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Retribution and the Experience of Punishment

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INTRODUCTION

The law regulates human life, so it should be informed by the best available understanding of how people experience their lives. The new field of hedonic psychology has made breakthroughs in improving that understanding, and it would be natural for scholars and policymakers to incorporate those improvements into their approaches to legal questions.¹

One such breakthrough involves psychological evidence suggesting that people adapt to imprisonment and monetary fines.² People initially experience

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1. John Bronsteen, Christopher Buccafusco & Jonathan S. Masur (“BBM”), *Welfare as Happiness*, 98 GEO. L.J. 1583 (2010) [hereinafter BBM, *Welfare as Happiness*]; John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Happiness and Punishment*, 76 U. CHI. L. REV. 1037 (2009) [hereinafter BBM, *Happiness and Punishment*]; John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, Essay, *Hedonic Adaptation and the Settlement of Civil Lawsuits*, 108 COLUM. L. REV. 1516 (2008) [hereinafter BBM, *Hedonic Adaptation*].

2. BBM, *Happiness and Punishment*, *supra* note 1, at 1045–49 (collecting studies).

such events negatively, but they adjust quickly and rebound toward their pre-event levels of subjective well-being. Accordingly, the negative experience associated with imprisonment is disproportionately front-loaded such that the difference between a one-year sentence and a two-year sentence is not nearly as great as had previously been assumed. Similarly, there may be only small differences between the negative experience typically imposed, respectively, by large and small fines.

If the experience of punishment is different from what it was previously thought to be, then the natural conclusion to draw would be that this new information is relevant to the way people think about punishment. We take this view.³ Adaptation is a feature of the *typical* way in which people experience punishment. Our contribution is to point out that this typical experience differs from what was supposed and to claim that this new understanding of the typical experience matters for the theory and practice of punishment.

It is important to differentiate our contribution from a separate claim about the experience of punishment that has recently received much attention. Adam Kolber argues that punishment theory should take account of the different ways in which specific offenders actually end up experiencing their punishment.⁴ In making that case, Kolber provides some arguments that could also support our different claim that the *typical* experience of punishment is relevant to punishment theory.⁵ To the limited extent to which our arguments may thus overlap with his, we of course give credit to Kolber for having made the points.⁶ More than that, it is possible that Kolber is right. The fact that our claim differs from his does not mean we disagree with his claim, but merely that we take no position on it one way or the other.

Unlike Kolber, we claim only this: to the extent that adaptation affects the experience of punishment that the typical person is expected to have, adaptation is relevant to punishment.⁷ When legislators and members of sentencing commissions decide how to choose punishments that constitute appropriate responses to given crimes, the findings of hedonic psychology regarding adaptation should influence their decisions. This claim is *entirely compatible* with both retributive and utilitarian theories of punishment. Indeed, the point of our initial article on this topic is that either type of theory would be improved

3. *Id.*

4. Adam J. Kolber, Essay, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182 (2009); Adam J. Kolber, *The Comparative Nature of Punishment*, 89 B.U. L. REV. 1565 (2009).

5. BBM, *Happiness and Punishment*, *supra* note 1, at 1069 (“According to Kolber, different individuals’ experiences of punishment must be taken into account. His arguments to that end support our contentions as well, and we refer readers to those arguments.”).

6. *Id.* (“[W]e credit his position.”).

7. *Id.* (“[E]ven if a retributivist were to reject Kolber’s claims by saying that the only relevant consideration is the way that a typical person would experience punishment, hedonic adaptation would still be relevant because it affects that typical experience.”).

by taking account of adaptation.⁸

In response to our prior work, a number of retributivist scholars have begun to examine the role of subjective experience in retributivist theory. For instance, in a recent paper, Dan Markel and Chad Flanders (“MF”) do not deny that adaptation could be relevant to the legislative tailoring of punishments.⁹ Nevertheless, they deny the importance of adaptation to retributivist punishment theory.¹⁰ They claim that punishment is used to communicate condemnation to offenders, and they acknowledge that the typical experience of punishment may have some limited relevance to the legislature’s goal of crafting punishments that communicate appropriate amounts of condemnation.¹¹ However, MF argue that this typical experience does not affect much the way that a reasonable person will view the condemnatory message of punishment, and therefore the experience has little relevance to punishment theory.¹² Relatedly, David Gray argues that punishments should be measured purely in objective terms—for instance, by the number of years an offender must serve in prison—and thus that the typical experience of any actual prisoner is irrelevant to the calculus.¹³

We believe, to the contrary, that if adaptation significantly affects the way that a typical person experiences punishment, then that fact must be central to any persuasive retributivist theory of punishment. Our society tailors punishments to fit crimes primarily by adjusting the size of fines and the duration of imprisonments. Criminal punishment as we know it is thus predicated on the assumption that the severity of punishments can be shaped in a meaningful way by these adjustments. If we are right that (a) adaptation means larger fines and longer incarcerations do not typically impose as much added negative experience as was assumed, and (b) this fact affects the capacity of our penal system to achieve its goal of proportionality in punishment, then there is a major problem with the standard assumptions about modern criminal justice.

MF’s project does not involve disputing (a)—that larger fines and longer prison terms are not as painful as believed.¹⁴ They are left, then, to dispute

8. *Id.* at 1055–68 (utilitarian theories), 1068–80 (retributive theories).

9. See Dan Markel & Chad Flanders (“MF”), *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CALIF. L. REV. 907, 910 (2010) [hereinafter MF, *Bentham on Stilts*] (“[W]e agree that retributivist policymakers should be sensitive to knowledge of human psychology and social norms when crafting laws and setting sentencing policy . . .”).

10. *Id.* at 910–11 (“[O]ur ‘concessions’ to the importance of subjectivity are minor and provide little basis for debate.”), 914 n.26 (“[W]hat is novel and nontrivial in what [the subjectivists] say is, in our opinion, false or unpersuasive.”).

11. *Id.* at 911.

12. See, e.g., *id.* at 973 (“[S]ociety is justified in believing that more (objective) punishment communicates a stronger message of condemnation.”).

13. David C. Gray, *Punishment as Suffering*, 63 VAND. L. REV. (forthcoming 2010) (manuscript at 145–46) (on file with authors) (“Neither is the amount or degree of suffering experienced subjectively by an offender the measure of punishment. Rather, punishment is the objectively determined, logical consequence of a crime. . .”).

14. MF, *Bentham on Stilts*, *supra* note 9, at 924–25 n.64 (“[W]e do not intend to register a

(b)—that this fact impacts attempts to achieve proportionality in punishment. We take up this argument in Part I, where we argue that punishment communicates condemnation *because* and *insofar as* it is associated with negative experience. Indeed, a larger fine or longer imprisonment constitutes more punishment than a smaller or shorter one simply because it typically imposes a greater negative experience—contra Gray, MF, and others. If adaptation changes the typical negative experience of punishment, then it changes punishment’s communicative message. Of course, the message might be unaffected if people remained unaware of adaptation, but only because the people would believe incorrectly that negative experience was being imposed as they had previously assumed. A punishment theory cannot be persuasive if it assigns no value to the accuracy of people’s beliefs on this score.

Additionally, unlike MF and Gray,¹⁵ we claim in Part II that in calculating the severity of its chosen punishments, society should not ignore the typical effects that incarceration has on offenders’ lives after prison. The state is responsible for the foreseeable, proximately caused effects of punishment—effects that the typical offender will understand to be part of her punishment—and this responsibility should influence the legislative crafting of punishments. Neither society nor punishment theory should turn a blind eye to the suffering incarceration is known to cause after offenders have been released from confinement, and there is no good reason to exclude this consideration from the framing of punishments in the first place.

In this Article, we defend and expand upon these arguments. MF’s work serves as a point of departure, largely because it frames many of the key questions in stark relief. Our aims, however, are much broader. In addressing their claims, along with Gray’s, we engage more generally with the sorts of arguments that retributivists might make in attempting to resist hedonic’s psychology’s significance for retributivism. We demonstrate that retributivism cannot be divorced from the expected punitive experience of the typical offender. Rather, the assignment of punishments to crimes depends directly on that typical experience.

This is, of course, not to say that all or even many retributivists will adopt the positions against which we argue below. We suspect that many will agree with our position or will disagree with it on separate grounds. Whenever we employ the term “retributivists,” we do not mean to implicate *every* scholar working within that philosophical tradition, but *only* those who would adopt the position we dispute.

If we are right that adaptation substantially undercuts the capacity of current penal sanctions to impose proportional punishments, then that fact must be confronted by anyone who values proportionality. Either new punishments

substantial quarrel with the accuracy of the empirical work cited and relied on by BBM[.]”).

15. *Id.* at 968–73.

should be conceived that resist adaptation, or else society must rethink the value it places on proportionality.

I

THE RELEVANCE OF ADAPTATION TO RETRIBUTIVE PUNISHMENT

The central question is this: to what extent is it relevant to a retributive theory of punishment that people adapt to fines and imprisonment? Virtually all retributivists seem to believe that more serious crimes should generally be punished more severely than less serious crimes.¹⁶ Various retributive theories supply different reasons for proportionality's importance.¹⁷ For some, such as Gray, proportionality is morally right.¹⁸ For others, like MF, proportionality communicates the appropriate level of condemnation to the offender.¹⁹ Differences in punishment severity must be sufficiently large if the goals of proportionality are to be achieved. Adaptation reduces differences in the amount of negative experience typically imposed by differently sized fines or incarcerations.²⁰ We contend that this fact significantly limits the capacity of fines and incarcerations to achieve the goals of proportionality. If we are right, then adaptation is important to any punishment theory that values proportionality, including Gray's and MF's theories.

MF resist this conclusion by arguing that society's capacity to communicate appropriately proportional levels of condemnation does not depend heavily on whether its punishments differ much in the level of negative

16. E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS 129 (2009); *see, e.g.*, Joel Feinberg, *The Expressive Function of Punishment*, in *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 95, 118 (1970) ("[M]ore serious crimes should receive stronger disapproval than the less serious ones. . . ."); Andrew von Hirsch, *Censure and Proportionality*, in *A READER ON PUNISHMENT* 128 (R.A. Duff & David Garland eds., 1994) ("Persons convicted of crimes of differing gravity should receive punishments correspondingly graded in their degree of severity."); MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 88 (1997) ("True enough, retributivists at some point have to answer the 'how much' and 'what type' questions for punishments of specific offenses, and they are committed to the principle that punishment should be graded in proportion to desert; but they are not committed to any particular penalty scheme nor to any particular penalty as being deserved."); Richard S. Frase, *Limiting Retributivism*, in *THE FUTURE OF IMPRISONMENT* 83, 112 (Michael Tonry ed., 2004) ("However, many . . . systems give too little weight to the important values of uniformity and proportionality"); STEPHEN KERSHNER, DESERT, RETRIBUTION, AND TORTURE 36 (2001) ("Our intuitions suggest that deserved punishment and the amount of punishment someone deserves correlate with culpable wrongdoings rather than with a person's bad moral character.") (emphasis added).

17. *See* Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 279–84 (2005).

18. *See* Gray, *supra* note 13, at 113.

19. *See* MF, *Bentham on Stilts*, *supra* note 9, at 910.

20. In other words, the difference in the amount of negative experience typically imposed by a fine of 2X dollars and by a fine of X dollars is far smaller than is typically assumed, and far smaller than would be the case absent adaptation. The same goes for a prison sentence of 2X years as compared with one of X years.

experience typically imposed by those punishments.²¹ On their view, punishment is about communicating condemnation. A reasonable person understands that a monetary fine of 2X dollars communicates substantially more condemnation than a monetary fine of X dollars, and that an incarceration of 2X years communicates substantially more condemnation than an incarceration of X years. MF's point is this: even if new findings about adaptation were to reveal that larger fines and incarcerations do not typically impose substantially more negative experience than smaller ones, the reasonable person would still understand those larger punishments to communicate substantially more condemnation than the smaller punishments. And because this is true, say MF, adaptation does not matter much for punishment theory.²²

Our disagreement with MF boils down to two points. First, we believe that the reason people understand punishments to communicate condemnation is that punishments typically impose negative experience. A fine of 2X is understood to communicate substantially more condemnation than a fine of X because people believe that the larger fine typically imposes substantially greater negative experience. Adaptation renders this belief incorrect, so adaptation crucially affects MF's communicative theory of retributive punishment.

Second, even if adaptation did not affect people's understanding of the condemnatory message of fines and incarcerations, that would be attributable simply to the fact that people wrongly assume that larger punishments impose greater negative experience. For MF, it does not matter whether people's understanding of the condemnatory message is based on a *correct* belief about how punishment affects the typical person. As long as people understand the condemnatory message that the state aims to convey, the system of punishment is legitimate on MF's view.²³ We think this approach cannot be squared with the fact that people care deeply about whether a punishment typically imposes negative experience, and not just about whether a punishment is perceived incorrectly to do so. Similarly, Gray denies that adaptation is relevant to punishment proportionality, but on somewhat different grounds. According to Gray's Kantian retributivism a criminal *deserves* to be punished, and the amount of punishment that she deserves is "justified, measured, and described solely in objective or perhaps intersubjective terms by reference to the offender's culpability."²⁴ Gray provides little aid for determining what these objective terms are and how they are to be compared.²⁵ Importantly, however,

21. See MF, *Bentham on Stilts*, *supra* note 9, at 973 ("[S]ociety is justified in believing that more (objective) punishment communicates a stronger message of condemnation.").

22. See *id.*

23. There may be other requirements for legitimacy, but they are irrelevant to the particulars of our dialogue with MF.

24. Gray, *supra* note 13, at 151–52.

25. The only suggestion that he offers is that the appropriate punishment for theft is to deny the offender access to property because the offender's action was "a contradiction to the concept

he notes that the offender's experience of her punishment is always "incidental" or "contingent" and thus "retributivists bear no responsibility for justifying that suffering."²⁶ Our response to Gray proceeds along similar lines to our response to MF, and for purposes of brevity we will include the two together. In short, both the decisions about which punishments to impose and the decisions associated with proportionality must depend on knowledge about how those punishments are typically experienced by offenders. Any theory of punishment that ignores such experiences (in whole, per Gray, or in part, per MF) is faced with insurmountable hardships.

A. What Feature of Punishment Makes It Punitive?

For MF, the goal of punishment is to communicate condemnation to the offender.²⁷ Suppose the state pursued this goal by merely *telling* offenders that their acts were unacceptable. For more serious crimes, the state would tell offenders that their acts were particularly unacceptable. Presumably, MF would deem such an approach insufficient. But because MF claim that punishment is merely about communication, they would need to explain why.

Perhaps a retributivist would say that punishment, unlike mere verbal communication, strongly gets the message across to the offender. Without punishment, a reasonable person might not fully understand society's condemnation of the criminal act. Society can say that it condemns, but unless it takes action by punishing, people might not appreciate that the state really means what it says.

If that is why society punishes, then what is it about punishment that communicates condemnation? There must be something about punishment that goes beyond merely verbally conveying the message, but what? The "something" is the imposition of negative experience. Punishment communicates condemnation, above and beyond verbally telling the offender that her act is unacceptable, *because* and *insofar as* it is understood to typically impose negative experience.²⁸

What do MF think about this? They never say what they think,²⁹ which is

of ownership." *Id.* at 146. We doubt whether Gray truly subscribes to a view of retributivism so closely aligned with *lex talionis*.

26. *Id.* at 152.

27. See MF, *Bentham on Stilts*, *supra* note 9, at 946.

28. Two points should be noted. First, we reiterate our agnosticism about whether the actual differing experiences of individual criminals are relevant. Maybe they are, and maybe they are not. Either way, what we seek to demonstrate is merely that the typical experience matters in framing punishments. Second, whether it matters that people's "understanding" of punishment's message be based on correct assumptions is the issue to which the next Section is devoted.

29. MF write: "Retributive punishments are not, on our view, about negative experiences. They are about creating the conditions through communicative actions to get the offender to *understand* that his actions are being condemned for violating the rule of law." MF, *Bentham on Stilts*, *supra* note 9, at 973. Our rejoinder is that the principal condition for understanding the communicated message is precisely that something is being imposed on the offender that is

peculiar for two reasons. First, their theory is that punishment's only goal is to communicate condemnation, so one might expect them to say something about what feature of punishment makes it condemnatory. Second, if MF believe that what matters is communicating condemnation rather than imposing negative experience, then it is puzzling that they ignore the obvious rejoinder that communicating condemnation is accomplished *via* imposing negative experience. As we wrote in a previous article, "the reason that liberty deprivation constitutes punishment . . . is that it is a negative experience. If it were not a negative experience, then it would not be retributively appropriate or meaningful and indeed would not be punishment at all."³⁰

We believe that a retributivist such as MF might say that fines and incarcerations communicate condemnation via the social meaning that has become associated with those measures. And we think they would go on to argue as follows: part of the reason these punishments are associated with condemnation may be that the punishments typically impose negative experience, but this fact is only one part of the reason the punishments communicate condemnation and is not a particularly central part of the reason.³¹

If this is the argument, then it is important to ask what feature of fines and incarcerations causes those measures to communicate condemnation *other* than the fact that those measures are understood to typically impose negative experience. *What other relevant feature is there?* We can imagine two possible attempts at an answer, neither of which could salvage MF's claims. We address them in the following two subsections.

1. Does Condemnation Derive from the Mere Fact that the State Has Chosen to Impose Something in Response to Crime?

What could it be about fines and incarcerations that communicates condemnation, other than that they typically impose negative experience? A retributivist might say that the condemnation comes from the mere fact that the state has selected these measures as responses to criminal behavior. On this

typically experienced as negative. In the passage just quoted, MF seem to reject that view. But they say nothing about what feature of punishment does the communicative work, if it is not the imposition of something typically experienced as negative. They drop a footnote "adverting to John Finnis' view on the matter," *id.* at 973 n.236, which they in turn quote in another footnote, *id.* at 922 n.52. Finnis says that "[t]he essence of punishments . . . is that they subject offenders to something *contrary to their wills*." *Id.* (quoting John Finnis, *Retribution: Punishment's Formative Aim*, 44 AM J. JURIS. 91, 98 (1999)). But as we have explained in considerable detail elsewhere, people's will (i.e., what people want) is typically to have positive rather than negative experience; and to the extent that will can theoretically diverge from experience, it is the experience that matters more. See BBM, *Welfare as Happiness*, *supra* note 1.

30. BBM, *Happiness and Punishment*, *supra* note 1, at 1068.

31. We attribute this approach to MF because we assume their goal is to maintain fidelity to their communicative theory while still denying that the experience of punishment is important to retributive theory. We think that the latter claim is unsustainable, and if MF prefer to agree with us that experience (including adaptation) is important, then so much the better.

view, if the state had chosen to give beads to people who commit crimes, then the beads would communicate condemnation.³² Instead, the state has chosen to fine or imprison those who commit crimes, so *those* measures communicate condemnation. That fines and imprisonment, unlike beads, impose negative experience is merely a coincidence on this view, rather than a driving force in explaining why fines and imprisonments communicate condemnation.

We find it quite plausible that the mere fact of the state's choice to impose something in response to crime plays a meaningful role in causing that thing to communicate condemnation. But that does not mitigate the need to explain why societies so often happen to choose "something" that typically imposes negative experience. If retributivists took the tack envisioned in this Section, then they would be espousing the view that condemnation has happened to become associated with measures that typically impose negative experience, but not *because* those measures typically impose negative experience. History could have unfolded differently, they might argue, such that condemnation could have become associated with giving money to offenders. Or, according to this argument, larger fines and incarcerations could have become associated with *less* condemnation than smaller ones, such that more serious crimes would be punished by *smaller* fines and *shorter* prison terms than would less serious crimes. If such practices had developed historically (which on this view could have occurred just as easily as the development of today's actual practices), and if everyone understood that the practices were used to communicate appropriate condemnation, then MF's argument would be that those alternative measures would constitute a system of punishment just as legitimate as the current one.

Such a view is entirely implausible. As an initial matter, the ubiquity across times and places of penal sanctions that impose negative experience cannot be a mere coincidence. In some shaming sanctions, the negative experience derives primarily from the communicated condemnation alone, but where a punishment does more than brand someone a criminal so as to impose shame, the "more" always seems to involve the imposition of something typically experienced as negative.³³ It is not merely a coincidence that parents communicate condemnation by acts that children typically dislike rather than by acts that children typically like. Similarly, it is not merely a coincidence that

32. It should be noted, for the sake of disentangling the separate issues here, that any statement by society that an offender has acted unacceptably is likely to cause negative experience for the offender by virtue of the shaming effect of such a statement. The question, though, is this: when society chooses to do more than just make a verbal or symbolic statement and instead *does something* to the offender, why does the something always seem to involve the imposition of that which is typically experienced as negative? The answer is that the measures society uses to punish (i.e., the things that are done beyond the mere statement of condemnation) communicate condemnation because and insofar as they impose negative experience.

33. The word "always" invites counterexamples. We can think of none, but even if a few were to exist, their rarity would speak volumes about the connection between punishment and negative experience.

our society's chosen means of communicating condemnation for criminal acts are measures (fines and imprisonments) that people typically dislike. If it were merely a historical accident, then history would be littered with examples of punishments that imposed positive experience rather than negative experience.

Instead, it makes perfect sense that the negativity of condemnation is linked with the imposition of negative experience—a view widely shared by retributivists.³⁴ The reason it is strange and far-fetched to imagine a state giving money to criminals as “punishment,” or imposing smaller fines for more serious crimes and larger fines for less serious crimes, is that most people recognize that *of course* punishment communicates condemnation by imposing negative experience.³⁵ It is elementary that if you want to reward people, then you do something that they like, whereas if you want to punish people, then you do something that they dislike. If MF choose to dispute such a simple and intuitively obvious claim, they will have set themselves a hard row to hoe.

For the same reason that imposing negative experience communicates condemnation, imposing greater negative experience communicates greater condemnation than imposing lesser negative experience.³⁶ One punishment

34. As Jean Hampton explains, “The way to communicate to [criminals] that there is a barrier of a very special sort against these kinds of actions would seem to be to link performance of the actions with what such people care about most—the pursuit of their own pleasure.” Jean Hampton, *The Moral Education Theory of Punishment*, in PUNISHMENT: A PHILOSOPHY AND PUBLIC AFFAIRS READER 112, 130 (A. John Simmons et al. eds., 1995). According to von Hirsch,

The censure and the hard treatment are intertwined in the way punishment is structured.

A penal measure provides that a specified type of conduct is punishable by certain onerous consequences. Those consequences both constitute the hard treatment and express the reprobation. Altering those consequences—by raising or lowering the penalty on the scale—will alter the degree of censure conveyed.

von Hirsch, *supra* note 16, at 124. Similarly, Feinberg writes, “Given our conventions, of course, condemnation is expressed by hard treatment, and the degree of harshness of the latter expresses the degree of reprobation of the former.” FEINBERG, *supra* note 16, at 118. Other retributivists are largely in accord. See, e.g., NORVAL MORRIS & MICHAEL TONRY, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM 93 (1990) (“[F]rom a moral perspective, the measure of punishment is not its objective appearance but its subjective impact.”); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 4 (1968) (stating that punishment “must involve pain or other consequences normally considered unpleasant”); GEORGE P. FLETCHER, THE GRAMMAR OF CRIMINAL LAW 228 (2007) (“The question is always whether the sanction is typically or characteristically onerous . . .”). But see Kenneth W. Simons, *Retributivists Need Not and Should Not Endorse the Subjectivist Account of Punishment*, 109 COLUM. L. REV. SIDEBAR 1, 2 (2009), http://www.columbia-lawreview.org/Sidebar/volume/109/1_Simons.pdf. Douglas Husak equivocates somewhat between these two views. See Douglas N. Husak, *Retribution in Criminal Theory*, 37 SAN DIEGO L. REV. 959, 973 (2000) (“My point is that the fit we intuit does not really obtain between crime and punishment, but rather between crime (as culpable wrongdoing) and suffering (or deprivation or hardship).”).

35. We occasionally, as here, use words such as “negative experience” as shorthand for the phrase “something that is typically experienced as negative.” We have been very clear that our claims refer to the latter—typical experience.

36. What we mean by the sentence in the main text is actually this more cumbersome formulation: “For the same reason that imposing something believed to be typically experienced as negative communicates condemnation, imposing something believed to be typically experienced as more negative communicates greater condemnation than imposing something

(“J”) is *greater* than another punishment (“K”)—and communicates greater condemnation—only if J is typically experienced as *more negative* than K. When society aims to communicate substantially more condemnation for murder than for petty theft, it achieves that aim only if the punishment for murder is typically experienced as substantially more negative than the punishment for petty theft. Indeed, how would anyone know that ten years in prison is a greater punishment (or communicates greater condemnation) than five years, otherwise than as judged by (assumptions about) typical negative experience? If choosing punishments that impose larger amounts of typical negative experience is not the way for society to communicate greater condemnation, then what is? Unless society is guided (principally and perhaps even exclusively) by the criterion of typical negative experience, there would be no way for society to know whether any particular punitive measure is more or less severe (and thus communicates more or less condemnation) than any other one.

If retributivists³⁷ want to concede that imposing negative experience is relevant to communicating condemnation while still insisting that other factors are more important to the communicative message, then they must explain *what those other factors are*.³⁸ True, the mere fact of doing anything to an offender in response to the crime may communicate condemnation. But if that were the important thing, then societies could merely tell offenders that their acts were unacceptable. That such a practice would seem utterly insufficient to most people in most societies reveals the central importance people place on punishment’s imposition of negative experience.

2. Do Deprivations of Liberty and Property Communicate Condemnation for Objective Reasons?

A retributivist might claim that, beyond merely being imposed in response to crime, deprivations of liberty and property communicate condemnation for reasons other than that those deprivations are typically associated with negative experience. For that matter, a retributivist might maintain that objective

believed to be typically experienced as less negative.” As we explain in the next Section, the state may be able to communicate condemnation even if people’s understanding of the message is based upon mistaken beliefs about negative experience. But that fact reveals the problems of a theory based solely on communication, not the irrelevance of the truth about negative experience.

37. Again, we do not mean to imply that all or even many retributivists will adopt this position. We mean only to describe a position that some retributivists might take so we can explain our response to that stance.

38. In other words, what makes a monetary fine of 2X dollars communicate more condemnation than a monetary fine of X dollars? We claim that people’s understanding of the social meaning of these punishments—i.e., that the larger fine communicates greater condemnation than the smaller one—derives primarily, if not entirely, from an assumption that the larger fine typically imposes more negative experience than the smaller one. If MF believe that the primary reason for people’s understanding of this message is something other than people’s assumptions about typical negative experience, then we would like to know what that “something” is.

deprivations of liberty constitute punishment irrespective of whether they involve negative experience.³⁹ Gray takes this approach.⁴⁰ Of course, anyone who wishes to make this argument must still explain *what* it is about these deprivations—apart from the imposition of negative experience—that communicates condemnation. We suppose that Gray or MF could try to generate a grand metaphysical argument about value wherein liberty and property somehow have “objective” value independent of any interaction with human experience (or at least independent of the positive experience that people associate with having liberty and property).

But such a project could not succeed because people live life subjectively, not objectively.⁴¹ Depriving people of liberty or property communicates condemnation because people *enjoy* liberty and property.⁴² If society intends an act (like punishment) to affect someone’s life such that she will care about it, then that act must be expected to affect her *experience* of life. An objective deprivation thus communicates condemnation only to the degree that it is likely to be experienced as negative.

Consider how difficult it would be to defend a contrary view. One’s argument would have to be that depriving someone of liberty or property would communicate condemnation even if people did not typically experience liberty and property as positive. On this view, there would have to be some intrinsic quality of liberty and property that imbues them with objective value—value that does not depend on what people actually like. But what could objective value even mean, and what could confer it, and how do people know which things are imbued with such value?

Everyone understands that depriving someone of money communicates condemnation whereas depriving her of vermin in her house or mud on her clothes does not. The reasoning we have espoused provides a straightforward, intuitively persuasive explanation of these facts: people typically like money but dislike vermin and mud. By contrast, whoever adopts some sort of objective view would have to explain what it is about property that makes it good, and about mud or vermin that makes them bad, apart from the fact that people typically like one and dislike the others. We believe that such a task cannot be accomplished.

Rather than trying to imagine what arguments could be made for such “objective” value, we leave it to any retributivists who disagree to advance such arguments if they so choose. We have elaborated elsewhere a comprehensive theory of human well-being wherein we argue that something can be good for a person only insofar as it improves the person’s subjective experience

39. Importantly, the retributivists cited by Gray do not generally seem to support this proposition. See *supra* note 34.

40. See Gray, *supra* note 13, at 131.

41. BBM, *Welfare as Happiness*, *supra* note 1, at 18–20.

42. See, e.g., Hampton, *supra* note 34, at 130.

of life.⁴³ If a retributivist would like to articulate and defend a rival view and in doing so reply to the points we made there, we welcome them to do so.

3. MF's *De Facto* Concession that Negative Experience Is the Linchpin of Communicating Appropriate Condemnation

MF themselves have taken a position that endorses, in effect, our claim that negative experience is at minimum a highly important feature of punishment for communicating condemnation. Depriving someone of money communicates condemnation because that deprivation is typically experienced as negative.⁴⁴ So it makes sense that MF, like us, deem a monetary fine to be a punishment. MF, though, take the position that objective increases in deprivation suffice to communicate greater punishment: "society is justified in believing that more (objective) punishment communicates a stronger message of condemnation."⁴⁵ If that were true, then there would be nothing wrong with simply imposing larger fines for more serious crimes and smaller fines for less serious crimes. But MF support monetary fines that scale with an offender's wealth or income, because "[s]uch sensitivity . . . helps the state better achieve its commitment to making the punishment serve as a condemnation register rather than as a luxury tax."⁴⁶ The question MF should be asking is, *why is this so?*

The reason that noncontingent fines communicate insufficient condemnation is that they are typically experienced as insufficiently negative when they are very small relative to the offender's wealth. By supporting fines that scale with an offender's wealth or income, MF have thus effectively acknowledged that expected typical experience drives the condemnatory message of proportional punishment. That is, MF have effectively acknowledged the truth of our core claim.

B. Does It Matter Whether People's Beliefs About Punishment Are Correct?

Let us take stock of the disputed issues. We claim that punishment is linked inextricably with the imposition of something that typically imposes negative experience. MF argue that punishment's goal is to communicate condemnation, not to impose negative experience. We have responded that

43. See generally BBM, *Welfare as Happiness*, *supra* note 1.

44. People adapt quickly to monetary losses, but the initial experience of the loss is negative. Ed Diener et al., *The Relationship Between Income and Subjective Well-Being: Relative or Absolute?*, 28 SOC. INDICATORS RES. 195, 221 (1993); Deborah A. Kermer et al., *Loss Aversion Is an Affective Forecasting Error*, 17 PSYCH. SCI. 649, 652 (2006).

45. MF, *Bentham on Stilts*, *supra* note 9, at 973; see also Gray, *supra* note 13, at 151–52 ("[P]unishment for retributivists is, or ought to be, justified, measured, and described solely in objective or perhaps intersubjective terms by reference to the offender's culpability in a crime. The suffering experienced by a particular offender subjected to the punishment he objectively deserves is therefore incidental, and retributivists bear no responsibility for justifying that suffering.").

46. MF, *Bentham on Stilts*, *supra* note 9, at 956.

punishment communicates condemnation because and insofar as it imposes negative experience.

A retributivist might reply that people will understand punishment's communicative message so long as they *believe* that negative experience is typically being imposed. Understanding the message depends merely upon having the belief and is unaffected by whether the belief is actually true. Thus, the communication does not depend upon what the typical experience of negativity *is*, but only upon what it is *perceived to be*. If the goal of punishment is solely to communicate condemnation, then that goal is unaffected by what is actually the typical experience of negativity.

Before we confront this argument, we would like to clarify it a bit. This argument involves a heavy focus on the word "understand."⁴⁷ The point is that when the state does something to an offender in response to a crime, what makes that thing a legitimate punishment is the fact that a reasonable person will understand the thing to communicate to the offender a message of condemnation.⁴⁸ But such an understanding could be based on a mistaken belief. As we argued in the previous Section, the state communicates condemnation *via* imposing something (a fine or an incarceration) that is typically experienced as negative. The *reason* people understand that the state is communicating condemnation is that they believe that the fines and incarcerations are typically experienced as negative. If it were actually true that these measures were not typically experienced as negative, and if people learned that truth, then the people might⁴⁹ no longer understand those punishments to communicate condemnation.⁵⁰ So long as they do not learn the truth, though, they understand that the state is communicating condemnation

47. *E.g., id.* at 973.

48. *E.g., id.*

49. We use the word "might" because someone could learn the truth while still realizing that the state has not learned it, and therefore the person could still understand the message the state aims to convey via punishment. By contrast, if everyone really knew that larger fines typically impose no more negative experience than smaller fines, then larger fines would cease to communicate more condemnation. The extra monetary deprivation would be no different from giving someone beads to signify greater condemnation: any communicative message would derive from pure symbolism, and whatever was sought to be gained by *fining* people rather than by merely telling them that their acts were especially unacceptable, would not be accomplished. If this seems counterintuitive, then that is only because people assume strongly that money correlates with positive experience. Like many strong assumptions, this one is called into question by empirical evidence.

Moreover, as we explain below, we believe that if someone learned the truth about adaptation while realizing that most other people's perceptions (and those of the state) remained unchanged, this revelation would matter a lot to the person. Even though the communicative message remained intact (due to the state's perceptions and those of most people), the legitimacy and success of the punishment system would nonetheless be undermined. The truth regarding negative experience matters, independent of the perceptions that may persist.

50. The evidence suggests that fines and incarcerations *do* typically impose negative experience, but that greater ones do not typically impose nearly as much greater negativity than lesser ones as is assumed.

because they see the state imposing punishments that they believe (albeit incorrectly) are typically associated with negative experience.

People understand that when the state imposes a monetary fine of X dollars on an offender, the state is communicating condemnation. If a similarly situated offender⁵¹ commits a significantly more serious crime and the state imposes a fine of 2X dollars, then people understand that the state is communicating substantially greater condemnation than it communicated via the fine of X dollars. Why do people understand this? It is because they believe that a fine of 2X typically imposes substantially greater negative experience than does a fine of X.⁵²

There is evidence, chronicled in our article *Happiness and Punishment*, that such a belief is wrong.⁵³ MF's response is to argue that *if* the claim is true, it is nonetheless of only trivial importance to punishment theory.⁵⁴

Currently in our society, the state fines people 2X in order to punish them substantially more than those it fines X. The state does this because it believes that a fine of 2X typically imposes substantially more negative experience than a fine of X.⁵⁵ Reasonable citizens also believe that the larger fine typically imposes substantially greater negative experience, and *due to that belief*, they understand that the state is communicating substantially more condemnation. For the sake of argument, MF accept our point that the evidence indicates the underlying belief is actually mistaken: a fine of 2X does not typically impose substantially more negative experience than a fine of X. On their theory, the truth of this underlying belief is *irrelevant*. (If instead MF accepted that the truth of the underlying belief is important, then MF would be accepting that hedonic adaptation is important and would thereby be conceding that our principal claim is true.) So long as people *believe* that the larger fine imposes substantially more negative experience, they will understand the condemnatory message that the state aims to communicate to the criminal. And this understanding, on MF's account, is everything. If it is predicated on a mistake, that matters not a whit.

The question is whether such a view, which places no premium on the truth, is persuasive. We think that it is not, for the following three reasons.

51. That is, someone with equal income and wealth. We mean to bracket the issue of scaling fines to wealth.

52. This is the argument we made in the previous Section.

53. See BBM, *Happiness and Punishment*, *supra* note 1, at 1045–46.

54. Compare MF, *Bentham on Stilts*, *supra* note 9, at 924–25 n.64 (“[W]e do not intend to register a substantial quarrel with the accuracy of the empirical work cited and relied on by BBM . . .”) with *id.* at 909 (“[W]e argue that these claims are, from a policy perspective, either true but of minor significance (since most retributivists will agree with them), or else nontrivial but unsound.”). It is worth pointing out that most retributivists agreeing with something does not make it trivial. If MF agree that adaptation should be incorporated into the *ex ante* framing of retributive punishments, then they have thereby acknowledged its importance.

55. Again, see the previous Section for this argument.

First, a theory focusing exclusively on perception⁵⁶ would appeal to very few people, be they scholars, policymakers, or members of the public. Suppose a person learned that greater fines and incarcerations do not actually impose substantially greater negative experience than smaller ones. Would the person care about this fact, despite knowing that those larger objective punishments convey substantially greater condemnation due to widespread misperceptions⁵⁷ about the degree of negative experience associated with them? We think most people would care *a lot* about such a revelation, even though it would leave untouched the communicative element of punishment. Even if both the state and the offenders were harboring the misperception, an onlooker would likely be outraged if she realized that, for example, society were assigning to mass murderers *ex ante* punishments that were only slightly more severe (in terms of typical negative experience) than those assigned to larcenists.⁵⁸

Indeed, if a retributivist theory relied solely upon perception, then there would be no problem with “punishments” that typically confer huge subjective *benefits*, so long as those punishments are misperceived as imposing negative experience. Again, we doubt anyone would deem acceptable such a state of affairs.

Reality, not just perception, matters. To the extent that any theory of punishment holds that the experience of punishment is irrelevant—and that only people’s perceptions of it matter—the theory loses its credibility. Whether or not the theory would remain “internally intelligible,”⁵⁹ we believe that few would find it appealing.

Second, focusing exclusively on perception would constitute only a limited rejection of the relevance of adaptation and subjective experience. If people’s perceptions eventually change to accord with reality, such that the people understand the message of punishment differently once they realize that

56. We recognize that MF describe their view as focusing on “understanding,” but as we have explained, people’s understanding of the communication can be (and, we believe, actually is) predicated on the mistaken perception that, for example, larger fines typically impose substantially more negative experience than smaller ones. If MF’s theory deems important the fact that this perception is mistaken, then MF’s theory deems important hedonic adaptation. If MF’s theory does not deem important the fact that this perception is mistaken, then MF’s theory is implausible because it accords insufficient value to the truth.

57. To reiterate, MF’s project is not to dispute the empirical evidence of hedonic adaptation but rather to argue that *even if it is true*, it is of only trivial importance to punishment theory. In other words, the question is this: assuming, *arguendo*, that these widespread misperceptions exist, does that matter? The claim that it does not matter is untenable because people care a lot about the truth and will be dissatisfied with a theory that does not care about it.

58. The evidence is actually that incarcerations do typically impose far more negative experience than fines. However, very large fines may not impose much more negative experience than very small ones. In any event, MF’s position commits them to claiming that the typical experience of punishment does not matter *no matter what* it is (for example, even if murderers typically received nothing worse than larcenists), so long as the truth about this does not affect the reasonable person’s understanding of the state’s message.

59. MF, *Bentham on Stilts*, *supra* note 9, at 909 n.8, 931, 933–934, 936, 948, 948 n.159.

adaptation occurs, then a retributivist would have had to acknowledge the importance of adaptation. Rejecting adaptation's importance is contingent upon people's continuing misperceptions.

Third, the communication of condemnation is a two-sided affair involving both the public and the offender, and one that takes place *throughout* the punishment, not just at the stage of the initial imposition.⁶⁰ Adaptation thus cannot help but affect the communicative message. Even if the general public does not understand that prisoners adapt, *the prisoners themselves* will realize that they are adapting in the course of their confinement. Perception cannot remain decoupled from reality *during* the punishment: offenders will perceive the reality while they are experiencing it, thereby weakening the condemnatory message. If it were true that people adapt to imprisonment such that they typically do not experience a ten-year sentence as much worse than a five-year sentence, then inmates will realize this fact during their stay in prison and cannot be expected to receive the message that the longer sentence represents substantially greater condemnation.⁶¹

One might object that the prisoners will receive the appropriate condemnatory message so long as they think that society *believes* (albeit incorrectly) that longer confinement or larger fines are typically experienced as severely more negative than smaller deprivations. But if society can communicate severe condemnation without imposing something typically experienced as significantly negative, then why would any deprivation at all be required? Society could merely *tell* criminals that their offenses are unacceptable and are hereby condemned. By requiring deprivation—indeed, deprivation that is typically experienced as negative—society takes the position that condemnation can be communicated effectively only if the offenders know *from the deprivation imposed upon them* that their act has been deemed unacceptable. The deprivation is therefore essential to the message.⁶² As

60. See *id.* at 968 (“[U]nder our communicative conception of retributive justice, that communication *ends* when the state stops speaking to the offender via state-sanctioned punishment. When the state releases the offender and extinguishes any remaining conditions, it has said all it had to say.”). The clear implication is that the state is not “done saying all it has to say” *until* the offender is released from prison.

61. To reiterate yet again, MF may not believe that people adapt to prison (although the evidence supporting that claim is substantial), but that is beside the point of this dialogue. MF have chosen to argue that even if adaptation is true, it is of bare relevance to punishment theory.

62. We suppose that MF could argue that condemnation is communicated so long as offenders think that the public or the state believes the offenders will receive some subjective deprivation. If this is MF's view, it seems particularly vulnerable to the first two arguments we made in this Section—about the problems with basing a theory on perception rather than reality. Moreover, such a view seems like a distinctly unappealing theory of punishment. Suppose that parents punish their child by making her stay in her room for a time, but it turns out that unbeknownst to the parents, the child loves staying in her room. Even if the child understands that the parents intend to communicate condemnation, we believe that most people would say that the punishment has not worked in some important way. Criminals are not children nor the state their parent, but the same point holds true for criminal punishment.

explained in the previous Section, this approach makes sense only if the deprivation's negativity is understood in subjective terms, because people experience life only subjectively. Whether the deprivation can be expected to convey its intended message thus depends upon the way that a typical offender is likely to experience that deprivation.

C. Putting It All Together

It is useful to give a brief description and assessment of the state of the disagreement between MF and us, refocusing on our claims about adaptation.⁶³ We devote this Section to that assessment.

1. Proportionality and Hedonic Adaptation

When the state fines or imprisons people, it does so because it believes that fines and imprisonments are typically experienced as negative. Whether the state's goal is to communicate condemnation or to achieve some other end (or a combination thereof), the ends being pursued depend upon the fact that the measures used impose negativity.

Crucially, we believe uncontroversially that it is desirable for the state to punish more serious crimes more severely than less serious crimes.⁶⁴ How does the state seek to accomplish that goal? It does so by trying to use measures that vary appropriately in the amount of negative experience typically imposed: larger fines and incarcerations for more serious crimes, and smaller fines and incarcerations for less serious crimes.

Finally, the assumption underlying so much of the penal system—that punishments can be tailored to crimes by adjusting the size of the fines and incarcerations—is called into question by the evidence of hedonic adaptation. The difference between the negative experience imposed by larger and smaller fines, or by longer and shorter incarcerations, may not be nearly as large as is assumed. Therefore, our system does not achieve the proportionality in punishment that it is commonly assumed to achieve.

Retributivists could accept all of these points and simply incorporate them into their general theoretical framework.⁶⁵ Instead, Gray takes the position that

63. It is worth noting, though, that MF's criticism goes beyond our emphasis on adaptation to the larger issue of the experience of punishment. *MF*, *supra* note 9, at 973 (suggesting that the aim of punishment is not "to make the offender suffer negative experiences"); *id.* ("[S]ociety is justified in believing that more (objective) punishment communicates a stronger message of condemnation.").

64. This also means that the state must punish more serious crimes more severely than less serious crimes *by a sufficient amount*. Meaningful proportionality is not achieved if large differences in crime severity are met with insufficiently large differences in punishment severity.

65. Indeed, we suspect that many will. If Gray believes that this is merely the importation of utilitarian ideas into retributivism—that it will "put justice at the whim of instrumental considerations," Gray, *supra* note 13, at 151—he is incorrect. The entire thrust of our argument is that a well-founded retributivist theory must take account of the hedonic consequences of

punishment is to be measured only in objective terms,⁶⁶ and MF assert that “society is justified in believing that more (objective) punishment communicates a stronger message of condemnation.”⁶⁷ As we have argued in this Part, punishment communicates condemnation because it imposes negative experience; and greater punishments communicate greater condemnation because they impose greater negative experience. MF have never said what it could be about a larger fine that communicates greater condemnation than a smaller fine *other* than the larger fine’s imposition of greater negative experience. We do not believe that any plausible answer can be supplied. Admittedly, greater fines may communicate more condemnation than smaller ones because people mistakenly believe those fines impose substantially greater negative experience. But this fact presents retributivists with a difficult choice.⁶⁸ Either they must accept that the truth matters a great deal, and in so doing acknowledge that hedonic adaptation matters a great deal (in which case they will have conceded the key point); or else they must deny the importance of the truth, in which case their theory becomes implausible and intuitively unappealing.

2. *The Implications of Hedonic Adaptation*

We do not offer specific or concrete prescriptions for the practice of punishment. Instead, we describe a phenomenon so as to help people understand better what punishment actually does.

What should be done about this phenomenon? The evidence suggests that current penal practices do not achieve the level of proportionality in punishment that would be the case absent adaptation. Larger fines, for example, are not much more severe punishments (in terms of the typical negative experience imposed—i.e., the terms that matter) than smaller fines. If society takes proportionality very seriously—that is, if it cares a lot about punishing more serious crimes substantially more severely than less serious crimes—then society might try to devise punishments that would resist adaptation. Such punishments exist, but it would take creative thinking to find ones that comport with the other demands of the criminal justice system.

If it turns out that any changes that solve the proportionality problem would create other problems, then the forced tradeoffs would sharpen our understanding of which values matter most in the penal system. Perhaps people would prefer to sacrifice proportionality to other values, or vice versa. In any event, those who theorize about punishment or who seek to improve penal policy must grapple with these questions.

punishment based upon retributivism’s own principles.

66. *Id.* at 140 (“[R]etributivism defines punishment as a restraint on liberty or other consequence that is determined and justified objectively by reference to a culpable offense.”).

67. MF, *Bentham on Stilts*, *supra* note 9, at 973.

68. Again, we do not mean to imply that all or even many retributivists will adopt this position.

II

WHAT "COUNTS" IN THE PROPORTIONALITY CALCULUS: THE CASE OF POST-PRISON OUTCOMES

We have argued that retributive theories of punishment value proportionality and that such accounts must incorporate offenders' expected experiences of punishment. Gray and MF argue that most of the typical post-prison consequences of incarceration that we identified in *Happiness and Punishment*—including the generally less adaptable effects of disease, unemployment, and dissolution of family and social relationships—should be excluded from the calculus of proportionality.⁶⁹ In this Part we show why any retributive theory of punishment, including Gray's and MF's, should account for the expected negative hedonic effects associated with illness, unemployment, strained social relations, or any other detriments⁷⁰ that are proximately caused by prison and reasonably foreseeable to state authorities.

A. State Responsibility for Post-Prison Outcomes

To whatever extent they admit that offenders' typical responses to prison might matter *ex ante*, MF reject our argument that the long-term hedonic consequences of *having been* in prison are relevant to a retributivist proportionality calculus.⁷¹ Their conclusion is based on the claim that the state is only responsible for those harms it has caused, and that the harms we identified are not caused by prison.⁷² Furthermore, they argue that their communicative theory of retribution implies that when the state stops "speaking" to the offender through its imposed punishment, the communication ends.⁷³ We agree with MF that for harms to "count"⁷⁴ in the proportionality calculus, they must have been caused by punishment. We contend, however, that state sanctions do cause the harms discussed in *Happiness and Punishment*. Additionally, we show that, by MF's own lights, the state's intent to cease communication cannot be determinative: if MF are going to reap the benefits of a communicative theory of retribution, they must also contemplate the other reasonable understandings of the state's message.

69. MF, *Bentham on Stilts*, *supra* note 9, at 967–73; Gray, *supra* note 13, at 130.

70. See, e.g., BBM, *Happiness and Punishment*, *supra* note 1, at 1049–53.

71. As we argue in *Happiness and Punishment*, these post-incarceration consequences differ from the prison experience by being largely unadaptable. *Id.* at 1052. The effects of disease, unemployment, and lost social and family ties will likely be felt for a considerable time after an inmate has been released.

72. See MF, *Bentham on Stilts*, *supra* note 9, at 968.

73. See *id.*

74. By "count" we mean harms that are "relevant for purposes of proportionality" or harms for which "the state bears responsibility."

1. Proximate Cause in the State Punishment Context

According to MF, when a state justifies the amount of punishment that it imposes on an offender, it need only count those harms that it causes.⁷⁵ MF claim that because the post-prison harms we have described are not proximately caused by some aspect of the state's chosen punitive method, they can be ignored for purposes of proportionality. We agree with MF that a proximate cause analysis is essential for determining the scope of proportionality,⁷⁶ but we disagree with their view that the offender or a third party, and not incarceration, is the proximate cause of most of the harms associated with disease,⁷⁷ unemployment, and strained family and social relations.

In both criminal and tort law, an agent will only be held responsible for consequences that she has caused.⁷⁸ The causation inquiry includes two determinations, often labeled *factual cause* and *proximate cause*.⁷⁹ The first inquiry typically asks whether certain consequences would have occurred but for the agent's conduct. This is generally uncomplicated, and since retributivists seem to admit that incarceration is a factual cause of most post-prison outcomes,⁸⁰ we will not argue it.⁸¹ But not all factual causes should result in moral or legal liability. Some causes are insufficiently related to their effects such that it would be unfair to hold the agent responsible for them. The proximate cause inquiry thus attempts to determine when it is fair to hold the agent responsible.⁸²

Various standards have been proposed for making this determination, but they each focus on general intuitions of fairness: Was the act a "substantial factor" in bringing about the harm? Was the harm "too remote or accidental" or "unforeseeable" in time or manner of occurrence? Were there "intervening" or "supervening" acts that "break the causal chain"? Or were the consequences a

75. MF, *Bentham on Stilts*, *supra* note 9, at 968 ("proximately caused").

76. Gray misses this point entirely when he suggests that we might believe that all types of suffering constitute punishment. Gray lists being struck down by the flu, cancer, lightning, or a bus as examples of suffering that are not punishment. Gray, *supra* note 13, at 127. Quite obviously none of that suffering was proximately caused by the state.

77. MF's opinion about disease is unclear. They write: "[W]e think that diseases or disabilities contracted by an offender during punishment on account of poor or squalid conditions of confinement raise different issues." MF, *Bentham on Stilts*, *supra* note 9, at 971 n.230. They do not, however, indicate what those issues might be.

78. See generally H.L.A. HART & ANTHONY HONORÉ, *CAUSATION IN THE LAW* (2d ed. 1985); MICHAEL S. MOORE, *CAUSATION AND RESPONSIBILITY* (2009).

79. WAYNE R. LAFAVE, *CRIMINAL LAW* 332 (4th ed. 2003).

80. MF, *Bentham on Stilts*, *supra* note 9, at 971 ("It may even be that but for the state's punishment of the offender, the offender would not experience those harms . . .").

81. Obviously, not all negative post-prison outcomes will be factually caused by incarceration. For example, an offender's wife might divorce him not because he was incarcerated but because he murdered her family.

82. See generally HART & HONORÉ, *supra* note 78.

“response” to the act or merely a “coincidence”?⁸³ Although these standards were developed for determining whether people should be held responsible for crimes or torts, they are also helpful for assigning responsibility for a state’s punishment decisions.⁸⁴ Just as legal policy and general intuitions of fairness limit an individual’s civil and criminal liability to the harms that she proximately causes, we can also establish the boundaries of a state’s responsibility for its punishment decisions by considering whether the harms imposed on prisoners are foreseeable.

Before we turn to the specific post-prison effects that we identified, two examples may help clarify our account of how the proximate cause analysis should function for purposes of punishment proportionality. Imagine, for example, that Alistair is sentenced to five years in prison. When his sentence ends on Wednesday, he is led to the door of the prison and allowed to leave. Immediately upon setting foot outside the prison door, however, he is run over by a passing truck and dies. But for his imprisonment, Alistair would not have been in a position to be hit by the truck, and had he been released on Tuesday he would not have been killed. Although being released on Wednesday has resulted in substantially more harm to Alistair, no one would believe that the state bears any responsibility for the resulting disproportionality (because the consequences were too remote, were unforeseeable, or were the effect of an intervening cause).

In contrast, imagine Bernice, who has been placed in solitary confinement in a dark cell with no access to light for the entirety of her one-year prison term.⁸⁵ At the end of her prison term, she is led to the prison door and released. Immediately upon exiting the prison, Bernice’s eyes are exposed to a bright, sunny day. Unfortunately, the light is too bright—it damages her eyes, resulting in permanent blindness. We assume that everyone would agree that in this case, although Bernice’s harm occurred after her release from prison, the punitive methods applied to her were the proximate cause of her injury. Her blindness was foreseeable, and it did not occur remotely in space or time. There were no supervening causes, and the method of incarceration was a substantial factor in bringing about the injury.

2. *The Irony of Incarceration*

We believe that the negative outcomes we described in *Happiness and Punishment* more closely resemble Bernice’s situation than Alistair’s. Most of the communicable diseases that prisoners contract are caused by the prison

83. See LAFAYE, *supra* note 79, at 336–58.

84. If MF have another standard of proximate cause in mind, they do not so indicate.

85. MF might deem this confinement cruel and therefore illegitimate, but that is beside the point. Bracketing the issue of the legitimacy of the incarceration itself, the question is whether it is additionally unacceptable to have created conditions such that upon release, the offender would likely become blind.

environment.⁸⁶ When the state places prisoners in an overcrowded prison where their chances of contracting a disease are substantially higher than in a properly populated facility, the amount that the state is punishing those offenders increases.⁸⁷ The higher levels of unemployment and the damage to social relationships that are related to having been in prison require more nuanced analysis. According to MF, the negative hedonic consequences associated with unemployment and lost social relationships “result from a *choice* by a third party.”⁸⁸ While we agree that some cases of unemployment or divorce may be due to independent decisions to avoid people who have broken the law, we think that many of these effects are proximately caused by incarceration itself.

When the state selects a punishment, it has a considerable number of methods available to it, each with its own costs and benefits.⁸⁹ The choice that the state makes has implications not just for matters of sentencing policy but for “determining whether a duty to punish has been discharged or perhaps even violated.”⁹⁰ Thus, when a state chooses to incarcerate someone rather than employing one of its other available sanctions, it is responsible for the effects of incarceration, including the required time that the offender will spend out of the workforce. When an incarcerated offender is out of the workforce for a considerable period of time, his value as an employee is considerably diminished.⁹¹ His skills in the profession fade, and he is unable to keep up with new developments, making him less attractive than other potential employees. Although the offender may only feel the effects of the state’s decision to incarcerate him after his release from prison, the manner of his punishment was a proximate cause of his harm.

86. Obviously, if an inmate contracts a disease due to his personal choice to engage in risky sex that happens to occur within prison, the harm from the disease would not be proximately caused by the prison environment. Gray raises the interesting issue of prison sexual violence, which he views as an independent criminal act outside of the state’s responsibility. Gray, *supra* note 13, at 131–32. While independent criminal conduct is obviously relevant to a proximate cause inquiry, it is not, on its own, sufficient to break the causal chain. See *Brauer v. N.Y. Cent. & H.R.R. Co.*, 103 A. 166 (N.J. 1918). Where that conduct is foreseeable and where other decisions by the state potentially increase its likelihood, there are good reasons to hold the state morally responsible for even independent criminal acts.

87. We fail to see how MF’s willingness to compensate these prisoners via tort remedies addresses the issue of whether those prisoners have been *punished* more. MF, *Bentham on Stilts*, *supra* note 9, at 971 n.230.

88. *Id.* at 971 (emphasis in original).

89. For example, the state could punish via imprisonment, fines, beatings, shaming, probation, community service, or talion, to name a few. On the practice of talion, see WILLIAM IAN MILLER, *EYE FOR AN EYE* 20–24 (2006).

90. Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2163 n.28 (2001).

91. See Bruce Western, Jeffrey R. Kling & David F. Weiman, *The Labor Market Consequences of Incarceration*, 47 CRIME & DELINQUENCY 410, 412 (2001); DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION* 32–35 (2007). See generally BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2006).

Yet the effects of imprisonment are considerably more pernicious than this. As we described in our previous article, prisoners show a surprising ability to adapt emotionally to the conditions of their incarceration such that each month or year in prison is generally less bad than the one before it.⁹² We noted, however, that this adaptation comes at a price upon release.⁹³ The coping mechanisms that prisoners rely on to adapt to their conditions—distrusting others, keeping to themselves, emotional hostility when threatened—prove maladaptive on the outside when they return to normal life.⁹⁴ Surely it is fair to hold the state responsible for this irony of incarceration, because it created the prison conditions that caused the deleterious emotional response.⁹⁵ If the psychological deprivations created by the prison environment result in ex-prisoners who are objectively less attractive employees, spouses, and friends, then the state cannot disclaim responsibility for the hardships they experience upon release by pointing to decisions made by others not to employ, marry, or befriend them.⁹⁶ Given the research that we cite in *Happiness and Punishment*, the psychological hardships experienced by former inmates are foreseeable, proximate effects of the nature of their punishment. In many instances, former inmates' unemployment and social isolation arise directly and predictably from the prison environment. Their situation is indistinguishable from that of communicable diseases or the Bernice example. Again, because the state selects from a spectrum of possible punishments, the state bears responsibility for its selection. It must account for the proximately caused costs that its choices impose on prisoners. If criminals continue to suffer in the years following their release from prison then this quantum of physical and emotional pain adds to the severity of their sentences.⁹⁷ Failing to account for this additional suffering can lead to severe disproportionality in sentencing regimes.

92. See BBM, *Happiness and Punishment*, *supra* note 1, at 1046–49.

93. See *id.* at 1051.

94. See Jason Schnittker & Andrea John, *Enduring Stigma: The Long-term Effects of Incarceration on Health*, 48 J. HEALTH & SOC. BEHAV. 115, 117 (2007) (noting that the “prison environment may foster psychological orientations that prevent integration and intimacy, including suspicion and aggression”).

95. In a reply to Adam Kolber’s argument that retributivists must accommodate subjective experiences into proportionality calculus, Kenneth Simons contends that the state need not adjust its punishments to individuals’ sensitivities because it is not responsible for those sensitivities. Simons, *supra* note 34, at 6. But unlike an inmate’s claustrophobia, her post-prison psychological dysfunction is caused by the prison environment.

96. This situation is different from one in which the ex-prisoners are less attractive as employees, spouses, and friends because of *the nature of their offense*. In such a case, these harms cannot be said to result from state-sanctioned punishment.

97. MF wonder whether the state should also be responsible for the *positive* effects of prison on prisoners. For example, they ask whether our argument would recognize the benefits a prisoner received if, while in prison, he fell in love with his prison guard and married her upon his release. MF, *Bentham on Stilts*, *supra* note 9, at 970. Our response is that of course this would matter to punishment proportionality *if* the typical experience of inmates was to find romantic love during the period of their incarceration. It should be quite obvious that prison is generally understood as a negative experience in part because most prisoners *do not* have such an experience.

3. *The Echoes of Imprisonment*

MF further contend that, under their communicative theory of punishment, once the state has stopped speaking through punishment its responsibility ceases as well.⁹⁸ This argument, however, is inconsistent with the stated goals and benefits of adopting a communicative theory of retribution.

Unlike “just deserts” or expressive theories of retribution,⁹⁹ MF’s Confrontational Conception of Retribution (“CCR”) theory focuses on the communicative nature of the punitive sanction. The ability for the state to communicate and for the offender to understand the state’s condemnation is one of the “intrinsic goods” of the CCR because it treats offenders as responsible moral agents.¹⁰⁰ Yet the communicative goal of the CCR also creates one of its limits: the state cannot punish those who cannot understand its communications.¹⁰¹ Thus, whereas other retributive theories may not care whether and how the offender understands the punitive message, the offender’s understanding is central to the CCR.

It follows, then, that the state cannot define the content of its messages by authorial fiat. To retain the benefit of treating offenders as responsible moral agents, the CCR must be willing to accommodate in its definition of punishment not just what the state intends to say but all of the reasonable understandings of the state’s message.¹⁰² Referring to a mentally ill offender who could not appreciate that he was about to be executed, MF write, “The retribution would not be internally intelligible if the offender could not understand the meaning of the state’s condemnatory action.”¹⁰³ Similarly, if the offender reasonably understands the state’s communicative message to include the subjective experience of his incarceration and its post-prison effects, then the state foregoes the communicative benefit of punishment if it denies the prisoner’s interpretation. To the extent that the state ignores an offender’s reasonable interpretation of the message, it fails to treat her fully as a moral agent.

98. MF, *Bentham on Stilts*, *supra* note 9, at 968–69 (“[C]ommunication ends when the state stops speaking to the offender via state-sanctioned punishment. When the state releases the offender and extinguishes any remaining conditions, it has said all it had to say. There is nothing it needs to or even tries to communicate after the offender has served his sentence and related release conditions.”).

99. An expressive theory of punishment—i.e., where punishment’s purpose is to express society’s condemnation of the criminal’s behavior—might be less tied to offenders’ typical experiences, but only insofar as the expression does not depend upon imposition of negative experience. BBM, *Happiness and Punishment*, *supra* note 1, at 1077. None of the leading expressive theories—those of Feinberg, von Hirsch, or Kahan—fit this bill. Each is concerned with the offender’s experience of punishment to some degree.

100. MF, *Bentham on Stilts*, *supra* note 9, at 944.

101. *Id.* at 946–47.

102. *See infra* Part II.B.

103. MF, *Bentham on Stilts*, *supra* note 9, at 933.

Thus, MF cannot claim for the state the right to specify the meaning of a sentence. If a typical ex-convict, years after being released from prison, can be expected to feel like she is “still being punished” through her inability to find a job and her loss of previous social relations, a communicative theory of punishment must credit that interpretation of her punishment if it is reasonable. To the extent that the state has knowledge of or could reasonably foresee these post-prison outcomes, the ex-convict’s interpretation begins to look increasingly reasonable. We suspect that most people share the intuition that when the state causes negative post-prison outcomes through the method of punishment it selects, it is reasonable for offenders to believe that the state is continuing to communicate its condemnation.¹⁰⁴ Ignoring offenders’ reasonable interpretations of their punishments thus sacrifices one of the primary advantages that the CCR may have over competing theories—its commitment to treating convicts as responsible moral agents.

B. Linking Punishment and State of Mind

In addition to the foregoing claims about causation, retributivists may embed within the definition of punishment some notion of the state’s state of mind: if the punishing authority does not have the required mental state when inflicting harm, that harm is not punishment and thus not relevant to proportionality. Many retributivists, including MF, require that the punisher “intend” for a criminal to experience some negative outcome before that outcome can be understood as punishment. Thus, according to these retributivists, the post-prison effects of imprisonment are not punishment because the state did not intend them. We believe this position is untenable. Even if a multi-person entity such as “the state” could be understood as having a state of mind—which it most likely cannot—there is no basis for requiring intent before classifying a harm visited upon a criminal as punishment.¹⁰⁵

1. The Incoherence of the “State’s” State of Mind

The problem of attributing a subjective state of mind to an unaligned group of legislators, police, lawyers, judges, and guards who may have widely disparate intentions or beliefs severely complicates any attempt to insist that the

104. The reasonableness of the view that the state continues to speak to offenders even after incarceration is further buttressed by provisions for expunging criminal records. Presumably the state knows that the record continues to communicate something to and about the offender that will cease only when the offender’s record has been wiped clean.

105. Other scholars have criticized the role of intent in punishment theory and practice as well. See, e.g., Alice Ristroph, *State Intentions and the Law of Punishment*, 98 J. CRIM. L. & CRIMINOLOGY 1353 (2008); Thomas K. Landry, “Punishment” and the Eighth Amendment, 57 OHIO ST. L.J. 1607, 1611 (1996) (embracing a theory that includes as punishment “all that a legislature or sentencer expects and intends a prisoner to endure, including the physical setting of confinement and the quality and quantity of life’s daily incidents (e.g., food, clothing, and activities) over which prisoners are denied choice”).

state exhibit a particular mental state. To put it mildly (and to borrow a phrase), the state is a “they,” not an “it.”¹⁰⁶ Just as a group of legislators has no singular “intent,” it is impossible to aggregate the states of mind of the legislators who have passed a criminal law, the executive who has signed it into law, and the myriad police, prosecutors, judges, wardens, guards, probation officers, and other officials who have played some role in enforcing it. Many retributivists who include an element of the state’s state of mind in their description of punishment circumvent this problem by requiring only that “a[ny] human being” possess the necessary state of mind.¹⁰⁷ In other words, any person within the system will do. This strips the intent requirement of any meaningful bite. There is undoubtedly *some actor* who intends that prisoners suffer negative consequences after they are released and contributes to those consequences.

By contrast, MF do not indicate whose intent they believe is important. This question is particularly sticky for their theory because of their emphasis on the communicative message of condemnation from the state to the criminal. If communication is the touchstone of punishment, which actor within the state must intend to communicate the appropriate message? If a legislator who votes for a criminal law and the warden who incarcerates an offender express disagreement regarding whether the criminal has done anything wrong, has the state’s communicative effort been frustrated?

Consider the case of prison sexual assault. Officially, of course, sexual assault in prison is prohibited by statute: it is a crime, just as much as it would be were it to take place outside of prison.¹⁰⁸ At the same time, legislators undoubtedly know that sexual assault is rampant in American prisons. Some of them might intend that convicted criminals be subjected to sexual assaults; others might find this practice abhorrent (as we do). The same is true for judges, wardens, and prison guards, all of whom are undoubtedly aware of the prevalence of sexual assault in prison, and all of whom are capable of reducing its incidence or facilitating it, depending on the steps they take.¹⁰⁹ Some of these state actors might intend for sexual assaults to take place; others might not. How could one possibly determine the state’s intent?¹¹⁰

106. Cf. Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992).

107. Hugo Adam Bedau, *Feinberg’s Liberal Theory of Punishment*, 5 BUFF. CRIM. L. REV. 103, 112 (2001) (observing that Stanley Benn, Antony Flew, H.L.A. Hart, and John Rawls, among others, require only that some individual within the penal system intend a particular harm).

108. See Gray, *supra* note 13, at 131–32.

109. Judges might sentence vulnerable prisoners to lower-security facilities (or not); wardens might take steps to segregate prisoners who are known to be violent (or not); and so forth.

110. Of course, one might say that “people intend the likely results of their actions,” and thus attribute to the state an intention corresponding to whatever outcome was likely from the aggregated actions of the thousands of individuals involved. See, e.g., *United States v. Calderon-Pena*, 383 F.3d 254, 271 (5th Cir. 2004) (Smith, J., dissenting). Yet this would reduce the state’s “intent” to some combination of proximate causation (addressed above) and an inquiry into what

We need not wrestle these problems to the ground, for the post-imprisonment effects of prison constitute punishment under any plausible view of the state's necessary state of mind, as we will demonstrate. The important point is that if MF or other retributivists wish to drag the actual subjective state of mind of any state actor into the picture, they must explain why that actor's mental state is relevant and how it interacts with the mental states of other state actors, rather than relying on a fictionalized conception of the state as unitary actor. MF are thus burdened with the unenviable task of attempting to explain how the subjective intent of a wide variety of people could possibly determine whether a punitive message has been sent on behalf of the state.

2. Retribution, Communication, and Mental States

The critical question presented by the retributivists' attempt to impose some type of mental state requirement is *what* state of mind the state must possess. Those retributivists who attach a mental state requirement to the notion of punishment generally demand that punishment be "intentional."¹¹¹

MF appear to agree that the state must intend that the criminal suffer some harm or deprivation before that harm constitutes punishment.¹¹² But they do not offer a full explanation for why the state must intend the post hoc consequences of imprisonment. As an initial matter, they admit that the state is morally responsible for the *reasonably foreseeable* effects of its actions.¹¹³ "Reasonable foreseeability" is a far cry from intent; an action may have many reasonably foreseeable consequences that the actor does not intend. Indeed, "reasonable foreseeability" instead seems to invoke a state of mind more resembling negligence.¹¹⁴

If the state is morally responsible for the reasonably foreseeable effects of its actions, then on what grounds would retributivists such as MF rule out unintended but reasonably foreseeable (or foreseen) consequences? Though

events are reasonably foreseeable (addressed below). At that point, the notion of requiring "intent" loses all of its force.

111. Bedau, *supra* note 107, at 112 (attributing this view to Benn, Flew, Hart, and Rawls). Again, these retributivists demand only that *one individual* within the penal system have the necessary intent. Accordingly, their mental state requirement has little bite.

112. MF, *Bentham on Stilts*, *supra* note 9, at 970 ("Because the polity did not intend, authorize, or proximately cause these . . . post-punishment experiences or effects, they cannot plausibly carry any communicative message . . .").

113. *Id.* at 960 ("If Kolber's argument here is that retributivists should not disclaim moral responsibility for the reasonably foreseeable bad effects proximately caused by the actions and omissions over which they have control, we agree."). We have already addressed the question of which actions the state has "control" over in the preceding Section on causality. See *supra* Part II.A.

114. Of course, in criminal law the notion of negligence involves a normative component: a person is criminally negligent when she should be aware of a "*substantial and unjustifiable risk*." Model Penal Code § 2.02(2)(d) (1962) (emphasis added). Here, we mean no such normative judgment; we use the term "negligence" only to indicate that the actor knew or reasonably should have known of the harm, as a means of differentiating this state of mind from intent.

they never make their position entirely clear, MF appear to rely on grounds related to their emphasis on punishment as communication. MF seem to believe that communicative punishment *inherently* requires intent, or at least they mean to define it in such terms by fiat.¹¹⁵ Along these lines, the state only communicates whatever messages it intends to communicate.¹¹⁶

As an initial matter, this theory defies typical scholarly understandings of communication. The majority position among scholars of communication is that intent is not essential or even significant to communication.¹¹⁷ The speaker need not intend to send the particular message that the recipient receives, or indeed any message at all;¹¹⁸ the fact that a message has been sent is sufficient.¹¹⁹ Scholars even classify *unconsciously sent* messages as communication.¹²⁰ This is a far cry from the intent that MF say is necessary for punishment.

Furthermore, MF's conception does not comport with everyday intuitions about communication. Imagine a driver stuck in heavy traffic. Cars all around her are weaving in and out of lanes, cutting her off repeatedly in attempts to gain a few seconds along the packed highway. The driver realizes that she has no chance of reaching her destination on schedule and regrets waiting until the

115. See *supra* Part II.A.3.

116. MF, *Bentham on Stilts*, *supra* note 9, at 929.

117. For a small sampling of the many scholars who hold this position, see, for example, Mark L. Knapp et al., *Background and Current Trends in the Study of Interpersonal Communication*, in HANDBOOK OF INTERPERSONAL COMMUNICATION 3, 14–15 (Mark L. Knapp & John A. Daly eds., 3d ed. 2002) (describing a variety of perspectives on defining communication within the discipline and outlining broad areas of agreement, including the difficulty of identifying “intent” as an element of any communicative act); JOHN FISKE, INTRODUCTION TO COMMUNICATION STUDIES 1–2 (2d ed. 1990) (outlining assumptions behind a working definition of communication); STEVEN W. LITTLEJOHN, THEORIES OF HUMAN COMMUNICATION 6–8 (7th ed. 2002) (describing various working definitions of communication, including the view “that communication should include any behaviors that are meaningful to receivers in any way, whether intended or not”); TIM O’SULLIVAN ET AL., KEY CONCEPTS IN COMMUNICATION AND CULTURAL STUDIES 50 (2d ed. 1994) (explaining that many communication scholars “include all the symbolic means by which one person . . . affects another,” regardless of intentionality); RICHARD WEINER, WEBSTER’S NEW WORLD DICTIONARY OF MEDIA AND COMMUNICATIONS 134 (1996) (defining “communication” as “the transmission or exchange of information, signals, messages, or data by any means”); Peter A. Anderson, *When One Cannot Not Communicate: A Challenge to Motley’s Traditional Communication Postulates*, 42 COMM. STUD. 309 (1991) (defining communication to include information or signals received, whether intentionally or unintentionally sent); Thomas R. Nilson, *On Defining Communication*, 6 SPEECH TEACHER 10, 14–15 (1957) (arguing that an ideal working definition of communication must include unintentionally communicated messages); Glen H. Stamp & Mark L. Knapp, *The Construct of Intent in Interpersonal Communication*, 76 Q. J. SPEECH 282–99 (1990) (describing “intent” as a construct).

118. See, e.g., O’SULLIVAN ET AL., *supra* note 117, at 50.

119. See, e.g., Anderson, *supra* note 117, at 309.

120. See, e.g., Nilson, *supra* note 117, at 14–15; Y. Susan Choi, Heather M. Grey & Nalini Ambady, *The Glimpsed World: Unintended Communication and Unintended Perception*, in THE NEW UNCONSCIOUS 334 (Ran R. Hassin, James S. Uleman & John A. Bargh eds., 2005); 2 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION (Thomas McCarthy trans., 1987).

last moment and subjecting herself to such traffic. Frustrated, she slams her hand down on the center of her steering wheel, unintentionally causing her horn to let out a loud blast. Drivers around her turn their heads, assuming she is angry with them for their impatient behavior. But the driver is only expressing private frustration about her situation; she had no intention to convey any sentiment to the motorists surrounding her.

This is by no means an example of a perfect communication: the recipient has misunderstood the message that the speaker meant to communicate. But can there be any doubt that a communication has occurred? The driver has sent a message, one that surrounding motorists reasonably interpreted as expressing anger with their behavior. For her part, the driver, at minimum, should have foreseen that slamming her hand down on her steering wheel would trigger her horn; in all likelihood, she in fact did foresee (or perhaps even knew to a substantial certainty) that this would be the outcome. It is hard to imagine anyone believing that the driver did not communicate a message, albeit inadvertently. Similarly defying standard intuition is MF's contention that the state is not communicating when it sends a message that criminals will foreseeably understand as punitive.¹²¹

It is possible that retributivists in general, or MF in particular, mean to ignore both standard intuition and scholarly conceptions of communication and simply define a punitive communication as requiring intent. But if this is the case they must put forth a persuasive explanation of *why* intent should be required, which they have utterly failed to do.

Moreover, as we note above, the issue of whether an *offender has received* a condemnatory message is central to MF's theory.¹²² If the offender believes that the state is communicating its condemnation to him—and if society understands the message in the same terms¹²³—it is difficult to understand what importance could attach to the fictionalized “intent” of a disparate group of state actors. Perhaps MF will attempt to supply some rationalization. But it is difficult to imagine what that will be, even on MF's terms, because their theory so thoroughly rests on ordinary notions of disapprobation communicated by the state to the individual.

In the end, we are not convinced that the state's mental state is at all important to whether the state is punishing a criminal when it inflicts some sort of suffering. But we will assume that the state punishes a criminal when it

121. For instance, a prisoner subjected to sexual assault understands that the state has incarcerated him in a place where sexual assault is rampant and failed to protect him or allow him the means to protect himself. For many such prisoners, the state's message of condemnation by assault is undoubtedly quite clear.

122. MF, *Bentham on Stilts*, *supra* note 9, at 933 (“[T]he 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.”).

123. *Id.* at 934 (“[R]etributive punishment also performs important coinciding *expressive* functions.”) (emphasis in original).

causes some negative consequence and that negative consequence is at minimum reasonably foreseeable. MF admit that the state bears moral responsibility for the fate of the criminal when it inflicts some reasonably foreseeable harm.¹²⁴ If nothing else, this is a reasonable position of compromise. As we demonstrate below, there can be little doubt that the post-prison consequences of imprisonment—the “echoes of imprisonment”—are reasonably foreseeable to the state.

3. The “State’s” Mental State

What, then, is the proper state of mind to attribute to the state when it imposes negative post-prison consequences on former prisoners? At a bare minimum, these consequences are reasonably foreseeable to the state, a point which MF explicitly accept (at least in some cases).¹²⁵ The negative post-prison effects of imprisonment we described in *Happiness and Punishment*—disease,¹²⁶ long-term unemployment,¹²⁷ the breakup of marriages and difficulties in forming social ties¹²⁸—are not obscure phenomena. Numerous studies exist documenting all of these effects, and consensus is developing among scholars and other observers that prison causes substantial disruptions in post-prison life.¹²⁹ Indeed, as we wrote in *Happiness and Punishment*, “it is not news that convicted criminals face reduced opportunities—particularly economic—after release from prison and are more likely to opt for criminal activity as a result.”¹³⁰ In light of all of this evidence, the consequences of imprisonment should be reasonably foreseeable to policymakers in the American penal system.

For the majority of retributive theories, including MF’s theory of retribution as communication, policymakers’ bare awareness of post-prison harms is enough for these effects to constitute punishment. Nonetheless, we believe that negative post-prison consequences are more than reasonably foreseeable. In most instances, the state¹³¹ is actually aware that incarceration

124. See *supra* note 113.

125. MF, *Bentham on Stilts*, *supra* note 9, at 968 (conceding that “in some cases, however, the effects are reasonably foreseeable”).

126. See Michael Massoglia, *Incarceration, Health, and Racial Disparities in Health*, 42 L. & SOC’Y REV. 275 (2008); Michael Massoglia, *Incarceration as Exposure: The Prison, Infectious Disease, and Other Stress-Related Illnesses*, 49 J. HEALTH & SOC. BEHAV. 56 (2008); Schnitker & John, *supra* note 94.

127. See WESTERN, *supra* note 91, at 89–91; Western, Kling & Weiman, *supra* note 91; PAGER, *supra* note 91.

128. Leonard M. Lopoo & Bruce Western, *Incarceration and the Formation and Stability of Marital Unions*, 67 J. MARRIAGE & FAM. 721 (2005).

129. See sources cited *supra* notes 91, 94, and 126–128.

130. BBM, *Happiness and Punishment*, *supra* note 1, at 1067 & n.142 (citing numerous studies of sex offenders as a small sampling of the substantial literature on this point).

131. Of course, as we have explained, we do not believe that it is coherent to describe “the state,” a collection of individuals, as having a particular subjective state of mind. But this is MF’s difficulty, not ours. If MF disagree with our analysis, they must first establish a workable

creates a substantial risk of disease, long-term unemployment, and the breakup of family ties—a state of mind akin to “recklessness.”¹³² It is not a mere possibility that criminals who leave prison will suffer from post-prison deprivations caused by their period of imprisonment; it is highly likely.¹³³ In addition, there is every reason to believe that the state is well aware of these post-prison consequences. State actors would have to be entirely deaf—or deliberately indifferent—to the consequences of their decisions to avoid learning of the suffering inflicted upon convicted criminals after they leave prison.¹³⁴

Moreover, state officials regularly behave as if they understand the difficulties that prisoners face when reintegrating into society. For instance, even jurisdictions that have long since given up on the notion of rehabilitating prisoners¹³⁵ still run programs designed to ease former prisoners’ transitions back into life outside prison.¹³⁶

understanding of what it means for a collection of individuals to share a subjective state of mind.

132. See, e.g., Model Penal Code § 2.02(2)(c) (1962) (“A person acts recklessly . . . when he consciously disregards a substantial and unjustifiable risk . . .”). Again, we mean no normative judgment here. We use the term “recklessness” not to indicate that any harm was “substantial and unjustifiable,” but to illustrate that the state not only should be aware but *is* aware of the post-prison harms it is causing. We employ this term, familiar to the criminal law, in order to provide a benchmark for evaluating the state’s state of mind. For most crimes an actor’s recklessness is sufficient to establish her guilt. *Id.* at § 2.02(3).

133. See sources cited *supra* notes 91 & 94; see also BBM, *Happiness and Punishment*, *supra* note 1, at 1049–53.

134. Scholarly research aside, the problems that former prisoners face upon their release from prison have been widely reported in the popular press. See, e.g., *Bob Edwards Weekend*, Sirius Radio (Feb. 28, 2009) (featuring author and ex-convict Louis Ferrante describing the lack of job, family, and educational resources available to ex-convicts); Rich Hein, *Group Seeks to Help Those Freed from Death Row*, CHI. SUN-TIMES, Mar. 2, 1999, at 13 (featuring convict describing having nothing when he was released from prison); Nathan Koppel & Mark Whitehouse, *More Ex-Cons on the Streets, Fewer Jobs—States Release More Inmates to Save Money Amid the Worst Employment Climate in Years; One Man Sends Out 500 Resumes*, WALL ST. J., Mar. 20, 2010, at A3 (“In most cases . . . ex-cons still get no more than a bus ticket and pocket money when they emerge from prison—and are often burdened with parole fees and child-support debts.”); Bill Leukhardt, *Conference Focuses on Plight of Ex-Convicts*, HARTFORD COURANT, Jan. 16, 2003, at B2 (describing inmates who refuse to leave jail because they have no home or job skills); Phil Manzano, *Lifestyle Traps Ex-Convicts*, OREGONIAN, Jan. 25, 1993, at A01 (“There’s no place to get on your feet” for ex-convicts.); Dan Pacheco, *A Home for Healing: Dismas Humanizes the Transition for Parolees*, DENV. POST, Dec. 28, 1994, at F-01 (Living) (featuring ex-convict describing logistical and emotional difficulties facing recent parolees); Joyce Purnick, *19 Years Late, Freedom Has a Bitter Taste*, N.Y. TIMES, Oct. 3, 2005, at B1 (featuring exonerated prisoner describing having lost his job, wife, retirement benefits, parents, and housing, and becoming estranged from his son, as a result of imprisonment).

135. Rehabilitation has fallen almost completely out of favor as a justification or objective of punishment. See SANFORD H. KADISH, STEPHEN J. SCHULHOFER & CAROL S. STEIKER, *CRIMINAL LAW AND ITS PROCESSES* 97–101 (8th ed. 2007).

136. See Shawn Bushway, Urban Institute Reentry Roundtable Discussion Paper, *Employment Dimensions of Reentry: Understanding the Nexus Between Prisoner Reentry and Work* (May 19–20, 2003), available at <http://www.caction.org/rrt/articles/BUSHWAY-EMPLOYMENT%20DIMENSIONS.pdf>; Office of Justice Programs (Reentry), U.S. DEP’T OF JUSTICE, <http://www.reentry.gov/>; National Institute of Corrections, *Transition from Prison to Community Initiative*, available at <http://www.nicic.org/pubs/2002/017520.pdf>.

There can be little doubt that the effects of imprisonment are at minimum reasonably foreseeable to the state, and in all likelihood the state is actually aware of them. On either account, these “echoes of imprisonment” form part of the state’s punishment of the criminal.

C. A Retributive Theory of Comparative Fault?

In a final attempt to avoid classifying post-prison effects as punishment, MF interpose what amounts to a theory of retributive “comparative fault”: if the criminal could have foreseen and avoided the punitive harm that would result from her criminal conduct, then she, and not the state, is responsible for it.¹³⁷ They explain: “Importantly, while retributivist institutions bear responsibility for what their agents proximately cause, the same maxim or principle applies to *offenders*. To that end, it is reasonable to hold offenders responsible for the bad and reasonably foreseen effects they cause.”¹³⁸

This argument sounds in theories of comparative negligence that are familiar from tort law,¹³⁹ yet it suffers from two decisive flaws. The first is that in the *criminal law*, the joint fault of a second actor is never understood to eliminate the first actor’s responsibility or criminal liability.¹⁴⁰ If two unconnected individuals are involved in recklessly causing the death of a third person, they are both guilty of murder, even if the death could not have occurred without both of their independent actions.¹⁴¹ Even in the majority of *tort* jurisdictions, the joint fault of a second actor only mitigates, and does not eliminate, the first actor’s responsibility.¹⁴²

If MF’s only point is the observation that the criminal should bear some of the moral responsibility for the consequences of his actions, then we certainly agree. But if MF intend to argue that the criminal’s comparative fault completely absolves the state of *any responsibility* for what penal consequences may follow (as apparently they do),¹⁴³ their claim finds no moral or theoretical

137. MF, *Bentham on Stilts*, *supra* note 9, at 961.

138. *Id.*

139. See generally VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* (3d ed. 1994).

140. So far as we are aware, the only standard criminal doctrine that incorporates a theory of comparative fault (either implicitly or explicitly) is the doctrine of provocation. See, e.g., *Mahe v. People*, 10 Mich. 212 (1862) (allowing a defendant to present evidence that his wife’s infidelity reasonably provoked him to kill). Even there, however, provocation only mitigates the crime the defendant has committed; it does not eliminate it. See, e.g., MODEL PENAL CODE § 210.3(1)(b) (1962) (classifying a reasonably provoked murder as manslaughter). Of course, the intervening actions of one individual may break the chain of proximate causation and thus absolve an earlier actor of responsibility. But proximate cause is an issue separate from comparative fault, and one that we have already addressed above. See *supra* Part II.A.

141. See, e.g., *People v. Arzon*, 401 N.Y.S.2d 156 (1978) (finding defendant guilty of murder even though victims would not have died were it not for a second, unrelated act of arson).

142. See SCHWARTZ, *supra* note 139, at ch. 1 (noting the avalanche of torts jurisdictions adopting comparative negligence regimes in the second half of the twentieth century).

143. MF, *Bentham on Stilts*, *supra* note 9, at 971 (arguing that moral blame for contingent harms an offender experiences after his state-imposed punishment due to choices of third parties

support within the criminal law—the field their theory purports to address.¹⁴⁴

Yet this is not the main drawback of MF's comparative fault theory. The second and larger problem is that it proves far too much. MF believe that if the criminal can reasonably avoid a penal harm by *simply not committing a crime* in the first place, that harm is not punishment.¹⁴⁵ But there is no limitation to this principle. Consider the implication of their argument: if the criminal was in a better position than the state to avoid the harm of *being sent to prison* (by simply not committing a crime), then *prison* is not punishment. MF certainly could not agree with this claim—and nor would anyone else, we imagine—but it is precisely the conclusion their theory of comparative fault compels. For that reason alone, it cannot stand.

CONCLUSION

Society punishes criminals by imposing negative experiences on them. Whatever goals the state seeks thereby to achieve, be they retributive or utilitarian, depend upon imposing negative experience in proportion to the severity of the crimes committed. To do so, the state should use the best evidence available for gauging the typical level of negativity associated with punishments such as fines and incarcerations. This includes foreseeable negative outcomes caused by these punishments, including the harm that lingers after inmates complete their time behind bars. To the extent that the goal of punishment is to communicate condemnation to offenders, communicating the appropriate message depends upon imposing appropriate, proportional levels of negative experience. Because the experience of life is subjective, it would be a mistake for the law to ignore lessons from social science when deciding how—and how much—to punish.

should be placed “on the offender—or, if the harms are unreasonable, on the third parties making those choices”).

144. It is worth noting again that MF admit that the state is morally responsible for the reasonably foreseeable effects of its actions. *Id.* at 960. Yet MF blithely ignore this moral responsibility simply because it is shared with the criminal, who could have refrained from committing a crime. This unjustified whitewashing of the state's role is, by itself, a sufficient reason to reject MF's theory.

145. *Id.* at 969 (“Moreover, the harmful effects of prison in post-prison life are also reasonably foreseeable to competent would-be offenders and they are in the best position to avoid those harms, since they can avoid criminality altogether.”).