

PUNISHMENT AS SUFFERING

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ABSTRACT

In a series of recent high-profile articles, a group of contemporary scholars argue that the criminal law is a grand machine for the administration of suffering. The machine requires calibration, of course. The main standard we use for ours is objective proportionality. We generally punish more serious crimes more severely and aim to inflict the same punishment on similarly situated offenders who commit similar crimes. In the views of these authors, this focus on objective proportionality makes ours a rather crude machine. In particular, it ignores the fact that 1) different offenders may suffer to a different degree when subjected to the same punishment; 2) different offenders may have different happiness baselines, which may lead to disparities in absolute, subjective, and comparative happiness-to-suffering ratios among offenders subject to the same punishment; and 3) offenders' self-reported states of happiness and suffering vary over the course of a sentence, revealing inaccuracies in our objective assessments of severity.

These scholars contend that a more sophisticated and rational approach would be to calibrate punishment according to the amount of suffering produced, trading objective proportionality for proportionality in subjective suffering. Looking forward to a day when advances in neuroscience and psychology will provide us with reliable qualitative and quantitative metrics of suffering, these defenders of punishment-as-suffering (“PAS”) are setting the stage now, arguing that no matter our theory of criminal law and punishment—be we retributivists or utilitarians—we are obliged to dial the machine according to who is in its thrall and to titer both the form and extent of punishment so as to achieve just the right kind and amount of suffering.

This view of the criminal law may strike some readers as troubling. It should. The problem with PAS can be traced to a crucial equivocation between “punishment,” which is a fundamentally normative concept, and “suffering,” which is one of punishment’s contingent effects, and a derivative failure to distinguish between the justification of punishment and the mechanics of penal practice. Once the elided distinction between punishment and suffering is reconstituted, it is clear that PAS has no bite on traditional theories of punishment, which define punishment objectively. To the contrary, most punishment theorists ought to reject outright the claim that punishment should be calibrated according to the subjective suffering it inflicts. That conclusion is bolstered by the uncomfortable outcomes PAS scholars deploy against objective theories of punishment as purported *ad absurdum*. While admittedly absurd, those results derive not from premises indigenous to traditional theories but from PAS’s distinctive claim that punishment is suffering.

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I. INTRODUCTION

According to some contemporary scholars, the criminal law is a grand machine for the generation and administration of suffering.¹ The machine requires calibration, of course. The main standard we use for ours is objective proportionality.² We punish more serious crimes objectively more severely and aim to inflict the same objective punishment on similarly situated offenders who commit similar crimes.³ In these authors' view, this focus on objective proportionality makes ours a rather crude machine. In particular, it ignores the fact that 1) different offenders may suffer differently or to a different degree when subjected to the same penal sanction;⁴ 2) different offenders have different happiness baselines, which may lead to disparities in absolute, subjective, and comparative happiness-to-suffering ratios among offenders subject to the same penal sanction;⁵ and 3) offenders' self-reported states of happiness and suffering vary over the course of a sentence, revealing inaccuracies in our assessments of both the amount of suffering inflicted and its distribution over time.⁶

The authors who hold these views propose that a more sophisticated and rational approach would be to calibrate punishment according to the amount of suffering produced, trading objective

¹ See John Bronsteen, Christopher Buccafusco, & Jonathan Masur, *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1037 (2009); Adam Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 212 (2009). This Article argues the contrary.

² While usually credited to retributivist theories of punishment, proportionality is equally a commitment of utilitarians. See, e.g., CESARE BECCARIA, OF CRIMES AND PUNISHMENTS 73-76 (Jane Grigson, trans., Marsilio Publishers 1996) (1764).

³ *Griffith v. Kentucky*, 479 U.S. 314 (1987).

⁴ See generally, Kolber, *supra* note 1.

⁵ See generally, Adam Kolber, *The Comparative Nature of Punishment*, 89 B.U. L. REV. 1565 (2009).

⁶ See generally, Bronsteen et al., *supra* note 1.

proportionality for proportionality in suffering measured subjectively,⁷ comparatively,⁸ or diachronically.⁹ Looking forward to a day when functional magnetic resonance imaging (“fMRI”), sophisticated brain mapping techniques, pain studies, and other advances in neuroscience and psychology will provide us with reliable qualitative and quantitative metrics of happiness and suffering,¹⁰ these writers are setting the stage now, arguing that no matter our theory of criminal law and punishment—be we retributivists or utilitarians—we are obliged to adjust the machine according to who is in its thrall and to titer both the form and extent of punishment so as to achieve just the right kind and amount of suffering in each case.¹¹

This view of the criminal law may strike some readers as troubling, and so it should. Immanuel Kant long ago warned against “crawl[ing] through the windings of eudaemonism” when deciding whom to punish and what form punishment ought to take.¹² All this talk of suffering and happiness smacks of precisely the reliance on hedonic economies to answer normative questions that Kant railed against. Nevertheless, defenders of punishment-as-suffering (“PAS”) contend that even retributivists, who reject on moral grounds attempts to calibrate punishment by reference to ratios of suffering-to-happiness, are obligated on pains of contradiction to look forward to a day when sensors and algorithms will identify a measurable and consistent inter-subjective quantum of suffering and thereby bring order, fairness, and reason to the criminal law and punishment.¹³ The

⁷ Kolber, *supra* note 1.

⁸ Kolber, *supra* note 5.

⁹ Bronsteen et al., *supra* note 1.

¹⁰ Kolber, *supra* note 1, at 222-23.

¹¹ *See, e.g.*, Bronsteen et al., *supra* note 1, at 1069.

¹² IMMANUEL KANT, *METAPHYSICS OF MORALS* 105 (Mary Gregor, trans., Cambridge Univ. Press 1996) (1785).

¹³ Bronsteen et al., *supra* note 1, at 1068-73; Kolber, *supra* note 5, at 35-36; Kolber, *supra* note 1, at 236.

same is true, they conclude, for those classic utilitarians who measure punishment on objective rather than subjective grounds.¹⁴

There is no doubt that PAS is “provocative” and addresses “an underappreciated problem in criminal law theory,” namely “[w]hat is the relevance of the criminal defendant’s subjective experience of punishment?”¹⁵ Specifically, PAS raises important questions for under-theorized areas of the criminal law and practice, including the proper role of mercy and nettlesome practical considerations relating to penal technology. However, pursuit of these important issues does not require a fundamental critique of traditional theories of criminal punishment. Nevertheless, PAS scholars have made undermining retributivism and classic utilitarianism a focus of their project. Those efforts fail to persuade because they indulge a key conceptual mistake, equivocating between a normative concept, “punishment,” and its contingent effects, including suffering.¹⁶ Also problematic is PAS’s treatment of all suffering as fungible.¹⁷ For example, PAS scholars argue that

¹⁴ Kolber allows that those who view punishment solely as a tool for incapacitation may be excused since they, at least, are not so distracted by suffering. *See* Kolber, *supra* note 1, at 218.

¹⁵ Kenneth W. Simons, *Retributivists Need Not and Should Not Endorse the Subjectivist Account of Punishment*, 109 COLUM. L. REV. SIDEBAR 1 (2009), http://www.columbia.edu/~kws1000/Sidebar/volume/109/1_Simons.pdf. This Article in no way denies the fact that suffering matters. *See infra* Part VI.

¹⁶ *See* Carlos Nino, *A Consensual Theory of Punishment*, in PUNISHMENT: A PHILOSOPHY AND PUBLIC AFFAIRS READER 94, 102-05 (A. John Simmons ed., 1994) (arguing that punishment is fundamentally a normative concept); Jean Hampton, *The Moral Education Theory of Punishment*, in PUNISHMENT: A PHILOSOPHY AND PUBLIC AFFAIRS READER 112, 128 (A. John Simmons ed., 1994) (distinguishing “punishment,” which is a “disruption of the freedom to pursue the satisfaction of one’s desires,” from subjective experiences of punishment, which are often, but not always, painful); JOEL FEINBERG, DOING AND DESERVING 118 (1970) (arguing that punishment is a symbolic medium for expressing moral condemnation and that “[g]iven our conventions, of course, condemnation is expressed by hard treatment” but that “[p]ain should match guilt only insofar as its infliction is the symbolic vehicle of public condemnation”). I am now and eternally in debt to Amanda Pustilnik for her revelatory work on pain, in which she elaborates the temptations of this mistake in multiple fields of law. *See, e.g.*, Amanda Pustilnik, *Violence on the Brain: A Critique of Neuroscience in Criminal Law*, 44 WAKE U. L. REV. 183 (2009).

¹⁷ *See, e.g.*, Bronsteen et al., *supra* note 1, at 1071.

suffering experienced by an offender if he is kidnapped and tortured before arrest,¹⁸ suffering caused by prisoner-on-prisoner violence,¹⁹ and suffering consequent of post-sentence discrimination by private parties²⁰ all count in the hedonic arithmetic of “punishment.”

Retributivists reject these views. Retributivists hold that punishment is fundamentally a normative concept. A particular punishment is justified only if and to the extent it is deserved. While retributivists may recognize suffering as an experiential window into punishment, they maintain that subjective suffering is neither a necessary nor a sufficient condition of punishment.²¹ The PAS critique of retributivism ignores this defining feature of retributivist theory and then purports to derive a set of counter-intuitive outcomes, leading PAS scholars to conclude that retributivism is unworthy of defense and perhaps is self-contradictory.²² For example, PAS argues that, because different offenders experience the same penal sanction differently, retributivists must, out of faith to proportionality, impose objectively weak sentences on rich and sensitive offenders and objectively brutal sentences on offenders toughened by poverty and privation even if they commit the same crime.²³ However, once the elided distinction between punishment and suffering is reconstituted, it is clear not only that PAS has no bite on retributivism, but that retributivists ought to reject outright the claim that punishment should be calibrated according to the subjective quantity of suffering it inflicts on individual offenders. That conclusion is bolstered by the uncomfortable outcomes PAS scholars deploy against retributivism as purported ad absurdum.

¹⁸ Kolber, *supra* note 5, at 1587-88.

¹⁹ Kolber, *supra* note 1, at 188.

²⁰ Bronsteen et al., *supra* note 1, at 2, 1050-55.

²¹ Feinberg, *supra* note 16, at 116-118.

²² *Id.*, at 31-36; Kolber, *supra* note 5, 1582-83; 1600-06; Kolber, *supra* note 1, at 199-216.

²³ Kolber, *supra* note 1, at 183, 191-92.

While admittedly absurd, those results derive not from premises indigenous to retributivism but from the distinctive PAS claim that punishment is suffering.

PAS is also hard to square with utilitarian theories of punishment. Again, the culprit is the reduction of punishment to suffering. For those who advocate rehabilitation or incapacitation, subjective suffering is purely incidental and has no theoretical role to play except, perhaps, at the far margins. PAS may appear on first glance to have more appeal for deterrence theorists, for whom the prospect of precisely calibrating suffering promises an elegant parsimony.²⁴ However, there is good reason to pause before indulging this intuition. Utilitarians are not behaviorists, at least not in the sense suggested by PAS's focus on subjective suffering. The most serious contributors to the tradition have much more sophisticated views of human beings, their possibilities, and their standards of reward and loss, happiness and despair.²⁵ Even a thin understanding of the views of human nature and possibility held by eudaemonists such as Aristotle, Mill, and their contemporary heirs²⁶ raises serious questions for PAS. Setting aside these richer accounts of utilitarianism, there is good reason to suspect the conclusions of PAS scholars on more technical grounds.²⁷ For example, deterrence turns on potential offenders' anticipated suffering if punished. For both general and

²⁴ Bronsteen et al., *supra* note 1, at 1074-75.

²⁵ See Martha Nussbaum, *Who Is the Happy Warrior? Philosophy Poses Questions to Psychology*, 37 J. LEGAL STUD. 81 (2008) (criticizing the thin account of human agents endorsed by the psychology literature of hedonic flow).

²⁶ Richard Kraut and Martha Nussbaum are two of the most compelling contemporary voices of ancient liberalism. See, e.g., RICHARD KRAUT, *WHAT IS GOOD AND WHY: THE ETHICS OF WELL-BEING* (2007); MARTHA NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, AND SPECIES MEMBERSHIP* (2006); Martha Nussbaum, *Capabilities as Fundamental Entitlements*, 9 FEMINIST ECON. 33 (2003).

²⁷ While perhaps not the most nuanced, Judge Richard Posner is one of the most prominent of the contemporary technical utilitarians. As contributors to the PAS literature note, he too resists the account of punishment as suffering advanced by PAS. See Kolber, *supra* note 1, at 194n.36.

specific deterrence theorists, it is hard to see how post hoc accounts of actual suffering would add to the calculus when ex ante perception of potential suffering is what counts.²⁸

The foregoing suggests a far more ambitious agenda than could possibly be accomplished here. In particular, a full account of the rich traditions in retributive and utilitarian approaches to criminal law and punishment is impossible in this Article. The more modest goal here is to provide credible grounds for the claim that PAS indulges a key conceptual error of its own design which is not grounded in the mainline arguments set forth by the theoretical traditions PAS purports to dismantle. This is an agenda in equal parts rehabilitative, critical, and constructive, and is pursued with the explicit purpose of setting the stage for a more rigorous exchange with PAS scholars going forward. Part II provides an exegesis of PAS. Part III engages the PAS claim that punishment is suffering on its own terms to expose key conceptual gaps in PAS. Part IV defends retributivism. Part V provides a brief defense of utilitarianism. Part VI concludes by highlighting the important contributions PAS can make in debates about penal practice and the role of mercy in criminal law. There I recognize that the fact that some punitive technologies produce excessive incidental suffering is not trivial. To the contrary, proper management of penal practices ought to minimize incidental suffering. However, this is a practical imperative which, even if granted, cannot be used as a lever to unseat objective theories of criminal punishment. Rather, the valid conclusions will be of a different order. For example, the empirical observations that drive PAS may require abandoning some penal practices because they produce large and unavoidable amounts of incidental suffering. Those observations may also argue for modifying the circumstances of some incarcerated offenders who experience levels of incidental suffering beyond those we are willing to accept. Finally, demonstrations of excessive incidental suffering may provide good moral or policy grounds

²⁸ Bronsteen, Buccafusco, and Masur note this “asymmetry.” See Bronsteen et al., *supra* note 1, at 1060-61.

for acts of mercy. Were PAS scholars to pursue a careful accounting of all suffering incidental to punishment for any of these applications, they would provide invaluable contributions to moral, criminal, and penal theory. However, as a logical matter, those insights do not threaten the coherency or persuasiveness of traditional theories of punishment which define punishment objectively, not subjectively.

II. THREE VERSIONS OF PUNISHMENT AS SUFFERING

PAS is inspired by a faith in the sciences and social sciences as sources for public norms.²⁹ While this turn is not new to penology or the criminal law,³⁰ the science of interest to PAS scholars is of more recent vintage than the psychology and sociology that inspired Bentham's panopticon³¹ and the Model Penal Code's interests in rehabilitation.³² Some PAS scholarship draws its inspiration from present and promised breakthroughs in the neurosciences, and particularly brain imaging and mapping capabilities,³³ which allow neurologists and psychologists to assign correlations between subjective mental states and activity in different brain centers by monitoring comparative oxygenation. Other PAS work focuses on social and behavioral psychology with a special interest in survey work documenting subjects' self-reporting of happiness.³⁴ While distinct in many ways, the scientific literature in these areas shares an interest in quantifying or describing in precise physical or

²⁹ Bronsteen et al., *supra* note 1, at 1037; Kolber, *supra* note 4 at 1599n.89; Kolber, *supra* note 1 at 222-23.

³⁰ See generally MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* (1979).

³¹ JEREMY BENTHAM, *THE PANOPTICON WRITINGS* (Miran Bozovic ed., Verso Books 1995) (1987).

³² It is worth noting that the American Law Institute is poised to abandon the commitment to utilitarian concerns as the sole justification of punishment in the Model Penal Code. See *infra* note 171.

³³ Kolber, *supra* note 1 at 222-23

³⁴ Bronsteen et al., *supra* note 1. The psychology literature on happiness has been applied to other areas of law as well. See, e.g., Peter Huang & Rick Swedloff, *Authentic Happiness and Meaning at Law Firms*, 58 SYRACUSE L. REV. 335 (2008); John Bronsteen, Christopher Buccafusco, & Jonathan Masur, *Hedonic Adaptation and the Settlement of Civil Lawsuits*, 108 COLUM. L. REV. 1516 (2008).

psycho-social terms subjective mental states. What drives PAS is the intuition that this potential descriptive capacity has revolutionary normative significance.³⁵

There is debate about the scientific merits of studies upon which PAS scholars rely as there is PAS scholars' reading of that science.³⁶ It is beyond the expertise of this author to take sides in these contests. Fortunately, it is not necessary to do so. For present purposes, we can join PAS advocates in noting that much of this contemporary neuroscience and happiness research is intriguing. The concern here is to determine whether and to what extent we should endorse PAS scholars' claims that these early results from neuroscience and behavioral psychology should make us question the coherency of traditional theories of criminal law, their applications to punishment, or both. This Part sets the stage by providing a brief exegesis of claims made by the most prominent recent contributors to PAS.

A. The Subjective Experience of Punishment

In his provocative essay “The Subjective Experience of Punishment,” Adam Kolber argues that prevailing theories of criminal law and punishment must take into account subjective experiences of punishment.³⁷ He further contends that doing so produces counter-intuitive results that should lead us to question if not reject those theories. His argument gets off the ground by noting that people may experience different subjective mental states in response to the same stimulus. In particular, offenders sentenced to the same punishment—ten days' imprisonment,

³⁵ Bronsteen et al., *supra* note 1 at 1055-81.

³⁶ See, e.g., Nussbaum, *supra* note 25; John Bickle, *Précis of Philosophy and Neuroscience: A Ruthlessly Reductive Account*, 4 PHENOMENOLOGY & COGNITIVE SCI. 231 (2005); Huib de Jong & Maurice Schouten, *Ruthless Reductionism*, 18 PHIL. PSYCHOL. 473 (2005); John Bickle, *Psychoneural Reduction of the Genuinely Cognitive: Some Accomplished Facts*, 8 PHIL. PSYCHOL. 265 (1995).

³⁷ Kolber, *supra* note 1. See also JEREMY BENTHAM, *THE PRINCIPLES OF MORALS AND OF LEGISLATION* 43-69 (1907); Nigel Walker, *Legislating The Transcendental: von Hirsch's Proportionality*, 51 C. L. J. 530, 533-34 (1992).

say—may and often do experience qualitatively and quantitatively different “disvaluable mental states.”³⁸ The point is hard to contest and is not trivial. To borrow one of Kolber’s examples, a prisoner who suffers claustrophobia will suffer more and differently in a six-by-eight foot cell than an inmate who does not.³⁹ Similarly, literature relied upon by other PAS scholars shows that many prisoners adapt to incarceration fairly quickly while others do not.⁴⁰ Setting aside idiosyncratic factors shaping subjective mental states, some prisoners just have a rougher time of it. Some are wrongfully convicted; others not. Some are sent to prison for the first time from relatively secure and staid lives; others are repeat offenders from rough backgrounds who have extensive experience with incarceration. Some inmates are beaten and raped; others are not. These objective differences are bound to produce different quantities and qualities of “disvalue”⁴¹ even among individuals with similar neuropsychological makeup when subjected to the same “punishment.”

In Kolber’s view, the fact that objectively identical punishments cause different kinds and quantities of disvalue has obvious normative significance. For example, he points out quite rightly that retributivists believe that punishment ought to be proportionate in both absolute and comparative terms.⁴² That is, punishment must be proportionate to the crime for which it is

³⁸ Kolber, *supra* note 1, at 187n.5, 215, 216.

³⁹ *Id.* at 190. While not at all trivial for practical penology, as is argued below, the example holds no sway in core theoretical debates. That is simply because the suffering a claustrophobe feels in the form of severe anxiety is incidental to incarceration as a punitive constraint on liberty. There is no contest that incidental suffering secondary to objectively justified punishment may raise independent moral, constitutional, legal, or institutional questions; incidental suffering may even rise to the level that amelioration or adaptation of penal technology is required. However, these practical issues need not and do not pose a challenge to traditional theories of punishment because punishment is neither justified nor measured by its ability to cause suffering.

⁴⁰ Bronsteen et al., *supra* note 1, at 1046-49.

⁴¹ See Kolber, *supra* note 1, at 187n. 5, 213n. 88, 215, 216, 220. As is argued below, this choice of words, by invoking an economy of pleasure and pain, suggests that something has gone wrong in PAS’s attack on retributivism. See *infra* Part IV.

⁴² Kolber, *supra* note 1, at 199.

inflicted and to the blameworthiness of the offender. Punishment also ought to be proportionate across cases in keeping with the familiar principle that like cases should be treated alike.

Kolber claims that the imperative of proportionality commits retributivists to some uncomfortable conclusions. In particular, on pains of violating proportionality, he argues that retributivists must give sensitive offenders objectively less severe punishments and insensitive offenders objectively more severe punishments no matter the source and nature of their sensitivities. Retributivists who refuse to adjust objective punishments to accommodate the individual sensitivities and circumstances of offenders run afoul of absolute proportionality according to Kolber because they risk producing more suffering in individual cases than is proportionate to the crime. Failure to titer punishment according to subjective sensitivities also compromises comparative proportionality because offenders whose crimes are in all relevant respects identical and who receive the same punishment may nevertheless experience different quanta of suffering.⁴³

Depending upon the future goal they hope to achieve, utilitarians are similarly obliged to calibrate suffering on an individual basis when inflicting punishment on Kolber's view. Utilitarian theories of criminal justice are heirs to a robust moral theory⁴⁴ captured by John Stuart Mill in the principle "that actions are right in proportion as they tend to promote happiness; wrong as they tend to produce the reverse of happiness."⁴⁵ In terms comfortable for PAS, Mill defines "happiness" as "pleasure and the absence of pain" and "unhappiness" as "pain and the privation of pleasure."⁴⁶ As Kolber points out, this primary commitment to an economy of pain and pleasure cashes out for most utilitarians as a balancing of the pain imposed by punishment and the pain prevented through

⁴³ *Id.*, at 187, 215-16.

⁴⁴ JOHN STUART MILL, *UTILITARIANISM* 48 (George Sher ed., 1979) (1861).

⁴⁵ *Id.* at 7.

⁴⁶ *Id.*

specific deterrence, general deterrence, rehabilitation, and incapacitation.⁴⁷ No matter which of these goals one sets, Kolber contends that individual calibration of punishment based on subjective experiences of disutility are called for on utilitarian grounds lest punishment produce surplus suffering and therefore suboptimal ratios of happiness and pain.⁴⁸

In the case of deterrence justifications, Kolber contends, this leads to the same uncomfortable results confronted by retributivists, including a commitment to subject sensitive offenders to objectively less severe treatment than insensitive offenders lest individual punishments or penal systems more broadly inflict more suffering than is necessary to achieve specific or general deterrence goals. Nevertheless, Kolber maintains that, unlike retributivists, utilitarians are not strictly committed to proportionality and therefore may be able to defend a policy of inflicting objectively equivalent punishments on objectively similar offenders regardless of differences in subjective experiences of disutility if doing so serves external goals.⁴⁹ However, Kolber maintains that this does not excuse utilitarians from recognizing potential disparities between actual subjective suffering and the minimal suffering justified by deterrence or other utilitarian goals; rather, it is a cost that must be justified on a systemic level, where offenders are means to larger ends.⁵⁰

B. The Comparative Nature of Punishment

In another article, Adam Kolber argues that “we must understand the burdens of incarceration in comparative terms” and not merely subjectively.⁵¹ The central insight underlying

⁴⁷ Kolber, *supra* note 1, at 216-17.

⁴⁸ *Id.*

⁴⁹ *Id.* at 216-220, 230-35.

⁵⁰ *Id.* at 198.

⁵¹ Kolber, *supra* note 5, at 1573.

this view is that we each have different happiness-to-suffering ratios (“HSRs”) at baseline.⁵² Kolber contends that the point of punishment is to reduce the offender’s HSR by inflicting pain or reducing happiness.⁵³ Based on that claim, he argues that the relevant measure of severity for any particular punishment is the degree and quality of difference it is able to achieve between baseline and punishment HSRs.⁵⁴ Consistent with his earlier work, Kolber argues that the difference in HSRs before, during, and after punishment must be measured subjectively.⁵⁵

On Kolber’s view, traditional criminal law theorists implicitly assume that the goal of punishment is to achieve an absolute HSR in each case.⁵⁶ He argues that once we accept the realities of comparative punishment, we find that there is good reason to doubt the common intuitions about punishment severity derived from this absolutist view. The core moves echo and reinforce his earlier work on subjective experiences of punishment.

Kolber once again focuses on the retributivist commitment to absolute and comparative proportionality.⁵⁷ If the goal of punishment is to achieve a particular HSR, then proportionality on

⁵² *Id.* at 1571-73.

⁵³ *Id.* at 1573-75.

⁵⁴ *Id.* Kolber grounds this argument in Joel Feinberg’s influential work on measures of harm in the tort context. *Id.* at 1571-73 (citing JOEL FEINBERG, *Wrongful Life and the Counterfactual Element in Harming*, in FREEDOM AND FULFILLMENT 3, 7 (1992), and JOEL FEINBERG, HARM TO OTHERS 35-36, 204 (1984)). In another important essay Feinberg analyzes the differences between comparative and noncomparative conceptions of harm and points out that noncomparative measures of harm and justice play a dominant role in the criminal field. See Joel Feinberg, *Noncomparative Justice*, 83 PHIL. REV. 297, 300-01, 311-13 (1974) [hereinafter *Noncomparative Justice*]. Elsewhere, Feinberg provides a muscular rejection of subjective suffering as a goal, measure, or justification of punishment. See Feinberg, *supra* note 16, at 116-118.

⁵⁵ Kolber, *supra* note 5, at 1573-75. There is a credible argument to be made that Bronsteen, Buccafusco, and Masur’s work based on hedonic adaptation throws Kolber’s arguments for comparative measurement of punishment into some doubt. After all, if the temporal arc of punishment finds the offender returning to his baseline HSR in short order, then it is hard to make the case that comparing HSRs before and during punishment would reveal much about the severity of the punishment. See *infra* Parts II.C and V.

⁵⁶ *Id.*, at 1573-75.

⁵⁷ *Id.*, at 1582-83.

both these dimensions is easy enough to achieve. However, once one realizes that the true measure of severity in punishment is the difference between baseline and punishment HSRs, we are led to the conclusion that “retributivists must calibrate the punishment of each offender by examining his baseline condition and his punished condition.”⁵⁸ In particular, on pains of offending proportionality, Kolber contends that retributivists are committed to the view that offenders with higher HSRs at baseline ought to receive objectively lighter sentences as compared to offenders with lower baseline HSRs.⁵⁹ The alternative—imposing the same punishment without regard to their baseline and punishment HSRs—risks producing disproportionate degrees and qualities of comparative suffering and therefore disproportionate punishment of two offenders who commit the same crime.

The tickle of absurdity suggested by this result becomes a psoriatic itch when Kolber sketches-in some details. For example, he contends that rich and privileged individuals generally have higher HSRs at baseline and may suffer a precipitous drop in HSR if subjected to imprisonment.⁶⁰ By contrast, poor and downtrodden people may have lower HSRs at baseline and therefore will fall less far when imprisoned. It therefore appears to follow that for two offenders who commit the same offense, proportionality requires retributivists to inflict only light punishment on the rich and sensitive offender and relatively heavier punishment on the hard-luck single mother working several minimum wage jobs.⁶¹ That result follows, according to Kolber, as a matter of

⁵⁸ *Id.* 1582-83, 1600-07.

⁵⁹ *Id.*

⁶⁰ *Id.* Kolber’s assumptions about rich people are in tension with findings reported by other contributors to the PAS literature. See *infra* Part II.C. In another recent study, researchers found that, compared to a control group, subjects who had just counted money reported less suffering in response to painful stimuli. Xinyue Zhou et al., *The Symbolic Power of Money Reminders of Money Alter Social Distress and Physical Pain*, 20 PSYCHOL. SCI. 700, 703-04 (2009).

⁶¹ Kolber, *supra* note 5, at 1582-83, 1600-07.

necessity from strong commitments to proportionality, a fact which, he concludes, ought to count as good reason to reject retributivism.⁶²

As in his work on subjective experiences of punishment, Kolber’s account of comparative punishment has critical but not devastating consequences for utilitarianism. For example, on first look, it appears that deterrence theorists may be obliged to impose objectively lighter sentences on wealthy and soft offenders.⁶³ However, Kolber suggests that utilitarians may find good reasons internal and external to punishment practices to reject this result. For example, it may turn out that the threshold of specific and general deterrence for folks with high HSRs is comparatively lower than their less happy peer criminals. It may therefore be necessary to impose more severe punishments in the form of greater diminishments of HSR in order to hit that deterrence threshold. That may be true particularly in the case of fines, which wealthy offenders likely would be able to absorb with little or no drop in HSR as compared to poor offenders. Alternatively, there may be good policy grounds to not show objective favor to rich and privileged offenders so as to maintain public faith in the overall justice system and therefore to preserve the relative gain in utils achieved by an objectively consistent rule-based system of punishment. Kolber maintains that any of these approaches must take account of comparative differences in subjective suffering or risk violating basic prohibitions against inflicting harm without reason or justification.⁶⁴

C. Happiness and Punishment

Citing Kolber with approval for the conclusion that “[a]ll leading theories of criminal punishment must be concerned with the way punishment is subjectively experienced by the

⁶² *Id.* at 1600-07.

⁶³ *Id.* at 1583-85, 1594-1600.

⁶⁴ *Id.* at 1602.

offender,”⁶⁵ John Bronsteen, Christopher Buccafusco, and Jonathan Masur, argue in their recent article *Happiness and Punishment* that a critical factor in measuring the subjective disutility experienced by offenders is their capacity for “hedonic adaptation.”⁶⁶ They draw the term and concept from behavioral and social psychological studies based on self-reports of contentedness and well-being.⁶⁷ Bronsteen, Buccafusco, and Masur (“the authors”) report that these studies reveal interesting and sometimes counter-intuitive facts about the subjective experiences of disutility experienced by offenders. In particular, they cite evidence showing that most of us tend to adapt relatively quickly to changes in our circumstances. Lottery winners initially report much higher degrees of satisfaction, but soon enough report a return to their pre-winning baselines.⁶⁸ After a surprisingly short interval, people who suffer disabling injuries adapt to their new circumstances and report levels of happiness within the proximate statistical range of those who are injury free.⁶⁹

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

⁶⁵ Bronsteen et al. et al., *supra* note 1, at 1039.

⁶⁶ *Id.* at 1037.

⁶⁷ Calling to mind Mark Twain’s quip that “reports of my death are greatly exaggerated,” in 1939 J.D. Mabbott reported the common belief that “the retributive view is the only moral theory except perhaps psychological hedonism which has been definitely destroyed by criticism.” J.D. Mabbott, *Punishment*, 48 MIND 152, 152 (1939).

⁶⁸ Bronsteen et al., *supra* note 1, at 1041.

⁶⁹ *Id.* at 1041-43.

The authors report that, like lottery winners, those subjected to criminal punishment report relatively rapid adaptation.⁷⁰ In particular, prisoners and those forced to pay fines turn out to be emotionally supple in the face of hardship. While initially distressed, prisoners tend to adapt fairly quickly to their new circumstances and report a significant rebound in their levels of happiness within a matter of months.⁷¹ Likewise, those made to pay fines report a drop in their levels of satisfaction when the fine is levied and paid, but soon adapt to changes in their economic circumstances and recount corresponding returns to their base levels of self-reported happiness.⁷² On the authors' account, these studies of hedonic adaptation reveal that most of the suffering associated with imprisonment and fines is heavily frontloaded.⁷³ They go on to argue that these results reveal the folly underlying the common view that longer prison sentences and larger fines inflict correspondingly more suffering.⁷⁴ In fact, the phenomenon of adaptation reveals that years or even decades longer terms of imprisonment inflict only marginally more suffering, and perhaps no more. Similarly, so long as fines leave payers with a basic level of material security, adaptation means that the net suffering inflicted does not change appreciably as fine amounts go up.⁷⁵

Adaptation has its limits, of course. Some degenerative and cyclical diseases such as rheumatoid arthritis and chronic headache defy adaptation,⁷⁶ as do some changes in social

⁷⁰ *Id.* at 1045-49.

⁷¹ *Id.*

⁷² *Id.* at 1038-39, 1058-59, 1069-70.

⁷³ *Id.* at 1053-55.

⁷⁴ *Id.* at 1055-57.

⁷⁵ *But see* Zhou et al., *supra* note 60, at 703-05 (reporting data suggesting that threatened loss of money can enhance subjective experiences of pain).

⁷⁶ *Id.* at 1042-43.

circumstances including divorce, death of a spouse, and continued unemployment.⁷⁷ Perhaps more surprising are results suggesting that, though offenders adapt fairly quickly to prison, they do not adapt as well to post-prison life.⁷⁸ The authors recognize that prison provides a fairly stable and predictable environment, but that the reentry world is populated with contingencies such as social marking, exclusion from work and society, loss of family and social support networks, and limited employment prospects, all of which work along a number of dimensions to inflict suffering on ex-convicts. These travails do not diminish appreciably over time.⁷⁹ As a consequence, convicts often report lower sustained levels of happiness and satisfaction post-release than they experienced while in prison.⁸⁰ This is a phenomenon familiar to those who dedicate their careers to reentry work⁸¹ and is a frequent topic for documentary reporting.⁸²

There is another funny quirk of hedonic adaptation identified by the authors: our remarkable inability to predict future adaptation.⁸³ We always think that more money will make us happier, even though it does not—at least not for long. Criminals live in absolute dread of prison,

⁷⁷ *Id.*

⁷⁸ *Id.* at 1049-55.

⁷⁹ *Id.* See also *infra* note 81.

⁸⁰ The authors make the quite insightful point that dramatic and sustained reductions in happiness post-release may contribute to recidivism by reducing convicts' subjective assessments of their prospective reductions in happiness if they reoffend, are caught, convicted, and reincarcerated because, in a real sense, they have little left to lose. See Bronsteen et al., *supra* note 1, at 1066-67.

⁸¹ A notable example is the University of Maryland School of Law's Michael Pinard, whose academic and clinical work on reentry issues is a tremendous public service and a source of persistent inspiration for his students, clients, and the public at large. See, e.g., Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. ____ (forthcoming 2010); Michael Pinard, *A Reentry-Centered Vision of Criminal Justice*, 20 FED. SENT'G REP. 103 (2007); Michael Pinard, *An Integrated Perspective of the Collateral Consequences of Criminal Convictions and the Reentry of Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623 (2006); Michael Pinard & Anthony Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 20 N.Y.U. REV. L. & SOC. CH. 585 (2006).

⁸² See, e.g., *A HARD STRAIGHT* (New Day Films 2004).

⁸³ Bronsteen et al., *supra* note 1, at 1044-45, 1060-61.

even though they will probably end up getting along pretty well. According to the authors, this failure to anticipate adaptation is also immune to directly relevant experience. “Thus, even people with substantial previous experience with a stimulus are unlikely to remember that its hedonic impact was both weaker and shorter than predicted.”⁸⁴ Even ex-convicts, who ought to know from past experience that prison is not so bad, still fear it just as much as those who have never had the privilege.⁸⁵ Even those freshly adapted to new economic conditions after paying a fine shudder at the thought of being hit with another one.

The impact on criminal law theory and practice inflicted by work on hedonic adaptation cited by the authors is not entirely clear, but in the authors’ view it is nonetheless important to recognize and accommodate these studies. For example, the authors contend that both deterrence theorists and retributivists commonly regard longer prison sentences and larger fines as linearly or perhaps even exponentially more severe than shorter sentences and smaller fines. In the authors’ view, the adaptation literature challenges that assumption by showing that most of the suffering caused by prison and fines is frontloaded and therefore the overall suffering imposed by a sentence is less than intuition might lead us to expect.⁸⁶ While this insight appears to be important both for deterrence advocates and for retributivists, the ultimate consequences are, as the authors note, equivocal.⁸⁷ For example, it might lead us to be skeptical of “tough on crime” demands for longer sentences because they do not actually result in more deterrence or proportionally more suffering. Alternatively, adaptation might require indulging “tough on crime” demands to the extreme in order

⁸⁴ Bronsteen et al., *supra* note 1, at 1045.

⁸⁵ *Id.* at 1059-61.

⁸⁶ *Id.* at 1048-49.

⁸⁷ *Id.*, at 1071-74.

to correct for diminishing suffering returns over time.⁸⁸ For utilitarians, that dramatic ratcheting up of punishments may be constrained by the fact that imprisonment is quite expensive in its own right.⁸⁹ Given this and other considerations, the authors suggest that the proper balance probably lies away from longer sentences.⁹⁰

III. THE ILLOGIC OF PUNISHMENT AS SUFFERING

The PAS critique of traditional theories of criminal law and punishment rides on an equivocation between punishment and suffering. This Part highlights the centrality of this equivocation to PAS and then engages in a critical analysis of the claim underlying the equivocation: that punishment *is* suffering. Section A sets the stage with a brief overview of an objective theory of punishment: retributivism. Section B exposes the key role of the equivocation in the PAS critique of retributivism. Section C tries to make sense of the contention that punishment is suffering and concludes that there is little promise in the effort because it results in the collapsing of familiar and necessary distinctions, such that between crime and punishment.

A. A Quick Sketch of One Objective Theory of Punishment

The defining feature of the criminal law is its claimed title to impose punishment.⁹¹ The core challenge to any theory of criminal law is its capacity to justify punishment generally and to rationalize the punishments inflicted in particular cases more specifically.⁹² Retributivism is one answer to the call. While there are differences among the theories advocated by its many and various proponents, retributivism is defined by its core commitment to the principle that

⁸⁸ *Id.*

⁸⁹ *Id.*, at 1075.

⁹⁰ *Id.*, at 1061-62. This author does not contest this conclusion, but would argue for it on retributive grounds.

⁹¹ The potential exceptions to this rule are punitive damages awards, which raise their own theoretical and practical concerns, none of which need be addressed here.

⁹² H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 1, 4-9 (1968).

punishment can only be justified if and to the extent it is deserved.⁹³ That commitment is often held in contrast to utilitarian theories,⁹⁴ which generally hold that punishment is justified if and only to the extent it can achieve more good than ill.⁹⁵

Desert is a necessary condition for punishment in the eyes of retributivists.⁹⁶ That is, if punishment is not deserved, then it cannot be imposed. Desert is important not only as a threshold requirement for punishment, it also plays a determinate role in defining and limiting punishment in particular cases. Again, proponents differ in the details, but in the main they share a commitment to objective proportionality: to be commensurate with desert, punishment must be proportionate to the offense or, in more poetic terms, punishment must “fit” the crime.⁹⁷ Retributivists are not blind to context or insensitive to texture. Variations among criminals and their acts have a role to play in evaluating desert. Retributivists are particularly sensitive to the variety of mental connections criminals may have to their acts.⁹⁸ The commitment to proportionality therefore has a case-specific

⁹³ See, e.g., MICHAEL MOORE, *PLACING BLAME* 83 (1997); KANT, *supra* note 12, at 105.

⁹⁴ See KANT, *supra* note 12, at 105 (“Punishment . . . can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society. It must always be inflicted upon him *because he has committed a crime.*”).

⁹⁵ BECCARIA, *supra* note 2, at 13-14.

⁹⁶ Some retributivists also argue that desert is a sufficient condition for punishment. See, e.g., KANT, *supra* note 12, at 105 (“The law of punishment is a categorical imperative . . .”); MOORE, *supra* note 93, at 88-89, 153-54; Thomas Hill, *Kant on Wrongdoing, Desert, and Punishment*, 18 *LAW & PHIL.* 407, 411-12 (1999); Michael Moore, *The Moral Worth of Retributivism*, in *RESPONSIBILITY, CHARACTER, AND THE EMOTIONS* 179, 182 (Ferdinand Schoeman ed., 1987). As Nigel Walker points out, however, many “modern” retributivists have shied away from the view that there is “an obligation to punish, and substituted a mere right to punish” if and only if that punishment is deserved. Nigel Walker, *Even More Varieties of Retribution*, 74 *PHIL.* 595, 601 (1999). For present purposes, this Article need not take sides in this “duty” vs. “rights” debate. *Id.* at 604.

⁹⁷ This objective constraint frequently is interpreted as suggesting a hierarchy of crime and punishment such that more severe crimes lead to more severe punishments. As is elaborated below, this idea of a hierarchy of severity is somewhat misleading to the extent it suggests the existence of a fungible unit of seriousness in crime and a corresponding unit of severity in punishment.

⁹⁸ See, e.g., KANT, *supra* note 12, at 106-07. See also *infra* note 200.

dimension, measuring punishment not only by reference to the crime itself but also according to the connection each offender has to his crime—what we often call his “culpability.”⁹⁹ This conception of guilt as a combination of bad act and culpability is familiar to all first-year law students. Indeed, requirements for *actus reus* and *mens rea* reflect the long-standing influence of retributivism in the common law.¹⁰⁰ In this regard, almost everyone is a retributivist, at least insofar as they indulge the deeply held intuition that guilt, as a combination of act and culpability, is a threshold qualification for punishment.

So, retributivists impose punishment if and only if the offender deserves it—that is, if he is culpable in a crime. Fidelity to this principle is not satisfied by the imposition of any old punishment upon a finding of guilt. Rather, retributivists maintain that the punishment inflicted in any given case must be deserved in its form and dimension—it must fit the crime and must reflect the offender’s culpability.¹⁰¹ From these commitments to proportionality in individual cases, it follows that retributivists are committed to proportionality between cases. If desert is determined by objective standards, then equally culpable offenders who commit the same crime should receive the same punishment. From the retributive point of view, however, the demand for comparative

⁹⁹ ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 363-65 (1983).

¹⁰⁰ Manuel Velasquez, *Why Corporations are Not Responsible for Anything They Do*, in *COLLECTIVE RESPONSIBILITY* 111, 113-14 (Larry May & Stacey Hoffman eds., 1991). These same prerequisites are also important in some utilitarian systems. Herbert Weschler’s Model Penal Code, for example, maintained in different language the common law requirements for a legal prohibition sufficient to meet legality demands, a voluntary act, and a mental connection to the crime as prerequisites for criminal punishment. *See* MODEL PENAL CODE, § 2 (1962). Inclusion of these requirements in a largely utilitarian system bespeaks the persistent influence of retributivism.

¹⁰¹ *See, e.g.*, *Taylor v. Superior Court*, 477 P.2d 131, 141 (1970) (Mosk, J., dissenting) (“Fundamental principles of criminal responsibility dictate that the defendant be subject to a greater penalty only when he has demonstrated a greater degree of culpability.”).

proportionality is derivative of the demand for noncomparative proportionality.¹⁰² This objective conception of punishment is fundamental to retributivism; a feature that will be essential to understanding the equivocation at the heart of PAS, its critique of retributivism, and the ultimate failure of PAS to persuade. The next Section makes explicit that equivocation.

B. Punishment as Suffering

The PAS critique of retributivist approaches to criminal law relies on a premise foreign to retributivism in the form of a fallacious equivocation between punishment and suffering.¹⁰³

“Equivocation” is used here for its technical meaning, denoting a semantic shift within an argument that allows the proponent to draw an unwarranted conclusion.¹⁰⁴ The equivocation from

punishment to suffering in PAS is evident if we consider in quasi-symbolic form Kolber’s argument

based on comparative proportionality—like cases ought to be treated alike—from *The Subjective*

Experience of Punishment.¹⁰⁵

1. If an offender commits crime C, then the offender receives punishment D.
2. A commits crime C.
3. B commits crime C.
4. Therefore A receives punishment D.
5. Therefore B receives punishment D.
6. D equals D.

¹⁰² MOORE, *supra* note 93, at 90-91; Feinberg, *Noncomparative Justice*, *supra* note 47, at 300-01, 311-13, 318-19. As Feinberg points out, comparative disparities may reveal noncomparative injustice, and comparative disparities may underwrite moral sentiments of injustice—particularly immature moral sentiments—but where disparities do not reveal noncomparative injustice, claims that a wrong has been committed do not carry much weight.

¹⁰³ See Hill, *supra* note 96, at 424-25 (characterizing the view that wrongdoers are “deserving of painful sanctions” as “conceptually dubious and morally repugnant” and unsupported in Kant’s theory of justice). Bronsteen, Buccafusco, and Masur are fairly straightforward in their endorsement of the proposition that punishment is suffering, stating that “When the state punishes a criminal, it inflicts suffering,” where “suffering” is a self-reported state of “unhappiness.” Bronsteen et al., *supra* note 1, at 1037-38. Kolber is also committed to the view that punishment is suffering, though he is less definitive on what constitutes “suffering.” Kolber, *supra* note 1, at 197, 198.

¹⁰⁴ BLACKWELL DICTIONARY OF WESTERN PHILOSOPHY 249 (Nicholas Bunnin & Jiyuan Yu eds., 2004).

¹⁰⁵ Kolber, *supra* note 1, at 215-16. See also Kolber, *supra* note 5, at 1600-01.

7. Therefore, A and B receive equal punishment.
8. If A receives punishment D, then A experiences quantum of suffering X.
9. If B receives punishment D, then B experiences quantum of suffering Y.
10. Therefore, A experiences quantum of suffering X.
11. Therefore, B experiences quantum of suffering Y.
12. X is not equal to Y.
13. Therefore, A and B do not receive equal punishment.

This argument purports to be a form of ad absurdum. Here, the alleged contradiction is between the conclusions reached on lines 7 and 13, which hold both that A and B receive equal punishment and that they do not. The problem is that these conclusions follow from incommensurable premises. The conclusion on line 7 follows from the familiar principle that like cases ought to be treated alike. However, the conclusion reached at line 13 follows only after the introduction of PAS's views on subjective experiences of punishment, set forth on lines 8, 9, and 12. The introduction of these premises is not itself an argumentative foul so long as they can be independently proved.¹⁰⁶ For now they shall be assumed *arguendo*. The real difficulty comes in the move made in line 13. 13 only follows from earlier premises and interim conclusions if we add and accept the premise that “punishment” and “quantum of suffering” are in some material way equivalent and therefore interchangeable without semantic loss.¹⁰⁷ If they are not, then the argument is invalid by virtue of a fallacy of equivocation and ought to be rejected. PAS scholars do not

¹⁰⁶ There are good reasons to doubt PAS scholars' readings of the scientific literature upon which they rest their normative claims. See *supra*, note 36.

¹⁰⁷ Kolber makes a similar argument based on the retributivist commitment that punishment ought to be proportionate to the crime for which it is imposed. Kolber contends that an offender may experience a quantum of suffering disproportionate to his crime, a prospect that presents retributivists with a potential contradiction. Kolber, *supra* note 1, at 199-216. See also Bronsteen et al., *supra* note 1, at 1068-69. Again, however, the claimed tension is between two claims—1) that an offender has received a punishment proportionate to his crime; and 2) that the same offender has received a quantum of suffering disproportionate to his crime—which are not in contradiction absent the added premise that punishment is suffering.

elaborate their claim that punishment is suffering. The next Section exposes this deficit and explores the argumentative consequences of this omission for PAS.

C. What it Might Mean to Claim that Punishment is Suffering

PAS advances two agendas based on its claim that punishment is suffering.¹⁰⁸ The first is largely critical. Relying on examples, mind experiments, hypotheticals, and the results of self-reported studies of happiness, PAS exposes endemic disparities in the suffering accounts tallied by various punitive practices. PAS argues that long-standing theories of criminal punishment do not or cannot justify these deficits or surpluses, and therefore must modify their sentencing recommendations on pains of contradiction.¹⁰⁹ Where the modifications required to preserve a theory of punishment are sufficiently distasteful, PAS contends that the theory itself ought to be abandoned. The second and as yet less well-developed goal of PAS appears to be a positive theory of punishment founded on new observational technologies and techniques.

This Section targets the first of these agendas. The argument is straightforward. PAS's critical thesis rides on the claim that punishment is suffering. That claim is over broad. There is quite a lot of suffering that is not punishment. Attempts to refine the claim that punishment is suffering fail to satisfy. To avoid those uncomfortable results requires reaffirmation of the very distinction between suffering and punishment PAS seeks to collapse. As the importance of that distinction is made manifest, it quickly becomes clear that the suffering disparities identified by PAS pose no threat to traditional theories of punishment. The mind experiments and self-reports of happiness that expose these disparities therefore are non sequiturs in conversations about

¹⁰⁸ Kolber, *supra* note 1, at 184-85.

¹⁰⁹ *Id.*

punishment theory, though they are highly relevant in conversations about mercy and penal technology.¹¹⁰

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

To start, it is worth noting that the claim by PAS scholars that punishment is suffering changes the landscape of the criminal law in ways that appear counter-intuitive. Recall the statement above that the defining feature of the criminal law is its authority to impose punishment and its core theoretical challenge is the justification of punishment generally and in particular cases specifically. If “punishment” is just a pass-through term for suffering, then it follows that suffering can be substituted for punishment in that formulation without raising eyebrows. However, the result of such an exercise would be something like the following: “The defining feature of the criminal law is its claimed title to impose *suffering*. The core challenge to any theory of criminal law is its capacity to justify *suffering* generally and to rationalize *suffering* inflicted in particular cases more specifically.” There is clearly something amiss here.

A protest from traditional theorists that that PAS violates intuitions is shallow response at best. However, PAS bears the burden of proving its central claim that punishment is suffering.¹¹¹ If it cannot, then the whole enterprise is constructed upon a fallacy and should be abandoned. One possibility would be for PAS to claim that punishment and suffering are perfectly coextensive. There is no ground for such a claim. Familiar counter-examples make the point. Those struck down by flu, cancer, lightning, or a bus, most definitely suffer. However, none of these afflictions can fairly be categorized as “punishment.”¹¹² The category of “suffering” is therefore larger than

¹¹⁰ See *infra* Part VI.

¹¹¹ Kolber recognizes the centrality of this claim to the PAS enterprise. See, Kolber, *supra* note 1, at 214.

¹¹² See Kent Greenawalt, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 344 (1983) (“God and humans can punish; hurricanes cannot.”). Some readers may cavil, suggesting that background facts will demonstrate

“punishment.” It follows that PAS cannot justify the needed premise equating punishment and suffering by claiming that the two are perfectly coextensive. The addition of “state-imposed” as a qualifier does not advance the cause. States impose a host of “disvaluable”¹¹³ conditions on individuals within their thrall ranging from taxes to mandatory military service to quarantines, none of which are “punishment” by any familiar use of the term.¹¹⁴

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

Another candidate for the missing premise is that punishment defines a wholly contained subset of suffering such that all punishment is suffering, but not all suffering is punishment. This view has considerable support in the PAS literature, which holds that “the subjective disutility of punishment . . . is largely or entirely the punishment itself”¹¹⁵ and that the purpose of punishment is

that these unfortunate souls “deserve” disease or physical harm because they contributed to the constellation of risks that eventually led to their suffering. *See, e.g.*, ARISTOTLE, NICHOMACHEAN ETHICS 38-39 (Terrence Irwin trans., 1999). While perhaps true in some cases, it is not true in all cases. *Id.* Regardless, the claim turns on another equivocation, neatly captured by Kant’s distinction between “*poena forensis*” (“[p]unishment by a court”) and “*poena naturalis*” (“in which vice punishes itself and which the legislator does not take into account”). *See* KANT, *supra* note 12, at 105. *See also* GEORGE FLETCHER, THE GRAMMAR OF CRIMINAL LAW 228 (2007); HART, *supra* note 92, at 4-5.

¹¹³ Kolber, *supra* note 1, at 187n.5. This switch from “suffering” to “disvaluable” states may also reflect an equivocation. In particular, “disvaluable” states might be defined objectively, without regard to whether a particular person experiencing that state finds it pleasant or unpleasant. Kolber does not perpetrate such an equivocation, however, and clearly means “disvaluable” states to refer to those states which actually cause a particular offender to experience some degree of suffering. *See* Kolber, *supra* note 1, at 212-13.

¹¹⁴ FEINBERG, *supra* note 16, at 106. The range of such state impositions provides ready counter-examples for other attempts to refine further the claim that punishment is suffering along this general line. For example, were PAS advocates to define punishment as state-imposed suffering in response to a voluntary act, they would have to distinguish income taxes, which are imposed in response to earnings, sales taxes, which are imposed in response to purchases, and registration requirements, which are imposed upon those who, for example, decide to own and drive a car. For an engaging analysis of taxes as non-punitive measures, see LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE (2002). As is argued here, the flow of counter-examples only abates when one recognizes desert as a necessary and defining feature of punishment; and taking this constraint on punishment seriously requires measuring punishment objectively, without regard to the idiosyncratic experiences of offenders.

¹¹⁵ Kolber, *supra* note 1, at 212.

inflict suffering.¹¹⁶ While certainly more conservative, this view already represents a significant concession. Specifically, it acknowledges that offenders subjected to punishment may experience not only suffering that falls within the scope of their punishment but additional, incidental, suffering as well.¹¹⁷ Therefore, while the claim that suffering occupies the entire field of punishment, but punishment occupies only a corner of suffering, may provide some solace for PAS on the level of hard logic, it highlights the fact that extraordinary care is necessary in analyzing the claim in general and as applied in particular cases so as not to indulge in an equivocation between suffering properly within the scope of punishment and incidental suffering.¹¹⁸

This is a rather fine but crucial point, and therefore deserves a bit more attention. Whether the argument focuses on differences in subjective experiences of punishment among individuals, differences in comparative suffering between individuals, or the waxing and waning of reported happiness and suffering over time, the fundamental points made by PAS advocates are the same: our current theories of criminal punishment do not keep an accurate tally of offenders' suffering; and, furthermore, once a proper tally is done, at least some of the theories deployed to justify punishment are so upside-down they are impossible to stomach.¹¹⁹ That argument only goes through if PAS can make a conclusive argument for including in the tally the categories and cases of suffering its advocates believe are ignored by prevailing theory. If it turns out that much or all of the suffering these scholars focus on falls outside the extension of “punishment,” then the entire enterprise is

¹¹⁶ Bronsteen et al., *supra* note 1, at 1037; Kolber, *supra* note 1 at 197, 198.

¹¹⁷ See *Flemming v. Nestor*, 363 U.S. 603, 616 (1960) (administrative consequences, such as “bar[ring] from practice [of medicine] persons who commit or have committed a felony,” are an exercise of “regulatory power,” and do not “add to the punishment”).

¹¹⁸ As is argued below, the examples, hypotheticals, and mind experiments offered by PAS as *ad absurdum* against traditional theories of criminal punishment are guilty of precisely this equivocation.

¹¹⁹ Kolber, *supra* note 1, at 184-85.

constructed upon an equivocation between punishment and suffering and must be abandoned in favor of more conservative but nevertheless important pursuits.¹²⁰

Kolber concedes the distinction, noting that “not all experiential suffering in prison is imposed in a knowing or intentional way.”¹²¹ However, he goes on to maintain that “even if some experiential suffering should not count, we must still consider the suffering that does.”¹²² This begs the question what suffering counts and what not, as it does important normative questions such as why the suffering that counts does and why the suffering that does not count does not. Bronsteen, Buccafusco, and Masur must confront the same issue. Reducing “punishment” to self-reporting of happiness and suffering fails to distinguish among sources and causes. For example, an imprisoned offender who happens to be a life-long devotee of *The Guiding Light* may have descended into abject despair upon cancellation of the show in 2009, but the “suffering” occasioned by that loss would be incidental to his punishment. Those who rely on self-reported happiness to advance PAS might argue that these incidental sources of suffering can be regressed out of the statistical results. However, they have so far not indicated an awareness of the need.¹²³ Furthermore, acknowledging the need for regressions from the raw data of self-reported happiness still begs the question what suffering counts, what not, and why.

If it is true that some suffering is incidental and some not, then it may simply be the case that all the subjective inequalities PAS scholars are concerned with, whether measured subjectively, diachronically, or comparatively, are incidental to punishment and therefore impose no duties of accommodation or accounting on traditional theories of punishment. To avoid that result, PAS is

¹²⁰ See *infra* Part VI.

¹²¹ Kolber, *supra* note 1, at 213.

¹²² *Id.* at 213-14.

¹²³ Nussbaum, *supra* note 25, at 86-88, 96-97.

on the hook for clear, plausible, and defended criteria that can distinguish between suffering that is “punishment” and suffering that is not. None so far has been offered by PAS scholars. The matter could rightly be left there. However, the better and more persuasive course is to proffer some plausible possibilities. Two deserve some attention: suffering inflicted purposely and suffering inflicted knowingly.¹²⁴ Neither is sufficient to fulfill the argumentative and theoretical burdens of PAS. Perhaps more importantly, this failure suggests that the core PAS claim is not merely question-begging, but self-defeating.

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

While not explicitly endorsed in the PAS literature, “purpose” as a criterion for distinguishing suffering that is punishment from suffering that is incidental is a familiar refrain in their writing.¹²⁵ “Purpose” certainly appears to mark a sharp distinction between suffering that is punishment and suffering that is incidental to punishment. Unfortunately, it fails to answer three crucial questions: 1) what suffering is intended; 2) by whom; and 3) why.¹²⁶ Consider for example prisoner-on-prisoner violence. If an offender sentenced to a term of imprisonment is the target of violent assaults by other prisoners solely to fulfill sadistic impulses of his attackers, then is the suffering caused by those assaults “punishment?” It is certainly a consequence of the offender’s imprisonment, but it is hard to imagine how it could be characterized as “punishment.” Quite to the contrary, these kinds of attacks are crimes.

¹²⁴ See, Kolber, *supra* note 1, at 196-98.

¹²⁵ See, e.g., Bronsteen et al., *supra* 1 at 1037; Kolber, *supra* note 1, at 196-98 (arguing that the primary burden of criminal theory is to justify “purposely or knowingly inflict[ing] substantial pain or distress . . .”); *id.* at 212-13 (contending that causing “[s]ubjective disutility” is a “necessary component of retributive punishment and constitutes, if not the sole reason for retributive punishment, certainly a major part of it.”).

¹²⁶ See Kolber, *supra* note 1, at 195-96. This is a significant omission. See FLETCHER, *supra* note 112, at 228 (interpreting Hart); Hart, *supra* note 92, at 4-5.

Any critique of traditional criminal law theories based on the proposition that “punishment” is suffering must distinguish between punishment and unjust treatment, including criminal acts. PAS does not. For example, Kolber contends that the Federal Sentencing Guidelines should take account of individual characteristics that might make an offender a likely victim of prison violence when deciding the length of a prison term.¹²⁷ On his view, the differences in subjective experiences foretold by such factors compel either a shorter sentence for the weak and vulnerable offender or a theory of punishment that would justify subsequent disparities among the subjective experiences of vulnerable and less-vulnerable offenders.¹²⁸ This only follows if one regards prisoner-on-prisoner violence as “punishment” rather than crime. Kolber appears to hold precisely that view, contending that “variations in [prison] conditions,” including “physical and sexual violence,” “reflect objectively observable features of punishment.”¹²⁹ Bronsteen, Buccafusco, and Masur at least implicitly endorse the same claim, including in their tally of unaccounted suffering “prison sexual violence” and its consequences.¹³⁰ However, these authors offer no argument for this quite counterintuitive proposition. The error is in the collapsing of two distinct moral concepts—“crime” and “punishment”—into an undifferentiated category of described effects—“suffering.” The consequences are far from trivial.

For PAS scholars, “subjective disutility” constitutes the “sole” or “major” reason for punishment,¹³¹ and the suffering caused by sexual assault constitutes “punishment” for its victims

¹²⁷ Kolber, *supra* note 1 at 193 (citing U. S. SENTENCING GUIDELINES MANUAL § 5H1.4 (2007)).

¹²⁸ *Id.* at 193-95, 197.

¹²⁹ *Id.* at 188.

¹³⁰ Bronsteen et al., *supra* note 1, at 1050.

¹³¹ Kolber, *supra* note 1, at 212-13.

simply because the offense is perpetrated in prison upon a prisoner.¹³² According to this account, the “subjective disutility” inflicted by sexual assault is entirely fungible with the suffering inflicted by restraints on liberty characteristic of imprisonment generally. If this argument is accepted, then those who suffer at the hands of other prisoners have no right to object, no claim for protection, and no right to demand the prosecution and punishment of their abusers. Quite to the contrary, if the suffering occasioned by prisoner-on-prisoner violence is “punishment,” and “punishment” is the suffering which offenders deserve as a consequence of their crimes, then the perpetrators of sexual assault in prison are by definition immune from prosecution because the suffering they inflict is “punishment.” Further, because suffering is fungible, victims of prison violence can be made whole by early release when the total quantum of suffering they deserve is reached and therefore have no claim that abuse at the hands of other prisoners should be stopped, much less prosecuted.

This is clearly specious. The source of the error is PAS’s failure to take seriously the fact that “crime” and “punishment” are fundamentally moral rather than forensic concepts equally comprehensible through the heuristic of suffering. The more persuasive view, which is reflected in the Guidelines prohibition, is that prisoner-on-prisoner violence is unlawful, perpetrated by the wrong people, inflicted for the wrong reasons, and therefore is crime, not punishment.¹³³ If that is right, then any suffering occasioned by prison crime need not, and in fact cannot and ought not, be justified by any credible theory of punishment because it is not “punishment.”¹³⁴ Further, critiques

¹³² *Id.* at 186.

¹³³ See FLETCHER, *supra* note 112, at 227-33. In recognition of this fact, some courts have held that where a prisoner escapes from custody out of fear of prisoner-on-prisoner violence he may claim a defense based on necessity. See *People v. Unger*, 362 N.E.2d 319 (1977).

¹³⁴ Respecting Hart’s prohibition, I do not mean to argue by definition. See HART, *supra* note 92, at 6. Rather, the point is that if PAS wants to jettison three of the five commonly identified characteristics of punishment Hart cites, its advocates must provide a robust normative argument for their departure.

that purport to find a flaw in traditional theories of criminal punishment because those theories do not justify differences in suffering occasioned by prison crime proceed on an unjustified equivocation.¹³⁵ In happiness terms, any degree of unhappiness that appears in prisoner self-reporting which reflects suffering at the hands of other prisoners would need to be somehow regressed out, which PAS scholars do not report having been done in the studies they cite.¹³⁶

Another PAS mind experiment suggests a partial retreat from “punishment” as all suffering purposely inflicted to “punishment” as suffering purposely inflicted by prison authorities.¹³⁷ Unfortunately, this does not turn the trick. Imagine a sadistic warden who abuses his position to inflict unjustified additional suffering on his charges either by affirmative conduct or by omission.¹³⁸ PAS argues that a theory of punishment which fails to account for differences in suffering between prisoners treated with respect and care by a virtuous warden and those abused at the hands of a sadistic warden cannot on pains of contradiction be sustained. This just repeats PAS’s core conceptual mistake. Just because a criminal wears a badge does not make him any less a criminal; neither does a position of authority end the conversation about justice in action. Out of respect for that distinction, traditional theories of punishment do not endorse sadistic abuse at the hands of

¹³⁵ See Kolber, *supra* note 1, at 186-88 (making just this argument).

¹³⁶ This is not to say that prisoner-on-prisoner violence is of no moral or legal significance. Prison officials are charged with protecting those under their care from unlawful assault. Failures by prison officials to provide sufficient protections from prison violence may be tortious or criminal. Mercy may also recommend early release for offenders subject to criminal violence in part as a reflection of institutional failures to provide adequate security and protection. However, none of this makes prisoner-on-prisoner violence “punishment;” and any suffering occasioned by crimes committed in prison are, strictly speaking, incidental to punishment. PAS’s contrary claim—that prison rape is an element of punishment—is troubling to say the least.

¹³⁷ Kolber, *supra* note 1, at 197.

¹³⁸ *Id.* at 197.

prison officials as “punishment.” PAS regards this as a fatal flaw in those theories.¹³⁹ That perspective is unsympathetic at best. To endorse PAS on this point would be to dissolve the distinction between crime and punishment, would promote even the worst abuses perpetrated by prison officials to the status of “punishment,” and would deny claims for protection from those who suffer at the hands of sadistic officials as long as they are released when their suffering thresholds are reached.

PAS scholars might respond by claiming that “punishment” is the suffering that authorities acting within the proper bounds of their official roles purposely inflict for the right reasons. While plausible, that claim needs elaboration because it begs important normative questions. Parts IV and V survey some of the possible grounds. Remaining for now inside PAS itself, the impact of such a concession is simply devastating. First, it recognizes the fact that punishment is fundamentally a normative concept not, as PAS would have it, a forensic phenomenon. Second, it upends PAS’s attack on traditional theories of punishment.

PAS uses examples, mind experiments, and self-reporting studies of prisoner happiness to argue that there is quite a lot of unaccounted and unjustified suffering in the system. To use that surplus as the leading edge of a wedge wielded to split retributivism and utilitarianism from within, PAS scholars must argue that those traditional theories of punishment have the burden of justifying the constituents of the surplus. However, if “punishment” is suffering purposely inflicted by the proper person for the proper reasons,¹⁴⁰ then no theory of criminal punishment is obliged to justify suffering purposely inflicted by the wrong people for the wrong reasons or the unintended suffering

¹³⁹ *Id.* at 197-98.

¹⁴⁰ HART, *supra* note 92, at 4-5.

that may incidentally result from punishment. PAS fails to respect this crucial distinction. Take for example Kolber's claustrophobic prisoner.¹⁴¹

Assume that the judge's lawful and authorized purpose in sentencing the claustrophobic to a term of imprisonment is to constrain his liberty and limit his capacity to pursue a range of capabilities that he can only explore fully outside prison walls.¹⁴² If that imprisonment has the additional effect of causing the offender to suffer anxiety secondary to his claustrophobia, then that suffering would be incidental precisely because it is was not the purpose of the duly authorized agent acting within the scope of his official powers to inflict that anxiety. The claustrophobic's anxiety therefore is not "punishment," and cannot be deployed to attack traditional theories of criminal law

¹⁴¹ Many other examples and mind experiments offered in the PAS literature also fail to illuminate because they beg the core question as to what, if any, suffering counts as punishment, what not, and why. Take as an example Kolber's mind experiment involving the punishment "truncation." According to Kolber:

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

Kolber, *supra* note 1 at 188. It is hard to imagine what possible justification might be deployed in favor of such a punitive practice such that it would be punishment at all. It is therefore hard to take it too seriously. Setting that aside, the pattern of unjustified equivocation at the heart of PAS is here in bold relief, now in the form of a confusion between punishment and penal technology. Let us assume that the justified punishment for an offense is permanent disfigurement and the technology used to carry out that sentence is truncation. If the person charged with carrying out the sentence botches the job by failing to adjust the angle of the blade and as a consequence the offender is not disfigured, then the penal technology "truncation" has failed to punish. Alternatively, if the truncadero fails to adjust the angle of the blade and as a result the offender is killed, then that death is incidental harm that is neither part of the punishment nor justified by whatever idiosyncratic theory justified the sentence. In other words, it is an unlawful homicide. Penal technology can go wrong in any number of ways, some accidental, some intentional, some too minor to notice, some worthy of a tort action, criminal prosecution, or abandonment. Where these disparities occur, however, they do not mark differences in the severity of punishment, but varying degrees of success in penal technology.

¹⁴² These formulations map onto retributivist and utilitarian accounts of punishment, respectively. See *infra* Parts IV and V.

that fail to justify his incidental suffering because no such justification would be necessary or, in all likelihood, possible. The same would be true of any suffering constituent of prisoner self-reporting relied upon by happiness scholars in the quite likely event that some or most of their suffering falls outside the scope of purpose described by the legitimate designs of the sentencing agent.

The point is not that severe idiosyncratic anxiety and prisoner-on-prisoner violence do not matter; for they surely do.¹⁴³ Rather, the point is that if what PAS scholars mean when they conflate “punishment” and “suffering” is the suffering purposely inflicted by the right person for the right reasons, then any suffering that falls outside that range is by definition incidental, probably unjustified, likely subject to protest, perhaps grounds for a tort claim or criminal action against the inflictor of that suffering, and, where widespread, requires systemic reform of punishment practices. However, precisely because it is incidental, criminal theory bears no burden to justify this additional or surplus suffering because it is not “punishment,” and therefore is not justified. This may seem like a bit of semantic sophistry. However, maintaining the distinction between “punishment” and “suffering” is critical, as evidenced by PAS itself.

PAS purports to upend traditional theories of punishment by arguing that these theories cannot bear the burden of justifying heretofore underappreciated kinds, measures, disparities, and surpluses of suffering. The rather narrow point made here is a consequence of confronting PAS on the ground it has chosen. Having done so, PAS bears the burden of defining what suffering is and is not “punishment.” If, on further examination, the suffering that PAS claims cannot be justified by prevailing criminal theory turns out to fall outside the scope of “punishment”—because it is

¹⁴³ See *infra*, Part VI.

caused by criminal conduct, for example—then the critical agenda of PAS rides on an unjustified equivocation and must be abandoned.¹⁴⁴

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

PAS scholars may try to reclaim some of their lost suffering by broadening the scope of “punishment” to include suffering that is “knowingly” inflicted.¹⁴⁵ This approach also begs crucial questions. For example, is actual knowledge required, or would something akin to that the Model Penal Code’s “aware[ness] of a high probability” do?¹⁴⁶ Who must possess the knowledge? When? How can they get it? Do officials carry epistemic duties? If so, what are the outlines of those duties? These are not trivial issues. We can set them aside for now, however, because simply adverting to “knowledge” rather than “purpose” does not solve PAS’s conceptual problem.

The fact that a sentencing judge is aware of a high probability that the offender before him will be the victim of violent crime while incarcerated does not convert that crime or the suffering it causes into “punishment” by some miracle of epistemic prestidigitation. The consequences of holding otherwise are the same as those elaborated above in the discussion of “purpose” as the

¹⁴⁴ Consider as an example the following passage:

While some theorists purport to hold objective accounts of punishment that ignore offenders’ subjective experiences, such theories are doomed to fail. By ignoring subjective experience, they cannot justify the amount of distress that punishment inflicts on offenders, and so they cannot justify punishment more generally.

Kolber, *supra* note 1, at 184. See also Bronsteen et al., *supra* note 1, at 1068, 1072n. 166. The fallacy in this argument is now evident in light of PAS’s failure to justify its equivocation from “punishment” to suffering. If, as it now seems, the suffering these theories ignore is incidental, then punishment theory carries no obligation to justify that suffering because to do so would conflate sadistic criminal abuse with just punishment. Far from constituting a failure of theory, then, retributivists’ and utilitarians’ refusals to justify incidental suffering is a necessary not a condemnatory feature of their efforts to justify punishment more generally.

¹⁴⁵ See, e.g., Kolber, *supra* note 1, at 196-98 (arguing that the primary burden of criminal theory is to justify “purposely or knowingly inflict[ing] substantial pain or distress . . .”).

¹⁴⁶ MODEL PENAL CODE §2.02(7) (1962).

marker between crime and punishment. The point can be made just as easily with a more benign example. Imagine that on the day his sentence is to begin, an offender is suddenly stricken with a tooth abscess. The judge expresses some concern, but is assured by officials that the prison dentist will be able to perform a root canal the next day. The judge is aware that root canals are painful procedures. He also knows that the prisoner will suffer during a period of convalescence after the procedure. To support its claim that “punishment” is suffering knowingly inflicted, PAS is obliged to come forth with an argument explaining why on this example the dental surgery and its attendant suffering constitutes “punishment” simply because the procedure was performed the day after rather than the day before incarceration. No argument for the proposition appears in the PAS literature or springs to mind. Moreover, the consequences of such a position do not inspire confidence precisely because they ignore the core normative character of punishment in favor of a purely descriptive accounting of suffering regulated by coincidence and other existential irrelevancies rather than moral concepts such as justice and desert.

This fundamental failure of PAS to draw key normative lines is also evident in arguments that punishment is “comparative” in nature.¹⁴⁷ Take for example Adam Kolber’s “abducted drug dealer.”¹⁴⁸ Imagine a drug dealer who, on the day he is to begin his prison sentence, is kidnapped by a rival gang and held in prison-like conditions. If he is later found by law enforcement officials and immediately transferred to official custody where his subjective experiences of disutility are identical to those suffered while in the unlawful custody of the rival gang, comparative PAS posits that the drug dealer is not being punished, and that he therefore “must be placed in an even smaller cell (or

¹⁴⁷ See, e.g., Kolber, *supra* note 4.

¹⁴⁸ *Id.* at 26.

otherwise have a more liberty-constrained sentence) in order to exact the same deprivation of liberty relative to his baseline that we exact from others who commit the same crime.”¹⁴⁹

PAS admits that “this result seems counterintuitive,”¹⁵⁰ and so it does. Unfortunately, PAS does not plumb the source of those intuitions, which are grounded in the normative distinction between crime and punishment that must form the core of any theory of criminal law. That PAS cannot distinguish between an unlawful kidnap, which is neither justified nor deserved, and lawful incarceration, which is both justified and deserved, discredits its critique of those traditional theories of punishment which do.

The approach to PAS drawn from the social science and psychology literature on hedonic adaptation is equally problematic insofar as it defines “punishment” as suffering a judge knows will result from conviction and imposition of sentence. As PAS advocates point out, among the more pernicious sources of suffering for felons are a variety of constraints on liberty that are consequent of conviction, including denial of the franchise, difficulty finding work, and the loss of professional licenses.¹⁵¹ Of course, the United States Supreme Court routinely has held that these kinds of administrative consequences, even if inflicted by state agents, are not “punishment,” and therefore need not meet constitutional standards of criminal process.¹⁵² That does not mean that government agents are liberated from any duty to justify these practices or the suffering they cause. Rather, the

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* Equally counterintuitive is the implied suggestion that the best way for an offender to reduce the objective severity of his punishment would be to go on a wildly pleasurable vacation right before submitting to custody.

¹⁵¹ Bronsteen et al., *supra* note 1, at 1049-53.

¹⁵² *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346 (1997) (administrative incarceration of convicted sex offenders is not punishment); *Flemming v. Nestor*, 363 U.S. 603, 616 (1960) (administrative consequences, such as “bar[ring] from practice [of medicine] persons who commit or have committed a felony,” are exercises of “regulatory power,” and do not “add to the punishment”).

point is that, because they are incidental to punishment, they must be independently justified and must pass muster under the Fourth, Fifth or Fourteenth Amendments, rather than the Eighth.

* * * * *

PAS proceeds from the premise that punishment is suffering. PAS scholars do not specify what they mean by such a claim. That alone presents a problem for PAS. Nevertheless, out of argumentative sportsmanship, this Section has examined what seem to be the most plausible contenders. With just a bit of pressing, all came up wanting because they are far too broad, drawing in whole categories of suffering that cannot plausibly be counted on the tally card of “punishment.” Among these incidentals is much of the suffering highlighted by PAS as unaccounted by traditional punishment theories. Rather than reflecting a mistake, the failure of criminal theory to justify incidental suffering of this sort now appears to be both intentional and reasonable. To the extent theories of punishment are obliged to justify any suffering at all, that obligation runs only to suffering linked to and justified by the theory of punishment that is deployed. To paraphrase a great American intellectual, “punishment is as punishment does.”¹⁵³

This may seem circular, but it is not. Theories of punishment are grounded by normative principles external to punishment practice and the experiences of individual offenders. That normative dimension is what is lost in the rather crude reduction of “punishment” to suffering, revealing PAS to be what H.L.A. Hart in a similar context called “a spectacular *non sequitur*.”¹⁵⁴ The next two Parts offer a brief exegesis of some of the major objective theories of punishment and further expose the absurdity of equivocating between “punishment” and suffering. What this

¹⁵³ MOORE, *supra* note 93, at 25. I refer to Tom Hanks’s eponymous character in *Forrest Gump* (Paramount 1994), but the adage traces to a proverb of much longer history: “He is handsome that handsome doth.” WILLIAM G. BENTHAM, *BOOK OF QUOTATIONS PROVERBS AND HOUSEHOLD WORDS* 788 (1907).

¹⁵⁴ HART, *supra* note 92, at 19.

discussion reveals is that a forensic account of suffering is at best a heuristic device for understanding a fundamentally normative concept.¹⁵⁵

IV. RETRIBUTIVE THEORIES OF CRIMINAL PUNISHMENT

The PAS critique of retributivism turns on the proposition that the defining feature, core purpose, and primary justification of criminal punishment is its capacity to inflict pain and suffering on an offender.¹⁵⁶ According to PAS advocates, “retributivists hold that offenders deserve to suffer for their crimes.”¹⁵⁷ Retributivists need not and do not endorse this view.¹⁵⁸ Retributivists use “punishment” in a precise way referring to background theories of crime, criminal agency, and justice. Pain and suffering under these theories may be an incidental effect of punishment, but punishment is neither justified nor measured by its capacity to produce pain and suffering.¹⁵⁹ This may strike PAS advocates and some readers as odd. That confusion is no doubt due in part to the fact that retributivism often is confused with baser sentiments of vengeance,¹⁶⁰ what Susan Jacoby has called “Wild Justice.”¹⁶¹ While there certainly are some blustery law and order types who share this view, and angry calls for revenge frequently do dominate public conversations about

¹⁵⁵ FEINBERG, *supra* note 16, at 111-18. This conceptual mistake is common in efforts by lawyers to make sense of new knowledge and technology at the cutting edge of medicine, neuroscience, and the social sciences. See, e.g., Pustilnik, *supra* note 16.

¹⁵⁶ See, e.g., Bronsteen et al., *supra* note 1, at 1068-70; Kolber, *supra* note 1 at 197, 199, 212-13.

¹⁵⁷ Kolber, *supra* note 1, at 199. See also Bronsteen et al., *supra* note 1, at 1072-73n. 166 (“when a retributive theory addresses the severity of punishment, that severity is necessarily measured in terms of the harm or negative experience imposed on the offender.”).

¹⁵⁸ See, e.g., FLETCHER, *supra* note 112, at 228 (rejecting this view); FEINBERG, *supra* note 16, at 116-18 (same); Hampton, *supra* note 16, at 128-29 (same); Herbert Morris, *A Paternalistic Theory of Punishment*, 18 AM. PHIL. Q. 263, 270 (1981) (same).

¹⁵⁹ See FEINBERG, *supra* note 16, at 116.

¹⁶⁰ See MILL, *supra* note 44, at 50-51 (noting roles of moral outrage and instincts of self-defense in punitive impulses).

¹⁶¹ SUSAN JACOBY, *WILD JUSTICE: THE EVOLUTION OF REVENGE* (1983). One also cannot help but recall Foucault’s vivid account of the elaborate execution of Damien. FOUCAULT, *supra* note 30, at 3-6.

punishment in the face of horrific crimes, the explicit task of retributivism as a theory of justice is to resist slavery to emotions like anger and bloodlust in favor of cool reason.¹⁶² To paraphrase a prominent British social critic, tell a retributivist he's in the vengeance business and he'll be in need of some restraint.¹⁶³

Retributivism is defined by the proposition that punishment can be imposed only if and only to the extent it is deserved.¹⁶⁴ From the retributivist point of view, the failure of PAS to distinguish between crime and punishment reveals the project's core pathology: its failure to recognize that just punishment is essentially a deontological, moral, concept,¹⁶⁵ and that suffering—as PAS scholars use the word—describes normatively neutral experiential phenomena.¹⁶⁶ This semantic slippage between normative and descriptive terms is not uncommon,¹⁶⁷ but is nonetheless without foundation and the source of much confusion in the PAS literature and elsewhere. PAS claims to the contrary notwithstanding, retributivism defines punishment as a restraint on liberty or other consequence that is determined and justified objectively by reference to a culpable offense.¹⁶⁸ Part A

¹⁶² NOZICK, *supra* note 99, at 366-70; GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 417 (2000) (“[Retributivism] is obviously not to be identified with vengeance or revenge, any more than love is to be identified with lust.”). *See also* J.F. STEPHENS, *GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND* 99 (1863) (“The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite.”).

¹⁶³ *See* THE ROLLING STONES, *Sympathy for the Devil, on BEGGARS BANQUET* (Abkco Records 1968).

¹⁶⁴ *See, e.g.*, FLETCHER, *supra* note 112, at 228; MOORE, *supra* note 93, at 153; HART, *supra* note 92, at 4-5; Hampton, *supra* note 16, at 128-29.

¹⁶⁵ Nino, *supra* note 16, at 102.

¹⁶⁶ This is in contrast to most utilitarians—with the notable exception of Bentham—who maintain that that suffering and happiness by their nature have a normative valence. *See* Nussbaum, *supra* note 25, at 92-95.

¹⁶⁷ FLETCHER, *supra* note 162, at 396-401.

¹⁶⁸ *Id.* at 415, 416-18, 461-62, 505-14; FLETCHER, *supra* note 112, at 228; KANT, *supra* note 12, at 104-09; Hampton, *supra* note 16, at 128-29.

explains this approach to punishment, paying particular attention to Immanuel Kant’s work.¹⁶⁹ Part B responds to several criticisms of objective accounts of punishment advanced by PAS scholars. Part C returns to the PAS critique of retributivism to reveal that the absurd results PAS scholars credit to retributivism, including the apparent obligation to impose lesser sentences on wealthy, sensitive offenders than on their poor and hardened peers, are a consequence not of retributivism but of PAS’ equivocation from “punishment” to “suffering.” Therefore, those unpalatable results serve as reasons to reject PAS, not retributivism.

A. The Retributive Account of Punishment

While utilitarian approaches to punishment dominated the conversation amongst theorists and practitioners for years surrounding and following Herbert Wechsler’s work on the Model Penal Code, retributivism has since enjoyed a revival.¹⁷⁰ In fact, the current draft of the Model Penal Code, which is in the last stages of adoption by the American Law Institute, abandons its exclusive endorsement of utilitarian justifications of punishment in favor of an approach bounded by retributivist principles.¹⁷¹ The federal approach to punishment also cites retributive commitments as

¹⁶⁹ The exegesis of Kant’s theory of punishment presented here is necessarily brief and as a consequence blurs over substantial debates among Kant scholars. See, e.g., Thomas Hill, *Kant on Punishment: A Coherent Mix of Deterrence and Retribution?*, 1997 ANN. REV. L. & ETHICS 5 (1997); Samuel Fleischacker, *Kant’s Theory of Punishment*, in ESSAYS ON KANT’S POLITICAL PHILOSOPHY 191 (1992); Sharon Byrd, *Kant’s Theory of Punishment: Deterrence in its Threat, Retribution in its Execution*, 8 LAW & PHIL. 151 (1989); Jeffrie Murphy, *Does Kant Have a Theory of Punishment?*, 87 COLUM. L. REV. 509 (1987); Don Scheid, *Kant’s Retributivism*, 93 ETHICS 262 (1983); Jeffrie Murphy, *Kant’s Theory of Criminal Punishment*, in RETRIBUTION, JUSTICE AND THERAPY: ESSAYS IN THE PHILOSOPHY OF LAW 82 (1979). These are fascinating debates and I welcome future opportunities to engage critics, but it is both impossible and unnecessary to indulge that temptation here.

¹⁷⁰ FLETCHER, *supra* note 162, at 416; WAYNE LAFAVE, CRIMINAL LAW 30 (2003).

¹⁷¹ See MODEL PENAL CODE § 1.02(2) (tentative draft April 9, 2007) (“Purposes; Principles of Construction. (2) The general purposes of the provisions on sentencing, applicable to all official actors in the sentencing system, are: (a) in decisions affecting the sentencing of individual offenders: (i) to render sentences in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders; (ii) when reasonably feasible, to achieve offender rehabilitation, general deterrence, incapacitation of dangerous offenders, restoration of crime victims and communities, and reintegration of offenders into the law-abiding community, provided these goals are pursued within the

its first principle.¹⁷² The ubiquity of retributivism in existing and reform approaches to criminal law and punishment demands critical engagement. There is therefore no fault to be found in the instinct exhibited in PAS to test the theory. However, such investigations must take seriously the work of sophisticated advocates on their own grounds rather than engaging strawmen or pastiches. Unfortunately, PAS targets a version of retributivism that few if any influential contributors propound. This Section provides some clarification.

“Retribution,” according to George Fletcher, “simply means that punishment is justified by virtue of its relationship to the offense.”¹⁷³ While retributivists vary in the details of what this relationship is,¹⁷⁴ the core of the theory was described by Immanuel Kant in *The Metaphysics of Morals*.¹⁷⁵ The central feature of Kant’s moral theory is the categorical imperative. The categorical imperative is expressed in several ways, but for present purposes the Universal Law formulation will do with its command that “I should never act except in such a way that I can also will that my maxim should become a universal law.”¹⁷⁶ To understand what Kant means by this it is necessary to understand what he means by “will” and “maxim.”

Laying the foundation for the German Enlightenment and its heirs, including John Rawls¹⁷⁷ and Jürgen Habermas,¹⁷⁸ Kant draws a broad distinction between faculties of will set to a specific

boundaries of proportionality in subsection (a)(i); and (iii) to render sentences no more severe than necessary to achieve the applicable purposes in subsections (a)(i) and (a)(ii).”).

¹⁷² See 18 U.S.C. §3553(a)(2).

¹⁷³ FLETCHER, *supra* note 162, at 416-17. See also MOORE, *supra* note 93, at 83.

¹⁷⁴ See generally, John Cottingham, *Varieties of Retribution*, 29 PHIL. Q. 238 (1979).

¹⁷⁵ See John Bronsteen, *Retribution’s Role*, 84 Indiana L.J. 1129, 1130 (2009) (noting centrality of Kant in the punishment canon). Kant’s theory of punishment is a subject of hot debate among Kant scholars. See *supra* note 169.

¹⁷⁶ IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 14 (James Ellington trans., 1993).

¹⁷⁷ JOHN RAWLS, *THEORY OF JUSTICE* 251-57 (2005)

purpose—what one might call instrumental reason¹⁷⁹—and faculties of will that operate in a reflective capacity to measure and determine the desires that lie at the heart of action—what Kant calls “practical reason,” or *Wille*.¹⁸⁰ The line drawn is roughly between those rational processes by which we choose among means to our ends, and the rational processes by which we choose our ends. Reason plays a crucial role in both fields of cogitation, but the nature of the reasons and the structures and rules of rationality in these two fields are distinct. For example, expediency, efficiency, and a balancing of costs and benefits dominate instrumental rationality. However, those considerations have no first-order role when deciding among competing goals or principles of action. Similarly, contingencies of circumstance take center stage in applications of the instrumental will to problems in the phenomenal world. By contrast, the reflective will, while necessarily influenced by inescapable existential realities, eschews the vagaries and vicissitudes of the world in favor of regulative ideals drawn from noumenal structures of reason.¹⁸¹

In Kant’s system, these two forms of rationality and their respective applications line up with distinctions between prudential considerations of what is possible or advisable and more purely normative considerations of what is right, just, or good.¹⁸² So, one might for good instrumental reasons determine that pursuit of a particular goal or desire is unwise—because doing so would impose too many limitations on the pursuit of other goals and desires, say—but that determination would go to whether it is possible to pursue a particular end rather than whether that end is in fact

¹⁷⁸ JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION*, VOL. I, 8-42 (1984).

¹⁷⁹ Kant uses “*willkür*.” See KANT, *supra* note 12, at 13.

¹⁸⁰ *Id.* at 13-14.

¹⁸¹ This account of freewill is not without its critics. See, e.g., Murphy, *supra* note 169, at 523-24.

¹⁸² KANT, *supra* note 12, at 13.

good. While it is not always possible to perform our duties to the good in the messy real world, duty serves a crucial function as a regulative ideal.¹⁸³

By invoking “will” in his formulation of the categorical imperative, Kant refers to practical rather than instrumental reason. The rational workings of non-instrumental will entail the identification and evaluation of maxims. A maxim is “[a] rule that the agent himself makes his principle [of action] on subjective grounds.”¹⁸⁴ It is the postulate that describes the action purely in terms of practical reason completely apart from both the goals that action might serve and instrumental considerations of effect and efficiency.¹⁸⁵ Kant allows that different agents may have different maxims for actions which appear identical when objectively observed.¹⁸⁶ For normative purposes, the question is always whether the maxim of an agent’s act may be made universal law. The resolution is found in a simple mind experiment. Agents considering a particular action must ask themselves whether the maxim of their action can be universalized without contradiction. The categorical imperative is, then, a crucible, testing the logical purity of a maxim in the fires of generality where internal contradictions are revealed. If a maxim fails the test, it is the moral duty of the agent to refrain from acting upon it.

¹⁸³ IMMANUEL KANT, *CRITIQUE OF PURE REASON* 312-13 (Norman Smith trans., 1965). Kant’s conception of a Kingdom of Ends serves a similar role in his historical philosophy. While outwardly naïve in his hope for a society where everyone acts in a purely moral fashion, Kant is well aware that we are a “race of devils,” and therefore need the external constraint of a state writing law in the shadow of the bloodbath of history to compel us to an approximation of the ideal. See Immanuel Kant, *Perpetual Peace: A Philosophical Sketch*, in *KANT: POLITICAL WRITINGS* 93, 105, 112-13 (Hans Reiss ed., 1991). See also RAWLS, *supra* note 177, at 246.

¹⁸⁴ KANT, *supra* note 12, at 17. An agent’s maxim of action is by definition available only to him, but can be imputed to him based on his actions. *Id.* at 19.

¹⁸⁵ Thomas Hill has a slightly different reading, concluding that maxims incorporate “rationales” in keeping with “general principles of rational choice.” As Hill admits, however, that reading “sets aside Kant’s troublesome references to ‘noumenal’ causation.” Hill, *supra* note 96, at 415-16.

¹⁸⁶ KANT, *supra* note 12, at 17.

Examples are always helpful in understanding what Kant is on about here. Let us consider theft. An agent considering whether or not to take the property of another must first consider the maxim of his action. Maxims, recall, are abstracted from instrumental goals and rationalizations. So, where the question is one of moral duty, the purpose to which an agent proposes to put the property to use is irrelevant, as are other reasons he might have for stealing. The essence of theft, and therefore its maxim, is taking the property of another. To determine whether that maxim is consistent with the moral law, the agent must ask whether the maxim “I take that which is not mine” may be generalized and made a universal rule of action without contradiction. The answer, quite obviously, is “no.” Were all agents to act upon the maxim “I take that which is not mine,” then the concept of mine and thine upon which the maxim of theft is predicated would disappear. Theft is therefore wrong because it contradicts the principal of ownership internal to and presupposed by the very concept of theft itself.¹⁸⁷ Because the maxim of theft cannot be made universal law without contradiction, agents have a duty not to steal.

Ideally, agents will respect their duties as determined by the categorical imperative and embrace right action as an ethical matter.¹⁸⁸ Kant is no Pollyanna, however. He recognizes that humans are a “race of devils,” and therefore require as a condition of justice an external authority that can propagate and enforce the commands of moral duty in the form of law.¹⁸⁹ States, like

¹⁸⁷ In a purely communist society the maxim of theft, “I take that which is not mine,” would be nonsensical because there is no conception of mine and thine. This reveals that in all but a few cases, moral duty is derivative of background social practice. Two notable exceptions are murder and suicide, which, taken to their logical ends, would entail the destruction of humanity and the exercise of reason in general. It is therefore impossible as a moral matter for a society to condone or allow murder and suicide.

¹⁸⁸ KANT, *supra* note 183, at 312-13.

¹⁸⁹ KANT, *Perpetual Peace supra* note 183, at 93, 105, 112-13; IMMANUEL KANT, RELIGION WITHIN THE LIMITS OF REASON ALONE 87-90 (Greene & Hudson trans., 1960). *See also* RAWLS, *supra* note 177, at 315; Murphy, *supra* note 169, at 516. Kant may be read here as anticipating Hart’s distinguishing among three

agents, are subject to the commands of the categorical comparative.¹⁹⁰ Consequently, states may enact and enforce only those laws that are consistent with the freedom of all and which respect the autonomy of subjects as citizens.¹⁹¹ That constraint forbids the use of punishment to effect or “promote some other good for the criminal himself or for civil society”¹⁹² because to do so would contradict the concept of autonomy upon which society as collection of free agents is constructed.¹⁹³ Rather, punishment can only be imposed “because [the agent] has committed a crime,” that is, because it is deserved.¹⁹⁴

That punishment *qua* punishment can only be imposed because it is deserved by an agent who has committed a crime does not answer the question of *what* punishment is deserved.¹⁹⁵ Kant’s reply is “the principle of equality (in the position of the needle on the scale of justice), to incline no more to one side than to the other.”¹⁹⁶ That is far from illuminating until considered in light of Kant’s account of crime. A crime, by definition, poses a contradiction to state-defined justice, inclining the needle. To right the needle, the contradiction must be resolved. The terms of that resolution are contained within the maxim of the crime upon which the offender himself acts. Just punishment demands no more and no less than expiation of the contradiction posed by the criminal and his crime. “Accordingly, whatever undeserved evil you inflict upon another within the people,

questions: 1) Why have a system of punishments?; 2) Who should be punished?; and 3) What form should punishment take? HART, *supra* note 92, at 4-9.

¹⁹⁰ Murphy, *supra* note 169, at 521, 52-28, KANT, CRITIQUE *supra* note 183, at 312.

¹⁹¹ KANT, CRITIQUE *supra* note 183, at 312.

¹⁹² KANT, *supra* note 12, at 104-05.

¹⁹³ RAWLS, *supra* note 177, at 241.

¹⁹⁴ KANT, *supra* note 12, at 104-05.

¹⁹⁵ HART, *supra* note 92, at 4.

¹⁹⁶ KANT, *supra* note 12, at 105-06.

that you inflict upon yourself. If you insult him, you insult yourself; if you steal from him, you steal from yourself; if you strike him, you strike yourself; if you kill him, you kill yourself.”¹⁹⁷

This has the veneer of simple revenge as “an eye-for-an-eye,” but Kant provides additional, crucial, clarification, writing:

But what does it mean to say, “If you steal from someone, you steal from yourself?” Whoever steals makes the property of everyone else insecure and therefore deprives himself (by the principle of retribution) of security in any possible property.¹⁹⁸

This, then, is the standard of justice for Kantian retributivists. The logical contradiction posed by an offense under law must be carried to its natural end and resolved for society by imposing the consequences of that contradiction on the offender. Punishment that provides this expiation is just because the offender is made to bear the logical consequences of his offense. Punishment other than what is necessary in light of the crime is unjust, either because it fails to right the needle or because it goes too far. Critical, however, is that punishment is measured and determined by objective standards. The goal of punishment is most definitely not to cause some quantum of subjective suffering.¹⁹⁹ Neither is the amount or degree of suffering experienced subjectively by an offender the measure of punishment.²⁰⁰ Rather, punishment is the objectively determined, logical

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 106-07.

¹⁹⁹ As Thomas Hill has pointed out, moral agents may well feel “discomfort” when they realize their wrongdoing and may even accept as appropriate the condemnation of others. However, those self-directed reactive attitudes are an “inherent liability in being one moral agent among others,” and “[t]here is no ground here for supposing that this suffering, or even more, should be deliberately imposed,” or that “wrongdoers *deserve* to suffer in any practical sense that entitles others to contribute to their suffering.” Hill, *supra* note 96, at 421-22, 424.

²⁰⁰ Kolber cites Kant for the proposition that punishment must be proportional to the subjective experiences of offenders. See Kolber, *supra* note 1, at 184 n.1. The passage he cites reads in full:

But only the law of retribution (*ius talionis*)—it being understood, of course, that this is applied by a court (not by your private judgment)—can specify definitely the quality and the quantity of punishment; all other

[51]

consequence of a crime imposed upon an offender by the state. The maxim of theft poses a contradiction to the concept of ownership upon which the laws of property are predicated; therefore the proper legal punishment for an act of theft is to deny the offender access to property in a form and to a degree commensurate with his offense.²⁰¹

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

KANT, *supra* note 12, at 106. Read incautiously, this passage does appear to endorse a subjectivist account of punishment. It mentions “pain” and “shame” after all. To rest on this surface would, of course, be to ignore the crucial reference to retribution and its role in determining the objective necessity for shaming in certain circumstances. Here, Kant recognizes that some crimes express a maxim of status entitlement. Proper punishment in these circumstances requires bringing this abusive use of status full circle upon the offender by causing him to supplicate himself to the person whose autonomy his unwarranted assertion of privilege has negated. Kant is in this respect democratic and refuses to endorse class as a claim of right to do wrong. The contemporary criminalization of hate crimes reflects a similar disposition. Jean Hampton's approach to retributivism also focuses on negating unfounded claims of entitlement. *See infra* notes 226-230 and accompanying text. Thomas Hill reads this passage slightly differently, but ultimately also reaches the conclusion that it does not provide grounds for thinking that Kant is giving leave for judges to vary punishments according to subjective factors. Hill, *supra* note 96, at 434-37. For a more expansive account of status inequality in crime and potential responses, see David Gray, *A No-Excuse Approach to Transitional Justice*, 87 WASH. U. L. REV. ____ (forthcoming 2010); and David Gray, *Power Paradigms, Status Inequality, and the Collapse of Dynamic Stability: Why Transitional Justice Is Not 'Ordinary'* (Feb. 15, 2009) (unpublished manuscript on file with author).

²⁰¹ Other punishments suggested by Kant share this same intuitive appeal. For example, the expiatory consequence of murder is the death penalty. KANT, *supra* note 12, at 106. Others are more elusive. *See, e.g., id.*, at 130 (“The punishment for rape and pederasty is castration . . . that for bestiality, permanent expulsion from civil society, since the criminal has made himself unworthy of human society.”). Others appear anachronistic. *See, e.g., id.*, at 108-09 (providing excuses for mothers who kill illegitimate children

Not all retributivists are pure Kantians,²⁰² of course, but the general conception of punishment as justified only in response to a culpable criminal offense objectively determined by reference to the nature of that offense forms a common core.²⁰³ Herbert Morris, for example, famously explained crime as inflicting an imbalance in the allocation of privileges and burdens central to a well-functioning society.²⁰⁴ Punishment on his view should force the offender to relinquish the benefits and assume the burdens imposed by the offense.²⁰⁵ Elsewhere, Morris advances a “Paternalistic Theory of Punishment,” arguing that punishment should attend to the moral development of the offender.²⁰⁶ While he there allows that punishment is “generally recognized as deprivation,” he maintains that this is an objective constraint such that punishment remains “punishment” even if the wrongdoer “desire[s] punishment.”²⁰⁷

and killings perpetrated during duels). That these punishments may seem odd, anachronistic, or culturally bound is no criticism of the theory, however, because the contradiction posed by any maxim of action is in most cases determined by reference to contingent social and legal commitments. *See supra* note 187.

²⁰² This category includes many politicians, pundits, practitioners, and others who claim the mantle of retributivism. The sad fact is that many of these folks are not really retributivists at all. Rather, they mine moral outrage to justify ever more severe punishments that are hard if not impossible to justify under any traditional theory of punishment, including retributivism. This author shares with contributors to the PAS literature an unapologetic belief that we ought not endorse or accept individual sentences or a system of criminal punishments that cannot be justified by a coherent and persuasive theory of criminal law and punishment. Therefore, any claim that our current punitive practices do not conform, in even a rough way, to the terms and dictates of retributivism is, in the context of a debate between PAS and retributivism, a non sequitur. Here, the questions at issue are whether PAS exposes a core incoherence in retributivism or whether PAS offers a superior theory of criminal punishment. The answer to both questions is definitively “no.”

²⁰³ *See, e.g.*, MOORE, *supra* note 93, at 84-92, 111; F. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* 66 (1981); ANDREW VON HIRSCH, *DOING JUSTICE* 51 (1976).

²⁰⁴ HERBERT MORRIS, *Persons and Punishment*, in *ON GUILT AND INNOCENCE* 31, 34-35 (1976).

²⁰⁵ For a criticism of this view, see Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 *UCLA L. REV.* 1659, 1660-61 (1992) and David Dolinko, *Some Thoughts about Retributivism*, 101 *ETHICS* 537, 545-49 (1991).

²⁰⁶ Morris, *supra* note 158.

²⁰⁷ *Id.* at 264.

Like Kant, John Rawls connects crime to moral rules, and argues that rational persons in the original position will agree that a system of rules for public conduct is necessary, but must conform to basic principles of legality, including objectivity and prospectivity as constraints on punishment.²⁰⁸

George Fletcher “readily accept[s]” the proposition that “punishment ought to be imposed according to desert.”²⁰⁹ While his analysis of desert entails a subjective component of culpability, he too maintains that punishment ought to respect the offender as an end in himself rather than rendering him a means to social ends,²¹⁰ and specifically rejects the proposition that “punishment” must be experienced as painful by the offender on whom it is inflicted.²¹¹

While not a pure retributivist, H.L.A. Hart allows that punishment “must involve pain or other consequences normally considered unpleasant.”²¹² However, as George Fletcher points out, this is an objective not a subjective standard.²¹³ So, a masochist who enjoys confinement or a homeless man seeking incarceration so he can escape the elements are both “punished” even if their

²⁰⁸ RAWLS, *supra* note 177, at 241, 314-15, 575-76. *See also* Kolber, *supra* note 1, at 203 (citing RAWLS, *supra* note 177, at 10 for the proposition that punishment must be defined objectively as a restraint on liberty). *Cf.* Walker, *supra* note 37, at 534-36 (describing such a “Rawlsian” moment).

²⁰⁹ FLETCHER, *supra* note 162, at 459-60, 461.

²¹⁰ *Id.* at 461, 505-14.

²¹¹ FLETCHER, *supra* note 112, at 227. As Fletcher points out, the rise of imprisonment as the main form of state-sanctioned punishment opens a space of ambiguity between criminal theory and penal practice. *Id.* at 226.

²¹² HART, *supra* note 92, at 4. Hart’s general approach relies on utilitarian considerations when justifying systems of punishment and retributive grounds when addressing questions of distribution. *Id.* at 4-11. Kent Greenawalt offers a similar definition of punishment as involving “designedly unpleasant consequences” which “most people would wish to avoid.” Greenawalt, *supra* note 112, at 343-44.

²¹³ FLETCHER, *supra* note 112, at 228. *See also* HART, *supra* note 92, at 19-20, 25 (rejecting on various grounds subjective approaches to punishment). Kolber recognizes that Hart defines punishment objectively. *See* Kolber, *supra* note 1, at 215. *But see* Kolber, *supra* note 4, at 34n.75.

imprisonment is subjectively pleasurable or welcomed, so long as incarceration is *normally* considered painful or unpleasant.²¹⁴

In his influential reconstruction of retributivism, Joel Feinberg defines punishment as “authoritative deprivations,”²¹⁵ which, *qua* punishments, provide a material and symbolic medium for the expression of social condemnation.²¹⁶ Feinberg recognizes that in order for punishment to express that condemnation, it must constitute “hard treatment.” However, he is clear that it is “the treatment itself [which] expresses condemnation,” and that method is what carries meaning, whether the state is “beheading a nobleman, hanging a yeoman, [or] burning a heretic.”²¹⁷ Nothing in Feinberg’s account of punishment suggests that the public social expression of punishment is bound to the individual subjective experiences of the punished;²¹⁸ quite to the contrary, he unequivocally rejects the notion that “the wicked should suffer pain in exact proportion to their turpitude” as “incoherent,” in part because it would lead to absurd results with which we are familiar, including punishing “some petty larcenies . . . more severely than some murders.”²¹⁹ What allows punishment to express official condemnation on Feinberg’s view is its intersubjective status as hard treatment,

²¹⁴ FLETCHER, *supra* note 112, at 228. Fletcher’s discussion neatly disposes of any normative significance that can be drawn from O’Henry’s famous story *The Cop and the Anthem*. See, e.g., Kolber, *supra* note 1, at 205; Kolber, *supra* note 4, at 18n.45.

²¹⁵ FEINBERG, *supra* note 16, at 97-98.

²¹⁶ *Id.* at 98-100.

²¹⁷ *Id.* at 100.

²¹⁸ For example, Feinberg analogizes punishment as symbolic idiom for condemnation to champagne as symbolic idiom for celebration. It is hard to see how the message of Ron Santo’s popping the cork on a bottle of champagne after the Cubs win the World Series would be muddied for viewers if Santo actually hated the stuff.

²¹⁹ *Id.* at 116-18. Kolber nevertheless claims that expressivists must link symbolic semantics to profane subjective experiences. Kolber, *supra* note 1, at 208-10. *But see* Bronsteen et al., *supra* note 1, at 1077 (concluding that a “thoroughgoing expressivist theory . . . would be unaffected by the phenomena we have emphasized”). These arguments are addressed in Section IV.B. *infra*.

not the subjective experiences of those punished.²²⁰ The alternative proposed by PAS makes punishment a private language, nullifying its communicative potential.²²¹

Carlos Nino also defines punishment in objective terms as “intentional deprivation of a person’s normally recognized rights of official institutions”²²² justified by the commission of a crime.²²³ While Nino’s consent-based conception of punishment²²⁴ is not purely retributive, his description of punishment in objective terms reflects his respect for basic Kantian commitments to legality, culpability, and respecting offenders as ends in themselves, which form the corpus of retributive theory.²²⁵

Jean Hampton’s theory of punishment as moral education provides yet another approach to punishment, which, out of respect for retributive principles, justifies punishment on objective moral grounds.²²⁶ In Hampton’s view, a just theory of punishment must respect the moral freedom of offenders.²²⁷ While punishment may have a secondary role in providing nonmoral reasons for conformance with law, its primary justification is as a marker at the border of public morality defined by law and a locus for moral education of the offender and the community.²²⁸ Elsewhere, Hampton also argues that crime asserts an unjust claim of entitlement by the criminal and

²²⁰ FEINBERG, *supra* note 16, at 118.

²²¹ See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 89-95 (G.E.M. Anscombe trans., 1953).

²²² Nino, *supra* note 16, at 94.

²²³ *Id.* at 102-03.

²²⁴ Nino argues that punishment systems and punishment in individual cases represents a disparity in the distribution of public burdens and benefits that can only be justified by reference to consent. Culpability for a crime, on his view, entails consensual loss of immunity from punishment. *Id.* at 102-03.

²²⁵ *Id.* at 96-97, 102-03, 107-08.

²²⁶ Hampton, *supra* note 16.

²²⁷ *Id.* at 126-27. For a pithy, if not entirely persuasive critique of Hampton’s theory, see Deirdre Golash, *The Retributive Paradox*, 54 *ANALYSIS* 72, 73-78 (1994).

²²⁸ Hampton, *supra* note 16, at 117-19.

diminishment of his victim’s moral status.²²⁹ In these circumstances, punishment provides public affirmation of the victim’s worth. In Hampton’s view, both approaches require distinguishing “punishment,” which she defines as “disruption of the freedom to pursue the satisfaction of one’s desires,” from the subjective experience of punishment, which may or may not entail “pain.”²³⁰

Robert Nozick distinguishes two distinct but interrelated approaches to retributivism, one teleological and the other not.²³¹ Both center on the communicative potential of punishment as a path to reform. Teleological retributivists care deeply about the success of a punishment as a method of communication, but as Nozick points out, full faith to that goal requires the same objective approach to punishment bound to culpability for a crime central to nonteleological retributivism.²³²

As this brief survey of the field reveals, the equivocation between suffering and punishment upon which PAS depends reflects an essential misunderstanding of retributivism. Serious and sophisticated theories of retributive justice are not driven by revenge, at least not in the sadistic sense implied by PAS, and therefore do not focus on returning suffering for harm.²³³ To the contrary, retributivists are committed to rejecting the view that punishment is suffering precisely because to do otherwise would be to make punishment part of a hedonic economy and therefore put justice at the whim of instrumental considerations. This does not mean that punishment cannot

²²⁹ Hampton, *supra* note 205, at 166-85. *See also* Bronsteen, *supra* note 175 at 1151 (citing unpublished data gathered by Kenworthy Bilz supporting Hampton’s view); *but see* Walker, *supra* note 37, at 531-32.

²³⁰ Hampton, *supra* note 16, at 128-29. Hampton offers the example of a physician convicted of Medicare fraud who is sentenced to community service in a state clinic. As she points out, attending to the sick need neither be painful nor unpleasant for the physician for his sentence to constitute “punishment” so long as his freedom is constrained and that constraint entails a moral lesson.

²³¹ NOZICK, *supra* note 99, at 363-80.

²³² *Id.* at 369, 374-80.

²³³ *Id.* at 366-67; FLETCHER, *supra* note 162, at 417; Morris, *supra* note 158, at 270.

cause suffering.²³⁴ Neither does it ignore the fact that most punishments are wholly undesirable and do cause most of those punished to suffer, at least to some degree. Rather, the point is that, contrary to views espoused by PAS scholars, the subjective suffering of a particular offender is neither sufficient nor necessary to the justification, measure, or description of punishment. To the contrary, punishment is justified, measured, and described solely in objective terms by reference to the offender's culpability in a crime.²³⁵ The suffering experienced by a particular offender subjected to the punishment he deserves is therefore incidental, and retributivists bear no responsibility for justifying that suffering. As has been emphasized here, this does not mean that subjective experiences of suffering are without moral or practical significance. For example, suffering may be an important factor in the exercise of mercy. Suffering may also be an important consideration for penal technologists charged with the practical task of executing objectively justified sentences. However, it is a mistake to conflate the normative concept "punishment" with suffering as a contingent effect.²³⁶

The commitment to define punishment in terms of desert and culpability allows retributive theories of criminal punishment to make a key distinction that PAS does not make. Part III argued that PAS does not distinguish between crime and punishment. That incapacity reflects a conflation

²³⁴ As Thomas Hill points out, in the ideal case an offender would experience guilt and moral suffering. Hill, *supra* note 96, at 414-23. As a solution for a race of devils, however, punishment under law is not defined or justified by the goal of inflicting guilt or moral suffering. First, organizing a public response to crime around the project of inspiring spontaneous subjective states would raise serious conceptional and practical concerns. See Gray, *No-Excuse*, *supra* note 200. Second, guilt and moral suffering are subjective and matters of private conscience. By contrast, punishment under law is a public matter, which as a practice maintains that only "the *law of retribution (ius talionis)*—it being understood, of course, that this is applied by a court (not by your private judgment)—can specify definitely the quality and the quantity of punishment." KANT, *supra* note 12, at 106. To lump this sort of suffering in with suffering of concern for PAS would repeat the core equivocation exposed in this Article.

²³⁵ NOZICK, *supra* note 99, at 363-65; WILLIAM BLACKSTONE, SELECTIONS FROM BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 42 (Gareth Jones ed., 1973).

²³⁶ FEINBERG, *supra* note 16, at 116-18.

of a normative concept, punishment, with one of its potential effects, suffering.²³⁷ Retributivism provides a superior theory of criminal law and punishment because it is sufficiently robust to make that distinction. To return to some of the examples drawn from the PAS literature, assault in prison does not constitute “punishment” on a retributive view because it is not deserved. Rather, sexual assault is a crime, even if perpetrated in prison. It is inflicted without legal right or privilege by non-state actors and is not justified by the victim’s culpability for a crime.²³⁸ Suffering experienced by a victim of prison rape therefore does not provide an experiential window into punishment for a retributivist. For the same reasons, retributivists would see no commensurability between a case of kidnapping and lawful incarceration because one is a crime and the other is punishment.²³⁹ It would therefore be nonsensical for a retributivist to factor illegally imposed harm in its assessment of what would constitute just punishment in a particular case. To follow the alternative path proposed by PAS is to commit a category mistake.

Closer consideration of treatments of proportionality in the PAS literature reveals a different but related concern. Much if not all of the PAS critique of retributivism is driven by the commitment to comparative proportionality: like cases ought to be treated alike. For retributivists, however, the commitment to comparative proportionality is wholly derivative of the commitment to objective proportionality: that the punishment should fit the crime.²⁴⁰ As Joel Feinberg has pointed out, from a retributive point of view, most claims of comparative injustice rise or fall depending on

²³⁷ See Hampton, *supra* note 16, at 128 (describing the distinction between punishment and subjective experiences of punishment); FEINBERG, *supra* note 16, at 116-18 (same).

²³⁸ See HART, *supra* note 92, at 4-5.

²³⁹ *Contra* Kolber, *supra* note 5, at 1587-88, 1593.

²⁴⁰ MOORE, *supra* note 93, at 90-91.

whether there is an underlying claim of noncomparative injustice.²⁴¹ For example, if an offender complains that his sentence is comparatively longer than his cellmate's sentence, that complaint only has merit if that comparison reveals an element of arbitrariness or objective unfairness in his sentence.²⁴² Deborah Hellman has made this point at length, arguing that discrimination is unjust only if objectively unjustified.²⁴³ Furthermore, inverting the order of priority between objective and comparative conceptions of proportionality would lead to results far more absurd than those advanced by PAS. For example, if the sole measure of justice was comparative proportionality, then there would be no reason to object to infliction of the death penalty for minor traffic violations so long as all similarly situated offenders were put to death.²⁴⁴ Just as retributivists are committed to measure punishment objectively rather than subjectively, so too are they committed to justify punishment on the basis of objective rather than comparative proportionality.²⁴⁵ To the extent the PAS critique of retributivism depends on a different reading of retributivism, it is a non sequitur.

²⁴¹ Feinberg, *Noncomparative Justice*, *supra* note 54, at 300-01, 311-13, 318-19.

²⁴² *Id.* at 311-13, 318-19.

²⁴³ *See generally*, DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG (2008).

²⁴⁴ Feinberg, *Noncomparative Justice*, *supra* note 54, at 311.

²⁴⁵ While far from determinative in the present discussion, it is worth noting that the Supreme Court's death penalty jurisprudence appears to endorse an objective rather than subjective account of "punishment." In *In re Kemmler*, 136 U.S. 436, 448 (1890), the Court confirmed that particularly barbaric punishments, such as disembowelment, are prohibited by the Eighth Amendment because "they involve torture or a lingering death" and are therefore "inhuman and barbarous, something more than the mere extinguishment of life." While it is not unreasonable to think that this "something more" is pain, the Court "has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment," *Baze v. Rees*, 128 S.Ct. 1520, 1530 (2008), and when asked to rule on the constitutionality of electrocution on particularly gruesome facts, the Court held that "[t]he cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely," *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464-65 (1947). When asked to determine the constitutionality of imposing death on mentally impaired and juvenile offenders, the Court again adopted an objective view, focusing its attentions on the moral culpability of these agents and our "evolving standards of decency," rather than the unique suffering members of these classes of offender might experience. *See Roper v. Simmons*, 543 U.S. 551, 568-74 (2005); *Atkins v. Virginia*, 536 U.S. 304, 317-21 (2002). However, one should not make too

B. PAS Fights Back: Five Objections to Objective Accounts of Punishment

Though PAS scholarship does not get far enough into the details to avoid false attribution of an equivocation from punishment to suffering to retributivism, PAS scholars have addressed the retributivist commitment to justify and measure punishment objectively.²⁴⁶ For example, one PAS advocate cites John Rawls for the proposition that “punishment” constitutes not “suffering,” but “legal[] deprivat[ion] of some of the normal rights of a citizen.”²⁴⁷ PAS denies the persuasiveness of this approach to punishment for two principle reasons. First, PAS contends that defining and justifying punishment in objective terms fails to take account of subjective experiences of punishment.²⁴⁸ That claim seems question-begging, and so it is; a point made in Parts III and IV.A. Second, PAS scholars suggest five reasons why a purely objective account of punishment would be “unattractive.”²⁴⁹ Below, each of these is addressed in turn.

1. “Contrary to Ordinary Understanding of Severity”

PAS contends that objective accounts of punishment “deviate[] from our commonsense intuitions about why we would not want to be punished.”²⁵⁰ PAS acknowledges that “this is hardly a knockdown objection,”²⁵¹ and for good reasons.

much of the Court’s record in these matters. The Court has never squarely addressed the validity of the equivocation proposed by PAS, and as a consequence is often less than clear on where it stands.

²⁴⁶ See Bronsteen et al., *supra* note 1, at 1068-74; Kolber, *supra* note 4, at 1585-94; Kolber, *supra* note 1, at 203-08.

²⁴⁷ Kolber, *supra* note 1, at 203 (citing RAWLS, *supra* note 177, at 10).

²⁴⁸ Bronsteen et al., *supra* note 1, at 1068-69, 1072-73n.166; Kolber, *supra* note 1, at 196-98.

²⁴⁹ Kolber, *supra* note 1, at 203. See also Bronsteen et al., *supra* note 1, at 1069 (adopting as their own these five arguments).

²⁵⁰ Kolber, *supra* note 1, at 203. See also Bronsteen et al., *supra* note 1, at 1068, 1072n.166.

²⁵¹ *Id.* at 203.

First, this appeal to intuitions is without empirical or other foundation, leaving us to wonder whose intuitions are being appealed to.²⁵²

Second, the entire purpose of criminal punishment theory is precisely to challenge common intuitions in order to determine the merits of those dispositions.²⁵³ It therefore begs the question to credit “commonsense intuitions” rather than arguing for or against those intuitions, whatever they might be.²⁵⁴

Finally, appeals to these intuitions are entirely irrelevant to an argument that purports to address retributivism on its own grounds. The “commonsense intuitions about why we would not want to be punished”²⁵⁵ adverted to by PAS appeal to a hedonic economy familiar from utilitarian analysis,²⁵⁶ where the degree of antipathy for a particular punishment might be important, say for evaluating deterrent potential.²⁵⁷ For good reasons, only some of which are explored here, retributivists reject that appeal and the intuitions that underwrite them.²⁵⁸ For retributivists, desert, not idiosyncratic aversion, is the central feature of just punishment. That punishment is unwanted,

²⁵² See Golash, *supra* note 227, at 73 (pointing out that appeals to intuition are “unsatisfactory” in part “because some have this intuition while others don’t”).

²⁵³ See Dolinko, *supra* note 205, at 557-58.

²⁵⁴ *Id.*

²⁵⁵ Kolber, *supra* note 1, at 203.

²⁵⁶ Hampton, *supra* note 16, at 115-18 (clarifying the border between utilitarian and retributive theories of punishment by reference to the role of punishment in producing pain, which provides a “nonmoral” reason for compliance with law).

²⁵⁷ As an example, consider Kolber’s discussion of “libertiles,” *supra* note 4, at 1567-69. To conceive of liberty as quantified according to the comparative value of that liberty to an agent or the fruits accrued through exploitation of that liberty collapses deontological accounts of justice and liberty into utilitarianism without argument or justification. The move itself is also another instance of the core PAS fallacy of equivocation between a normative concept and its experiential or material effects.

²⁵⁸ KANT, *supra* note 12, at 105

why, and how much, neither makes punishment “punishment,” nor justifies it as punishment. To claim otherwise is to switch fields from retributivism to utilitarianism.²⁵⁹

2. “Awareness Requirement”

PAS advocates also argue that for an imposition on liberty to constitute “punishment,” an offender must be aware that he is being punished.²⁶⁰ Advocates offer two examples to support this claim. First, they ask us to imagine an offender sentenced to home confinement who, during the appointed period, is locked inside his home but for reasons of his own decides to stay at home and as a consequence is blissfully unaware that he is serving his sentence.²⁶¹ Second, they posit an offender who falls into a coma during his incarceration, and therefore is not cognizant of anything, much less his imprisonment.²⁶² PAS maintains that neither the naïf nor the comatose prisoner is punished because neither is aware of his punishment.

Again, it is not clear that PAS intuitions on this point are either common or tied to bedrock conceptions of justice.²⁶³ Pressing the coma example a bit further makes the point. Imagine that an offender sentenced to ten years’ imprisonment falls into a coma during his first year of incarceration and wakes up during his last. Would the state have a credible claim that his years in the coma cannot be counted toward his time served and that his sentence must therefore be extended accordingly? It is hard to see how. Appeals to subjective experience would beg the question, and also open the door to a host of absurdities. For example, in terms of awareness there is no clear distinction between coma and deep sleep. If awareness is a necessary feature of punishment, and

²⁵⁹ *Id.*

²⁶⁰ Kolber, *supra* note 1, at 203-04. *See also* Bronsteen et al., *supra* note 1, at 1069 (adopting this argument).

²⁶¹ *Id.* at 204.

²⁶² Kolber, *supra* note 1, at 204.

²⁶³ Kolber’s claim here is confusing in part because he cites Jean Hampton, who holds precisely the opposite view, again raising the question whose “intuitions” PAS is appealing to. *Id.* at 209 n.72.

PAS is taken seriously on this point, then it follows that, over the course of a ten-year term of imprisonment, a prisoner who sleeps on average nine hours a day is punished substantially less than one who sleeps on average eight hours a day. PAS therefore seems committed to the view that offenders must be denied timely release if they are good sleepers. In a battle over intuitions, this is tough ground to defend.

Fortunately, for present purposes, there is no need to see this battle of intuitions to its bloody conclusion. There is certainly something to the proposition that retributivists attach importance to awareness of both the punishment and the reason for punishment.²⁶⁴ This is reflected in the substantive law on the death penalty, which prohibits executing defendants who are incapable of understanding the nature and reasons for their punishment.²⁶⁵ However, “knowledge” does not imply “suffering.” Therefore, even if knowledge is required for punishment to be “punishment,” the core claim of PAS, that punishment is suffering, does not follow.²⁶⁶ A brief example helps to make the point.

Imagine an offender who is initially resistant to his incarceration but over the course of several years faces the reality of his crime, assumes full responsibility, and comes to accept his incarceration as just, deserved, and an opportunity for personal reform. For the remainder of his sentence he is a model prisoner. He pursues an education, counsels fellow prisoners, makes amends with his victims, and seizes every opportunity to do good. During this period, our model prisoner achieves a deep sense of peace and contentment. If knowledge is a necessary criterion of punishment, then we are not barred from celebrating this personal blossoming. Retributivism

²⁶⁴ NOZICK, *supra* note 99, at 368; Morris, *supra* note 158, at 264.

²⁶⁵ Ford v. Wainwright, 477 U.S. 399 (1986). *See also* R.A. DUFF, TRIALS AND PUNISHMENTS 16-35 (1986).

²⁶⁶ *See, e.g.*, FLETCHER, *supra* note 112, at 228; Hampton, *supra* note 16, at 128-29.

certain does not introduce any obstacle. To the contrary, while reformation is not a goal or justification of punishment, Kant and others hold in highest regard those who accept punishment as a perfection of their autonomy.²⁶⁷

Not so PAS advocates, who maintain that “the subjective disutility of punishment is . . . largely or entirely the punishment itself.”²⁶⁸ If this foundational premise of PAS is maintained, then prison officials are obliged to inflict additional hardship on offenders who pursue reformation and come to experience their incarceration as just punishment because they suffer less than their bitter and taciturn peers.²⁶⁹ That call to bring out the hot pincers and molten lead²⁷⁰ in order to inflict additional suffering on the most virtuous and honorable offenders can only be regarded as perverse from a retributive point of view. For retributivists, punishment is prescribed objectively by reference to crime and culpability.²⁷¹ Moral instincts derived from retributivism incline us to view infliction of additional hardship as undeserved and therefore unjustified. Intuitions to the contrary motivated by PAS are suspect to say the least.

3. “Selecting Liberties to Lose”

PAS scholars further assert that “one must consider subjective responses to punishment when deciding *which* liberty deprivations to use as punishment.”²⁷² The unacceptable alternative, on the PAS view, is that a particular deprivation of liberty may not be sufficiently “aversive” to the

²⁶⁷ KANT, *supra* note 12, at 107. See also NOZICK, *supra* note 99, at 370-80; Hill, *supra* note 96, at 439; MORRIS, *supra* note 204, at 48-49.

²⁶⁸ Kolber, *supra* note 1, at 212; see also Bronsteen et al., *supra* note 1, at 1037-38, 1068-70.

²⁶⁹ Bronsteen, Buccafusco, and Masur imply that the same would be true of an offender who “views incarceration as a badge of honor.” Bronsteen et al., *supra* note 1, at 1077.

²⁷⁰ FOUCAULT, *supra* note 30, at 3-6.

²⁷¹ NOZICK, *supra* note 99, at 363-65.

²⁷² Kolber, *supra* note 1, at 204; Bronsteen et al., *supra* note 1, at 1068-69.

offender to constitute punishment.²⁷³ The use of this sort of language serves notice that something has gone wrong. Utilitarians, not retributivists, measure punishment according to economies of aversion—in order to calculate deterrence potential, for example.²⁷⁴ To assert that retributivists require that punishment be “aversive” therefore attributes to them precisely that which they reject, begs the question, or both.²⁷⁵

For retributivists, punishment may be imposed only if and to the degree it is deserved. If the correct punishment is inflicted, and the offender embraces that punishment as his just deserts and an opportunity for personal reform, then it would be the grossest perversion of retributivist theory to argue that additional hard treatment that is not deserved must be inflicted solely for the purpose of achieving a threshold of subjective aversion. That result does not change if, for reasons of his own or because he is a masochist, a particular offender experiences just punishment as a source of pleasure.²⁷⁶

4. “Nonarbitrary Severity Determinations”

As additional evidence that punishment must be suffering, PAS scholars claim that “[t]hose who defend an objective account of punishment must be able to describe why some punishments are more severe than others.”²⁷⁷ At risk of being repetitive, this too reflects a basic misunderstanding not only of retributivism but of punishment theory generally. The basic sufficiency criteria for all theories of punishment are justifying punishment generally and punishment inflicted in particular cases specifically. There is no requirement for describing an

²⁷³ Kolber, *supra* note 1, at 215.

²⁷⁴ See, e.g., Hampton, *supra* note 16, at 115-18.

²⁷⁵ See FLETCHER, *supra* note 112, at 228; MOORE, *supra* note 93, at 111.

²⁷⁶ FLETCHER, *supra* note 112, at 228.

²⁷⁷ Kolber, *supra* note 1, at 205. See also Bronsteen et al., *supra* note 1, at 1070-73.

ordinal array of punishments or pinpointing where on such a scale any particular punishment might fall.²⁷⁸ Retributivism carries its burden of justifying punishment in general and in specific cases by reference to culpable criminal conduct. Because those selections are not in any way “arbitrary,”²⁷⁹ questions engaging idiosyncratic views on which of two punishments imposed in response to different crimes is the more severe are non sequiturs.

5. “Objective Punishment Calibration”

PAS scholars’ final argument for the proposition that punishment cannot be accounted for objectively but must be defined by subjective experiences of suffering asserts that retributivists cannot “eliminate the obligation to engage in complicated, counterintuitive punishment calculations.”²⁸⁰ PAS advocates do not specify what “complicated, counterintuitive punishment calculations” they have in mind, but the notion that where crime is defined as the abuse of liberty the proper punishment is to deprive the offender of the very liberty abused is appealing precisely because it is intuitive—poetic even—and certainly is far more intuitive than the conclusion that rich and sensitive offenders should be treated more delicately than their hardscrabble peers simply because the rich and sensitive have had the luxury of indulging delicate sensibilities.

On this point, it is worth a brief aside to discuss the comparative approach to punishment.²⁸¹ The essence of the position is that different offenders’ experiences with the world vary just as their experiences in prison vary. Based on the premise that “punishment” is defined as a change in

²⁷⁸ See HART, *supra* note 92, at 11; Murphy, *supra* note 169, at 530. See also Feinberg, *Noncomparative Justice supra* note 54, at 311. Feinberg considers the vivid example of a system where “beheading and disembowelment became the standard punishment for overtime parking.” As he points out, such a punishment is objectively unjust; and “[m]oreover, it would be unjust even if it were the mildest penalty in the whole system of criminal law, with more serious offenses punished with proportionately greater severity still.”

²⁷⁹ Kolber, *supra* note 1, at 235.

²⁸⁰ *Id.* at 207. See also Bronsteen et al., *supra* note 1, at 1069 (adopting this argument).

²⁸¹ See *infra* Part II.B.

hedonic status, PAS concludes that punishment must take account of pre-punishment states, conditions, and experiences in order to provide a baseline from which to determine whether sufficient suffering has been inflicted. In the present context, PAS translates those subjective accounts into objective language, concluding that “[u]nder any plausible conception of liberty, people vary in the amount of liberty they have.”²⁸² Taken at face value, this observation does not advance the ball. It is almost tautologically true that those of us on the outside have more liberty than those in prison, that most women in the United States have more liberty than most women living under the Taliban, and, to recall a PAS example, that a person kidnapped and taken hostage has less liberty than a person at . . . well . . . liberty. Part III pointed out that the comparative account of punishment is incoherent because it fails to distinguish between punishment and crime. Here, however, PAS may be read to mean something different: that rich people have more liberty than poor people both because they have more stuff and because that stuff affords them the opportunity to do more and different things.²⁸³ Bill Gates has more liberty than I do because he has a bigger house and a private airplane that allows him to head to the Maldives on a lark whereas I do not.

There are a number of intersecting problems in this account of liberty. One is a failure to appreciate a distinction central to the liberal tradition between liberty and unrestrained license. “Liberty,” is not unfettered license. It is freedom bounded by morality, ethics, and law. To hold the contrary would be to argue that a prohibition on murder, say, is an infringement upon liberty when, in fact, it is a precondition of liberty.²⁸⁴ The PAS gloss of “liberty” also fails to distinguish between

²⁸² Kolber, *supra* note 1, at 207; *see also* Kolber, *supra* note 4, at 1587.

²⁸³ Kolber, *supra* note 5, at 1587-89.

²⁸⁴ *See, e.g.*, BLACKSTONE, *supra* note 235, Chap. 1, §2 (arguing that laws, discoverable by application of reason, and by which “freewill is in some degree regulated and restrained,” are necessary conditions of

liberty and the material consequences of exercising or not exercising liberty.²⁸⁵ If I am at liberty to own a house, but choose not to do so, then it would be nonsensical for me to complain that a homeowner has more liberty than I do simply because he exercised his liberty and I did not. So too would be my complaint that I have less liberty than a law school classmate who remained in private practice while I chose the life of a law professor simply because she makes more money and therefore drives a Maserati and takes luxurious cruises. Yet a third possible source of confusion is a failure to distinguish between liberty and questions of distributive justice, including the practical capacity and opportunity to exploit liberty.²⁸⁶ There is no doubt, for example, that a child of privilege has the opportunity to leverage more easily her liberty into material comfort than does her impoverished peer. However, recognizing distributive disparities does not entail or support the conclusion that the child of privilege has greater liberty than the child of poverty because both, strictly speaking, are at liberty to pursue the same material or existential goals. That we might regard the fact that one will have an easier time of it than the other as an injustice does not complicate the distinction between liberty and material rewards, and certainly does not provide authority to use criminal punishment “to rectify preexisting unjust distributions in society.”²⁸⁷

The collection of these confusions is another iteration of the basic category mistake at the heart of PAS in the form of a failure to recognize the difference between the normative concept of punishment and its contingent effects, including subjective experiences of offenders. Here the mistake is to conflate the normative concept of liberty with its material effects, including wealth.

justice); Immanuel Kant, *Idea for A Universal History with a Cosmopolitan Intent*, in KANT: POLITICAL WRITINGS 41, 46-48 (Hans Reiss ed., 1991); KANT, *supra* note 12, at 89-90; KANT, *supra* note 189, at 105; THOMAS HOBBS, LEVIATHAN 78 (Edwin Curley ed., 1994).

²⁸⁵ RAWLS, *supra* note 177, at 201-05.

²⁸⁶ *Id.*

²⁸⁷ Kolber, *supra* note 1, at 232.

The PAS case against retributivists comes down to an accusation that retributivists fail to make the same conceptual mistakes. This is not persuasive criticism.

C. The Consequences of Equivocation

PAS proceeds from an indefensible premise: that punishment is suffering. Its critique of retributivism depends upon importing this poison pill and then extrapolating absurd or perverse consequences. Up to this point, this Part has argued that the initial move, attribution of the claim that punishment is suffering to retributivism, is without foundation in credible theories of retribution. That is because those theories treat punishment as a fundamentally normative concept and justify punishment in particular cases by objective standards of desert without reference to the idiosyncratic experiences of particular offenders.²⁸⁸ PAS also has a positive agenda, built around the claim that subjective accounts of suffering ought to matter when determining, measuring, and justifying punishment. Part III suggested that this positive agenda is incoherent, at least because it cannot and does not distinguish crime from punishment. As Lon Fuller pointed out in another context, assertions that intellectual clarity is wanting often are married to claims of harmful effect.²⁸⁹ PAS certainly treads this path. This Section returns to this catalogue of horrors to argue that the perverse results PAS scholars deploy as *ad absurdum* against retributivism derive from PAS, not retributivism, and therefore count as good reasons to reject PAS as a positive theory of punishment.

1. A Brief Catalogue of Horribles

The main counter-intuitive result PAS purports to draw against retributivism is that its commitment to proportionality in punishment requires inflicting objectively less severe punishment

²⁸⁸ FLETCHER, *supra* note 112, at 228; HAMPTON, *supra* note 16, at 128-29.

²⁸⁹ Lon Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 631 (1958).

on the wealthy and soft because they are more sensitive and have more to lose.²⁹⁰ PAS scholars contend that this result offends our moral intuitions, and therefore should lead us to reject retributivism. There is no doubt that punishing two offenders who commit the same crime differently based on existential conditions that do not bear on their culpability offends strong justice intuitions—that offense is all the worse if those conditions reflect background distributive injustice.²⁹¹ As is by now clear, however, the intuitions offended are retributivist, and reveal objective, not comparative, injustice.²⁹² The retributivist commitment to justify and measure punishment objectively by reference to culpability in crime without regard to hedonic economies is attractive precisely because it avoids these sorts of results. Only if one endorses the PAS claim that “the subjective disutility of punishment . . . is largely or entirely the punishment itself”²⁹³ does one face the prospect of basing punishment determinations on considerations other than desert. It follows that PAS, not retributivism, is the theory of punishment which bears the burden of justifying these perverse consequences.

There are other consequences of defining punishment as suffering. Imagine two people who join in a murder conspiracy, one of whom is twenty-one and the other seventy-one. If both are sentenced to fifty years’ imprisonment without the possibility of parole, then, actuarially speaking, and excluding other contingencies, the net suffering inflicted on the twenty-one year-old is likely to be much greater than the net suffering inflicted on the seventy-one year-old. If PAS is taken

²⁹⁰ Kolber, *supra* note 5, at 1569-70; Kolber, *supra* note 1, at 186-87, 210-11, 214-16.

²⁹¹ For a useful discussion of the relationship between criminal justice and distributive justice, see Stuart Green, *Hard Times, Hard Time: Retributive Justice for Unjustly Disadvantaged Offenders*, 2010 U. CHI. L. FORUM ____ (forthcoming 2010) (manuscript available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1511732).

²⁹² Feinberg, *Noncomparative Justice*, *supra* note 54, at 300-01, 311-13.

²⁹³ Kolber, *supra* note 1, at 212.

seriously, then that disparity would require either inflicting gratuitous pain on the older offender or sending the younger one to serve his sentence at the beach. This will strike most readers as an absurd result, as it probably would PAS scholars.²⁹⁴ The solution is to maintain a commitment to define punishment according to objective standards of desert rather than subjective assessments of suffering.

The United States Sentencing Guidelines allow for a reduction in sentencing range for those who accept responsibility for their crimes and a further departure for those who assist law enforcement.²⁹⁵ This rule consolidates similar norms recognized in most sentencing and parole regimes favoring those we might call “honorable offenders.” In addition to being worthy of praise,²⁹⁶ those who embrace their punishment as an opportunity to take responsibility for their crimes, seize opportunities to pursue personal reform, and do some measure of good for others, likely suffer less than those who are bitter and withdrawn. If PAS is taken seriously, then punishment is defined not objectively, but as a particular quantum of subjective suffering. For honorable offenders who reach the end of their prison terms yet fail to accrue the proper total of suffering as consequence of their moral and spiritual reform, PAS requires extending the term or inflicting additional suffering by some other means. Further, if PAS is taken seriously, then penal officials who see an offender tending toward contentment secondary to enlightenment and reform would be obliged to inflict additional hardship because the offender is no longer suffering enough. It is impossible to miss the sadistic irony in this approach to punishment; a result that derives

²⁹⁴ *Id.* at 187.

²⁹⁵ U.S. SENTENCING GUIDELINES MANUAL §3E1.1 (2009).

²⁹⁶ NOZICK, *supra* note 99, at 370-80 (discussing the teleological hopes of retributivism for communicating public norms which offenders will incorporate).

directly from the shift to subjective experiences from objectively defined punishment based on culpability for a crime.

A slight twist on an example from the PAS literature helps to clarify the conceptual source for many of these results. PAS scholars argue that claustrophobic prisoners are punished more severely because they suffer more while incarcerated. If that is right, then it is also true that in the obverse case of an agoraphobic prisoner that he does not suffer enough while incarcerated in a small, dark cell because he feels deep comfort in such circumstances. If punishment is defined objectively, then this matters not so long as the constraint on liberty inflicted by incarceration is deserved.²⁹⁷ Those who follow PAS cannot be satisfied, however, and would be obliged to find some creative measure for causing the agoraphobic prisoner to experience the proper degree of suffering. Because suffering is fungible for PAS advocates, the methods available are legion. Hot pincers, starvation, sleep deprivation, all would be equally at the service of authorities who rely on PAS as their theory of punishment.

For retributivists, punishment is a normative concept. For PAS scholars, punishment is a normatively neutral description of subjective states. There are serious practical and conceptual difficulties raised by the prospect of measuring subjective experiences of punishment; these are magnified by the need to render those experiences commensurable by application of some universal metric of suffering.²⁹⁸ Setting those concerns aside, however, PAS self-consciously treats suffering as fungible.²⁹⁹ PAS does not distinguish between suffering caused by unlawful kidnapping, suffering caused by sadistic wardens, suffering inflicted by fellow prisoners, and suffering caused by fellow

²⁹⁷ FLETCHER, *supra* note 112, at 229; Hampton, *supra* note 16, at 128-29.

²⁹⁸ See *supra* note 36.

²⁹⁹ See, e.g., Bronsteen et al., *supra* note 1, at 1071.

citizens upon release. Part III pointed out that this left PAS unable to distinguish punishment from crime, and also opened the door to post hoc justification of crimes perpetrated against prisoners so long as the suffering inflicted by prison rape, say, is tallied against the prisoner's suffering goal.³⁰⁰ That failure to distinguish suffering also opens the door to a diverse universe of cruelty which PAS can neither forbid nor even identify as cruelty except by reference to the changeable moods of the body politic.³⁰¹ If an offender is sentenced to 100 units of suffering, PAS provides no prohibition on using hot pincers and molten lead to achieve the goal rather than imprisonment. By contrast, deontological approaches bar these sorts of sadistic measures by imposing objective moral constraints on punishment.

2. PAS and Unjust Sentencing Disparities

The project of PAS is to identify gaps between our intuitions about the subjective experiences of those in the criminal justice system and empirical or hypothesized realities about those experiences. Then PAS argues that those gaps reveal lacuna in traditional objective theories of punishment. Cabined to a claim that present-day American approaches to criminal punishment are at best a muddle and at worst without significant theoretical or instrumental justification, traditional theorists would offer no cavil. Quite to the contrary, most retributivists and utilitarians would readily endorse the linked claims that 1) there is a gap between theory and much of our current

³⁰⁰ If suffering is the defining goal and metric of punishment, it is hard to see why the same would not also be true of crime. For example, if PAS is taken seriously, then what are we to say about a vicious stranger assault where the criminal has the good fortune of beating a masochist who takes pleasure from the pain inflicted upon him? Taken a step further, imagine a terribly depressed person who resolves to kill himself. A moment later, he is killed by a fleeing bank robber who sprays the sidewalk with bullets. If crime is measured by the suffering it inflicts, then is this homicide murder?

³⁰¹ This is precisely the appeal Kolber makes. See Kolber, *supra* note 1, at 236.

punishment policy, and 2) that the gap reveals systemic injustice.³⁰² Many if not most punishments inflicted on offenders are the consequence of political pressures of the moment rather than the cool logic of theory. Relatively independent expert groups, including the United States Sentencing Commission, do their best,³⁰³ but through combinations of over-inclusive criminalization, excessive mandatory minimum sentences, and frequent appeal to the apparently endless rhetorical resources of “tough on crime,” the blunt fact is that few criminal sentences respect the constraints of justice.

Given that PAS does not make basic normative distinctions necessary to guide and determine punishment; there seems little reason to think that scrupulous accounting of subjective experiences of punishment will resolve any injustices in our criminal justice system. Quite to the contrary, were PAS taken seriously it would likely only make matters worse by further attenuating the connection between punishment that is justified and punishment actually imposed. Take for example the intersection of race, poverty, and crack cocaine. The statistics place beyond contest the simple fact that black children and juveniles from poor backgrounds enjoy a lower standard of living, worse nutrition, fewer educational opportunities, and are far more likely to have early interactions with the criminal justice system as compared to their white, middle-class peers.³⁰⁴

Parallel statistics bear-out the raw fact that black persons from poor backgrounds are

³⁰² One example is the attention PAS scholars draw to reentry issues. Bronsteen, Buccafusco, and Masur highlight evidence showing the subjectively miserable lives lived by many post-convicts. Bronsteen et al., *supra* note 1 at 1049-55. A claim that some among us frequently suffer harm that is in varying degrees unintentional, uncontrolled, and undeserved seems to constitute a perfectly credible call to action. We ought therefore to celebrate the work of those who dedicate their careers to reentry issues. *See supra*, note 81.

³⁰³ U. S. Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (Feb. 1995) [hereinafter *Special Report*] (recommending that Congress reduce the 100:1 ratio of sentences imposed for crack and powder cocaine offenses).

³⁰⁴ *See, e.g.*, Green, *supra* note 291; Office for the Surgeon General, Department of Health and Human Services, *Youth Violence: A Report of the Surgeon General*, Chapter 4, available at <http://www.surgeongeneral.gov/library/youthviolence/toc.html>.

disproportionately affected by the disparity between sentencing practices for crack cocaine offenses and those for powder cocaine.³⁰⁵ The coordinate impact of these phenomena on both the likelihood of punishment and the severity of punishment imposed on non-violent, young, black drug offenders is staggering and impossible to justify on retributive grounds.³⁰⁶ For retributivists, this and other facts about our present punishment policy constitute persistent injustice because the individual sentences are objectively unjustified and, therefore, so are the broader disparities by which each of these “[i]njustice[s] become[s] manifest.”³⁰⁷

For those interested in defending race and class disparities in our criminal justice system evidenced in disparities among sentences for crack and powder cocaine, PAS provides welcome refuge. According to the logic of PAS, lifelong experience with conditions of poverty and racism means two things. First, poor black youths enter the criminal justice system at a lower baseline position of material and environmental comfort as compared to their white, privileged peers.³⁰⁸ Second, by virtue of their experiences, including early contact with the criminal justice system, poor, black youths are more likely to be subjectively tolerant of privation and somewhat hardened to the threats and realities of criminal punishment.³⁰⁹ Third, those same features likely make poor black youths more likely to rebound quickly from the initial unhappiness imposed by incarceration. According to the logic of PAS, poor, black youths therefore must receive objectively more severe punishments than their effete white peers in order to achieve the same quantum of subjective suffering, the same change in comparative suffering, and the same sustained levels of unhappiness.

³⁰⁵ See *Special Report*, *supra*, note 303.

³⁰⁶ See Green, *supra* note 291; *Special Report*, *supra*, note 303.

³⁰⁷ Feinberg, *Noncomparative Justice*, *supra* note 54, at 301.

³⁰⁸ Kolber, *supra* note 5, at 1567-69, 1577n.20.

³⁰⁹ Kolber, *supra* note 1, at 230-31.

Claims that sentences for crack offenses are objectively disproportionate given the nature of crack offenses as compared to powder cocaine offenses and even claims that those disparities effect racist sentencing policy are therefore irrelevant for PAS. From a PAS point of view, the fact that those disparities disproportionately impact poor, black folks actually counts as good reason for maintaining the disparities.³¹⁰ From a retributivist point of view, this is unconscionable.

V. UTILITARIANISM AND PUNISHMENT AS EQUIVOCATION

The critical agenda of PAS is not confined to retributivism. PAS scholars also argue that utilitarian theories of punishment err in defining and justifying punishment on purely objective grounds and must in practice and theory recognize and incorporate subjective experiences of punishment. The major contributors to the PAS literature appear to endorse utilitarianism as having the best theoretical architecture for justifying and measuring criminal punishment, so these criticisms are in the form of friendly amendments rather than condemnation.³¹¹ Nevertheless, there are good reasons to believe that these amendments are unwelcome. Those reasons are by now familiar. As in its engagement with retributivism, PAS evidences in its discussions of utilitarianism conceptual mistakes that in some cases reflect a misunderstanding of the core theory.

A. PAS and Thin Utilitarianism

Utilitarian approaches to criminal punishment are nearly as diverse as retributive, but there are four dominant, non-exclusive, positive goals of punishment cited by most proponents: general deterrence, specific deterrence, incapacitation, and rehabilitation. It is not at all clear that subjective

³¹⁰ In an effort to protect themselves from these results, PAS scholars disclaim the logic of their position at crucial points. See, e.g. Kolber, *supra* note 1, at 187, 235. However, PAS offers no normative principle that would identify these sorts of disparities as unjust.

³¹¹ Kolber, *supra* note 1, at 236.

experiences of punishment in the form of measured or reported changes in hedonic states have any normative impact on penal theories justified by pursuit of any of these four goals.

While goal oriented, incapacitation and rehabilitation bear some similarity to retributivism in this respect: all three reject categorically the claim that punishment is suffering. Suffering is neither an end nor immediate goal of incarceration for purposes of incapacitation or rehabilitation. Suffering may well be incidental to the technologies deployed to achieve incarceration or rehabilitation, but it is incidental. Individual experiences of suffering therefore may bear on issues of technical penology in incapacitation or rehabilitation regimes³¹² but do not carry any particular normative weight for the project of justifying punishment practices generally or in particular cases because suffering is not an essential much less substantive feature of punishment justified by the ends of incapacitation or rehabilitation.³¹³

General deterrence is on different footing because, as opposed to other theories of punishment, deterrence theory defines and justifies punishment in terms of suffering.³¹⁴ Nevertheless, there seems no reason to take much notice of individual experiences of punishment in a general deterrence regime. General deterrence uses threats of suffering to raise the risk profile of crime for members of the general public.³¹⁵ Assuming that agents refrain from crime only when the product of risk and severity of punishment outweighs the product of promise and benefit of crime, general deterrence will still determine punishment objectively based on demographic assessments of

³¹² See *infra* Part VI.

³¹³ Kolber seconds this point, going so far as to say that rehabilitation and incapacitation are not even forms of punishment because they do not require infliction of suffering. See Kolber, *supra* note 1, at 218-19.

³¹⁴ Jeremy Bentham, *Principles of Penal Law*, in BENTHAM'S WORKS 396, 402 (J. Bowring ed. 1843).

³¹⁵ There is good reason to doubt the model of agency implied by this model. See, e.g., Paul Robinson & John Darley, *The Role of Deterrence in the Formulation of Criminal Code Rules*, 91 GEO. L.J. 949, 951-53 (2003); D.J. Pyle, *The Economic Approach to Crime and Punishment*, 6 J. INTERDISC. STUD. 1, 4-8 (1995). Present purposes do not require taking a position in this debate.

prospective aversion, not subjectively, based on individual experiences of suffering among those actually punished.

To extend the point, what matters to the general deterrence theorist is not how a particular offender experiences a punishment or even how most people will actually experience a punishment. Rather, the operative factor for general deterrence is the level of suffering most people expect, *ex ante*, that they would experience if punished.³¹⁶ As some PAS scholars note, it does not matter if that assessment is accurate.³¹⁷ The currency of general deterrence is, then, not actual suffering, but imagined suffering determined objectively across the relevant demographic group. One PAS scholar has argued that titration of suffering on an individual basis is nonetheless necessary in a general deterrence regime because to do otherwise would send inconsistent messages due to different experiences of punishment.³¹⁸ That argument ignores the logic of general deterrence and entails the same fallacy perpetrated by Bentham in his defense of excuses, described by Hart as a “spectacular non sequitur.”³¹⁹

If the goal of punishment is to cause the offender to experience sufficient suffering so that he will be deterred from future offenses, then subjective assessments of suffering appear to be highly relevant. That intuition ought not to be indulged uncritically, however. First, this approach to punishment would endorse the perverse results discussed above in Section IV.B. and C. The traditional solution for utilitarians faced with such objections is to withdraw into a defense of rules.

³¹⁶ It is worth pointing out that the most effective contributors to these perceptions are likely not the actual, real-time, subjective experiences of prisoners, but a constellation of actual and purported reports of those experiences. Television shows, movies, media reports, etc., are probably far more influential contributors to the general deterrence effects of punishment than the actual experiences of real offenders.

³¹⁷ Bronsteen et al., *supra* note 1, at 1060.

³¹⁸ *Id.* at 24; Kolber, *supra* note 1 at 216-17.

³¹⁹ HART, *supra* note 92, at 19.

Of course, that retreat endorses objective justifications of punishment, setting aside as irrelevant differences in individual suffering.³²⁰

There is a deeper problem here, however, which is revealed in work by PAS scholars on the phenomenon of hedonic adaptation. According to studies cited by these authors, offenders tend to be very poor predictors of the suffering they will experience if punished.³²¹ The accuracy of those assessments appears to be no better if informed by experience. So, recidivists tend to “overestimate” the level of suffering that punishment, measured as subjective changes in hedonic states, will inflict.³²² This apparent oddity will be addressed in a moment, but these contributors to the PAS literature surely ask the right question.

As do general deterrence approaches to criminal punishment, specific deterrence operates *ex ante*. That is, what matters in calibrating punishment in a specific deterrence regime is not how that punishment actually is experienced, but predictions of subjective experiences of punishment made prospectively by the offender to be deterred. Thus, even in specific deterrence regimes, the actual subjective experiences of offenders assessed contemporaneously or *ex post facto* are irrelevant to the task of measuring and justifying punishment.

The foregoing is not beyond debate, of course. For example, it may turn out that future brain studies will reveal that certain subjective experiences of suffering create or strengthen specific neural pathways implicated in future risk assessment. Those subjective experiences would in that case be relevant for predicting offenders’ prospective assessments of potential hedonic change in the face of future opportunities to commit crime. We are not there yet, of course, and there is good

³²⁰ Adam Kolber appears to endorse this approach. *See* Kolber, *supra* note 1, at 265.

³²¹ Bronsteen et al., *supra* note 1, at 1058-62.

³²² *Id.*

reason to suspect that we may never get there or, if we do, that the models of agency and constructions of happiness and suffering endorsed by PAS will have little or no role to play. As is argued in the next Section, those reasons have their root in the rather base and one-dimensional descriptions of suffering and happiness endorsed by current contributors to the PAS literature. When considered in light of more nuanced and persuasive accounts of suffering and happiness dominant in the literature on utilitarianism, it is ever more evident that PAS ought to be rejected as both critique and positive theory of punishment.

B. PAS and Deep Utilitarianism

PAS treats suffering as fungible. Parts III and IV discussed the consequences of that view for the critical and positive agenda of PAS in relation to retributivism. Similar concerns arise in the context of PAS discussions of utilitarianism. The persistent PAS treatment of suffering as fungible raises particular concerns for hedonic adaptation.

PAS scholars interested in hedonic adaptation report two phenomena which they find interesting and which they claim raise serious normative and practical challenges to traditional theories of criminal punishment. The first is that offenders quickly adapt to incarceration and, within a relatively short period, report levels of happiness on par with those reported before incarceration.³²³ The second is that, despite this quick adaptation, those who have been incarcerated tend to “inflate” their assessments of how unhappy they will be if incarcerated again.³²⁴ PAS scholars suggest that these phenomena are in tension with traditional theory and current practice because the deterrent “bang” is all frontloaded, and that longer sentences therefore serve no

³²³ *Id.* at 1046-49.

³²⁴ *Id.* at 1058-61.

utilitarian purpose. That view reveals a key conceptual gap between PAS and most liberal theorists in the utilitarian tradition.

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

When we do, it is pretty clear that prison life is wholly undesirable in objective terms and, in most relevant ways, objectively bad. Evidence of emotional resilience does not change that fact. What the literature cited by PAS scholars shows, then, is adaptation to bad circumstances. What PAS scholars see as “inflated” assessments of future misery do not reflect inflation at all. Rather, potential recidivists are simply reporting a point so obvious it hardly bears stating: that life in prison is much less desirable than life outside of prison.

While the conclusion is obvious, it exposes a more profound gap between PAS and the bulk of liberal theorists in the utilitarian tradition. PAS scholars endorse a view of human pain and suffering that is both thin and somewhat demeaning. The point is made famously by Mill in *On Utility* in his discussion of “swine.” Mill states clearly his view that “actions are right in proportion

as they tend to promote happiness; wrong as they tend to produce the reverse of happiness.”³²⁵

“Happiness” and its “reverse” are not, however, reducible to raw sensations shared with beasts. It would be “absurd,” Mill writes, to suppose that “the estimation of pleasure should be supposed to depend on quantity alone.”³²⁶ Rather, “pleasure” for human beings has a strongly qualitative dimension referring to the scope of capacities descriptive of the human condition. Thus Mill’s famous dictum that “[i]t is better to be a human being dissatisfied than pig satisfied; better to be Socrates dissatisfied than a fool satisfied. And if the fool, or the pig, are of a different opinion, it is because they only know their own side of the question.”³²⁷

There is a deep and substantial contemporary literature exploring objective and intersubjective accounts of happiness in keeping with Mill’s fundamental insight. Martha Nussbaum, Amartya Sen, and Richard Kraut are particularly worthy of note.³²⁸ As Martha Nussbaum points out in her work on capabilities, it is quite common for persons denied rights and opportunities to ignore, discount, or deny the value of those dimensions of experience and pleasure.³²⁹ That does not make those experiences and capabilities less valuable, however. Destitute and exploited persons the world over find pleasure and happiness in small comforts, but that does not mean that their lives would not be substantially better if they enjoyed bodily security, basic material provision, education, freedom of expression, etc.³³⁰ That would be true even if they adapted quickly to those new conditions, and returned to the same baseline of happiness they had

³²⁵ MILL, *supra* note 44, at 7.

³²⁶ *Id.* at 8.

³²⁷ *Id.* at 10.

³²⁸ See, e.g., AMARTYA SEN, *THE IDEA OF JUSTICE* 225-317 (2009); KRAUT, *supra* note 26; NUSSBAUM, *supra* note 26; Nussbaum, *Capabilities*, *supra* note 26.

³²⁹ See, e.g., Nussbaum, *Capabilities*, *supra* note 26.

³³⁰ See, NUSSBAUM, *supra* note 26.

when poor and oppressed. Kraut agrees, pointing out that access and opportunity to explore the breadth of human capacities provides the best definition we can have of human good as “flourishing.”³³¹

While these views might strike some as elitist, most such criticisms indulge a core mistake, miss the point, or both.³³² The claim is not that one cannot report happiness if one never makes more than \$30,000 a year. The claim is not even that reports of happiness by those who make less than \$30,000 are not to be believed. Rather, the point is that the possibilities of what one can do in life expand and increase if you make \$100,000 a year rather than \$30,000. For that reason, most people would rather have the extra \$70,000 a year. Similarly, if you never learn French, travel to Istanbul, read Proust, come to understand John Cage, or develop the vocabulary of an oenophile, that does not mean that you cannot be truly happy; but it does mean that your life will lack the dimensionality provided by those capacities and experiences. What is on the vast list of possibilities constitutes the good life varies by the person, of course, but most people when given a series of “what if’s” will agree that, even though they are perfectly happy now, they would prefer a life with some of those things, experiences, or abilities. And that, of course, is the crucial bit: choice.³³³ Even if one chooses to live in a small room for twenty-three hours a day with little substantial human contact doing nothing more than staring at the walls,³³⁴ it is by far better to choose it than to have it forced upon you.³³⁵ That is true even if the choice has little impact on self-reported happiness.

³³¹ KRAUT, *supra* note 26.

³³² MILL, *supra* note 44, at 8-10.

³³³ Nussbaum, *supra* note 25, at 99-103.

³³⁴ Academics, say.

³³⁵ See, e.g. THE STATLER BROTHERS, *Flowers on the Wall, on Flowers on the Wall* (Columbia Records 1965) (“Countin’ flowers on the wall/That don’t bother me at all/Playin’ solitaire till dawn with a deck of fifty-one/Smokin’ cigarettes and watchin’ Captain Kangaroo/Now don’t tell me I’ve nothin’ to do.”).

Humans are a remarkably resilient species. A prisoner may therefore adapt to his surroundings by reducing his expectations and focusing on small pleasures. Upon release, he can afford to set aside the emotional structures of his adaptation, free now to pursue the expanded pleasures afforded by greater freedom. What PAS scholars regard as “inflation” in assessments of future misery is on this view nothing more than a fully rational and objective assessment of two very different environments. Happiness in prison is just incommensurate with happiness outside of prison. Any doubts on this point are quickly erased with a simple rhetorical question: Would you rather be in prison or not? Would your answer change if you were told that, in answer to a blunt questionnaire,³³⁶ you would report levels of happiness during your incarceration identical to those you report now?³³⁷

In closing this brief exploration of PAS’s views on utilitarianism, one additional phenomenon is worth brief note. PAS scholars cite evidence suggesting that offenders experience continuing hardship upon release from prison and that these hardships are more difficult to bear and adapt to than constraints imposed by prison life.³³⁸ To the extent this is an argument for greater attention to reentry issues in the criminal justice system, this author has no objection—quite to the contrary.³³⁹ In agreeing, however, it is important to take note of the fact that, here again, PAS scholars appear to have missed the descriptive and normative significance of the phenomenon to which they refer.

³³⁶ Nussbaum, *supra* note 25 at 86-88.

³³⁷ The literature is rife with more profound questions ranging from Robert Nozick’s ethical turn on brain-in-a-vat problems to challenges posed by cultural relativists which are topics for late night dorm conversations at universities and colleges the world over. It is beyond the scope of this Article to take up those discussions, but the fact that they can be had comes close to proving the point apparently lost on PAS scholars who attempt to draw normative conclusions from the literature on hedonic adaptation.

³³⁸ Bronsteen et al., *supra* note 1, at 1049-55.

³³⁹ See *supra*, note 81.

There is a normative and an experiential difference between hard structural constraints and socially constructed restraints. Limits on the pursuit of happiness imposed by incarceration are, while difficult to bear, essentially physical truths. Limits on happiness imposed by socially constructed status inequalities are just of a different ontological and moral order. Imprisonment imposed by a well-functioning legal system in cases where an actual crime has been committed have at least a veneer of justice. Social discrimination is by contrast arbitrary, unfair, and undeserved. The disparities in adaptability and reported happiness between offenders in prison and those who are shunned upon release therefore may reflect prisoners' internalizing the moral sensibilities which PAS rejects.

VI. CONCLUSION: WHY SUFFERING MATTERS

In battles over definitions, there is a danger that out of “concern to assign the right labels to the things men do, [we] lose all interest in asking whether men are doing the right thing.”³⁴⁰ In picking an unnecessary and ultimately unfruitful fight with traditional theories of punishment over the definition of “punishment,” PAS is at risk of missing the very significant opportunities its insights offer in our ongoing efforts to “do the right thing.” The observations offered by PAS scholars are not trivial just because they do not pose intractable objections to traditional theories of criminal punishment. There is no doubt that suffering matters. For example, judges and executive-branch officials routinely entertain pleas for mercy from prisoners who have suffered inordinately during their incarceration.³⁴¹ Kant, for one, has acknowledged the justice of such practices, noting with approval the authority of executives to grant clemency.³⁴²

³⁴⁰ Fuller, *supra* note 289, at 643.

³⁴¹ Sentencing Memorandum at 14-15, *Simon v. United States*, No. CR-90-216 (E.D.N.Y., March 17, 2005), available at <http://www.nyed.uscourts.gov/pub/rulings/cr/2005/90cr216sm31705.pdf>.

³⁴² KANT, *supra* note 12, at 107-08.

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

A similar case for relevance of suffering can be made for the practicalities of penal method. Any punishment is bound to produce some degree of incidental suffering. In some instances, a particular technology may consistently produce incidental suffering beyond an acceptable or remediable threshold. In those cases, prudence may provide normative ground for abandoning or altering the practice. For example, several litigants in recent years have raised concerns that techniques used to carry out the death penalty may inflict excessive incidental pain and suffering.³⁴³ These arguments have the best hope of success if the suffering at issue is characterized as incidental, and therefore worthy of remediation without attacking the justice of the punishment itself.³⁴⁴

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

³⁴³ See, e.g., *Cooey v. Strickland*, 589 F.3d 210, 215 (6th Cir. 2009); *Emmett v. Johnson*, 532 F.3d 291, 292-93 (4th Cir. 2008); *Hamilton v. Jones*, 472 F.3d 814, 816-17 (10th Cir. 2007).

³⁴⁴ See *supra*, note 245.

To the incautious reader, these may seem like tremendous concessions. It is certainly true that there may not be much practical distance between some results suggested by PAS scholars and those reached by proper application of traditional punishment theory and overlapping considerations of mercy and prudence. However, as in most conversations of about law and morality the “why” is at least as important as the “what.” In this instance, defining punishment independent of suffering offers the most coherent and persuasive account of why excessive suffering requires remediation. The alternative offered by PAS leaves all concerned unable to distinguish crime from punishment, conflates a normative concept with contingent effects, commits officials to inflicting additional pain and suffering on model prisoners, paints a shallow and demeaning picture of humans and human potential, and pushes justice down the “winding path”³⁴⁵ of sadism and perversion.

³⁴⁵ KANT, *supra* note 12, at 105.