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Dan Markel

Chad Flanders

David C. Gray

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Beyond Experience: Getting Retributive Justice Right

Dan Markel*
Chad Flanders**
David Gray***

How central should hedonic adaptation be to the establishment of sentencing policy?

In earlier work, Professors Bronsteen, Buccafusco, and Masur (BBM) drew some normative significance from the psychological studies of adaptability for punishment policy. In particular, they argued that retributivists and utilitarians alike are obliged on pain of inconsistency to take account of the fact that most prisoners, most of the time, adapt to imprisonment in fairly short order, and therefore suffer much less than most of us would expect. They also argued that ex-prisoners don't adapt well upon reentry to society and that social planners should consider their post-release experiences as part of the suffering the state imposes as punishment.

In subsequent articles, we challenged BBM's arguments (principally from the perspective of retributive justice). The fundamental issue between BBM and us is whether "punishment" should be defined, measured, and justified according to the subjective negative experiences of those who are punished, an approach we refer to as "subjectivism," or whether the more compelling approach is to define and justify punishment, more or less, in objective terms

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* D'Alemberte Professor, Florida State University College of Law; A.B., Harvard University; M.Phil., University of Cambridge; J.D., Harvard Law School.

** Assistant Professor, Saint Louis University School of Law; J.D., Yale Law School; Ph.D. (Philosophy), University of Chicago.

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such that the amount need not vary based on experiences of offenders alone.

In their responsive essay, “Retribution and the Experience of Punishment,” BBM responded to our challenges. This Essay of ours now assesses the impact of their responses, again from the perspective of retributive justice. We remain not only principally unpersuaded as to the conceptual and normative responses, but we use this Essay to explain further the wrong turns associated with BBM’s decision to endorse subjectivist concerns as the principal measure and justification for the infliction of retributive punishment.

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INTRODUCTION

If Oscar the offender is a generally happy person and able to bounce back from disappointments quickly, should those charged with determining and implementing sentences take his adaptability into account? Does it matter if Oscar is better or worse at adapting than his criminal peers?

Professors Bronsteen, Buccafusco, and Masur (“BBM”) provoked these and other questions in their article *Happiness and Punishment (HP)*.¹ We addressed their thesis emphasizing hedonic adaptation in earlier articles,² where it became clear that the fundamental issue between BBM and us was whether

1. John Bronsteen, Christopher Buccafusco & Jonathan Masur (“BBM”), *Happiness and Punishment*, 76 U. CHI. L. REV. 1037 (2009) [hereinafter *HP*].

2. For those joining the conversation, BBM first wrote *HP*; Dan Markel and Chad Flanders (“MF”) then wrote *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CALIF. L. REV. 907 (2010) [hereinafter *BOS*]. Around the same time, David Gray wrote *Punishment as Suffering*, 63 VAND. L. REV. 1619 (2010) [hereinafter *PAS*]. BBM then responded to MF in *Retribution and the Experience of Punishment*, 98 CALIF. L. REV. 1463 (2010) [hereinafter *REP*]. MF invited Gray to join in for those portions of this reply that relate to shared interests.

“punishment” should be subjectively or objectively evaluated. BBM defined, measured, and justified punishment according to the *subjective* negative experiences of those who are punished, an approach we refer to as “subjectivism.” In our earlier articles, we argued that the more compelling and coherent approach was to define and justify punishment from a more *objective* perspective, a view we will call “objectivism.”³

In their recent response, *Retribution and the Experience of Punishment (REP)*, BBM challenge our views. There they clarify their earlier arguments, emphasizing their limited interest in the adaptability of the “typical” offender rather than the specific experiences of particular offenders.⁴ As to whether an individual’s ability to adapt to punishment should factor into the calculation of his or her punishment, BBM now state unambiguously that they are “agnostic[.]”⁵

Accordingly, we now understand BBM to contend that to constitute “punishment,” a practice must cause a reduction in the typical offender’s self-assessment of happiness.⁶ Importantly, BBM still adhere to the two main conclusions they advanced earlier in *HP*: (1) because offenders typically adapt to prison and fines, longer sentences and larger fines do not necessarily inflict more negative experience, and thus may fail as proportionate punishment;⁷ and (2) because offenders do not adapt well upon release from prison, they deserve additional consideration (in the form of leniency) from retributivist social planners.⁸ Thus, notwithstanding the apparent shift in interest described above (from *ex post* and *ex ante* beforehand to *ex ante* only now), BBM remain committed to the view that punishment must be focused on the suffering experienced by offenders.

In this Essay, we assess the impact of the claims advanced in *REP*. In short, we are neither persuaded by the merits of the positions they defend nor by their critiques of our views.

We begin in Part I by highlighting BBM’s claim that they are agnostic as to the merits of calibrating actual punishment *ex post* in light of individual variances in adaptability. Whether this is a concession to our earlier arguments

3. Two caveats regarding labels. MF’s views are perhaps better labeled as “inter-subjective,” but for purposes of this reply, and to emphasize MF’s overlapping agreement with Gray, we embrace the “objectivist” moniker. Second, although we adopt the objectivist label for this exchange, MF earlier emphasized the need for retributivists to consider individual experience in a few significant contexts such as mental competence. Those “concessions” to individualized subjective experience are chiefly not at issue here.

4. *REP*, *supra* note 2, at 1464.

5. *Id.* at 1464, 1469 n.28.

6. *Id.* at 1468.

7. *Id.* at 1465.

8. *Id.* at 1482 (“[A]ny retributive theory of punishment . . . should account for the expected negative hedonic effects associated with illness, unemployment, strained social relations, or any other detriments that are proximately caused by prison and reasonably foreseeable to state authorities.”).

or merely a clarification of their prior views, we find this development to be an improvement of sorts. Nevertheless, it raises several concerns. The first, developed in Part II, is interpretive. By our lights, BBM cannot adopt a position of “ex post agnosticism” without running afoul of their stated views about the mechanics of retributive proportionality.⁹ We briefly consider ways in which their position of ex post agnosticism could be vindicated, but ultimately find that BBM provide no principled or pragmatic basis for such a view. We stress this point because, in our earlier work, we detailed numerous absurd or unattractive results that follow from individualized calibration.¹⁰ BBM’s current agnosticism on ex post tailoring may be an attempt to avoid these results, but BBM remain committed to views about proportionality and punishment that still lead to those unsavory consequences.

Our second concern is conceptual. Thus, in Part III, we elaborate the argument that BBM’s subjectivism (even as newly clarified) yields a conceptually distorted understanding of punishment, one that crudely predicates punishment on self-reports of happy *feelings* without sufficiently considering the significance of human *understanding* and its relationship to social meaning in our theory of punishment.

In Part IV we address the policy implications of BBM’s recently stated views. BBM are curiously opaque on the practical upshot(s) of their positions. As we detail, their views are still consistent with a range of bizarre and unappealing policies governing the distribution of punishment. Moreover, as we explain in Part V, BBM’s analysis of what we call the “post-prison blues” confirms our view that they are continuing to smuggle in non-retributive concerns to advance claims about retributive justice.

Finally, we note that BBM’s latest sally not only reprises earlier flawed arguments, but also introduces a series of misunderstandings about our account of punishment. In Part VI, we endeavor to defend our views from mischaracterization. In so doing, we hope to clarify the contours of our existing disagreements. Whether we are right on the merits, we leave for readers to decide.

I.

AN IMPORTANT SHIFT REGARDING EX POST AGNOSTICISM?

In *HP*, BBM claimed that “for a retributivist, it is of core importance to understand the *actual* amount of harm that punishment inflicts.”¹¹ They repeat this view a number of times in similar language,¹² giving rise to the inference

9. While not directed at BBM, Adam Kolber develops this point. *See generally* Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182 (2009).

10. *See, e.g., BOS, supra* note 2, at 974–84; *PAS, supra* note 2, at 126–38, 162–65.

11. *HP, supra* note 1, at 1069 (emphasis added).

12. *See id.* at 1070 (“[I]f increasing the amount of a fine or the length of a prison term does not increase the *harm imposed on an offender* to the degree expected, then any quantum of

that BBM cared about the relevance of prisoner adaptability measured not only for offenders as a class *ex ante*, but also at the individual level *ex post*. That conclusion was supported by BBM's explicit endorsement of views and arguments recently advanced by Adam Kolber, which focus on the capacities, baselines, and experiences of offenders measured on an individual, *ex post* basis.¹³

BBM now emphasize what we will call their "ex post agnosticism,"¹⁴ explicitly disclaiming views on whether punishment should be tailored *ex post* to individuals based on their varying capacities for hedonic adaptation.¹⁵ They nonetheless maintain their views that hedonic adaptation should be central to any persuasive retributive account that seeks to set punishment policy *ex ante* for the "typical offender."¹⁶

Regardless of whether BBM's *ex post* agnosticism marks a shift in their stated views, or is merely a clarification of their earlier views, we believe that such *ex post* agnosticism is an improvement of sorts in that it is less offensive to ideals of equality and autonomy than *ex post* individualization. Nevertheless, we find ourselves skeptical that BBM can justify such *ex post* agnosticism. Part II explains that skepticism.

II.

IS BBM'S SUBJECTIVISM PLAUSIBLE WITHOUT SOME EX POST INDIVIDUALIZATION?

BBM now claim to be neutral on the question of whether to adjust punishments *ex post* based on the variance in suffering experienced by individual offenders. But this newly articulated view is in tension with their earlier work and with principles fundamental to their subjectivism. In our earlier articles we explained the dangers inherent in adjusting punishment on an

punishment carries less retributive force than has been supposed.") (emphasis added); *id.* at 1071 ("[I]n order to deliver the deserved punishment, the state needs to be able to adjust the amount of *imposed harm*.") (emphasis added); *id.* at 1072 ("Even more so than utilitarianism and expressive theories of punishment, which place at least some importance on the severity that a given punishment is perceived to have, pure retributivism concerns itself with the *actual severity* of punishment.") (emphasis added and omitted).

13. *Id.* at 1069 ("Kolber has argued that the actual experience of negativity is central to punishment theory, and *we credit his position*. According to Kolber, different individuals' experiences of punishment must be taken into account. His arguments to that end support our contentions as well, and we refer readers to those arguments.") (emphasis added) (citing Kolber, *supra* note 9, at 196); *cf.* Kolber, *supra* note 9, at 186 ("Retributivists who fail to consider variation in offenders' actual or anticipated experiences of punishment are not measuring punishment severity properly and are therefore punishing disproportionately.").

14. *See REP*, *supra* note 2, at 1464, 1469 n.28 ("[W]e reiterate our agnosticism about whether the actual differing experiences of individual criminals are relevant.").

15. *Id.* at 1464 ("Unlike Kolber, we claim only this: to the extent that adaptation affects the experience of punishment that the typical person is expected to have, adaptation is relevant to punishment.").

16. *Id.* at 1465 ("We believe . . . that if adaptation significantly affects the way that a typical person experiences punishment, then that fact must be central to any persuasive theory of punishment.").

individual basis based on ex post measurements of suffering.¹⁷ Perhaps to avoid some of these difficulties, BBM now distance themselves from that view, though they offer literally no reason for their ex post agnosticism. Nor can they. We believe that the logic of their views on retributive proportionality compels them in the direction of ex post individualization.

In both their earlier and more recent work, BBM express a fundamental concern with securing proportionality between the negative experience inflicted by the state and the gravity of the offense.¹⁸ But if retributive punishment is understood as the amount of negative experience a sanction inflicts—a position we dispute but BBM still affirm—then this renders BBM vulnerable to the very claim they use as a cudgel against retributivists who do not emphasize subjective experiences. That is, on pains of violating their understanding of retributive proportionality, each *individual offender* must be made to suffer the right amount. That is impossible to achieve without taking account, ex post, of individual differences in adaptation.

Consider: suppose that Oscar is worse at adapting to prison life than other offenders. If he is punished as the “typical” offender, then he will suffer more “negative experience” than his crime warrants. In contrast, suppose Bob easily adapts to prison. Then Bob will end up also suffering disproportionately *less* than is required by his crime. This violates proportionality as conceived by BBM (along with Adam Kolber).¹⁹ The most plausible logical inference would be to inflict additional suffering on resilient offenders and to take it easy on those who are less resilient.

We think this argument applies to BBM because of their organizing principle that “people live life subjectively, not objectively.”²⁰ Assuming they are right, it is no stretch to say that people do not suffer “typically,” but rather, *people suffer individually*. Because people vary at least somewhat in resilience or adaptability, it is implausible to retain a commitment to proportionality (as BBM understand it) and simultaneously aver that adaptation is “central” at a general level at the ex ante stage,²¹ but not substantially relevant—let alone

17. See sources cited *supra* note 2.

18. *HP*, *supra* note 1, at 1069 (“Imposing too much punishment for a minor crime is retributively unacceptable, as is imposing too little punishment for a major crime. . . . And because punishment is linked inextricably with negative experience, *retribution can be implemented only via a spectrum of punishments that impose varying degrees of negative experience*. The level of negativity must be adjusted to accord with the offender’s desert.”); *REP*, *supra* note 2, at 1467 (“Adaptation reduces differences in the amount of negative experience typically imposed by differently sized fines or incarcerations. We contend that this fact significantly limits the capacity of fines and incarcerations to achieve the goals of proportionality.”); *id.* at 1465; *infra* note 29 and accompanying text.

19. We borrow this argument from Adam Kolber. See Kolber, *supra* note 9, at 213, 236. We do not think that Kolber’s critique has any bite on justifications for punishment like ours, but it surely does against BBM’s because of their reliance on the idea that punishment must generate a quantum of negative experience.

20. *REP*, *supra* note 2, at 1474.

21. See *id.* at 1465.

“central”—at an individual level at the ex post stage. This tension is especially hard to understand if it turns out there are opportunities for policies to reflect some (cheaply administered and empirically validated) assumptions of adaptive variance across individuals or small groups. Indeed, if punishment is concerned with what people actually and subjectively experience, then we have to look at the “actual experience” of the offender, as BBM put it in *HP*,²² not at the experiences of the “typical offender.”

We must also note that BBM are unclear about who the “typical offender” is. The possibilities are numerous: (a) the typical person who commits crimes, (b) the typical person who commits crimes and gets convicted, or (c) the typical person who commits crimes and is then imprisoned. The demographics of these categories are likely to vary substantially. This is worrisome because BBM mean to pick out an empirically measurable category of people rather than a legal fiction like “the reasonable person.” Moreover, BBM prescind from explaining why we ought to care about the typical offender’s adaptive capacities instead of the typical citizen’s. Whichever group is the benchmark, however, will cause results that, on BBM’s views of proportionality, are too harsh for some and too easy for others.

These unhappy results cannot be avoided once one identifies retributive punishment with the need or desire to cause offenders a quantum of negative experience. By contrast, if punishment is understood as the polity’s communicating to the offender condemnation of his acts by depriving him of things that are objectively good, such as liberty or property, then these issues do not arise.

BBM are therefore faced with a dilemma: on one horn is the host of normative problems identified in our earlier articles regarding their understanding of retributive proportionality; on the other is some form of objectivism they purport to reject. BBM might try to avoid this dilemma by identifying reasons why concern for adaption ex ante need not devolve into accommodating adaptation ex post. However, they have not done that work.

Hypothetically, BBM might appeal to a non-monetized form of cost-benefit analysis to rescue their subjectivism.²³ They could then argue that adaptation should be central to sentencing policy ex ante, but not ex post, because individualized tailoring might be too costly (in terms of information costs) or too dangerous (to other values or goals). Although this might be a sensible and pragmatic view, it is not one that BBM have advanced. What’s more, even were this position expressly adopted, BBM would have to recognize that part of the cost of failing to tailor based on individual variances

22. *HP*, *supra* note 1, at 1068.

23. *Cf.* BBM, *Welfare as Happiness*, 98 *GEO. L.J.* 1583, 1628–33 (2010) (describing well-being analysis as similar to but distinct from traditional cost-benefit analysis).

in adaptive skills would be a failure to give each offender the experiential suffering he or she purportedly deserves.

Furthermore, the cogency of such a “pragmatic” view is predicated largely on tenuous assumptions. In particular, one would have to assume that: (a) attention to adaptation *ex ante* would solve more problems (in terms of crime control or other relevant end-states for a consequentialist analysis) than it causes, *and* (b) attention to adaptation *ex post* would cause more problems than it solves. These assumptions are not defended, let alone addressed. Finally, for purposes of this particular conversation between BBM and us, such an appeal to cost-benefit analysis would require harmonizing the discourse of cost-benefit analysis with retributive justifications of punishment, a task that might be possible but requires more work than BBM have so far done.²⁴

Because BBM do not offer a more nuanced cost-benefit analysis, and in light of Kolber’s arguments regarding proportionality that they credited in their earlier work, we think that there is no principled reason they can offer as to why adaptation matters to punishments *ex ante* for the typical offender but not *ex post* for individual offenders. For reasons we soon sketch, we think that this should incline BBM to our view, which is that punishment is better understood as something other than the sum of negative experiences caused by penal practices and technology.

III.

FROM SUFFERING PUNISHMENT TO UNDERSTANDING PUNISHMENT

Assuming, *arguendo*, that BBM’s *ex post* agnosticism is a tenable position, we believe BBM’s recently stated views about the relevance and centrality of adaptation to retributive punishment are still conceptually worrisome.

In *Bentham on Stilts*, we argued that adaptation would, practically speaking, prove to be largely insignificant and should remain so from a retributive perspective. Understandably, this diagnosis distresses BBM, who think adaptation should direct sentencing policy rather than be merely theoretically relevant.²⁵ However, BBM have offered no new and compelling arguments to explain why, given our social world, a stiffer coercive condemnatory deprivation of liberty or property would ever be understood as a less severe punishment even if prisoners were able to adapt to more prison or stiffer fines. Consequently, our view is that adaptation will remain quite trivial from a policy perspective because the social understanding of the meaning of punishment is (and ought to be) much richer than a snapshot of hedonic levels as measured by self-reported surveys during confinement. Specifically, when punishment is understood as resting primarily upon the *communication* of

24. *Cf. BOS*, *supra* note 2, at 944–45 (discussing the relationship between retributive justice and consequentialism).

25. *REP*, *supra* note 2, at 1465.

censure to the offender (and the coinciding *expression* of that censure to the citizens throughout the polity) through coercive deprivations, punishment is not reducible to reductions in “happiness” as measured by self-reported surveys.

By any reasonable measure, life in prison is substantially and objectively less desirable than life outside prison. Prisoners are physically confined, physically controlled, and may access only a very narrow range of pleasures and pursuits. That prisoners may turn out to be relatively happier than they or the public anticipated *ex ante* does not alter that general assessment. Rather, it shows that prisoners can be emotionally flexible and can adjust expectations based on the realities of their circumstances. The same can be true of fines. Consequently, to the extent that the hedonic adaptation studies BBM rely upon can be extrapolated to penal policy,²⁶ one can only observe that such “facts” have little relevance given the overwhelming objective badness of (nearly all) conventional punishments.

The conclusion that our conventional punishments are objectively undesirable is actually and unsurprisingly supported by the data upon which BBM rely. BBM report that ex-convicts, despite having previously adapted to the objective badness of prison life, fear future imprisonment as much as, if not more than, those who have never been imprisoned. BBM seem startled by these results.²⁷ We are not. What these results reveal is a repudiation of the fundamental premise of BBM’s argument, namely, that what makes punishment undesirable is its ability to inflict self-reported unhappiness. On the contrary, what makes punishment undesirable—and therefore communicates condemnation—is that it entails coercive deprivations (of liberty and/or property), which are objectively viewed *and understood* as undesirable. In assessing that objective undesirability, there is no need to restrict ourselves to the self-reports of happiness provided by those currently in prison.²⁸

In short, the social meaning of punishment cannot be artificially confined to what offenders typically “feel.” According to BBM, retributive punishment is only successful as a communicative device if and to the extent it inflicts

26. In *BOS*, we largely refrained from challenging the inferences drawn from the studies relied on by BBM. This does not mean we agree with those inferences. *See, e.g., infra* notes 32, 37, and accompanying text.

27. *See, e.g., HP, supra* note 1, at 1061 (noting that “remarkably,” prisoners do not learn that they adapt to prison life).

28. Indeed, even if we accepted the view that what principally matters for setting punishment policy is the offenders’ experiences, we do not understand why policymakers should consider only some time-sliced reports of hedonic experiences (such as those occurring during confinement). Presumably, if repeat offenders revert to prior levels of anxiety about punishment even though they have experienced positive adaptation in their prior confinement, then that means that even the typical experience (which should include memories as well as anxieties) of punishment changes over time (probably in a “typical” way), and that should also be considered. To our minds, once one becomes more reflective about past and future, we think that is good evidence of a capacity to *understand condemnatory actions*, not just feel suffering in response to them.

proportionately more negative experience.²⁹ But this formulation is wrong: punishment is not just experienced, but also understood as condemnation. Accordingly, whether and how much offenders suffer in response to imprisonment do not inherently affect prison's status as "punishment." Rather, prison serves as retributive punishment on our view when it is understood by the polity as condemnatory and coercive.³⁰ There is no serious argument that a term of imprisonment or a fine imposed upon a finding of criminal guilt fails to express or communicate some condemnation. Nor is there any serious reason to doubt that the polity (which includes current and former prisoners) regards more time in prison or larger fines as more undesirable, even if offenders hedonically adapt. For the general public, the longer sentence is understood to represent a longer period of constraint on liberty and an increased dimension in lost opportunities to define and pursue the good life. For offenders who actually lose those liberties, the calculus is unlikely to be different.³¹

We doubt that adaptation, even *significant* adaptation, could disrupt, let alone overturn, the underlying social meaning of most punishments. To see why, imagine an offender who opposes his sentence initially but realizes over time that his experience of incarceration is warranted and in fact serves as an opportunity for personal reform. He pursues self-education, counsels fellow prisoners, apologizes to his victims, and thereafter does good within the prison, deriving a deep sense of contentment. The message of condemnation is not lost on him, nor does his coerced constraint cease to be punishment merely because he *subjectively* experiences contentment. Quite to the contrary, here we have a prisoner who is "happy" precisely *because* he is being condemned—he is "perfecting" his freedom by accepting the punishment for his offense against others. Even if this admittedly odd situation typified the arc of experience for most offenders, we would not hesitate to say that imprisonment under these conditions would still be punishment because it adequately expresses and communicates condemnation to the polity and the offender respectively.

29. *REP*, *supra* note 2, at 1466 ("[W]e argue that punishment communicates condemnation *because* and *insofar as* it is associated with negative experience."); *id.* at 1467 ("Adaptation reduces differences in the amount of negative experience typically imposed by differently sized fines or incarcerations. We contend that this fact significantly limits the capacity of fines and incarcerations to achieve the goals of proportionality. If we are right, then adaptation is important to any punishment theory that values proportionality, including Gray's and MF's theories.") (citation omitted); *id.* at 1472 ("For the same reason that imposing negative experience communicates condemnation, imposing greater negative experience communicates greater condemnation than imposing lesser negative experience.").

30. The offender, we emphasize, must also, as a threshold condition, rationally understand that he is being punished on account of his offense. See generally Dan Markel, *Executing Retributivism: Panetti and the Future of the Eighth Amendment*, 103 NW. U. L. REV. 1163 (2009). Needless to say, the capacity to understand condemnation and the capacity to experience the sensation of pain are different.

31. If it is, that may be evidence that the person is not a fit interlocutor for retributive punishment because he does not understand social meanings. See *supra* note 30 and accompanying text.

On our view, subjective negative experiences alone cannot properly be considered the defining and reasonable limits on the production of social meaning. BBM's mistake here is bound up with their apparent failure to appreciate the crucial role of legitimate democratic processes in constructing the social meaning of many public acts, including punishment. Legitimately adopted laws and legal practices in democratic states are semiotically generative: that is, they not only reflect social meaning but also help shape it. For that reason, the "negative experience" associated with paying \$500 to the government in taxes is different in meaning and consequence as compared to the "negative experience" arising from paying the same \$500 as a criminal fine, though in both cases the loss of the \$500 might generate the same hedonic dip and then adaptation.³² Individual subjective experiences and aggregate subjective experiences may serve in this context as heuristic devices for gauging condemnation, but it would be a mistake of Platonic dimensions to misconstrue the image for the object by assuming these experiences represent condemnation. Indeed, BBM's understanding of social meaning is fully backwards. People subjectively perceive liberty deprivation as a bad because it objectively *is* bad (that is, it is bad for beings like us).³³ BBM mistakenly treat a heuristic for finding out what is bad—our subjective experience—as being *constitutive* of what is good or bad.³⁴

Once our critical point—that human understanding is informed by more than one's experience alone—is recognized, one can successfully resist BBM's thesis that we must incorporate hedonic adaptation into mainstream sentencing practice and policymaking. As long as it is reasonable for people in our society to think that a politically sanctioned constraint of liberty communicates condemnation, and that stiffer sanctions signal yet greater condemnation, adaptation among typical offenders need not play a central or even prominent role when setting sentencing policy.

If subjective experience were indeed central, then small changes in the ability of offenders to adapt to suffering could indeed have large implications for proportionality. But since we think the important thing is the *objective* badness of a punishment, our position is not hostage to minor shifts in subjective feelings. So, for us, adaptation will almost certainly remain an insignificant aspect of setting punishment policy.

32. Interestingly, BBM's discussion of monetary penalties in *HP* cites studies that only pertain to (generic) economic loss, not the particular loss of money connected to fines. See *BOS*, *supra* note 2, at 926 n.75. Here, if anywhere, is a good example of how the same thing (a loss of money) could have radically different social meanings—where, to paraphrase BBM, the state's choice to impose something on people is part of what makes it condemnation. See *REP*, *supra* note 2, at 1470–71.

33. In general, adaptation to a bad does not make that bad into a good, or even *less* of a bad. See generally Martha C. Nussbaum, *Who Is the Happy Warrior? Philosophy Poses Questions to Psychology*, 37 *J. LEGAL STUD.* S81, S99–S100 (2008).

34. See *REP*, *supra* note 2, at 1465.

IV.

THE POLICY CONSEQUENCES

BBM's current view—that the adaptive skills for the typical offender should be central to retributive determinations of sentences—raises a number of policy concerns. Indeed, their reluctance to be specific is telling.³⁵ What would the world look like if their views were implemented? As we suggest below, depending on how the empirical findings emerge, BBM's views regarding adaptation could lead to longer sentences, shorter sentences, uniform sentences, or quietism.

For our part, we are especially worried that their rhetoric about adaptation may suggest that punishments in America are simply *not harsh enough* because prisoners will adapt to them. Consistent with a desire to match popular views about how much prisoners should suffer with what offenders typically suffer, one plausible upshot of BBM's proposal would be to lengthen prison sentences considerably. If it is true that the study of adaptation reveals that current sentences involve *less* negative experience than is intended by a subjectivist approach to punishment, then punishments must be increased so that actual negative experiences more neatly match intended negative experiences, rendering offenders' suffering more nearly "proportional" to popular views about how much prisoners should suffer for their crimes. If punishment must inflict targeted levels of subjective unhappiness, and current practice inflicts less unhappiness than the polity originally thought, then BBM commit us to imposing harsher sentences (if need be), so that just as offenders adapt to one level of hell, another is upon them. Punishment on this view is little more than a complicated pain-delivery device.

BBM might wish to resist the implied recommendations of longer or harsher punishments, but such aversion must—for them—be determined by the empirics of experience, not the principles associated with understanding social meaning. Importantly, the empirics could lead to further odd policy recommendations. For example, if some adaptation studies are to be extrapolated, then we perhaps should reduce the duration of incarceration but make the peak of suffering especially onerous and painful along with the last few days for each offender—on the theory that the global or comprehensive memories of those experiences will likely be an average of the peak and last few days, rather than a recall of the average pain level through the sum total of time.³⁶

35. *See id.* at 1481 ("We do not offer specific or concrete prescriptions for the practice of punishment. Instead, we describe a phenomenon so as to help people understand better what punishment actually does.").

36. *See* Daniel Kahneman, *Maps of Bounded Rationality: A Perspective on Intuitive Judgment and Choice*, Nobel Prize Lecture (Dec. 8, 2002), available at http://nobelprize.org/nobel_prizes/economics/laureates/2002/kahnemann-lecture.pdf (discussing findings of pain from colonoscopy procedures).

Alternatively, a policy that gave all offenders the same objective punishment regardless of their offense would be consistent with making adaptation central to setting sentencing policy. The predicate for such a policy would be an empirical finding that, despite a short, sharp hedonic dip in response to punishments such as fines or imprisonment, offenders typically revert to their prior mean levels of reported hedonic affect. If such empirical results occur, and there is some reason to think so based on BBM's review of the literature, hedonic adaptation on these terms might be so strong that we would effectively have to abandon any hope of implementing proportionality between the offense and the negative experiences of the offender.³⁷ To the extent that the state cannot achieve a sustained and proportionate impact on the negative experience for the typical offender using conventional measures, the polity might as well adopt a "second-best" measure of imposing any short, sharp sanction on all offenders—on the supposition that anything more would be superfluous. In other words, BBM's enthusiasm for the lessons of hedonic adaptation could paradoxically lead to blunter—rather than granulated—conventional sentences. But if an adaptation-is-central perspective leads to roughly the same objective punishments for murderers and car thieves alike, then that would provide ample reason to be suspicious of it.

To be fair, we could imagine BBM attempting to resist the efforts toward blunting by sincerely putting adaptation concerns above efficiency and other reasonable concerns regarding the social cost of the sanction imposed. But since they view themselves as Bentham's heirs,³⁸ it would be puzzling if adaptation provided a categorically stronger reason for action in a particular direction (anti-blunting efforts) than, say, the diminished well-being that comes from wasting money on excessive sanctions that provide little extra actual suffering. One would think that all options should be on the table for them.

Finally, although BBM believe offenders adapt too "well" to match conventional imprisonment or fines, they also raise reasonable concerns about the difficulty of ex-prisoners' failures to adapt to their lives upon reentry to society. Thus, because "typical" offenders do not adapt well post-release, BBM believe that retributivists committed to experience-adjusted proportionality must tailor punishment to account for their anticipated excess suffering.

While we elaborate our disagreements related to offenders' "post-prison blues" in Part V, it bears mentioning that BBM might respond to the "excess suffering" of post-release life by advocating that polities simply discount all

37. BBM may not support such an extreme result, but it is suggested when BBM hypothesize, e.g., that the different term of years served by murders is only "slightly more severe" (measured in negative experience) than the term of years served by larcenists, *REP*, *supra* note 2, at 1478, or that "people adapt to imprisonment such that they typically do not experience a ten-year sentence as much worse than a five-year sentence," *id.* at 1479.

38. See BBM, *supra* note 23, at 1586 & n.7 (defending a "Benthamite concept of hedonism").

terms of incarceration for offenders based on the difficulty the typical offender faces upon release from prison. Naturally, this sits in tension with the thrust of the previous discussion, which suggests more draconian sentencing is needed to deal with the experience of adaptation to prison life itself. The two vectors of argument are directly opposed and the question becomes which vector is more forceful. If they are about the same magnitude for the typical offender, then perhaps the best solution is simply to do *nothing* because the hedonic consequences of their “post-prison blues” simply offset the hedonic consequences of adaptation to prison. But if the “post-prison blues” are (on average) worse than the in-prison experience of hedonic adaptation, then it seems the state must (per BBM) craft policies designed to limit the unhappiness caused during or after a term of incarceration, or somehow jettison prison altogether. On these important policy issues, BBM are silent.

V.

THE STATE AND THE “POST-PRISON BLUES”

Despite a desire to focus their efforts on improving our understanding of the nature of retributive punishment and proportionality, BBM’s analysis of the “post-prison blues” only makes matters of understanding punishment worse. As we elaborate below, contingent post-reentry experiences are not properly thought of as part of the punishment that retributivists must justify because they are not part of any conventional definition of punishment. If the hardship endured by the offender is not authorized, intentionally imposed, and proximately caused by the state, then it is a conceptual error to call it “punishment,” even if it involves negative experience to the offender after his offense. Otherwise, almost anything could be categorized as punishment. On BBM’s logic, every time a prisoner is released and drives over an unfilled pothole near the prison, the resulting damage is punishment so long as the state reasonably foresees the pothole will likely cause damage to some people (including offenders).³⁹

A. What is “Punishment”?

BBM not only fault our position for being inattentive to how prisoners adapt to prison life, but they also reemphasize their earlier argument that retributive theories in general do not sufficiently take into account the suffering offenders may experience *after* they are released from prison.⁴⁰ Any retributive

39. See, e.g., *REP*, *supra* note 2, at 1488. The mistake BBM make here is a conflation of statistical knowledge with individualized knowledge and the assumption that the former is always as culpable as the latter. See discussion *infra* Part V.B.

40. To illustrate, BBM correctly note that we generally believe “disease, unemployment, and dissolution of family and social relationships . . . should be excluded from the calculus of proportionality.” *REP*, *supra* note 2, at 1482. Compare, for example, their view about various contingent but foreseeable harms. See *id.* at 1495 (“[T]hese ‘echoes of imprisonment’ form part of

theory, they write, “should account for the expected negative hedonic effects associated with illness, unemployment, strained social relations, or any other detriments.”⁴¹ Conceding that this assertion needs qualification to avoid absurdities, a point we stressed in our earlier work, BBM view these harms as only relevant to punishment if they are “proximately caused by prison and are reasonably foreseeable to state authorities.”⁴² While BBM are on the right track by adding these qualifications, we think that this formulation still leads to an array of conceptual problems.

Most importantly, they still retain the puzzling view that the response to any such moral responsibility by the state for such harms should be effectuated through the currency of sentencing adjustments.⁴³ We find this view especially odd in light of the fact that, from the clarification BBM made regarding the typical offender (discussed in Part I), one must infer that the projected offsets will benefit all offenders through an *average* discount rather than just those who “actually” experience such contingent harms.

The essence of our disagreement here is largely conceptual,⁴⁴ but it also has some practical implications. State punishment, in our society at least, is not the disease an offender may contract in prison. It is not what happens to the offender after his release, either—which again is not to say that the state has no interest in helping those released from prison. Rather, we think state punishment is best and conventionally thought of as those intended, coercive, condemnatory deprivations inflicted *against* persons *in response to their crimes* and *by* state officials who are authorized to inflict those deprivations. This narrower definition is common within the punishment literature;⁴⁵ on this view, disease, prison rape, or divorce are not punishment because they are not the

the state’s punishment of the criminal.”). From this we infer that BBM believe they *should* be included in the calculus. At the same time, BBM concede that “*some* cases of unemployment or divorce may be due to independent decisions to avoid people who have broken the law.” *Id.* at 1485 (emphasis added). They do not, as far as we can see, give us a sufficiently precise guidepost to distinguish harms that are the state’s responsibility to ameliorate through punishment discounts (as opposed to potential other remedies) from those that are not the state’s responsibility or those that are the state’s responsibility to remediate through nonpunitive measures such as compensation.

41. *REP*, *supra* note 2, at 1482.

42. *Id.* at 1482. Indeed, the words and ideas of proximate causation and foreseeability appear nowhere in *HP*.

43. *See supra* note 40 and accompanying text.

44. The fact that it is conceptual in nature—i.e., a dispute over a value-neutral definition of punishment—does not mean that we are trying to perpetrate some *improper* “definitional stop” argument. *See* LEO ZAIBERT, PUNISHMENT AND RETRIBUTION 27–28 (2006) (analyzing “definitional stops” in punishment theory). We simply think that BBM’s conflation of crimes, torts, and punishment signals an abuse of language akin, to use Zaibert’s example, to saying “I forgive you, though I believe you have done nothing wrong.” *Id.* at 28.

45. *See id.* at 21 (observing the “contemporary trend” of legal scholars to focus discussion of punishment not on the practice of penalties or censure in the family or workplace but rather as a *state* institution and thus entailing the requirement of limiting punishment to authorized and intended deprivations).

product of lawful and intended authorized state action that the polity's officials are tasked to see through to completion. They simply do not qualify. Our commitment to maintain a clear distinction between state authorized punishment on the one hand and crimes/torts/bad luck/self-destructive choices on the other hand governs not only the incidental suffering endured by offenders during prison, but also the range of contingent harms that befall them after they are released from the supervision of the state.

To be clear, legal relief should sometimes, depending on the circumstances, be available to those offenders who are subsequently victims of torts or crimes: for example, when the polity and its officials are causally involved and morally blameworthy for some unintended and unauthorized experiences of suffering endured by prisoners during and even after prison. We maintain, however, that simply because the state is in some way causally responsible or even blameworthy for a harm of this sort does not imply that the harm itself is "punishment" that must be justified by retributivist theories of punishment, such as ours, or otherwise remediated through some form of off-setting leniency. The *state's* violations of its duties would typically entail or permit remedies including compensation, medical treatment, or injunctive relief, not wholesale punishment discounts.⁴⁶ Indeed, if the harms experienced are actionable constitutional torts, then they likely deserve some remedy, not because these harms are punishment *but precisely because they are not*.

The desire for legal relief in some situations, however, must also be juxtaposed against the reality that there will be numerous situations where the offender endures suffering (not authorized by the state qua punishment) that is nonetheless without any remedy either from the state or a third party. For example, if a sadistic murderer has trouble getting dates after prison because he has become a less agreeable person after his prison experience, his lackluster love life is not punishment—at least not *state* retributive punishment—because those inflicting harm on the offender by turning down dating requests are independent agents who are neither acting for the state nor subject to state authority. There may be very few catches for sadistic murderers, and that might be something the offender has to own—rather than seek relief from—at the hands of the state. Various sources of "post-prison blues" that BBM want to address may be analogous to the unlucky-in-love murderer. Here again, BBM's tendency to see so much suffering experienced by offenders as punishment is likely to blame.

It does no service to BBM's argument against us to identify a number of post-imprisonment *legal* disabilities that offenders may incur upon release. As we noted in *BOS*, these disadvantages are distinct from the harms inflicted by third parties, and we think that BBM are wrong again to conflate them with the

46. Of course, as we noted in *BOS*, if the state "broke" the offender through its officials' tortious activity, we could imagine the state's forfeiting its warrant to further punish that person, but this would be an exceptional circumstance. *BOS*, *supra* note 2, at 961 n.193.

legal disabilities under a nebulous cloud of proximately caused negative experience. With respect to some of these restrictions or disabilities, the state may indeed be continuing its message of condemnation. Denying the franchise to felons might qualify, as might automatic removal in the cases of some immigrant offenders. In other cases, the state may simply be instituting measures that are intended to protect society, such as with limitations on the rights of violent ex-felons to carry firearms and the withdrawal of professional licenses from those convicted of crimes relating to abuses of their professional positions. In all these scenarios, the state *is* expressing something, but the message will be different depending upon the circumstances. In some cases, the message is condemnatory (and reasonably thought of as part of the punitive calculus); in others, the message may be reasonably understood to convey nothing more than one of risk containment. Lumping all of these state-imposed legal consequences together under the label “punishment” does not further the debate, because some are, and some are not, punishment.

In reply, BBM might answer by saying that “[n]either society nor punishment theory should turn a blind eye to the suffering incarceration is known to cause after offenders have been released from confinement, and there is no good reason to exclude this consideration from the framing of punishments in the first place.”⁴⁷ We agree that *society* should not be indifferent towards the statistically predictable suffering of its members, but we do not believe that this goal should be identified as one of *retributive* theory’s principal concerns. Since BBM are attacking our *retributive* ideas, we hasten to point this out.⁴⁸ We might think that society should care about vast inequalities of wealth, but we do not think that this necessarily means, for example, that every criminal law should be altered to be a vehicle for redistributive goals. This does not necessarily reflect a view on moral priorities, but, rather, a commitment to maintain important disciplinary boundaries. The alternative view, which BBM continue to endorse, conflates torts and crimes with punishments. Their view is especially odd in light of the proliferation of offender reentry programs, the existence of which undermines their claim that the state is “impos[ing] negative post-prison consequences on former

47. *REP*, *supra* note 2, at 1466.

48. It should be said that some utilitarians might not view the realm of criminal justice as a *distinctive* lever of social policy; to them, it is just one of many that are capable of advancing utility. For those who share that view, there is nothing inherently wrong with effacing the disciplinary boundaries of justice that we have tried to maintain. After all, if one has a “well-being analysis” hammer, every problem looks like a hedonic nail. See BBM, *supra* note 23, *passim* (championing well-being analysis for policy issues). But our point regarding the importance of boundaries and who causes which harms to whom and under what justifications is relevant here as it illuminates the thrust of our worry earlier elaborated upon in *BOS*, namely, that BBM are just giving the world warmed-over utilitarian arguments even though they purport to be making a critique internal to the discourse of retributive justice.

prisoners.”⁴⁹ It is counterintuitive to find the state *imposing* the “reentry” harms it is expressly trying to prevent through reentry programs.

What is at stake here? Well, as a practical matter, our view is that if offenders are the victims of torts or crimes, inside or outside of prison, then the proper legal response should not be some blanket punishment discount for all offenders based on projections of difficult adaptation, but rather compensation to specific victims, targeted injunctive relief, and public prosecution of those who criminally wronged the offender, whether inside or outside of prison. And if it is just bad luck or the fault of the offender that causes the “post-prison blues,” then the harms must fall where they do, preempting a legal remedy.

Of course, as a prescriptive matter, to the extent that BBM believe that social planners should focus some resources on ensuring successful offender reentry, we agree. And inasmuch as BBM hold the view that, all things considered, there is too much use of incarceration in terms of scope and duration, then we share that view too. But these convergences, if they exist, mask our rather fundamental theoretical disagreement.

For us, the task of successful reentry for offenders does not emerge from our retributive commitments so much as our humanistic and prudential ones. It may well be that the state has a number of interests in helping offenders reenter society to “get back on their feet” or at least help them steer clear of criminality. But we think that whatever the state’s interests in this area are, they are best kept separate from the question of retributive justifications for punishment. Conversely, our desire to see sentencing reform (in the form of both reducing the gross amount of incarceration and searching for alternatives to prison) is in fact a piece of our retributive commitments.⁵⁰

B. A Related Note on Culpability and Aggregated Acts

Part of BBM’s argument relies on the claim that because the state has a choice of punishment tactics, when the state chooses to punish one way it also chooses to embrace as part of the punishment any incidental bad consequences caused by that mode of punishment that are reasonably foreseeable.⁵¹ When they consider these consequences, BBM do not focus on the individual consequences to any one offender. Rather, they tend to look at the experience of offenders as a whole, for instance, that they are more likely to suffer disease or poverty.

49. *REP*, *supra* note 2, at 1493.

50. *See generally* Chad Flanders, *Retribution and Reform*, 70 MD. L. REV. 87 (2010); David Gray & Jonathan Huber, *Retributivism for Progressives: A Response to Professor Flanders*, 70 MD. L. REV. 141 (2010); Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157 (2001) (criticizing over-reliance on incarceration).

51. *REP*, *supra* note 2, at 1484, 1488.

The problem here is that while BBM say that the state has its choice of punishments, they do not say which type of punishment would be better *on the whole* than imprisonment. This is important. What BBM fail to realize (or acknowledge) is that if it is permissible (i.e., not negligent or worse) to punish a single offender through prison notwithstanding the small risk that some harm post-prison might contingently occur, then it is also permissible to punish offenders generally in the same way notwithstanding that the foreseeable likelihood of some incidental harm increases with the number of persons punished. This is what Professor Simons has called the principle of “invariant culpability when acts are aggregated,”⁵² which deserves brief mention here.

Consider the following: If we drive to the store one day with care and caution, we would likely be permitted to say this activity is reasonable by comparing the various social and private benefits and costs. If we drive to the store one thousand times, with the same care and caution, however, there is a much higher likelihood of an accident causing an injury to someone. The incidence of an accident does not necessarily change the culpability of the actor even if we know we are more likely to be involved in an accident if we drive a thousand times than if we only drive once. In order for BBM’s argument to succeed, they would need to show that there is something negligent (or even more culpable than negligence) about imprisoning any offender on account of the contingent harm that person may experience. But this is a critically important argument about prison usage that they have not provided.

VI.

SOME MISSTEPS REGARDING OUR ARGUMENTS

Even with the lines between us and BBM clearly drawn, we would be remiss to leave unaddressed BBM’s more dubious charges against retributivism generally, and the specific conception of retributivism discussed in *BOS*. A few deserve special mention, which we turn to below.

A. Fears of Communicative Unilateralism

When defending the relevance of the “post-prison blues” to retributivist calculations of proportional punishment, BBM reject the claim that the polity is only responsible for the intentional communication of condemnation occurring within the punitive encounter over which the state has control and authority.⁵³ We have already explained how BBM mistakenly assume that the state’s responsibility for a foreseeable and proximately caused harm must result in the form of penal leniency.

52. Kenneth W. Simons, *Statistical Knowledge Deconstructed* 23–25 (Bos. Univ. Sch. of Law, Working Paper No. 10-26, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1673266.

53. *REP*, *supra* note 2, at 1490–92.

In the course of their analysis of punishment as intentional communication, however, BBM raise a different point: what if a prisoner thinks he is still being punished even *after* he has been technically released from state supervision?⁵⁴ The state, they argue, “cannot define the content of its messages by authorial fiat” and the state does not have the “right to specify the meaning of a sentence.”⁵⁵

Once again, BBM underappreciate the significance of social meaning and its genesis.⁵⁶ As we discussed in Part III, when a liberal democratic polity comes together and announces that some conduct is blameworthy and condemnable as a crime, such statements are entitled to a kind of prima facie deference. Of course, such deference must coincide with independent judicial review, and to our mind, there has to be a reasonable basis for legislative action before the polity can use a criminal sanction to promote particular objectives. But this desire for at least some (nontrivial) restraint upon criminal law’s scope is pretty uncontroversial among many criminal law theorists.

Here is the upshot: as long as some nontrivial restraining conditions hold, then there is little reason to credit BBM’s concern that the state is issuing an unreasonable “authorial fiat” or is unilaterally communicating some bizarre message to an offender when the polity is reflecting or generating the social meaning associated with punishment in this context.

As a result, there is no reason to credit just *any* interpretation of a punishment given by an offender qua offender. Rather, the polity need only be constrained by the *reasonable* interpretation of the sentence imposed, and this will largely follow the polity’s perspective since it is the polity that is creating and reflecting the social meaning involved here. To see this in less abstract terms, consider a prisoner who is hit by a bus upon being released from prison. He may blame the state, perhaps because he is not as nimble as he was pre-prison. On our view, he would not be reasonable in thinking that *this* injury was part of the state’s punishment of him, and that the state was trying to communicate its condemnation via the bus or even by making him more vulnerable to the bus. Similarly, we believe it is entirely plausible to attribute to prisoners the knowledge of the difference between being imprisoned and the contingent harms that befall them after imprisonment, even if in moments of deep frustration they might succumb to more diffuse and undifferentiated forms of resentment.

Relatedly, BBM’s claims regarding communication of punishment here wrongly suggest that our account of communicative punishment would be satisfied simply by “verbally conveying” the message of condemnation.⁵⁷ In fact, we explained in detail why coercive condemnatory sanctions are needed to

54. *Id.*

55. *Id.* at 1487–88.

56. *See supra* Part III.

57. *REP*, *supra* note 2, at 1468.

make the communication a plausible one, and why reliance upon mere epistles and declarations from the sovereign are insufficient.⁵⁸ Briefly put, the social meaning of such epistles or declarations is important; in *our world*, such missives would fail to achieve adequate and effective condemnation in the case of many offenses. To rest on rebuke in the absence of coercive sanctions would create a signal of faux condemnation, indeed, perhaps even a signal of impunity.

B. Fears of Semantic Unilateralism

Elsewhere, BBM chastise us for ostensibly misunderstanding the nature of communication. Specifically, they claim that our usage of the idea of communication (which we explicitly distinguish from expression) runs counter to the way scholars in other fields use the term “communication.”⁵⁹ As a result, they use the word “communication” to connote a meaning that we specifically identified in *BOS* as an expression, not communication.⁶⁰

Their objection is misplaced. The fact that scholars outside punishment theory lump together communication and expression does not mean that we have to, especially if we call attention to our stipulated definitions, as we do, and have reasons for distinguishing between instrumental justifications of punishment (that would look at expressions by the state to the public) and non-instrumental justifications of punishment (that would focus on communicative practices to the offender). Moreover, the distinction between communication and expression has a by-now familiar ring in the legal literature of which BBM should be aware.⁶¹

Relatedly, we think there is little problem with invoking the idea of a shared collective intent behind the polity’s communication of condemnation to

58. See *BOS*, *supra* note 2, at 931–40; see also Joel Feinberg, *The Expressive Function of Punishment*, 49 *MONIST* 397, 402 (1965) (“[C]ertain forms of hard treatment have become the conventional symbols of public reprobation. This is neither more nor less paradoxical than to say that certain words have become conventional vehicles in our language for the expression of certain attitudes, or that champagne is the alcoholic beverage traditionally used in celebration of great events, or that black is the color of mourning.”). Of course, as Anthony Skillen remarked, Feinberg likely overstates the claim that hard treatment is merely a “signal” of reprobation much like the wearing of black is a signal of mourning. “[I]t is pretty clear that losing money, years of liberty, or parts of one’s body is hardly neutral in that way.” Anthony Skillen, *How to Say Things With Walls*, 35 *PHILOSOPHY* 509, 517 (1980). Rather, per Skillen, our “[punitiv]e practices embody punitive hostility, they do not merely ‘symbolize’ it.” *Id.* If Skillen is correct, then it surely reinforces our view that the hard treatment aspect of state punishment is necessary in order for punishment to communicate reprobation adequately, though of course the “hardness” of the treatment can be calibrated using objective metrics capable of ex ante determination, such as months in prison or fines based on percentages of net wealth.

59. See *REP*, *supra* note 2, at 1490–91 & n.117.

60. See *id.* at 1490; cf. *BOS*, *supra* note 2, at 929–30 & n.89 (distinguishing between communication and expression).

61. See generally Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 *U. PA. L. REV.* 1503, 1508 (2000) (explaining the distinction).

offenders when it attaches punishments to defined crimes.⁶² BBM actually rely upon this notion (perhaps unwittingly) throughout their critique, such as when they refer to a state being “reckless” with respect to the harms caused by punishment.⁶³ Moreover, their critique of us—that “the state is a they, not an it”⁶⁴—founders on their conflation of intention with motivation. We agree that it may be difficult to find agreement on the motivation for action when it is undertaken by an institution, club, or nation-state, because in those situations persons might agree to authorize, ratify, or undertake action for different reasons. However, we think it is quite conventional and useful to ascribe a state of mind (like intent) to an action undertaken by a polity or other *governable* groups.⁶⁵ Otherwise, how would the state, to use BBM’s own argument, be reckless regarding the harms it causes to offenders?⁶⁶

C. Some Remaining Challenges

BBM offer some other objections to our argument along the way; we will deal with them only briefly here, since they are, to our mind, ill-formed and largely irrelevant.

First, they argue that when we say that offenders might bear the responsibility for some of the consequences they suffer after prison, we are sounding in “theories of comparative negligence that are familiar from tort law” but have no place in criminal law.⁶⁷ In response, we note the origins of the concept are not relevant so much as its utility in the given context. And surely the *concept* of comparative or contributory negligence is fair game for understanding the issues here. Indeed, in making the argument we did, we meant no more than what BBM ultimately conceded, namely, that “the criminal should bear some of the moral responsibility for the consequences of his actions.”⁶⁸ What we emphasize here is that: (a) not all the consequences for which the state *may* be responsible are rightly considered part of the state’s *punishment*; (b) those harms for which the state is responsible need not necessarily be (and usually should not be) remediated through punishment

62. REP, *supra* note 2, at 1489.

63. *Id.* at 1493–94 & n.132 (discussing the recklessness of the state’s “state of mind” regarding the harms it is aware of and uncritically describing the state as an actor capable of having a reckless state of mind).

64. *Id.* at 1489.

65. See, e.g., Philip Pettit, *The Reality of Group Agents*, in PHILOSOPHY OF THE SOCIAL SCIENCES: PHILOSOPHICAL THEORY AND SCIENTIFIC PRACTICE 67 (C. Mantzavinos ed., 2009), available at <http://www.princeton.edu/~ppetit/papers/2009/Reality%20of%20Group%20Agents.pdf>.

66. REP, *supra* note 2, at 1493–94 & n.132 (discussing the recklessness of the state’s “state of mind” regarding the harms it is aware of and uncritically describing the state as an actor capable of having a reckless state of mind).

67. *Id.* at 1495.

68. *Id.*

discounts; and (c) the state is not responsible for those harms for which the offender or a third party is better thought of as the proximate cause.⁶⁹

Second, BBM assert that our claim that offenders could have avoided punishment if they had chosen not to commit a crime entails that prison is not punishment.⁷⁰ This badly misunderstands our argument. BBM misread our position to be that if a prisoner could avoid his punishment by not committing a crime, then his imprisonment is not really a punishment. This would be an absurd thing to say. On the contrary, our claim is that the criminal cannot reasonably blame the state for all the consequences of his conduct (including the intended and contingent aftereffects of prison). The question at this point is not about whether to call something “punishment.” The question is whether the criminal can disclaim some or all responsibility for those harms he experiences after incarceration and instead blame the state. We think it reasonable to hold that he cannot blame the state unless the state somehow has caused those collateral consequences by acts of malfeasance or nonfeasance. Our basic point here, which we take to be rather uncontroversial, is that it would be absurd for a criminal to say that he is not responsible for his imprisonment or its collateral effects simply because the state imposed upon him the punishment he deserved. Undeserved harm suffered in prison, or post release as a result of state action, is, of course, another matter entirely. But here again, we think that BBM miss a crucial distinction.

CONCLUSION

BBM’s arguments rest on the maxim that “people live life subjectively, not objectively.”⁷¹ Perhaps much of our disagreement with them boils down to our skepticism that the thorough-going subjectivism stated in their maxim can provide any bedrock upon which to build institutions of justice, retributive or otherwise. Whether in political theory, law, or theology, much of the entire enterprise of seeking justice is properly focused on pushing us outside of ourselves in search of something with more normative weight than our idiosyncratic views and experiences. We do not simply accept people’s preferences—racist, sexist, adaptive, maladaptive, or otherwise—as given and immutable, and thus the best foundation upon which to build public policy. Rather, we try to think about what people *ought* to believe, given our best judgments and arguments about what justice requires in a heterogeneous political union.

Consequently, BBM’s appeal to aggregating and averaging subjective experience is largely a source of problems, not solutions. Most damningly from

69. See *BOS*, *supra* note 2, at 971.

70. *REP*, *supra* note 2, at 1496 (characterizing our claim as arguing that because “the criminal can reasonably avoid a penal harm by *simply not committing a crime* in the first place, that harm is not punishment”).

71. *Id.* at 1474.

the perspective of political philosophy—of which the philosophy of (state) punishment is a branch—“subjective experience” alone cannot capture complicated ethical assessments of the good life shared with others in a moral polity. That is in part why we believe that we should, when defining and justifying punishment, *reason* about which subjective experiences are worth having and promoting, and about which objective goods are reasonable for people to pursue.

While this exchange with BBM may not have minimized the distance between us on these issues regarding the sources of value, it has served to clarify our differences with three sophisticated scholars whose advocacy for their brand of subjectivism has helped us see our own views, and theirs, with greater clarity. Accordingly, the game has been well worth the candle.