

COLUMBIA LAW REVIEW

SIDEBAR

VOL. 109

MARCH 12, 2009

PAGES 1–10

RETRIBUTIVISTS NEED NOT AND SHOULD NOT ENDORSE THE SUBJECTIVIST ACCOUNT OF PUNISHMENT

*Kenneth W. Simons**

Response to: Adam J. Kolber, *The Subjective Experience of Punishment*, 109 Colum. L. Rev. 182 (2009).

In his provocative essay, *The Subjective Experience of Punishment*,¹ Professor Adam Kolber addresses an underappreciated problem in criminal law theory: What is the relevance of the criminal defendant's subjective experience of punishment to the justifiability of that punishment? As Kolber explains, punishment theorists have neglected to analyze carefully whether the harsh conditions of punishment should be understood objectively (e.g., as a deprivation of liberty) or subjectively (e.g., as the physical or emotional distress that the particular offender suffers). Retributivists, he points out, have said relatively little about the issue, and also have much greater difficulty than consequentialists reconciling their views with his stance, which I will call the "subjectivist" view. In this response, I suggest that Kolber understates the conceptual and normative difficulties with the subjectivist view, and is mistaken in believing that only a subjectivist version of retributivism is defensible.

According to the subjectivist view, two people who would otherwise be punished the same—having committed the same crime, under similar circumstances, with the same criminal record, family background, and so forth—should in fact receive different levels or types of punishment if they differ in their subjective negative reaction to a given quantum of punishment. Suppose "Sensitive" is claustrophobic, while "Insensitive" suffers less distress from punishment than most people. Under the subjectivist theory, Sensitive should be punished less than the typical offender, while Insensitive should be punished more.

* Professor of Law and The Honorable Frank R. Kenison Distinguished Scholar in Law, Boston University School of Law. I thank Larry Alexander and Antony Duff for helpful comments.

1. Adam J. Kolber, *The Subjective Experience of Punishment*, 109 Colum. L. Rev. 182 (2009).

Kolber is especially dubious that retributivists can adequately respond to this problem. They face a dilemma, he believes: Either they endorse calibrating punishment quite subjectively, even though this contradicts existing practice; or they refuse to do so, but then forfeit their claimed advantage over consequentialists—namely, a distinctive commitment to meaningful, defensible proportionality limits on punishment. His argument is intended in part as a *reductio ad absurdum*:² If retributivists want to seize the moral high ground and criticize consequentialists for lacking any principled reason for not punishing the innocent or for permitting other moral atrocities, then they are committed to the subjectivist view, despite its many implausible implications. For example, not only must they punish Sensitive less than the average prisoner, and Insensitive more, but they should also punish Paris Hilton for a shorter period of time than a less wealthy person who commits the same crime, simply because she is accustomed to greater material comforts and thus suffers more from any given period of incarceration.

Although there are practical objections to Kolber's argument for the subjectivist view,³ the greater significance of his argument is its theoretical critique of retributivism, which will be my focus. Part I of this response rejects his claim that retributivists should endorse the subjectivist view. Part II then points out ambiguities and problems that a subjectivist view engenders.

I. WHY RETRIBUTIVISTS NEED NOT ENDORSE THE SUBJECTIVIST VIEW

Must retributivists calibrate punishment according to each offender's subjective negative emotional reaction to punishment? Kolber is correct that the offender's subjective reaction to a punishment is sometimes relevant to the justifiability of that punishment; as he points out, a state-inflicted burden (such as restricting the offender's freedom of movement) cannot count as punishment if the offender does not even realize that he is being burdened.⁴ But it does not follow that in determining the required length or conditions of punishment retributivists must give decisive weight to the offender's subjective negative reactions. Rather, *objective* deprivations—including loss of liberty of movement, loss of employment prospects, and loss of opportunity for normal family life and other social interactions—are also highly relevant, both to expressivist and to nonexpressivist versions of retribution.

2. See *id.* at 236.

3. For example, Kolber makes the valid point that in tort law, subjective determinations of pain and suffering have long been considered feasible. *Id.* at 219–20. However, I believe he understates the difficulty of introducing expert testimony about individual variations in punishment experience into the resource-starved American criminal justice system.

4. *Id.* at 203–04 (discussing this “Awareness Requirement”).

Consider first expressive retributivists, some of whom believe that punishment must publicly convey the wrongfulness of the offender's conduct, and others of whom believe that punishment properly gives expression to the resentment that the community feels towards the offender. From the perspective of the latter group especially,⁵ it is absolutely crucial that the public view the conditions of the offender's punishment as proportionate to the initial blaming judgment. Yet (as Kolber concedes) the public will not view a lighter punishment for certain "sensitive" offenders as proportionate. Consider Kolber's example of an interior designer who cares a great deal about his aesthetic surroundings, and thus has much more trouble coping with a given period of incarceration than does the average prisoner.⁶ The community's judgment of disapproval is likely to focus almost entirely on the offender's crime, and—at least in contemporary American political culture—that judgment will typically be thought to warrant a period of incarceration that is proportionate to the seriousness of the crime, with no consideration of idiosyncratic reactions to incarceration.

To be sure, expressive retribution is itself a controversial theory and some versions of this approach awkwardly or even incoherently straddle deontological and consequentialist perspectives.⁷ So it is fair to object, as Kolber does, that expressive retributivism is problematic insofar as it detaches community views of just blaming practices from how much suffering those practices actually cause offenders. If members of the public erroneously assume that all "sensitive" offenders are fraudulently invoking the condition in order to obtain an unjustified mitigation, or if the public suffers from a fetishistic attachment to how punishments are conventionally named or described,⁸ we should be cautious before deferring to those public sentiments. Consider Kolber's example of the offender with a diagnosed condition of claustrophobia. If we reduced the punishment of such an offender, the public might erroneously view the reduction, not as a proper response to a genuine and relevant

5. The former category of expressivism is less consequentialist in spirit and thus is more plausibly justified as a genuine retributivist theory. For a sophisticated account within the category, see generally R.A. Duff, *Punishment, Communication, and Community* (2001) (defending system of punishment that aims not just to communicate censure but also to persuade offenders to self-reform and reconciliation).

6. See Kolber, *supra* note 1, at 189–90.

7. See Michael Moore, *Placing Blame: A General Theory of Criminal Law* 90 (1997) (arguing that retributivism should not be confused with a denunciatory theory justified by its achievement of good consequences such as psychological satisfaction); Kolber, *supra* note 1, at 209.

8. Kolber points out that some of our objectivist intuitions focus fetishistically on the way punishments are conventionally named, rather than on their substance. Thus, under the conventional description, "incarceration in a cell," we treat seven foot Yao the same as five foot Muggsy by placing them both in a cell that is six feet in all three dimensions. But this punishment, Kolber explains, might actually be considered *unequal* once we take into account their different physical sizes. By contrast, under the more creative description "boxing," defined as incarcerating in a cell with dimensions equal to the person's height, we treat the two the same if Yao's cell is seven feet in all three dimensions while Muggsy's is five feet in all three. See Kolber, *supra* note 1, at 235.

difference in punishment sensitivity (comparable to the legitimate policy of placing a seven foot, 350 pound offender in a slightly larger cell), but as expressing the dubious view that being claustrophobic is a factor that justifiably mitigates the degree of the offender's desert for the crime. Kolber reasonably asks why we should let the public's cognitive biases dictate punishment policy in this way.

Nevertheless, nonexpressive retributivists also have strong grounds for rejecting Kolber's argument. Consider the following five plausible reasons that they might assert in rejecting a fully subjectivist view.

First, the state is not morally responsible for all hypersensitive, or for all hyperinsensitive, reactions to punishment, even if those reactions are entirely predictable and indeed predicted. One distinguishing feature of a deontological justification (such as retribution) is that the causal structure of action and consequences matters to responsibility.⁹ Consequences—"the bottom line"—are not the only morally and legally relevant factors.

Consider the much discussed question of whether punishment should take into account the collateral negative effects of the offender's criminal act. Retributivists and consequentialists give very different answers. Suppose a drunk driver accidentally kills his own child, whom he loved. Or suppose incarcerating an offender would deprive her family of her emotional and financial support. On a deontological view, the state should not consider all the predictable negative effects of the criminal act or of the imposition of punishment, and is not required to adjust punishment to account for these effects. Indeed, the state is also not responsible for, or required to compensate for, all of the predictable *positive* effects of punishment. If an offender has a religious conversion, and honestly concludes that being punished for his crime is the best thing that ever happened to him, a retributivist need not conclude that the proper response is to punish him more, until his postconversion level of well-being is equal to that of similarly situated offenders who do not undergo such a conversion. The state's responsibility is simply to ensure that the punishment that it directly inflicts is proportionate to desert. It need not monitor the flow of burdens and benefits in the offender's life and make appropriate corrections so that when he meets his maker, cosmic justice has been done.

Second, imagine a perverse version of Robert Nozick's "experience machine,"¹⁰ one that, rather than producing the illusion of positive life

9. See, e.g., F.M. Kamm, *Intricate Ethics: Rights, Responsibilities, and Permissible Harm* 423 (2007) (noting that deontologists—as opposed to most modern consequentialist theorists—"have always been concerned with *how* end states come about"); Leo Katz, *Ill-Gotten Gains: Evasion, Blackmail, Fraud, and Kindred Puzzles of the Law* 52–59 (1996) (noting that deontologists, unlike consequentialists, consider morally relevant the path and causal structure by which a consequence is produced).

10. Robert Nozick, *Anarchy, State, and Utopia* 42–45 (1974). Nozick asks whether one should, or would, plug into an "experience machine"—a machine that provides the illusion of success in writing novels, making friends, or whatever the agent believes to be

experiences, instead produced the illusion of negative experiences—but, of course, without objectively causing loss of liberty or deprivation of opportunities. Imagine that hooking the offender up to the machine for five minutes gives him the illusion of having spent ten years in prison, and of not having seen his family or friends for ten years. On certain subjective views—especially the purely hedonic view that considers only pain or loss of pleasure—this would be a fine idea, since there is no reason why we must actually deprive the offender of opportunities. Yet most of us, I believe, find the negative version of the experience machine no more intuitively acceptable than the original positive version. Under the negative version, it seems, we have not adequately punished the offender; instead, we have simply given the offender the illusion that he has been punished. Our reaction to this (admittedly fanciful) example is evidence that a purely subjective approach to measuring the severity of punishment is inadequate.

Third, if retribution really requires that punishment *fully* compensate for the subjective sensitivity of certain offenders, highly implausible results follow. Realistically, a purely subjective theory could easily require enormous variation in length or severity of punishment according to variations in sensitivity. Consider the resilient hardened criminal who doesn't mind prison very much, or the ascetic who doesn't suffer much from any adversity. Under the subjectivist approach, we must lengthen such an offender's sentence, but it is possible that no sentence for him, not even a life sentence, will cause him as much suffering as a supersensitive person endures in just a few weeks. If each has committed the same crime and otherwise deserves the same punishment, it seems unthinkable that a punishment system would "equalize" their punishment by imposing such wildly disparate periods of incarceration.

To be sure, this analysis is only persuasive if we can satisfactorily explain the proper criteria for just deserts and for translating greater desert into greater punishment. These are daunting tasks. But let me briefly suggest a reason why the subjectivist approach is unlikely to provide the best answers. The differential in seriousness of punishment deserved for different crimes will depend overwhelmingly on differences in the crimes themselves, not on differences in subjective sensitivity to punishment. In stylized form, if a typical robber (R) justly deserves a punishment of 100, and a typical murderer (M) a punishment of 800, but robber R_s is sensitive while robber R_i is insensitive, then the difference in punishment between R_s and R_i should not be of the same order of magnitude as the difference in punishment between R and M. Perhaps R_s should receive 99 and R_i 101. Taking Kolber's approach, however, it is conceivable that insensitive robber R_i must receive 800, the same punishment as M, the murderer. Only a predominantly objective

valuable—for the rest of one's life. The answer, he claims, is no; people find value not just in pleasant illusions, but in actual accomplishments and actual relationships. Nozick offers the hypothetical as a refutation of purely subjective conceptions of well-being.

approach can explain why the overriding factor in differentiating the deserved punishments for R and for M is the crime they committed (and also perhaps the surrounding mitigating or aggravating circumstances), not their subjective reactions to punishment. But if this is so, then a largely objective approach will permit only a very small differential in punishment between R_s and R_r .

Fourth, consider the death penalty. Kolber's approach is unable to explain why many retributivists support imposing the death penalty for the most serious crimes. Must they believe that the death penalty causes the offender more subjective suffering than life without parole does? Granted, contemplating one's own death must be an awful experience. But a retributivist could believe that death is the most severe deserved punishment, even for offenders who do not fear death at all, for a straightforward reason: death irreversibly takes away all of the objective benefits of life.

Fifth and finally, the subjectivist approach will often disproportionately benefit wealthy defendants, insofar as the wealthy are accustomed to more spacious accommodations and better food, health care, and other amenities; accordingly, the wealthy will be disproportionately sensitive to harsh prison conditions relative to those without such advantages. In principle, then, the wealthy should receive shorter sentences. To be sure, in the context of criminal fines, Kolber's approach would ameliorate the current system's bias in favor of the wealthy by calibrating fines to wealth and income.¹¹ However, he concedes that, with respect to incarceration, his approach might require shorter sentences (or more comfortable conditions) for the wealthy. To some extent, he notes, retributivists can offset this troubling punishment discount for the wealthy with a punishment *supplement*—insofar as the wealthy typically benefit from more opportunities than the poor and therefore are somewhat more culpable for committing a given crime. In the end, though, Kolber thinks retributivists have to bite the bullet: They cannot endorse their principles in an unqualified form if they want to avoid creating de facto wealth discrimination.

Again, however, a more objective account is the better answer: It can both explain and justify the popular indignation that would surely greet a subjectivist policy that favored the "sensitive" wealthy by providing them with shorter terms of incarceration. The objective deprivations imposed by prison—such as loss of liberty or of the opportunity for relationships with family and with others outside of prison—are normally the same for more wealthy and less wealthy offenders. Moreover, it bears repeating that the state is not responsible for all the sensitivities (or insensitivities) of those it punishes, and thus is not obligated to adjust its punishments in response to these qualities. Here, the state is not responsible for the fact that when people

11. Kolber aptly criticizes, as crude and unjustifiable, the widespread current practice of imposing an invariant, one-size-fits-all criminal fine for a particular crime, without regard to the offender's wealth or income. Kolber, *supra* note 1, at 226.

accumulate wealth and privilege they often develop greater sensitivities to confined spaces and to harsh physical conditions. The point is not that the wealthy are somehow to blame for acquiring wealth and the sensitivities that accompany their lifestyle, but simply that the state is not responsible for compensating for these personal characteristics—just as it is not required to reduce the punishment of a person who has carefully nurtured an unusually large circle of close friends and who is especially disconsolate at losing contact with those friends while in prison.

II. AMBIGUITIES AND PROBLEMS WITH A SUBJECTIVIST VIEW

A second major concern about Kolber's argument is his agnosticism about *which* mental states should be treated as disvaluable.¹² Even if one does decide to employ some kind of subjectivist criterion, the precise criterion chosen seems critical—on both a retributive and consequentialist account. Do we define subjective “disvalue” as frustration of preferences? As frustration of desires? Do we consider both short-term and long-term preferences (or desires)? Both first-order and second-order? Or is suffering pain the most appropriate measure of (negative) well-being in this context?¹³ Should we include long-term regret at lost opportunities? What about sorrow at the loss of relationships with family and friends on the outside? Or shame due to the judgment of community blame? Some of these criteria point to a need for much greater individual variation in punishment length and conditions due to offender sensitivity than others do. Some blur the line between a subjectivist and an objective account. And some are much more relevant than others to any plausible retributivist account.

To take an extreme example, if a defendant is a masochist who prefers a life of physical suffering, should we punish him with a sentence that provides him with (what most people would consider) pleasant experiences? On the view that punishment requires the state to deliberately frustrate the offender's preferences, apparently we should; on the view that punishment requires causing the offender pain, apparently we should not. Or consider a more straightforward case: A defendant wants to be punished because he admits his responsibility and wants to pay his debt to society. Is this offender, by definition, not being punished, because punishment is what he most prefers? Surely not. Finally, consider the O. Henry story in which the offender commits a

12. See *id.* at 187 n.5.

13. Contemporary philosophers typically distinguish three possible theories of well-being: hedonic (pleasure and pain), desire-satisfaction (encompassing both desires and preferences), and “objective list” (objective components of well-being, such as knowledge or friendship). See Roger Crisp, *Well-Being*, in *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed., Winter 2008), at <http://plato.stanford.edu/archives/win2008/entries/well-being> (on file with the *Columbia Law Review*).

crime in order to be fed and sheltered in jail.¹⁴ Kolber quickly concludes that jail cannot serve as a punishment here.¹⁵ But again, this depends on what types of subjective disvalue count for purposes of calibrating the extent (or even the existence) of punishment.

The controversy about which criterion to employ also explains why our intuitions about punishment severity are often unclear. Some inmates on death row will declare that they prefer the death penalty to life imprisonment. If the state really wants to impose the maximum penalty, shouldn't it impose the penalty that such an inmate claims to disprefer? Or, in a future world of reliable brain scans, shouldn't we then inflict whichever punishment, life or death, that such a scan shows is dispreferred? Even putting pragmatic measurement and fraud problems aside, it is not clear that frustrating the offender's preferences should be the primary—or even a relevant—factor in determining which punishment is, for retributive purposes, most severe.

One important distinction, not emphasized in Kolber's essay, is between a punishment that deliberately imposes pain, suffering, or some other negative emotional or psychic state, and a punishment that deliberately *deprives* the offender of a *positive* emotional or psychic state. I believe that our most severe modern punishments, the death penalty and incarceration, are mainly intended to cause deprivation—deprivation both of objective goods (such as liberty and relationships) and of subjective pleasures. Prison excludes the inmate from valuable experiences and opportunities that he might otherwise have had on the outside. Such punishments are not primarily *designed* to cause pain or negative psychic reactions, though these effects may occur as a consequence of the deprivation.¹⁶

But shouldn't a retributivist be willing to impose pain or psychic harm on offenders if he is willing to deprive the offender of positive subjective experiences? Would it not be better to impose, say, one day of intentionally degrading treatment, rather than six months of imprisonment, if the two sanctions will equally express the blameworthiness of the crime or will both be proportionate to the crime? The short answer is no, this is not preferable. A liberal retributivist should abjure intentionally humiliating and degrading punishments as inconsistent with the attitude that the state should take toward the offender.¹⁷

14. O. Henry, *The Cop and the Anthem*, in *The Ransom of Red Chief and Other O. Henry Stories for Boys* 143, 147–52 (Franklin J. Mathiews ed., 1928).

15. Kolber, *supra* note 1, at 205.

16. One reason that shaming penalties are so controversial is that many seem designed to humiliate the offender, rather than to deprive the offender of positive objective goods or positive subjective pleasures. See, e.g., *United States v. Gementera*, 379 F.3d 596, 610–12 (9th Cir. 2004) (Hawkins, J., dissenting) (claiming that punishment upheld by majority—in which convicted mail thief was sentenced to stand outside post office for a day with sign stating, “I stole the mail. This is my punishment.”—was at bottom an uncivilized, degrading, and dehumanizing shaming punishment).

17. Alternatively, one might concede that deliberately degrading punishments are

A final point: Kolber seems to implicitly assume that punishment severity is properly gauged by the disutility it causes the offender. But, apart from the problem we have noticed—that the meaning of “disutility” is uncertain and controversial—retributivists need not share this basic utilitarian assumption. Indeed, this assumption generates some dubious implications for punishment policy. One implication is that punishers should be indifferent between imposing a lengthy, less severe punishment and a shorter, more severe punishment, so long as the total disutility imposed by each is the same. Suppose the disutility caused by four years of incarceration in a medium security prison is $4M$, and the disutility of one year is M .¹⁸ From a utilitarian perspective, one can increase deterrence either by increasing the severity of the punishment (e.g., placing the offender in a prison with a harsher environment) or by increasing its duration. But from a retributive perspective, there might be all the difference in the world between a short-term, very unpleasant sentence and a longer-term, less unpleasant one. If deprivation of liberty and of outside relationships is the critical measure of deserved suffering, then in order to increase the severity of punishment of those who deserve to suffer more, longer sentences will generally be favored over shorter, harsher ones. To be sure, even a retributivist will consider some shorter, harsher punishments equal in their severity to some longer, less harsh ones. But the terms of the tradeoff will be quite different, and will not depend only on whether the two punishments cause the offender the same aggregate disutility.

CONCLUSION

Retributivists need not endorse Kolber’s subjectivist view. Both expressivist and nonexpressivist retributivists can, and indeed should, give substantial weight to objective deprivations of liberty and of society’s role in determining the proper severity of punishment. Moreover, insofar as the offender’s actual subjective experience of punishment is indeed relevant, either to a retributivist or to a consequentialist, one must say more than Kolber does to specify which of a wide range of subjective mental states are relevant. From the perspective of a liberal retributivist, the state may legitimately inflict punishment in order to deny the offender objective goods or positive subjective experiences, but arguably may not inflict punishment in order to cause the offender subjective negative experiences of pain and humiliation.

Notwithstanding the concerns that I have expressed, Kolber’s essay

consistent with retribution, but insist that retributivist values must be qualified by the state’s duty to treat its citizens, including convicted criminals, humanely and with respect for their dignity. For the analogous argument that the death penalty is consistent with retributivism but inconsistent with civilized values, see Jeffrey H. Reiman, *Justice, Civilization, and the Death Penalty: Answering van den Haag*, 14 *Phil. & Pub. Aff.* 115, 134–42 (1985).

18. There are other possibilities; perhaps the disutility of one year is $2M$, if the last three years cause diminishing marginal disutility.

is an important contribution to criminal law theory. Kolber observes that many judges today probably secretly calibrate punishment according to individual experience, at least to some degree. I share his view that if this is the case, the practice should be assessed more carefully and openly. And I agree with his judgment that retributivist theorists have not carefully addressed this problem. It is an open question whether they will succeed in offering a plausible account that is less subjective than Kolber insists is required. This response is an effort in that direction, but there is much more to be said.

Preferred Citation: Kenneth W. Simons, *Retributivists Need Not and Should Not Endorse the Subjectivist Account of Punishment*, 109 COLUM. L. REV. SIDEBAR 1 (2009), http://www.columbialawreview.org/Sidebar/volume/109/1_Simons.pdf.