles that might support *lex talionis*, but rather as a sensible understanding that retributive justice is not the only thing of value in the world. See LEO ZAIBERT, *RETHINKING PUNISHMENT* (2018) (proposing that retributive justice is a value within a pluralist axiological universe). Equality, mercy, distributive justice, social welfare, to name a few, are also valuable. Some, like Kant, may adhere to an absolutist view of retributive justice. See IMMANUEL KANT, *General Introduction to the Metaphysics of Morals*, in *THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTALS OF JURISPRUDENCE AS THE SCIENCE OF*

One way of accommodating the practical and dignitary concerns expressed above is through the process of abstraction. As Jeremy Waldron has noted, the idea of literally subjecting a wrongdoer to the very wrongful act they committed is nonsensical.<sup>84</sup> If Jones assaulted Smith at noon, June 30, 2019, Jones cannot himself be punished by subjecting him to an assault at noon, June 30, 2019. And if Smith was wearing a polka dot shirt at the time, there is no need that a polka dots shirt play any role in Jones's punishment. Rather, some abstracting of Jones's act is necessary under *lex talionis*. The abstract description of Jones's act might run from the relatively concrete "assaulting a shirt-wearing person during the day" to the relatively abstract "acting in a manner that interfered with an interest of another." Likewise, as Waldron has noted, acts that are wrongful have many wrongful features. To borrow an example, the killing of another is wrong not only because it is the most severe deprivation of autonomy, but also because "it contributes to fear and insecurity, it deprives dependents of their support and relatives of their loved one, it causes grief, it reduces the GNP, it disrupts whatever projects the victim was working on, etc."<sup>85</sup> Thus, the principle of *lex talionis* in application has wider play, both vertically (the degree of abstraction) and horizontally (the aspect of wrongfulness), than the traditional "eye for an eye" formulation might suggest. However, *lex talionis* requires, to the extent possible, that abstract features of the wrongdoing be imposed on the wrongdoer to a degree that an abstract equivalence between wrong and sanction is achieved. Under *lex talionis*, the question remains open what abstract features of the wrong are to be imposed. The next part will focus on this question.

### *B. The Principle of Legality and the Scope of Wrongdoing*

The second step of the argument for an objective, non-individualized version of retributivism is to invoke the principle of legality as a general limit on the wrongs for which the state may punish. In a state of nature, it has been argued, all individuals may justly punish acts of wrongdoing.<sup>86</sup> The nature and scope of punishments that may be imposed in such a state is a matter of retributive justice or, more generally, moral theory. Moral theory, in conjunction with practical constraints, would determine the

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RIGHT 198 (W. Hastie trans., 2002) ("Even if a Civil Society resolved to dissolve itself with the consent of all its members . . . the last Murderer lying in prison ought to be executed before the resolution was carried out."). The most plausible view of retributivism is that desert is highly relevant to determining how an offender should be treated, but it is not the only thing relevant. See *infra* Part IV.

84. Waldron, *Lex Talionis*, *supra* note 76, at 32.

85. *Id.* at 41.

86. JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 103-04, 314 (Ian Shapiro ed., Yale University Press 2003) (1689).

abstract features of a wrongdoing to be imposed by a wrongdoer. In contrast, what abstract features of a wrongdoing may *legally* be imposed on a wrongdoer is not entirely a question of moral philosophy. Because it is the state that is doing the punishing, it is also a question of political philosophy.

Political philosophy examines the nature, power, and authority of the state as it relates to the rights and liberties of its citizens. Among the principles that limit state power is the legality principle. According to this principle, conduct may not be treated as criminal unless it has been so defined by the state at the time the conduct occurs.<sup>87</sup> The principle of legality is generally regarded as the first principle of criminal law.<sup>88</sup> It has been described as one of the most “widely held value-judgment[s] in the entire history of human thought.”<sup>89</sup> It has deep roots in our legal culture.<sup>90</sup> On first blush, the legality principle rests on practical concerns of fair notice and prevention of abuse of official discretion.<sup>91</sup> These bases, however, have been critiqued. When it comes to wrongful conduct, there is arguably always fair notice of illegality. The courts’ ability to interpret the law broadly to reach “situations in which the community’s sense of security and propriety was deeply offended” is widely recognized.<sup>92</sup> Furthermore, because of the relative ease of avoiding serious moral wrongdoing, citizens cannot complain or claim undue surprise when just criminal laws prohibiting such conduct are applied to them. Finally, because of officials’ ability to interpret general laws broadly, abuse of discretion will remain an open possibility despite adherence to the legality principle.<sup>93</sup> A firmer basis for the doctrine is required.

The legality principle is better understood as ultimately resting on the commitment to the rule of law. Under the rule of law, the state is not simply a well-heeled vigilante with a monopoly on violence. Rather, it is an entity that operates pursuant to a set of rules, norms, and practices established through a logically prior set for identifying the former.<sup>94</sup> Persons act in an official capacity—that is, as the state—rather than in a private capacity when their acts are guided by the rules, norms, and practices of the state.<sup>95</sup> Officials, of course, have discretion in their

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87. See HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 79-80 (Stanford University Press ed.1968).

88. See *id.*

89. JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 59 (2d ed. 1960).

90. While the principle flowered in 18th century liberalism, its threads may be traced back to Roman jurisprudence. See Jerome Hall, *Nulla Poena Sine Lege*, 47 *YALE L.J.* 165, 165-70 (1937).

91. See LOCKE, *supra* note 86, at 80.

92. *Id.* at 85.

93. *Id.* at 86.

94. See generally, H.L.A. HART, *THE CONCEPT OF LAW* 97-107 (1961).

95. See ALON HAREL, *WHY LAW MATTERS* 126-28 (2014) (arguing that persons act in their private

actions, but that discretion has been validated by prior legal authorization. Therefore, the legitimate acts of the state are bounded by the rules it has established for itself, whether these rules are publicly available or not. When the state punishes, it does so based on conduct that has been defined to trigger a punitive response. While the goal of the state may be to punish wrongdoing per se, ultimately the state acts based on its determination that one of its rules defining wrongdoing has been breached. Persons are punished justly only for engaging in wrongful conduct, but persons are punished legitimately only for breaking the law.<sup>96</sup>

In our legal system, it is the criminal laws—broadly construed to include statutes, case law, and interpretive guides such as legislative history—that determine the circumstances in which the state may legitimately impose penal sanctions (*nullum crimen, sine lege*). For example, if the state repeals the laws of assault and robbery, and Robert thereafter takes Wally’s wallet at gunpoint, under the legality principle Robert may not be punished. Pursuant to legality, some wrongdoing may go unpunished. Likewise, under the standard legality principle, the state is limited in the punishments it may impose (*nulla poena, sine lege*). The state may only impose punishments it has established with sufficient precision beforehand.<sup>97</sup> If the state has set the punishments for assault at one week’s imprisonment and robbery at two weeks’ imprisonment, two weeks’ imprisonment is the maximum permissible imprisonment that may be imposed on Robert. (Since every robbery entails an assault,<sup>98</sup> the penalty for assault is merged with that for robbery.<sup>99</sup>) Pursuant to the legality principle, some criminal wrongdoing may go inadequately punished.

Finally, despite the requirement of precision in punishment specification, the legality principle should not be construed to prohibit criminal statutes that establish a sentencing range for a given offense. The state, however, should be limited in selecting a sentence within the range by its prior specification of the conduct that is prohibited. Imagine, for example, that a state allows a judge to sentence a person for assault anywhere from one to five years, and robbery from three to ten years.

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capacity when acting “by force of circumstances” rather than in their official capacity which entails deferring to judgments of the state concerning public good).

96. It is possible to imagine a group of people forming a society and creating a free-roaming institution to punish (undefined) wrongdoing wherever it finds it. I would not view such a society as a liberal democratic one operating under the rule of law.

97. Slightly more formally, the legality principle “means that an act can be punished only if, at the time of its commission, the act was the object of a valid, sufficiently precise, written criminal law to which a sufficiently certain sanction was attached.” Claus Kress, *Nulla Poena Nullum Crimen Sine Lege*, MAX PLANCK ENCYCLOPEDIAS OF PUBLIC INTERNATIONAL LAW, available at <https://opil.ouplaw.com/home/mpi>.

98. See MODEL PENAL CODE §§ 211.1, 222.1 (1985).

99. See MODEL PENAL CODE § 1.07(1)(a) (1985).

Assume a fair interpretation of this legislation is that the legislature believes that the wrong of assault is the violation of the right of physical security and that robbery involves an assault that also violates the victim's interest in property (hence the higher penalty range). The state then repeals the robbery law, but not the assault law. Assume a fair interpretation is that the legislature has decided that property interests are better protected, and their violation remedied, through tort or other forms of civil law. Then, Robert takes Wally's wallet, but uses relatively little force. Under the legality principle, Robert should receive a relatively light sentence for assault; say, two years. To impose a five-year sentence based on Robert violating Wally's property interests would offend the legality principle as much as punishing Robert for violating Wally's property interests in the example of the previous paragraph, where both assault and robbery were repealed. In neither case did the legislature criminalize the violation of a particular interest. Thus, the legality principle may require that wrongful *aspects* of prohibited conduct to go unpunished just as it may require wrongful acts to go unpunished. The scope of legitimate punishment all depends on what interests the state has in fact criminalized prior to the wrongdoer's act.

### *C. Criminal Wrongs*

The third step is to argue that, by and large, the interests protected by our criminal laws are not subjective, comparative, or remote. Rather, they are objective, baseline-independent, and proximate. These are the punishable aspects of the offender's wrongdoing.

#### 1. Objective

First, in our legal system, crimes are almost always defined in objective terms, criminalizing the violation of objectively defined interests. Theft, as relevant, is unlawfully taking or exercising unlawful control over the property of another.<sup>100</sup> It is not a defense to the charge of car theft that the owner never became aware that the taken car was missing or that the car's being taken never frustrated any of the owner's desires. Perhaps in a state of nature, taking a car, the absence of which was never noticed or never minded, would not be worthy of punishment because it didn't negatively affect the owner's well-being. But our society, through its laws, has recognized property rights. Laws against theft criminalize the violation of these rights. The violation of these rights is the wrong of theft. Likewise,

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100. See WAYNE R. LAFAVE, CRIMINAL LAW § 19.8(d) (5th ed. 2010); MODEL PENAL CODE § 223.2 (1985).



a battery is the causing of bodily injury to another.<sup>101</sup> It is not a defense to the charge of battery that the knife jabbed in the victim's leg (a) caused no pain because of the victim's prior nerve damage, or (b) that the jab, although unconsented to, was welcome because of the victim's psychological obsession with cutting. Perhaps in a state of nature, pain-causing or unwelcomeness would be the aspect of battery that would make it a wrongdoing, but our society has come to recognize a right against physical contact analogous to a right against interference with property. People have a right to uncompromised bodily integrity, and, for the purposes of the law, the subjective effects of a battery are neither here nor there.

Inchoate offenses provide an additional example of offenses grounded in the violation of objectively defined interests. Inchoate offenses may be committed without the subjective awareness of any would-be target and need not negatively impact any person's subjective well-being. The firing of a gun may be attempted murder even if the discharged bullet flies into the sea, missing its intended victim by a wide mark and, even though, because of a silencer, the would-be victim never became aware of the attempt. Where is the wrongdoing? Objective theories of attempts postulate the violation of an objective right of the intended target not to be placed at risk or not to be subject to attack.<sup>102</sup> According to these theories, our criminal law of attempts reflects the existence of such rights. Concededly, among retributivists, there is debate regarding the nature of the wrongdoing that justifies punishment for attempts. In contrast to objective theories, so-called subjective theories locate the wrong of a criminal attempt in the actor's acting on the unjustified intent to cause the harm associated with the completed offense or the intent itself.<sup>103</sup> In neither objective nor subjective theories, however, is the wrongdoing underlying inchoate offenses a matter of causing another person subjective harm. When it comes to inchoate offenses, subjective harm is neither here nor there.

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101. See LAFAVE, *supra* note 100, § 16.2 (listing bodily injury or offensive touching as an element of battery); MODEL PENAL CODE § 211.1 (1985) (listing "bodily injury" as an element of simple assault).

102. The idea that risk imposition is analogous to harm creation has been explored by Claire Finkelstein, who defends the claim that exposure to risk is itself a harm. Claire Oakes Finkelstein, *Is Risk a Harm?*, 151 U. PA. L. REV. 963, 973 (2003). According to Finkelstein, "[A]gents have a legitimate interest in avoiding unwanted risks." *Id.* at 966. An analogous approach is taken by Larry Crocker. He takes the position that an act can be wrongful by virtue of the objective risk it imposes on society. Lawrence Crocker, *The Upper Limit of Just Punishment*, 41 EMORY L.J. 1059 (1992). On this assumption, he argues that "an offense creating a risk of 1/n of concrete harm h imposes a harm of h/n." *Id.* at 1084.

103. See, e.g., Michael S. Moore, *Prima Facie Moral Culpability*, 76 B.U. L. REV. 319, 321 (1996) ("Culpability could thus be said to be wrongdoing in a sense"). For an example of subjective retributivism (not to be confused with the subjective theory of punishment of Kolber and others), see Larry Alexander, *Crime and Culpability*, 5 J. CONTEMP. LEGAL ISSUES 1 (1994).

## 2. Base-Line Independent

Second, in our legal system, comparative considerations are not the measure of criminal wrongs; the victim's counterfactual and historic baselines are not relevant. For example, if a person agrees to be kicked in the derriere by a friend (say, as an agreed consequence for losing a bet), and another person, at the last moment, restrains the friend and delivers the kick herself, the kicker may not avoid a charge of battery on the ground that she did not cause a physical contact relative to the victim's baseline of physical contact (that is, an equal kick would have occurred anyway). Similarly, if A and B, acting independently, simultaneously shoot C, A and B will each be guilty of homicide, assuming each shot would have been sufficient to kill C.<sup>104</sup> C's baseline life expectancy—per hypothesis zero given the other shot—would be irrelevant.

This principle of baseline independence is not limited to rare cases of duplicate causation. When it comes to intentional unprovoked killings, we have a single crime—murder. It is possible to imagine a set of distinct criminal offenses for depriving a person of different number of years of life. (“Murder-1 is depriving another of 80-100 years of life.” “Murder-2 is depriving another of 59-79 years of life.” Etc.) That however is not our system. The law of homicide is based on the idea that the wrong of killing is the violation of the right to life. All lives are deemed of equal value and every violation of the right to life of any person is equally wrongful.<sup>105</sup> The victim's baseline life expectancy (or baseline life quality) is irrelevant in measuring the wrong. Likewise, a person is liable for kidnapping if he, with appropriate motive, forcibly interferes with another's liberty of movement.<sup>106</sup> A victim's baseline of movement is irrelevant. It is no defense that a bound victim was planning on remaining in a chair for 24 hours or that an adducted victim was planning on leaving the state anyway. It is being placed in an absolutely defined state of restricted autonomy that is the wrong of kidnapping.

The matter is somewhat more complicated with respect to property crimes. Arson is commonly defined as the purposeful destruction of a building or occupied structure of another.<sup>107</sup> The harm of arson is the

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104. AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES, § 203, at 258-59.

105. Some jurisdictions have higher penalties for killing of children or the elderly. *See, e.g.*, ARK. CODE ANN. 5-10-101(a)(9) (permitting death penalty in some cases of knowingly causing the death of a person under 14). Such enhanced penalties, I believe reflect only a legislative belief that the young and elderly are more vulnerable than others, and so are more in need of protection than others. Such penalties do not reflect a legislative determination that the lives of the young and the elderly are more valuable than others. Since the young and the elderly have very different life expectancies, any enhanced penalties for their killing does not reflect that the wrong in killing is a function of life expectancy.

106. *See* MODEL PENAL CODE § 212.1 (1985).

107. *See* MODEL PENAL CODE § 220.1(1)(a) (1985).

deprivation of shelter. It does not matter whether a mansion or shack was destroyed. In either case the victim is reduced to a state of homelessness. The victim's "housing baseline" is thus irrelevant. In contrast, the offense of theft is commonly graded. Stealing \$5,000 might be a higher degree of theft than stealing \$500.<sup>108</sup> The change in wealth from the victim's pre-theft baseline to her post-theft state can be thought of as the harm of theft. However, it is not a higher degree of larceny to steal \$5,000 from a person with \$10,000 total wealth than to steal the sum from a person with \$1,000,000 total wealth. Because of the decreasing utility of the marginal dollar, the former theft has a greater impact on the victim's overall finances than the latter. Nevertheless, the criminal law ignores wealth effects because the wrong of theft is not understood as the effect of the taking on the victim's overall finances or on the victim's overall set of objective opportunities (or subjective reaction to the loss of the stolen item). A \$5000 loss is a \$5000 loss. As will become important when the focus returns to the punishment deserved for theft, the victim's financial baseline is irrelevant to the wrong of theft.

Our tort and contract systems, as Kolber points out, measure damages relative to the victim's or contracting parties' counterfactual or historical baselines.<sup>109</sup> Thus harms in these areas of law are understood comparatively. But neither of these fields are animated by principles of retributive justice. It would make no more sense to look to them for an understanding of harm than it would to look to the criminal laws of other jurisdictions. Our criminal law defines what we are being punished for. Thus, these are the proper laws to examine to determine the norms of wrongdoing which are to guide the norms of punishment.

### 3. Proximate

Third, in our legal system, criminal wrongs do not include all the harms that result from an act, in the "but-for" sense. Rather, principles of proximate causation limit the scope of harms that the actor might be criminally responsible for. The wrongs that actors may be criminally punished for are just those that are proximately caused.<sup>110</sup> Moreover, proximate causation is not simply a matter of foreseeability, understood as empirical predictability. Proximate cause is a complicated, highly normative notion. For example, if an actor steals the car of another in a bad part of town, and it is predictable that as a result the car owner, left without a means to leave the area, will be mugged by a local gang, the car

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108. See MODEL PENAL CODE § 223.1(2) (1985).

109. Kolber, *Comparative Punishment*, *supra* note 3.

110. See MODEL PENAL CODE § 2.03 (1985); LAFAVE, *supra* note 100, § 6.04(c)-(g).

thief will not be liable as an accomplice to the assault.<sup>111</sup> Likewise, not all benefits resulting from the criminal act are legally relevant. Even if it is predictable that the victim of a high-profile sexual assault will write a highly profitable best seller about the assault resulting in a net improvement in the victim's life, this cannot be raised as a legal justification (or even a partial legal justification) of the offense.

In sum, when it comes to protecting interests and assessing wrongs, the criminal law is largely objective, base-line independent and proximately based.

#### *D. Pay-Off*

Thus far, the Article has argued for the following points: (1) under retributivism, construed pursuant to *lex talionis*, punishments to the extent possible should reflect the abstract features of the wrongs being punished for; (2) under the legality principle, the wrongs being punished for are limited to the violation of interests that have been protected by the criminal law in effect at the time of the act, and (3) the interests our society has protected through the criminal law are, abstractly characterized, violations of objective, absolute and proximate interests. From these points, it directly follows that the punishments criminals retributively deserve should be defined in objective, absolute and proximate terms. Incarceration, entailing the subjecting of an offender to an environment of minimal liberty for a fixed period regardless of idiosyncratic features of the offender, is such a punishment.

It may be useful to restate the overall argument with the component points ordered somewhat differently. In a liberal society, there are two constraints on what conduct may qualify for criminal punishment. First, the conduct must be wrongful, that is, it must set back (or at least risk setting back) an interest of another that the other has a moral right not to have set back. Conduct violating another's interest in physical integrity might count; setting back another's interest in establishing a romantic relationship with the actor might not. Second, the conduct must have been criminalized prior to its commission by a legitimate political authority, typically a legislature. Such an authority need not criminalize every wrongdoing or every aspect of a given wrongdoing. A legislature, for example, might choose to protect through the criminal law an individual's interest in bodily integrity or in security of property, but not an individual's interest in their reputation or their being told the truth. Once these legally protected interests are established, punishment for their

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111. See MODEL PENAL CODE § 2.06(3)(a) (1985) (requiring intent to aid conduct to establish accomplice liability).

violation should meet the demands of retributive justice and meet associated moral constraints. Thus, consistent with practical considerations and perhaps other moral values, such as mercy, the punishment should reflect, at a suitable level of abstraction, the nature and extent of the violated interests that provide the grounds for the punishment. The interests that our society has chosen to protect through the criminal law are, by and large, (1) objectively defined interests, (2) measured in absolute terms, and (3) limited to those proximately violated by the actor's conduct. Thus, these are the interests that should be set back by punishment. Accordingly, the same conclusion as above is reached: Incarceration, entailing the subjecting of an offender to an environment of minimal liberty for a fixed period regardless of idiosyncratic features of the offender, is a retributively just form of punishment.

The nature of the argument presented above may be clarified by describing its limits. I do not claim that individualized retributivism (that is, a version of retributivism assessing punishment in subjective, comparative or nonproximate terms) is inconsistent, incoherent or flagrantly counter to our moral intuitions. If, contrary to fact, the political institutions of our land had chosen to criminalize conduct causing subjective, comparatively measured suffering of others without regard to proximity, the appropriate retributive response would be to impose on offenders similar subjective suffering measured comparatively without respect to proximity limitations (assuming that such conduct was indeed wrongful). Such a system, however, is not ours. In our system, the wrongful conduct that the state has chosen to criminalize is overwhelmingly the proximate deprivation of objective liberties measured in absolute terms. Accordingly, the appropriate retributive response is a proportionate deprivation of comparable liberties: objective punishment.

### 1. Some Implications

The foregoing argument for objective punishment has a number of implications. First, happily, it solves the "Paris Hilton Problem." The retributivist is under no obligation to reduce Paris Hilton's sentence on the subjectivist ground that she will have a tougher time in prison than most because she cannot live without her luxuries, and on the comparativist ground that going to prison would deprive her of more objective liberties, like her planned exotic vacation, than others. Likewise, this argument relieves the retributivist of the obligation to increase the sentence of an offender from an impoverished background on the ground that he would not find prison a particularly distressing place and would be deprived of relatively few liberties since he had only a

limited set to begin with. Likewise, there is no duty to decrease the punishment of the offender who, as a result of his incarceration, has deeply reflected on right and wrong and has thereby become a better, and in the long run, more content person. There are no such duties because, under objective retributivism, the only duty is to punish proportionately and the subjective, comparative and proximate effects of incarceration are not part of the punishment. They are merely consequences, or side-effects, of the punishment.

Second, objective retributivism explains some of our current penal practices. If Young and Old commit murders for which they are equally blameworthy, Young cannot complain that it would be unfair for the state to execute both on the ground that Young would thereby be deprived of more years of life than Old. As argued above,<sup>112</sup> the wrong of killing, as recognized by our criminal legal system, and indeed in all others, is the violation of the right to life, not the reduction in the number of years lost from the victim's life expectancy baseline. First degree murder is not depriving of 100 to 80 years of life, etc. Accordingly, it is just to impose on Young and Old the same absolute harm of termination of life.<sup>113</sup>

Third, objective retributivism suggests reasonable solutions of controversial issues. For example, to what extent should the impact of a sentence on the offender's family be taken into account? This is the question of the proximate cause boundaries of punishment. The analysis thus far suggests that the law should be guided here by its practices when determining the scope of the wrongdoing. If, for example, in the case of a serious assault, judges at a sentencing hearing are to take into account the impact of the assault on the victim's family, judges should also take into account the impact of a potential sentence on the offender's family. The boundaries of the wrong should inform the boundaries of the punishment. A similar analysis should apply to the question of whether an offender should be entitled to enjoy the profits of a book he writes in prison concerning his experiences in prison. The analysis thus far suggests that the answer to this question should be guided by whether the state would take as a factor mitigating an offender's wrongdoing the victim's deriving profits from a book he writes about the crime.<sup>114</sup> Since the latter is likely not the case, the offender should be entitled to book profits, much as he should be entitled to whatever psychological profits or character improvements he extracts from the experience of prison.

Fourth, and most importantly for the issues addressed in this Article,

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112. See *supra* text accompanying note 105.

113. As discussed previously, see *supra* text accompanying note 81, retributive notions of justice may be tempered by other values. The death penalty, for example, might be rejected based on dignity concerns.

114. See *supra* text accompanying note 110.

under objective retributivism, crime and punishment may be proportionate despite variations among offenders. This result follows from the fact that both crime and punishment are understood in objective, absolute and proximate terms. Other factors, such as subjective sensitivity or insensitivity, pre-punishment baseline, and factors outside the boundaries of proximate cause (such as assaults by other inmates) are not part of the punishment. Thus, they cannot render disproportionate punishments which are proportionate in objective, absolute, and exclusive terms.

## 2. Some Possible Objections

Kolber raises some objections to the objective version of retributivism. I respond below.

First, Kolber argues that objective theories, insofar as they identify punishment with the loss of liberty, are contrary to the ordinary meaning of punishment. Kolber writes that if people are asked why they would not want to be in prison, they will probably cite the unpleasant experiences they expect to have there (e.g., they would be sad, scared, and lonely) more than they would reference the loss of liberty in the abstract.<sup>115</sup> True, it would be unusual to respond to the question, “Why would you not want to be in prison,” with “Because I wouldn’t be able to leave and live my normal life.” But this is because that response is too obviously true, not because it is false. If asked whether they would mind going to prison if they could take a pill that prevented all sadness, fear, and loneliness that would be caused by prison, most people still likely would say no because of the objective interference with their normal lives and relationships.

Second, Kolber considers the example of an inmate, “Coma,” who is sentenced to a ten-year term, spends those ten years in a coma, and awakens at the end of his prison term. Kolber suggests it would make no sense from a retributivist perspective to say that Coma has gotten the punishment he deserves. Kolber infers from this that our retributivist sentiments focus on negative subjective experience to which Coma was clearly not subjected.<sup>116</sup> Gray counters that it would be absurd to take time off for sleep, or greater than average sleep, challenging the notion that Coma has received insufficient punishment. In Gray’s view, knowledge of an objective deprivation is required, even if not suffering.<sup>117</sup> But does knowledge require conscious awareness or will latent knowledge<sup>118</sup>

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115. Kolber, *Subjective Experience*, *supra* note 3, at 203.

116. *Id.* at 204.

117. Gray, *Punishment as Suffering*, *supra* note 59, at 1674-75.

118. A person might be said to have latent knowledge of a fact, such as the fact that Christopher Columbus discovered America in 1492, even when not thinking about the matter if disposed to affirm the

suffice? Will one or the other be absent during periods of daydreams, sleep or coma? If so, should the sentence be adjusted accordingly? And how does a knowledge requirement fit into objective theories? Gray does not explain.

In my view, we should be guided by the idea, grounded in *lex talionis*, that norms of punishment should reflect the objective norms of wrongdoing. Albert plans to forcibly rape Betty. Just before Albert acts, however, Betty accidentally overdoses on a self-administered drug and so is unconscious when Albert rapes her. Even though Betty was unconscious and did not subjectively experience the rape, our criminal laws recognize that Albert seriously wronged her. Likewise, Coma's lack of consciousness is not material per se. Rather, our hesitancy to say that Coma has gotten the punishment he deserves stems from the fact that it is not clear that Coma has been subject to even objectively defined punishment. If Carl commits a serious crime and is sentenced to 10 years living a middle-class lifestyle in a suburban home, Carl has not received the punishment he deserves. This is not because, as a subjective matter, Carl likely does not mind the objective conditions that have been imposed on him. Rather it is because regardless of Carl's feelings about his sentencing conditions, the conditions being imposed are no different than the typical conditions of the average member of our society. His "punishment" is an objective one; it just happens to be excessively lenient. The same holds for Coma. While unconscious, Coma, we may imagine, is in a medical facility—either on or off the prison campus—connected to a respirator and feeding tubes, monitored and nursed as necessary. The conditions he is subjected to are no different than the conditions that an average member of our society would be in if in a coma. Thus, his objective punishment is excessively lenient, and so disproportionate to his wrongdoing. From an objective perspective, Coma has not gotten the punishment he deserves. Compare Sleepy, an offender who sleeps an average of nine hours a day during the course of his imprisonment. In my view, Sleepy's prison term need not be lengthened on account of his above-average slumbers. This is because, looking at Sleepy's overall circumstances, we would say that Sleepy is being subject to a state of confinement 24-hours a day and is never experiencing objective conditions of freedom comparable to those of an ordinary citizen. Assuming that 10 years' imprisonment is proportionate to his wrongdoing, Sleepy has received the punishment he deserves.

Third, Kolber argues that "one must consider subjective responses to punishment when deciding which liberty deprivations to use as punishment. The kinds of liberty deprivations that can constitute

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fact under the appropriate circumstances.



punishments must be deprivations that the offender finds aversive.”<sup>119</sup> According to Kolber, depriving an opera hater of access to opera intuitively does not count as punishment. Thus, Kolber infers, punishment is a matter adverse reaction. But this inference is no more sound than the inference that criminal wrongs are a matter of adverse reactions. It is illegal to threaten to assault a person if he goes to the opera even if the person, being an opera hater, never intended to go. To constitute a crime, it is sufficient that the person has suffered an objective deprivation that, abstractly characterized, typically produces an adverse reaction. The effect on any particular person is irrelevant. We still think the subject of the deprivation has been wronged. As argued earlier, the norms that inform criminal wrongdoing should inform the norms of criminal punishment.

Fourth, Kolber argues that “[t]hose who defend an objective account of punishment must be able to describe why some punishments are more severe than others.”<sup>120</sup> Kolber asks whether being confined to a small cell, even in objective terms, is a greater deprivation of liberty than being confined in a large one given that there are some things that can be done in a small cell that cannot be done in a large one “like climb up the walls of a prison cell by pressing one’s legs against parallel cell walls.”<sup>121</sup> “We cannot determine the value of a particular freedom without knowing how that freedom affects the life experiences of human beings. And even if we know how the activities affect a typical person, the objectivist will have to explain why we should apply an analysis developed for typical people to some actual human being about to be punished.”<sup>122</sup> But, for an objectivist, severity determinations are not as difficult as Kolber suggests. By far the two most prominent variables in sentences are duration of confinement and amount of fine. Sentence duration and fine size are highly monotonic across individuals. The longer the sentence, the longer the liberty deprivations, and the greater the severity of the sentence. Likewise, the greater the fine, the greater the deprivation in spending power, and the greater the severity of the sentence. Sentence length and fine size are highly monotonic across individuals. While there may be variations in prison conditions—some prisons, for example, deprive inmates of access to natural sunlight more than others—such variations are relatively small and should be minimized as much as they can be. As discussed later, achieving retributivist goals must be traded off, to some extent, with practical considerations and costs since retributive justice is not the only thing of value in the world.

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119. Kolber, *Subjective Experience*, *supra* note 3, at 204 (original emphasis omitted).

120. *Id.* at 205.

121. *Id.* at 206.

122. *Id.* at 206-07.

*E. Justifying Individualized Aspects of Punishment*

The final step in my argument concerns Kolber's claim that retributivists must give up the claim to proportionality or accept counterintuitive modifications of our sentencing practices, such as sentence reductions for offenders like Paris Hilton, who would have a greater than average negative subjective response to incarceration. Under objective retributivism, however, this dilemma need not be faced. As discussed, under objective retributivism, the punishment imposed by our criminal justice system are viewed in objective, absolute and proximate terms. So viewed, punishments are largely proportionate to desert (murderers get harsher sentences than rapists, rapists get harsher sentences than thieves, etc.). The subjective, comparative, and remote aspects of punishment that Kolber focuses on are, under objective retributivism, not components of punishment that must be meted out proportionately, but rather the side effects of the objective imposition of circumstances of limited liberty, which is the actual punishment.

Still, even if they are merely side effects of punishment, the subjective and comparative aspect of punishment are foreseeable effects and something must be said about why the state is justified in causing them. After all, as Kolber points out, even if punishment is defined narrowly to include only intentionally caused harms, ultimately what must be justified is what the state does—the “practice of punishment”—which produces unintentionally caused harms.<sup>123</sup>

Kolber discusses the strategy of justifying the practice of punishment by “splitting” the harms it produces into two parts: the first part, the intended harms, might be strictly referred to as the punishment harms, to be retributively justified, and the second part, the unintended harms, which might include some subjective, comparative and remote harms, to be supplementally justified. With respect to the latter set of harms, Kolber imagines that either a retributive or a consequentialist justification might be advanced.<sup>124</sup> As discussed below, however, retributivists, in justifying the unintended aspects of punishment, need resort to neither consequentialist justifications nor retributivist justifications for these harms as a proportionate reflection of the wrong done to others. Rather, the justification of these harms is derived from the traditional retributivist justification of the intended harms.

### 1. Derivative Justification

In general, there are two ways to justify the causing of a state of affairs

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123. See Kolber, *Unintentional Punishment*, *supra* note 3, at 14-15.

124. Kolber, *Unintentional Punishment*, *supra* note 3, at 23-26.

that, considered in isolation or in light of past events, is intrinsically disvaluable: The state of affairs might be justified in light of the suitably valuable consequences it generates, or the state of affairs might be justified in light of it itself being a consequence derived from a suitably valuable state of affairs. The causing of individualized harms to the subject of criminal sanctions may be justified in the latter derivative manner.<sup>125</sup>

Consider this example: Abel has a bike and Baker has a laptop. Baker uses his laptop to access the internet and social media. It is foreseeable that without it, Baker would experience isolation, boredom, and depression. If Abel maliciously takes Baker's laptop, Abel would be morally and legally responsible for Baker's resulting psychological harm. Abel caused the harm without justification or excuse. If sued in tort, Abel would be obliged to compensate Baker for such derivative losses.<sup>126</sup> In contrast, imagine Baker agrees to trade his laptop computer for Abel's bike. Under these circumstances Abel may justly take the laptop even if it is foreseeable that Baker will suffer isolation, boredom and depression. Furthermore, having taken the laptop and caused Baker emotional distress, Abel would be under no moral obligation to mitigate it. As this demonstrates, whether Abel acts wrongly or rightly in taking the laptop computer determines the scope of his responsibilities vis-a-vis the consequences of the taking. Broadly speaking, you are responsible for the consequences of the wrongs you do others, but not the consequences of the "rights" (the permissible acts). In the language of justification, the justification of Abel's causing Baker emotional distress by taking the laptop computer after the agreed trade is simply that, having agreed to the trade (and fulfilled his obligation by giving Baker the bike), Abel had better things to do with the laptop computer than let it remain in Baker's possession. The justification of the foreseeable consequences caused by the exercise of a right of possession derives largely from the right of possession itself.

A closer example to this Article's topic arises in the context of corrective justice. Imagine that now Abel owns a laptop. Baker takes Abel's laptop computer without Abel's consent and quickly grows psychologically dependent on the access it gives him to the internet and social media. Abel sues Baker in tort and receives a judgment allowing him to reclaim the laptop. It is foreseeable that Abel's reclaiming the

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125. A similar approach is taken by Walen. See Walen, *Retributive Justice*, *supra* note 80, § 4.3.3 ("unintended differences in suffering . . . can justifiably be caused if (a) the punishment that leads to them is itself deserved, (b) the importance of giving wrongdoers what they deserve is sufficiently high, and (c) the problems with eliminating the unintended differences in experienced suffering are too great to be overcome.").

126. See *Lance Prods., Inc. v. Commerce Union Bank*, 764 S.W.2d 207 (Tenn. App. 1988) (allowing for emotional damages based on malicious acts of conversion).

laptop will result in Baker's suffering emotional distress because Baker will no longer have access to the internet and social media. Abel is justified in reclaiming the laptop and thereby causing Baker emotional distress on the ground that reclaiming the laptop is an act licensed by principles of corrective justice and Baker's emotional distress is a direct consequence of that act. The justification of inflicting foreseeable harms largely derives from the corrective justice right to restitution. Furthermore, Abel would be under no particular obligation to mitigate the distress Baker might suffer as a result of exercising his corrective justice right of restitution.

The situation is no different when it comes to retributive justice. The imposing of a sentence of a term-of-years incarceration is a just act (under the theory developed here) as it subjects an offender to an objective deprivation of liberty abstractly reflecting the objective wrongs he culpably caused a victim. The individualized harms that he may experience are justified analogously to the subjective harm of emotional distress suffered by Baker in the examples above. The emotional distress is not the foreseeable consequence of a wrongful act by the state, which the state would be required to mitigate. Rather, it is the consequence of an act affirmatively licensed by retributive justice from which it derives its justification. No further justification is needed.

## 2. Residual Obligation

This is not to say that the suffering of those in prison is without moral significance. The state has a limited obligation to mitigate the suffering of those it has incarcerated. It bears this obligation, however, not by virtue of having incarcerated an offender. Rather it bears the obligation by virtue of the fact the offender is a citizen and the state has a general obligation to give equal respect to the needs and interests of all its members.<sup>127</sup> Thus, the state may be obliged to provide drugs or therapy if an incarcerated offender suffers from claustrophobia or PTSD as an instance of its general obligation to try to mitigate these maladies. (Because PTSD is often the result of service in the armed forces, the state may have a stronger obligation, all things equal, to mitigate its effects than those of other psychological maladies.) Furthermore, because the state will have greater knowledge of the distress of those in the prison population than those in the general population, and because its greater proximity and control over members of the prison population might make mitigating the various forms of mental distress more cost effective, the state might be obliged to

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127. See generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* chs. 6, 9, 12 (1977); RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* (2002).

attend to members of the prison population before members of the general population. But, as a general matter, when it comes to the mental distress of those incarcerated, the state should view it similarly as it would the mental stress of those outside of prison. The two groups have different degrees of freedom, but neither group suffers an unjust restraint on its freedom.<sup>128</sup>

Likewise, a court may be faced with the question whether a sentence reduction is appropriate for an offender who, because of personal characteristics, is more likely to be assaulted in prison than the average offender.<sup>129</sup> In such a case, the state would have an obligation to respond to the foreseen risk of assault to the offender, just as it has an obligation to protect all citizens from crime. But, realistically, such a response might not be sufficient to eliminate the risk, just as, given the state's limited resources, awareness of risks of crime does not ensure prevention of crime. Crime in prison is thus no different in kind than crime outside of prison. Both are serious wrongs which a potential victim may have a claim to state resources to avert. Critically, however, offenders being sentenced or offenders who have been the victim of crime in prison would have no claim to having their sentences reduced in light of their foreseeable or actual victimization. This position is contrary to that of Kolber who thinks that under retributivism, the unintended aspects of a sentence should be credited to the offender against his "desert debt."<sup>130</sup> Being the victim of a crime while imprisoned, however, can no more serve as a get-out-of-jail-sooner card for an inmate than being a victim of a crime outside of prison can serve as one for some future unrelated offense.

### 3. Possible Objections

Three possible responses to my analysis are considered below.

First, it might be said that the argument above is circular insofar as it purports to justify the consequences of an act based on the permissibility of the source act. Does the argument thus improperly assume the permissibility of the source act? Imagine a trolley is headed down a track and will foreseeably hit and kill five workers unless the trolley is diverted to a spur where it will kill one worker. In that case, it is usually considered

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128. The same analysis applies to comparative harms. Many people in our society lack the ability to take an exotic vacation through no fault of the state. A subset of this group are those who happen to be unable to take exotic vacations because, through no fault of the state, they are incarcerated. The state has no general obligation to make exotic vacations available to the subset than the group as a whole and so need not provide any further justification for the deprivation.

129. *State v. Blarek*, 7 F. Supp. 2d 192, 198 (E.D.N.Y. 1998), *aff'd*, 166 F.3d 1202 (2d Cir. 1998).

130. See Adam J. Kolber, *The Subjectivist Critique of Proportionality*, in *THE PALGRAVE HANDBOOK OF APPLIED ETHICS AND THE CRIMINAL LAW* 577 text accompanying n.9 (L. Alexander, K. K. Ferzan, eds., 2019); Kolber, *Unintentional Punishment*, *supra* note 3, at 4.

permissible to divert the trolley. Imagine now that after the trolley hits and kills the one worker on the spur, it will continue along the spur and hit and kill six workers. Clearly, the killing of the six workers cannot be justified on the ground it was merely the consequence of diverting the trolley—an otherwise permissible act. The reason it cannot be so justified is that the purported initial justification of diverting the trolley was that it was necessary to prevent the loss of a greater number of lives than it caused the loss of. But when the six additional workers are considered, that initial justification is no longer valid. Thus, the justification for causing the death of the six workers cannot be derived from the underlying permissibility of diverting the trolley when the six workers are not considered. In contrast, when it comes to the justification of the state's causing of individualized harms to those it incarcerates, the *prima facie* permissibility of the incarceration based on the offender's objective desert is not undermined by the individualized harms that occur as a consequence. Despite these harms, the objective deprivation of liberty suffered by the offender still mirrors the abstract features of the objective wrongs he culpably caused a victim. Deriving the justification for causing individualized harms from the retributive justness of the underlying incarceration is no more circular than deriving the justification for causing emotional distress to Baker from the corrective justness of the underlying reclaiming of Abel's laptop—the example from the previous section.

Second, it may be objected that the state has a greater obligation to mitigate the emotional distress experienced by those incarcerated than those in the general population on the ground that it caused the former (albeit with good reason) and not the latter. Supporting this objection is the tort doctrine that those who innocently cause injury to another have a duty to take reasonable measures to mitigate the injury.<sup>131</sup> This doctrine, however, is not based on the moral principle that harm causers thereby assume greater duties. Rather, the doctrine is best understood as resting on practical considerations about the limits of the general no-duty-to-aid rule. Recognizing a general duty to aid would be overly burdensome and cause coordination problems among those affected by the duty. A limited exception for harm-causers, however, can be accommodated. As discussed previously, some practical factors, such as awareness of emotional distress and control of the person experiencing it, may make individualized harms of an offender easier to detect and less costly to mitigate. But these factors do not include the state's causal responsibility for the offender's incarceration.

Third, it may be claimed that even an unenhanced obligation to relieve the mental distress of citizens may warrant a reduction in sentence of

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131. See DAN B. DOBBS, ET AL., *THE LAW OF TORTS* § 316 (2d ed. 2020).

some or all offenders; little resources must be expended to provide this form of mitigation. This claim cannot be ruled out in principle. Under objective retributivism, the mental distress suffered by offenders as a result of their incarceration may not be imposed by the state as part of punishment and hence it is not intrinsically good. Whether such distress should be mitigated through sentence reduction is like the question of whether sentences generally should be reduced from what is deserved on the ground that society's resources might be put to better use by, for example, funding schools and arts, or even providing medication to those in the general population who suffer from mental distress. Under objective retributivism, there is value in punishing offenders based on their desert, but it is not an absolute value. Trade-offs with other ends, goals and values may have to be made. Sometimes the price of retributive justice is too high, either on society or those subject to punishment. For example, imagine a defendant who, after being convicted and sentenced to a year in prison, but before beginning his sentence, suffers acute respiratory failure requiring him to be on a ventilator if he is to live, and no such device is available in any prison.<sup>132</sup> Prison would literally kill him. In such circumstances, imposing the stated sentence, all things considered, would not be justified. The price would be too high. Likewise, in extreme cases, some trade-offs, between retributive justice and subjective suffering should be made.

#### IV. RETRIBUTIVISM REDUX

Where does all of this leave retributivism? Objective retributivism, as I have developed it, plays an important role in guiding our punishment practices. It responds to the deeply entrenched feeling that wrongdoers deserve to be subjected to the wrongs they have subjected others to. Furthermore, it does so within the minimal restraints of legality that apply to all liberal legal systems. It respects our intuitions that judges should not reduce sentences for the sensitive or wealthy nor enhance sentences for their opposites in the name of just punishment. It provides a basis for derivatively justifying the individualized harms that punishment causes. Finally, it allows the state to mitigate those harms as it might be led to if the harms were experienced by those in the general population. Based on this assessment, I reject Kolber's characterization of retributivism as "anemic."<sup>133</sup>

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132. See Nora Shelly, *She needs surgery to treat cancer, but judge gave her 10 months in prison for \$110 theft*, USA TODAY (Feb. 4, 2020), <https://www.usatoday.com/story/news/nation/2020/02/04/lebanon-county-woman-needs-surgery-treat-cancer-gets-prison-instead/4654516002/>.

133. Kolber, *Unintentional Punishment*, *supra* note 3, at 24.

The ambitions of objective retributivism, however, are modest. Objective retributivism is not an absolutist theory that insists on proportionate punishment for every lawbreaker come what may, no matter the cost or consequences. Nor does objective retributivism deny the relevance of other values, such as dignity, mercy, equality or human happiness. In particular, it allows that the requirements of retributive justice may yield at some point when punishment would necessarily cause excessive distress. Kolber writes, “If retributivists do not punish proportionally because of financial costs, then they have not meaningfully distinguished themselves from consequentialists who also give up on proportionality whenever its benefits fail to justify its costs.”<sup>134</sup> But allowing that costs and other consequentialist considerations can limit punishment is consistent with preserving the core distinction between retributivism and consequentialism. Retributivists reject the utilitarian notion that individuals need not be considered as ends in themselves but may be used to maximize the good of society as a whole. Allowing an individual who needs a respirator to survive to avoid his full prison term is not to use that person as a means to an end. Acknowledging consequentialist considerations as a constraint on retributivist justice is different from recognizing consequentialist justifications as the core of just punishment. Indeed, Kolber might make the same objection to any moral theory that assigned a value to a state of affairs, such that financial costs or other consequences could lead to the determination that, all things considered, it should not be brought about. Objective retributivism is distinct from consequentialist theories of punishment not because it assigns an infinite value to deserved punishment, but because it assigns a value to (or at least licenses) deserved punishment that consequentialism fails to. Just as just punishment gives offenders their due, so objective retributivism gives desert its due.

Finally, it should not be seen as a strike against objective retributivism that it cannot specify with exactitude when the extreme point is reached at which countervailing considerations, such as excessive hardship, call for relaxing the claims of retributive justice. Moral theories can be divided into deontological and consequentialist theories. Absolutist deontological theories are implausible. The consequences of an act, if great enough, must affect the all-things-considered determination of whether the act should be undertaken.<sup>135</sup> The demands of retributive justice must at some point yield to consequences. Consequential theories, in turn, must weigh alternative, seemingly incommensurate consequences. Even absolutist

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134. Kolber, *Comparative Punishment*, *supra* note 3, at 1605.

135. As John Rawls has stated with uncharacteristic fervor, “All ethical doctrines worth our attention take consequences into account in judging rightness. One which did not would simply be irrational, crazy.” JOHN RAWLS, *THEORY OF JUSTICE* 30 (1971).



theories like utilitarianism that proclaim, without qualification, that the right act is the one with the greatest expected utility must somehow place seemingly incommensurable states of affairs of a common scale of utility. The difficulty for retributivists in specifying when individualized harms become unacceptably high is indistinguishable from the difficulties suffered by contending moral theories. Different moral theories may give better and worse answers to difficult moral questions, but they cannot escape the difficulty of the questions.

#### V. CONCLUSION

Professor Kolber's writings have posed a formidable challenge to retributivists. There is much in Kolber's writings to agree with. I agree with his justification-symmetry principle that the state, in justifying its punishment practices, must justify all the harms an individual engaging in the same practices would have to justify. Likewise, I agree with his claim that individualized harms to offenders should be measured when practical to determine that they are not excessive. Likewise, I agree that retributivists must give up the position that sentences are just only if the full range of harms suffered by an offender as a result of the intended sanction is proportionate to the offender's wrongdoing. Within the space defined by these agreements, however, there is much room for theorizing. This Article has attempted to show that objective retributivism is a plausible desert-based theory that, in conjunction with other plausible principles of moral and political philosophy, provides an illuminating justification for our current punishment practices. In this manner, I hope to have added my voice to the larger conversation concerning the integration of first-order moral principles, such as retributivism, within the activities and operations of the modern liberal state.