
THE COMPARATIVE NATURE OF PUNISHMENT

ADAM J. KOLBER*

INTRODUCTION	1566
I. WHY PUNISHMENT SEVERITY IS COMPARATIVE.....	1571
A. <i>Measuring Harm Generally</i>	1571
B. <i>Measuring Severity of Incarceration</i>	1573
C. <i>Other Comparative Punishment Practices</i>	1575
1. Monetary Fines.....	1575
2. Erroneous Conviction Compensation.....	1577
D. <i>Shiffrin's Absolute Conception of Harm</i>	1579
II. STRANGE IMPLICATIONS OF COMPARATIVE PUNISHMENT	1581
A. <i>Punishment Severity in Punishment Theory</i>	1581
1. Retributivist Punishment Severity	1582
2. Consequentialist Punishment Severity	1583
3. The Currency of Punishment.....	1584
B. <i>The Objective Account of Punishment</i>	1585
1. Liberties-in-Fact	1587
a. <i>The Abducted Drug Dealer</i>	1587
b. <i>Pervasive Variation in Baseline Liberties</i>	1588
2. Liberties-Under-Law	1589
a. <i>Property Rights Affect Baselines</i>	1589
b. <i>Military Service, Quarantine, and Curfews Affect</i> <i>Baselines</i>	1591
c. <i>Liberty-Under-Law Approach Too Limited</i>	1592
3. Idealized Liberties	1593
C. <i>The Subjective Account of Punishment</i>	1594
1. End-Stage Experiential Calibration	1595
2. Baseline Experiential Calibration.....	1597
III. RETREATING FROM PROPORTIONALITY	1600

* Professor of Law, University of San Diego School of Law. For helpful comments, I thank Larry Alexander, John Bronsteen, Larry Crocker, Antony Duff, Adam Elga, Matt Evans, Cynthia Godsoe, David Gray, Adil Haque, Elizabeth Harman, Heidi Hurd, Doug Husak, Leo Katz, Joshua Knobe, Rahul Kumar, Ivy Lapidés, Evan Lee, John Mikhail, Michael Moore, Philip Pettit, Walter Sinnott-Armstrong, Larry Solum, Victor Tadros, and Gideon Yaffe. I also thank participants at Columbia Law School's Legal Theory Workshop, The George Washington University Law School's Young Scholars Criminal Law Conference, and Hofstra University School of Law's Prawfsfest Conference, as well as participants at faculty colloquia at the University of California, Hastings College of the Law; the University of Illinois College of Law; and the University of San Diego School of Law. This project was generously supported by the Princeton University Center for Human Values and the University of San Diego School of Law.

A. <i>The Retributive Superiority Claim</i>	1600
1. Four Failed Attempts to Maintain the Retributive Superiority Claim	1601
a. <i>The Forewarned Is Forearmed Attempt</i>	1601
b. <i>The Deliberateness Attempt</i>	1602
c. <i>The Banded Proportionality Attempt</i>	1603
d. <i>Cost and Administrative Complexity Attempt</i>	1604
2. Punishing the Innocent	1605
B. <i>The Significance of Recognizing the Comparative Nature of Punishment</i>	1606
CONCLUSION.....	1607

In tort and contract law, we calculate the harm a defendant caused a plaintiff by examining the plaintiff's condition after an injury relative to his baseline condition. When we consider the severity of prison sentences, however, we usually ignore offenders' baseline conditions. We deem inmates as receiving equal punishments when they are incarcerated for the same period of time under the same conditions, even though incarceration does not change their situations equally (unless they started out in identical circumstances). It is the amount by which we change offenders' circumstances that determines the severity of their sentences.

We calculate the severity of some punishments, like fines, comparatively. Fines specify an amount by which to change an offender's wealth relative to his baseline. We never use fines to equalize the net worth of offenders, but we do use prison to equalize the liberties of prison inmates.

When we recognize the comparative nature of punishment, we see that, by putting two equally blameworthy offenders in prison for equal durations, the offender with the better baseline condition is likely punished more severely than the offender with the worse baseline condition. We must attend to the differences in their baselines or else we will fail to justify some of the harsh treatment that we knowingly impose. If we insist on giving both of these offenders equal prison terms, we cannot justify doing so on the grounds of proportional punishment.

INTRODUCTION

Our assessments of the severity of prison sentences rest on a fundamental mistake. We usually deem inmates as receiving equal punishments when they are incarcerated for the same period of time under the same prison conditions. Such punishments may seem equal because the inmates have roughly the same amount of liberty. We use what I call an "absolute" approach to measuring the severity of prison sentences that looks only at an offender's life while incarcerated. To assess punishment severity accurately, however, we must use what I call a "comparative" approach that examines an offender's life in prison relative to his life in his unpunished, baseline condition. The true severity of incarceration depends on the ways in which prison changes an offender's life.

To illustrate the difference between the absolute and the comparative approaches, suppose that you have twin children who both engage in equally blameworthy behavior. You intend to punish them by taking away some of their jellybeans, knowing that each jellybean is of equal value to each child. Assume first that, before they are punished, each child has 20 jellybeans and that you take 15 away from each. In this scenario, both the absolute and comparative approaches agree that the children are punished equally, but they offer different explanations. The absolutist says the punishments are equal because each ends up with 5 jellybeans. The comparativist says the punishments are equal because they both gave up 15 jellybeans.

The appeal of the comparative approach becomes clearer when the children start out with different amounts of jellybeans. Suppose one starts out with 100 jellybeans and the other with 20. If you leave each with only 5 jellybeans, comparativists will say that the first child received a more severe 95-jellybean reduction than the second child who received a mere 15-jellybean reduction. Absolutists, by contrast, must take the surprising position that the punishments are equal because both end up with the same number of jellybeans.

In the criminal justice context, we can understand the preceding punishments as fines that happen to be in units of jellybeans. If so, the comparative description is clearly more accurate: the punishments are unequal because one child is fined 95 jellybeans, which is substantially more than his sibling's fine of 15 jellybeans.

Now suppose, as many theorists do, that incarceration deprives us of liberty. In that case, we can think of jellybeans as representing units of liberty (which I will call "libertiles") at a particular moment in time. We can then compare two equally blameworthy offenders: one with a baseline of 100 libertiles and another with a baseline of 20 libertiles. In prison, the offenders will both be reduced to the same liberty-limited condition of 5 libertiles for the duration of their sentences. Under a comparative approach, as before, these offenders are not punished equally. One has a 95-libertile reduction and the other has a 15-libertile reduction. Yet, we typically say that they are punished equally because they both end up in the same liberty-limited condition for the same amount of time. Our conventional approach measures the severity of incarceration in absolute terms, paying no attention to pertinent baselines.

It is important to measure punishment severity comparatively because people differ in their baseline conditions, including their baseline levels of liberty. Civilians have liberties of movement that soldiers and people in quarantine lack. Eighteen-year-olds have rights to vote that seventeen-year-olds lack. Rich people have rights to use particular property that poor people lack. Yet, for the duration of their terms in a particular prison facility, they all have roughly the same liberty.

When people have liberties in their baseline conditions that others lack, prison punishes them more severely than people with less liberty in their baseline conditions. For a given prison term, all else being equal, civilians are punished more severely than soldiers or people in quarantine, eligible voters

are punished more severely than those who are ineligible (in jurisdictions where inmates lose their voting rights), and rich people are punished more severely than poor people.

I am *not* arguing that civilians should spend less time in prison than soldiers or that rich people should spend less time in prison than poor people. What is most endangered by recognizing the comparative nature of punishment, I will suggest, is the appeal of punishment proportionality, which holds that offenders who are equally blameworthy should be given punishments equal in severity.

We are so used to understanding the severity of prison sentences in absolute terms that something may seem horribly amiss when we use the comparative approach. On the contrary, I will argue, the comparative nature of punishment is inescapable. It is precisely the method we use to measure the severity of harm throughout the rest of the law. In tort and contract law, we assess harms by comparing two conditions. A person in an unharmed, baseline condition is injured and thereby placed in a worse, harmed condition. We calculate the amount the person is harmed as the difference in these conditions. If you negligently crash into my parked car, you owe damages for the difference in the value between the damaged car and the value of the car before the accident. It is hard to imagine any plausible alternative method of understanding the severity of harm or harsh treatment.

Though scholars have recognized the comparative nature of tort and contract harms,¹ they have failed to recognize the comparative nature of the burdens of punishment. This oversight raises serious questions about the justification of our sentencing practices. We must justify not only whether or not a person is punished but also the amount of punishment we impose. If our sentencing practices misconstrue the severity of punishment, then those practices are vulnerable to the charge that they fail to adequately justify punishment. Absent justification, our punishment practices are no better than the crimes they are meant to address. When we incarcerate without justification, it looks like kidnapping. When we execute without justification, it looks like murder.

There are two ways, however, to avoid the most counterintuitive implications of the comparative view. The first method is to better understand what we might call the punishment “currency” question. We must decide what constitutes the ultimate disvalue of punishment. So far, I have described punishment severity in terms of deprivations of liberty, including the liberty to possess property. But as I have argued elsewhere,² the distress of punishment

¹ See, e.g., JOEL FEINBERG, HARM TO OTHERS 35-36, 204 (1984); Stephen Perry, *Harm, History, and Counterfactuals*, 40 SAN DIEGO L. REV. 1283, 1309-13 (2003).

² Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182 (2009). On the subjective experience of punishment, see also JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 182 (Prometheus Books 1988) (1789) and JESPER RYBERG, THE ETHICS OF PROPORTIONATE PUNISHMENT 102-09 (2004).

is a principal component of the severity of prison sentences that cannot be adequately captured solely in terms of liberty deprivations. When the negative experiences of punishment are properly recognized, I will argue, the counterintuitive features of the comparative nature of punishment are reduced.

Importantly, this question about the currency of punishment is conceptually distinct from the central question I examine here about the “boundaries” of punishment: namely, whether punishment severity is comparative or absolute. No matter what we take to be the currency of punishment (libertiles, utiles, jellybeans, or something else entirely), we must still decide whether to measure the change in these metrics from one condition to another (the comparative approach) or simply to measure their absolute levels during the course of punishment (the absolute approach).

If I am right that the currency of punishment is largely experiential and the boundaries of punishment are comparative, then we have to consider offenders’ baseline experiential conditions as well as their experiential conditions in prison. Explicitly recognizing the comparative, experiential nature of punishment could lead to rather dramatic shifts in our sentencing practices, either at the policy level or at the level of sentencing individual defendants.

The second method of avoiding the counterintuitive implications of the comparative approach calls into question the merits of equally punishing offenders who are equally blameworthy. When we recognize the comparative nature of punishment, we see that, by putting two offenders into identical circumstances, the offender with the better baseline condition is generally punished more severely than the offender with the worse baseline condition. Even if they end up in the same condition, the condition of the offender with the better baseline declined to a greater degree. In the real world, this will often mean that better-off (frequently wealthier) offenders are punished more severely than equally blameworthy worse-off (frequently poorer) offenders when they serve equal terms at identical facilities. Yet, many people are understandably troubled by the idea that the better-off offender should get a shorter prison sentence than a worse-off offender who is equally blameworthy.³

The solution to this problem is *not* to pretend that both offenders receive equal punishments when they have equal prison terms. Doing so would fail to properly recognize the severity of their sentences. An alternative solution is simply to punish them unequally. Perhaps they should receive the *same* prison sentence, *even though* the punishment will probably be more severe for the better-off offender. Certainly, there may be good consequentialist reasons for

³ One might believe that better-off offenders are, in some cases, more blameworthy than worse-off offenders when they commit the same crimes, perhaps because the former have more and better alternative opportunities. To avoid this complication, I stated that the better- and worse-off offenders are *equally blameworthy*, not that they have committed the *same crimes*.

punishing them with unequal severity (for example, to incapacitate dangerous offenders or to satisfy the public *perception* that we are punishing equally).

We can retain the intuition that equally blameworthy better- and worse-off offenders should receive sentences of equal duration only by discarding a commitment to true equality of punishment. Doing so means violating the notion of proportionality at the heart of most retributive theories of punishment. When we recognize the comparative nature of punishment, we see that, all along, our intuitions about proportional prison sentences have been guided by the wrong notion of punishment severity. When we apply the correct, comparative account of punishment severity, the idea of proportional punishment looks a lot less attractive. Thus, the comparative view of punishment challenges the notion of punishment proportionality that underlies the retributive justification of punishment.

In Part I of this article, I explain why punishment severity must be understood in comparative terms. If we hope to justify our punishments, we must appropriately measure that which must be justified. To do so, we must use a comparative approach to punishment severity, even though the comparative conception seems to conflict with our absolutist approach to prison sentencing.

In Part II, I describe the sometimes strange implications of the comparative conception of punishment for those who seek to punish proportionally. I find these implications devastating when the currency of punishment is understood solely in liberty deprivation terms but merely counterintuitive when understood in experiential terms. A comparative, experiential view of punishment can retain the notion of proportionality but must do so by advocating dramatic changes in our sentencing practices.

In Part III, I explain why we might instead give up on the retributive commitment to proportional punishment. Though proportionality is beloved by punishment theorists, when we examine the concept more carefully, it looks considerably less appealing. Because proportionality has typically been considered the great strength of retributivism relative to consequentialism, retreating from proportionality weakens the appeal of retributivism. In a famous Supreme Court case on proportional punishment, Justice Antonin Scalia stated that proportionality “is inherently a concept tied to the penological goal of retribution.”⁴ According to Scalia, “it becomes difficult even to speak intelligently of ‘proportionality,’” when seeking to promote consequentialist punishment goals like deterrence and rehabilitation.⁵ This article shows why it may be difficult even for retributivists to speak intelligently about proportionality.

⁴ *Ewing v. California*, 538 U.S. 11, 31 (2003) (Scalia, J., concurring in the judgment).

⁵ *Harmelin v. Michigan*, 501 U.S. 957, 989 (1991).

I. WHY PUNISHMENT SEVERITY IS COMPARATIVE

The most important task for punishment theorists is to determine which, if any, punishments are justified. We need to justify punishments because they do things to offenders that, generally speaking, ought not be done without good reason. For example, when we incarcerate, we knowingly or intentionally cause prisoners distress by limiting their liberty to move about, to associate with others, to possess property, and to express themselves.

If we knowingly put non-offenders in prison, we would uncontroversially be harming them. Doing so would itself be a crime. We can incarcerate offenders only if we can offer a sufficient justification for doing so. But if we are to justify punishment, we need to understand how much we burden offenders with particular kinds of treatment. Bigger burdens require more substantial justifications. In order to know if our justifications pass muster, we must understand what it is they must justify.

In this Part, I explain why we must understand the severity of harms (including punishment) using a comparative approach. Indeed, we measure harms comparatively in tort and contract law and when imposing some punishments, like fines. Incarceration, however, is a form of punishment in which we, rather inexplicably, measure its severity without regard to offender baselines. Any theory of punishment that hopes to justify incarceration must measure sentence severity comparatively or else it will fail to justify the changes to offender baselines we cause when we incarcerate. These changes, like the deprivation of certain property rights, must be justified throughout the rest of the law, and punishment is no exception.

A. *Measuring Harm Generally*

According to Joel Feinberg's influential understanding of harm, harms are certain kinds of "setbacks" to our interests.⁶ It follows from Feinberg's view that, to measure harm, we have to measure two states of affairs. One is the state of affairs in some unharmed, baseline condition, and the other is the state of affairs after a harm has occurred.

There is considerable disagreement about how we should determine the appropriate baseline condition to use when measuring harm. Feinberg described two possibilities. The first is a historical baseline.⁷ To assess harm in this historical sense, we look at a person's condition before some injury and compare it to his condition afterward. If I tortiously crash into your new car, I owe you compensation based on the difference in the value of the car between the moment before the crash and the moment after.

⁶ FEINBERG, *supra* note 1, at 31-64. Seana Shiffrin calls this a "comparative model" of harm. Seana Valentine Shiffrin, *Wrongful Life, Procreative Responsibility, and the Significance of Harm*, 5 LEGAL THEORY 117, 120-22 (1999).

⁷ See JOEL FEINBERG, *Wrongful Life and the Counterfactual Element in Harming*, in FREEDOM AND FULFILLMENT 3, 7 (1992). Feinberg calls this a test of "worsening." *Id.*

A second approach uses a counterfactual baseline.⁸ We look at a person's condition after an injury and compare it to the condition he *would have been in* had the injury not occurred. Under the counterfactual inquiry, if I tortiously crash into your new car, I owe you compensation based on the difference in the value of the car between the condition the car *would have been in* had the crash never occurred and the condition it actually is in as a result of the crash. In practice, the two baselines will usually produce the same result. Nevertheless, they are conceptually different and sometimes produce different results.⁹ While there is no general agreement about which baseline to use, there is general agreement that some baseline or some conjunction of baselines should be used.¹⁰

As in tort, harms in contract disputes are typically understood in comparative terms. For example, injured contracting parties are sometimes entitled to a remedy measured as the condition the injured party is actually in relative to the condition it reasonably expected to be in if its contract had been honored.¹¹ Other times, the injured party is entitled to a remedy measured by its actual condition relative to the condition it would have been in had it not relied on the breaching party's promises.¹² Still other times, the relevant comparison is between the state of the breaching party and the state it would

⁸ *Id.*

⁹ Feinberg illustrates the difference with an example like the following. *See id.* Suppose that a woman is about to enter the Miss America Pageant and win its million dollar prize. The morning before the pageant, a reckless driver crashes into her car, causing her serious physical injury and preventing her from competing in the pageant. Using a historical baseline, we look at her condition prior to her injury. At that point, she had not yet won the contest, so the fact that she was going to win does not affect her baseline condition. Under this approach, the driver should pay damages for the woman's physical injuries but not for preventing her from winning the pageant and the prize money.

By contrast, under a counterfactual approach, the woman should receive compensation based on the difference between her injured condition and the condition she would have been in, contrary to fact, if the driver had not injured her. Since we stipulated that she would have won the pageant but for the driver's tortious conduct, the driver owes her compensation not only for her physical injuries but also for preventing her from winning the pageant and prize money.

¹⁰ Stephen Perry suggests that courts typically instruct juries to use the counterfactual approach to damage assessments. Perry, *supra* note 1, at 1310 n.49. For example, Lord Blackburn stated that juries should award "that sum of money which will put the party who has been injured . . . in the same position as he would have been in if he had not sustained the wrong." *Livingstone v. Rawyards Coal Co.*, (1880) 5 A.C. 25, 39 (H.L.) (appeal taken from Scot.). John Goldberg points out, however, that the matter is not so clear-cut. *See* John C.P. Goldberg, Commentary, *Rethinking Injury and Proximate Cause*, 40 SAN DIEGO L. REV. 1315, 1321 n.19 (2003).

¹¹ *See* L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*: 2, 46 YALE L.J. 52, 52-53 (1936) (describing the expectation interest).

¹² *See id.* at 54 (describing the reliance interest).

have been in had it not received the benefit of contracting.¹³ Though these situations differ in their details, the harms associated with torts and breaches of contract are understood in terms of changes in pertinent states of affairs.

B. *Measuring Severity of Incarceration*

As with other kinds of harm, we must understand the burdens of incarceration in comparative terms.¹⁴ We cannot simply examine an inmate's condition in prison because the burdens of punishment, like harms more generally, impose a *change* in his condition. The punishment moves an offender from some baseline status to some worse status. The severity of the punishment depends on the extent of the change. In this sense, assessments of punishment severity, like assessments of harms in contract and tort law, are fundamentally comparative.

Some might resist my analogy between harms and the burdens of punishment. But whether or not we describe the burdens of punishment as "harms," the burdens of incarceration inflict what we would call harm absent justification. In fact, when non-state actors forcibly confine people and deprive them of their property without adequate justification, non-state actors may be guilty of the crimes of false imprisonment and theft.

When a punishment burden is morally justified, we might prefer to call the burden a "would-be-harm" or a "pseudo-harm." But we are not entitled to use these softer terms until a punishment burden is justified in all its fullness. Recognizing punishment in all its fullness requires us to measure its severity in comparative terms.¹⁵

¹³ See *id.* at 53-54 (describing the restitution interest).

¹⁴ To my knowledge, no one has discussed the fact that we understand the severity of incarceration in a non-comparative way, even though we otherwise understand harm severity in a comparative way. Doug Husak, however, has recognized the possibility of understanding punishment severity in comparative terms. See Douglas N. Husak, "Already Punished Enough," 18 PHIL. TOPICS 79, 81-82 (1990). Husak distinguishes between two methods of assessing whether or not punishments are of equal severity. *Id.* at 91. According to Husak, two punishments have "equality of *impact* . . . if they bring about an equal loss of utility for both offenders." *Id.* Alternatively, punishments have "equality of *market value* . . . if consumers in a free market would pay the same price to be spared their infliction." *Id.* at 92. Husak adds that the equality of market value "approach does not relativize sentences to the baselines of particular offenders." *Id.*

¹⁵ To actually measure a punishment comparatively, we still have the difficult task of selecting an appropriate baseline. A historical baseline is hard to identify because the pertinent point in time could arguably be prior to any police intervention, upon arrest, after indictment, during trial, after conviction, at sentencing, and so on. A counterfactual baseline is hard to identify because we must determine what would have happened to an offender over time had he not been arrested and convicted. The selection of a baseline is not at all trivial, as we will sometimes get very different measurements of punishment severity depending on which we choose. The problem is hardly fatal, however, as we face similar tough choices in tort and contract law.

The similarity between harms in general and the burdens of punishment can be seen by comparing the tort of false imprisonment to the punishment of incarceration. Suppose that Carl is kidnapped by a business associate who locks him up for several weeks in a small cabin. The abductor is later caught by police, and Carl successfully sues him for false imprisonment and intentional infliction of emotional distress. Carl is undisputedly entitled to damages calculated in a comparative way.¹⁶ For example, for having been forcibly confined in a small space, Carl is entitled to monetary damages based on the difference between any income he happened to earn while abducted compared to his baseline income. Similarly, he is entitled to compensation for the amount of emotional distress he experienced while abducted compared to his baseline emotional state.

In the punishment context, however, we inexplicably measure the burden of forced confinement in absolute terms. Suppose that Darren is sent to jail for destroying public property. Like Carl, Darren will spend several weeks confined against his will. Darren will lose income and experience substantial emotional distress. When we think about the severity of Darren's sentence, however, we generally ignore his baseline income level and emotional state. In fact, federal sentencing guidelines explicitly discourage judges from relying on a variety of offender baseline characteristics, like employment status and wealth, which arguably affect the severity of his punishment.¹⁷

Both Carl and Darren were confined against their wills. True, Carl was *wrongfully* held against his will, while Darren was properly convicted of a crime. True, Carl had a right to his freedom that Darren did not have. Nothing about the wrongfulness of Carl's confinement, however, explains why we should calculate the amount that he was harmed in a fundamentally different way than we calculate the harm of Darren's confinement. The burdens of their confinement may differ in quantity, but they must still be measured comparatively to accurately assess their size.

Moreover, we really do not know that Carl's moral rights were violated and that Darren's were not, unless Darren's punishment is justified. Unless their

¹⁶ See *supra* Part I.A.

¹⁷ For example, under the United States Sentencing Guidelines, judges at sentencing are ordinarily not supposed to consider an offender's employment status, U.S. SENTENCING GUIDELINES MANUAL § 5H1.5 (2007); age, § 5H1.1; family ties, § 5H1.6; or mental and emotional conditions (unless they affect culpability), § 5H1.3. Similarly, federal statutes require that when the Bureau of Prisons makes prisoner facility assignments, "there shall be no favoritism given to prisoners of high social or economic status." 18 U.S.C. § 3621(b) (2006).

Some offender characteristics, like criminal history, are quite important to sentencing. U.S. SENTENCING GUIDELINES MANUAL § 5H1.8. Criminal history, however, usually increases sentence length because recidivism is thought to augment *culpability*, not punishment severity. In fact, however, criminal history may also bear on punishment severity. See Kolber, *supra* note 2, at 224-25 (describing how the tendency to hedonically adapt to prison could help explain why we give lengthier punishments to recidivists).

confinement can be justified, they are both indisputably harmed. In seeking to justify our punishment of Darren, we cannot all of a sudden switch to a different and in fact quite idiosyncratic manner of assessing the severity of his treatment. Unless Darren's confinement is justified, there is no difference in kind between the wrongfulness of his confinement and of Carl's confinement, only a difference in degree.

The harms to Carl and Darren are both quite similar in form. They are both cases of involuntary confinement. If we seek to justify the burdens associated with Darren's punishment, we cannot begin with the premise that the state is entitled to inflict non-comparatively-understood harms while the rest of us inflict comparatively-understood harms. Some argument has to be made to support such a view. We cannot distinguish the wrongfulness of Carl's confinement from Darren's, unless Darren's was justified. But we do not know if Darren's punishment is justified until we examine the full scope of his punishment along with the purported justification for confining him. More severe harms and burdens require more or better justificatory reasons. If those reasons cannot justify the full, comparatively-understood scope of a harm or punishment burden, then the harm or punishment is, to that extent, unjustified.

C. *Other Comparative Punishment Practices*

While I have already shown how our absolutist incarceration practices are puzzling when we compare them to our treatment of harm in tort and contract law, they are even more puzzling relative to our other punishment practices. Those who would defend the absolute conception of punishment severity must explain why our method of assessing harm changes depending on the method of punishment at issue.

1. Monetary Fines

We readily understand monetary fines in comparative terms. When a person commits an offense punishable by a fine, we force him to reduce his wealth by the amount of the fine. After a \$1000 fine is imposed, a person who previously had \$11,000 in accumulated wealth will now have \$10,000. His punishment is measured comparatively as the loss of \$1000.

Remember that the issue we are now addressing speaks to the punishment boundary question. I am claiming that monetary fines are best understood as imposing comparatively-understood burdens. A quite separate question speaks to the punishment currency question. Namely, should we understand the burden of fines in objective terms, like the deprivation of rights to property, or in subjective terms, like the displeasure of losing money? Fines in the United States are typically understood in objective terms. Even though some people experience a loss of \$1000 as dramatic and life-changing while others view it as insignificant, we typically ignore variations in the experience of monetary

finer.¹⁸ Some countries, however, impose fines that are more subjectively sensitive by providing for fine amounts that are percentages of income.¹⁹ Importantly, however, even these more experientially sensitive fines are plausibly still comparative in nature, for we can understand them as imposing a *reduction* in the quality of an offender's experiences from a pre-fine level to a post-fine level.

By contrast, imagine a very peculiar fine that is absolute in nature. We could punish offenders by setting their wealth to a particular level. People punished by "wealth-setting" would have the total value of their assets reset to a certain dollar amount, say \$10,000, and then they could do with their money as they wish. The punishment would make no reference to an offender's assets before punishment. A billionaire who is wealth-set would end up with \$10,000, as would a person of very modest means. Even stranger, a wealth-set person with no assets or with debt would have his wealth rise to \$10,000. Clearly, the absolute approach to punishment strikes us as bizarre. Many people would find it unfair to punish a billionaire, a person of modest means, and a debtor who are equally culpable by setting their assets to the same level.

If wealth-setting seems like an absurd, unjustified form of punishment, know that we do, in fact, punish people with something very much like wealth-setting. The reason is that wealth-setting is part of the punishment of incarceration. For the period of incarceration, we restrict prisoners' rights to use personal property to just the bare essentials. Prison officials wealth-set all inmates to more or less the poverty level for the duration of their sentences. Inmates sentenced to life imprisonment are permanently deprived of most of their baseline property rights. If incarceration is to be justified, we must be able to justify all of the burdens associated with it, including the absurd-seeming, absolutist practice of wealth-setting.

One might try to characterize traditional fines in absolute, single-reference point terms by arguing that the burden of a monetary fine consists of the act of handing over a certain amount of money to the government. On this view, more blameworthy offenders have to hand over larger amounts of money, and we need not make explicit reference to offenders' baseline levels of wealth.

The problem with this description is that it fails to adequately characterize the nature of the burden of monetary fines. The reason why larger fines are more severe than smaller fines is not a function of the action of handing over a larger amount of currency to the government. Larger fines are more severe

¹⁸ *But cf.* Susan Turner & Judith Greene, *The FARE Probation Experiment: Implementation and Outcomes of Day Fines for Felony Offenders in Maricopa County*, 21 JUST. SYS. J. 1, 3-4 (1999) (describing United States jurisdictions that have experimented with fines that vary based on offender income).

¹⁹ See ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 304-06 (Cambridge Univ. Press 4th ed. 2005) (1992); Alan Cowell, *Not in Finland Anymore? More Like Nokialand*, N.Y. TIMES, Feb. 6, 2002, at A3 (describing a wealthy Nokia executive in Finland who was fined approximately \$100,000 for speeding under a penalty calculated as a fraction of his income).

than smaller fines because larger fines represent greater losses of wealth. The act of handing over *somebody else's* check is not severe at all. Fines are comparative in nature because only when fines are understood as a reduction in people's assets (or a change in their level of happiness) can we make sense of their severity.²⁰

2. Erroneous Conviction Compensation

So far, I have described how certain forms of punishment seem to embed a comparative or absolutist approach to punishment severity. We can also examine how we compensate people who were mistakenly imprisoned. To be sure, erroneous convictions and appropriate convictions are not the same things. All else being equal, the erroneously convicted may suffer more emotional distress during a particular period of confinement than the appropriately convicted. Nevertheless, the fact that innocent people are likely to experience additional distress when confined does not change the manner in which we ought to calculate the burden associated with their confinement. If severity is comparative for the appropriately convicted, then it is still comparative for the erroneously convicted.

There are a variety of compensation mechanisms available to people who have been erroneously convicted and incarcerated.²¹ Depending on the jurisdiction and the circumstances, people who are unjustly convicted may have claims for false imprisonment,²² violations of constitutional rights,²³ and

²⁰ Home confinement is another punishment practice that seems roughly comparative in nature. Suppose a wealthy person, who lives in a big mansion, and a poor person, who lives in a tiny dilapidated studio apartment, commit crimes for which they are equally blameworthy and are sentenced to equal terms of home confinement. If there is any sense in which those punishments (or parole conditions) are even roughly proportional, they are proportional by reference to the offenders' baseline housing conditions. To see why, consider how clearly *disproportional* it seems to confine the wealthy person in the dilapidated studio apartment and the poor person in the fancy mansion.

²¹ See generally Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73 (1999) (arguing that all states should have indemnification statutes to compensate the unjustly convicted); James L. Buchwalter, *Cause of Action or Claim Under State Statute Providing Remedy for Wrongful Conviction and Incarceration*, in 25 CAUSES OF ACTION SECOND 579 (Clark Kimball ed., 2004 & Supp. 2005) (discussing indemnification statutes, wrongful imprisonment statutes, moral obligation bills, and civil rights actions).

²² See, e.g., *Gittens v. State*, 504 N.Y.S.2d 969, 970, 974 (Ct. Cl. 1986) (reviewing a claim for wrongful excessive confinement, a form of false imprisonment, where the inmate was held in his cell for nine days beyond his lawful sentence).

²³ See 42 U.S.C. § 1983 (2006) (providing a civil remedy for deprivation of constitutional rights by a state actor); cf. *Reed v. McBride*, 96 F. Supp. 2d 845, 848 (N.D. Ind. 2000) (“[A] habeas corpus petition filed pursuant to 28 U.S.C. § 2254, is the exclusive federal remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release. . . . If [plaintiff] prevails in an administrative

attorney malpractice.²⁴ Damages in these causes of action make use of the traditional comparative notions of compensation that we use in tort law.

Sometimes, people who have been unjustly convicted have no tort remedies. Many states and the federal government have established statutory or administrative schemes that still provide them some compensation.²⁵ In some cases, these recovery schemes also use comparative principles of compensation. For example, in a number of jurisdictions, the unjustly convicted can recover for lost earnings,²⁶ a practice which implicitly recognizes that punishment has greater severity, at least in financial terms, for inmates with higher baseline incomes. Under the recovery scheme in Illinois, unjustly incarcerated former inmates can also seek recovery for mental anguish caused by their confinement.²⁷ Mental anguish in such cases is presumably determined according to traditional comparative calculations in tort.²⁸ Like Illinois, New York provides recovery for a variety of harms that inmates experience in ways that seem to be calculated in a comparative fashion.²⁹

In many other jurisdictions, however, recovery schemes are only sensitive to baselines to some extent. For example, in Iowa, the unjustly incarcerated are entitled to \$50 per day in “liquidated damages.”³⁰ Since these damages are the same for everyone, they are insensitive to offender baselines. Iowa also

appeal or a habeas action and achieves restoration of his good time credits, he may bring a § 1983 action seeking damages for any harm resulting from the violation of his due process rights and the loss of good time credits.”).

²⁴ Cf. *Frank v. Frank*, 948 So. 2d 1224, 1227-28 (La. Ct. App. 2007) (affirming award against defense attorney for failure to file a timely motion to quash a two-year-old burglary charge).

²⁵ See, e.g., 28 U.S.C. § 2513 (2006); IOWA CODE ANN. § 663A.1 (West 1998 & Supp. 2009); MASS. GEN. LAWS ANN. ch. 258D, §§ 1-9 (West Supp. 2009); N.Y. CT. CL. ACT § 8-b (McKinney Supp. 2009); WIS. STAT. ANN. § 775.05 (West 2009).

²⁶ See, e.g., OHIO REV. CODE ANN. § 2743.48(E)(2)(c) (LexisNexis 2008).

²⁷ *McKibben v. State*, 32 Ill. Ct. Cl. 147, 149 (Ct. Cl. 1977) (“In computing an award for time unjustly served in a prison of this state, the Court must consider monetary loss, the anguish necessarily suffered by a Claimant [due to] . . . the loss of his liberty, and the length of the incarceration in a prison of this State.”); see also *Lonzo v. State*, 32 Ill. Ct. Cl. 125, 126-27 (Ct. Cl. 1978). Recoveries are limited, however, by statutory caps that are adjusted for inflation. 705 ILL. COMP. STAT. ANN. 505/8(c) (West Supp. 2009).

²⁸ See *supra* notes 7-10 and accompanying text (describing counterfactual and historical worsening tests). For example, if an inmate was depressed prior to arrest and conviction, it seems that he should only be able to recover emotional distress damages to the extent that prison increases his emotional distress beyond his baseline condition.

²⁹ The New York indemnification statute provides for uncapped recoveries that “will fairly and reasonably compensate” those who were unjustly convicted. N.Y. CT. CL. ACT § 8-b. For example, a New York court awarded over \$1.5 million to an unjustly convicted person who spent nearly eleven years in prison, where less than one-tenth of that amount was attributable to lost earnings. *Kotler v. State*, 680 N.Y.S.2d 586, 587 (App. Div. 1998).

³⁰ See IOWA CODE ANN. § 663A.1.

provides for up to \$25,000 per year in lost wages, which *are* sensitive to offender baselines, at least until the statutory maximum is reached.³¹

Overall, those who are unjustly imprisoned are compensated based on a comparative conception of punishment severity. To the extent that we cap these recoveries, the limits reflect stinginess or ambivalence about fully compensating those who were unjustly convicted rather than any widespread belief that everyone who is incarcerated for a particular period of time was punished with equal severity.

D. *Shiffrin's Absolute Conception of Harm*

While harms seem to be almost universally understood in comparative terms, at least one scholar, Seana Shiffrin, has defended what seems very much like an absolute conception of harm severity.³² If harms can be plausibly understood in absolute terms, then perhaps punishment severity also can be so understood. Under an absolute conception, punishment severity would depend solely on the condition imposed by punishment without reference to the offender's condition beforehand. I will briefly describe Shiffrin's view in order to argue that either: (1) Shiffrin is not really defending an absolute conception of harm severity³³ or (2) if she is, the absolute conception of harm is implausible.

Shiffrin has argued that "comparative models of harm and benefit should be reconsidered."³⁴ According to Shiffrin, it might be better to "identify harms with certain absolute, noncomparative conditions (e.g., a list of evils like broken limbs, disabilities, episodes of pain, significant losses, death)."³⁵ While she does not purport to offer "a complete, rival account"³⁶ of harm, she does challenge the notion that harm is a setback to interests and defends what seems to be a conception of harm that does not, at least explicitly, make reference to a baseline condition.³⁷ According to Shiffrin:

[H]arm involves conditions that generate a significant chasm or conflict between one's will and one's experience, one's life more broadly understood, or one's circumstances. . . . Typically, harm involves the imposition of a state or condition that directly or indirectly obstructs, prevents, frustrates, or undoes an agent's cognizant interaction with her circumstances and her efforts to fashion a life within them that is distinctively and authentically hers To be harmed primarily involves

³¹ *Id.* The statute also provides for attorney's fees, another comparatively-sensitive form of compensation, since offenders will vary in the amounts they spend on such fees. *See id.*

³² *See* Shiffrin, *supra* note 6, at 120-24.

³³ I read Stephen Perry as offering such an interpretation of Shiffrin. *See* Perry, *supra* note 1, at 1299-309.

³⁴ Shiffrin, *supra* note 6, at 123.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

the imposition of conditions from which the person undergoing them is reasonably alienated or which are strongly at odds with the conditions she would rationally will³⁸

Shiffrin gives several examples of how we can understand harms non-comparatively. She states that “pain counts as a harm because it exerts an insistent, intrusive, and unpleasant presence on one’s consciousness that one must just undergo and endure.”³⁹ Similarly, “[d]isabilities, injured limbs, and illnesses also qualify as harms” because “[t]hey forcibly impose experiential conditions that are affirmatively contrary to one’s will.”⁴⁰

Despite these claims, Shiffrin’s target seems to be rather different than my own. As I read Shiffrin, she is, in part, making a claim about what sorts of conditions represent bad states of affairs. For example, suppose a person is forced to take a new job. We may disagree about whether the new job is good or bad, and Shiffrin offers one way of tackling the problem: she believes that we can judge whether a condition is good or bad, at least in part, by examining whether a person is “reasonably alienated” from the condition imposed or whether the imposition is “strongly at odds with the conditions she would rationally will.”⁴¹ If Shiffrin is merely making a claim about a necessary condition of being harmed, then her claim does not challenge the view that harm severity is comparative in nature. To the extent that Shiffrin is merely suggesting a necessary condition of being harmed, she need not take a position about how we are to judge the *severity* of those harms that do satisfy the condition she describes.⁴²

³⁸ *Id.* at 123-24.

³⁹ *Id.* at 124.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² In the O. Henry story, *The Cop and the Anthem*, a homeless man deliberately seeks to be incarcerated so he can receive free food and shelter in prison. O. HENRY, *The Cop and the Anthem*, in *THE RANSOM OF RED CHIEF AND OTHER O. HENRY STORIES FOR BOYS* 143, 143 (Franklin J. Mathiews ed., 1918). It is difficult for retributivists to justify incarcerating people like O. Henry’s homeless man on the ground that they deserve, as punishment, treatment that they affirmatively desire.

Shiffrin provides a method, albeit an ambiguous one, of assessing whether a person who desires incarceration is harmed when he is subsequently incarcerated. Perhaps one might say that he is not harmed because he is not reasonably alienated when held in the very conditions of confinement that he actively sought. Similarly, his condition is not at odds with a condition he would rationally will (assuming Shiffrin’s test is based on his actual, limited options). Thus, it may be the case that a person who desires incarceration is not harmed by it on her view. Alternatively, perhaps one could apply Shiffrin’s proposal to reach the opposite result. Perhaps the person who desires incarceration is reasonably alienated from his condition in prison because the condition is not one he would rationally will relative to some broader set of options that he currently wishes he had. Either way, Shiffrin’s method cannot plausibly measure the *amount* the person is harmed without examining his baseline condition.

If, however, Shiffrin really does endorse an absolute conception of harm *severity*, then her view is clearly implausible. To see why, imagine that a homeless man is viciously beaten by Stuart and now lies bleeding on the ground. Tommy, unaware of precisely what happened to the homeless man before he arrived, comes by and plucks three hairs from the head of the homeless man, causing him very modest additional pain. As a result of their actions, both Stuart and Tommy have causally contributed to the homeless man's harmed condition. On an absolute view of harm, however, we cannot account for the much greater harm that Stuart caused than that Tommy caused. Thus, the absolute conception of harm cannot properly measure harm severity.

Is there some way we could account for the difference in what Stuart and Tommy did to the homeless man in absolute terms? Can we say that Stuart was a much more substantial cause of the homeless man's final, absolute condition than Tommy was? No, we cannot. Doing so only hides the underlying comparative analysis. The difference in their causal contribution depends on the change in the homeless man's condition caused by Stuart relative to the change in his condition caused by Tommy. The comparative conception of harm and punishment severity is inescapable.

II. STRANGE IMPLICATIONS OF COMPARATIVE PUNISHMENT

Suppose that I am right that we must understand punishment severity in comparative terms. Does this mean that richer offenders should receive shorter prison sentences than poorer offenders when both are equally blameworthy? Not necessarily. In order to see the implications of a comparative view of punishment severity on sentencing, we need to see how prevailing justifications of punishment use the concept of punishment severity. Those who think that punishments should be proportional to blameworthiness – a common view among retributivists and laypeople – are indeed led to some very counterintuitive results once we recognize the comparative nature of punishment.

A. *Punishment Severity in Punishment Theory*

Both retributivists and consequentialists make use of the concept of punishment severity and must, therefore, take into account its comparative nature. They disagree, however, about how punishment severity should factor into our sentencing practices. In this section, I describe how the comparative nature of punishment severity affects the retributive commitment to proportional punishment and the consequentialist commitment to cost-benefit analysis.

Moreover, it could be that we are only reasonably alienated from situations that are *comparatively* worse than our baseline situations. If so, Shiffrin's necessary condition for being harmed may itself conceal a comparative conception of harm.

1. Retributivist Punishment Severity

Retributivists hold that offenders deserve to suffer or to be deprived of liberty for having engaged in criminal behavior.⁴³ They claim that an offender's wrongdoing justifies our imposition of hard treatment.⁴⁴ Most retributivists also believe that the severity of an offender's punishment should be proportional to his blameworthiness,⁴⁵ a view shared by many laypeople.⁴⁶ We punish very serious crimes, like murder and rape, more severely than we punish less serious crimes, like petty theft and prostitution. The facts and circumstances of a first time shoplifting offense are more likely to justify three months of probation than thirty years of confinement.

Most retributivists seek to punish each offender in proportion to his blameworthiness. Unfortunately, proportionalists have failed to appreciate the comparative nature of punishment. To punish proportionally, retributivists must calibrate each offender's punishment so that the punishment imposes the appropriately-sized change in his baseline condition. Proportional retributivists must engage in "comparative individualized sentencing" by examining each offender's baseline condition and then punishing accordingly.

⁴³ See Douglas N. Husak, *Retribution in Criminal Theory*, 37 SAN DIEGO L. REV. 959, 972 (2000) ("[R]etributive beliefs only require that culpable wrongdoers be given their just deserts by being made to suffer (or to receive a hardship or deprivation)."); see also MICHAEL MOORE, *PLACING BLAME* 78-79, 88 (1997) ("Of the possible functions for criminal law, only the achievement of retributive justice is its actual function. Punishing those who deserve it is good and is the distinctive good that gives the essence, and defines the borders, of criminal law as an area of law. . . . The distinctive aspect of retributivism is that the moral desert of an offender is a sufficient reason to punish him or her . . ."); Herbert Fingarette, *Punishment and Suffering*, 50 PROC. & ADDRESSES AM. PHIL. ASS'N 499, 499 (1977) (defending "a retributivist view of punishment – one that shows why the law *must* punish lawbreakers, *must* make them suffer in a way fitting to the crime").

⁴⁴ See R.A. DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY* 21 (2001) ("Retributivists assert a justificatory relationship between past crime and present punishment.").

⁴⁵ See, e.g., RYBERG, *supra* note 2, at 5 ("Sometimes proportionalism is even presented as a necessary condition for the classification of a theory as retributivist."); ANDREW VON HIRSCH & ANDREW ASHWORTH, *PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES* 4 (2005) ("The desert rationale rests on the idea that the penal sanction should fairly reflect the degree of reprehensibility (that is, the harmfulness and culpability) of the actor's conduct.").

⁴⁶ Cf. Kevin M. Carlsmith, John M. Darley, & Paul H. Robinson, *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 J. PERSONALITY & SOCIAL PSYCHOL. 284, 284-97 (2002) (finding that lay punishment intuitions in hypothetical scenarios are often easier to explain in retributivist rather than consequentialist terms); Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1856-61 (2007) (recognizing a high level of consistency among laypeople's ordinal rankings of the severity of crimes); see also RYBERG, *supra* note 2, at 2-5 (observing that many criminal justice systems around the world have adopted proportionality as a central goal of punishment).

To the extent that sentencing judges currently examine offender baseline conditions, they purport to focus on conditions thought to affect blameworthiness, like past convictions. They almost never discuss how baseline conditions affect punishment severity. Judges may surreptitiously consider baselines that relate to punishment severity, but if they do, we know little about how often they do it or how well they do it, and such determinations cannot be reviewed on appeal. In other words, judges do not overtly consider baseline conditions that affect punishment severity, and if they do consider such baselines, the practice is covert and seems to be frowned upon.

Therefore, proportional retributivists should be upset by our current sentencing practices. When we imprison, we take people from all walks of life with quite different opportunities, financial assets, and emotional states and force them into prison cells for periods of time that are mostly independent of their baseline opportunities, financial assets, and emotional states. For proportionalists, coming to terms with the comparative nature of punishment means that an offender with a better baseline condition will often have to receive a shorter prison sentence (or a bigger cell) in order to be punished an amount equal to the punishment of an offender with a worse baseline condition. Later, I will suggest that this counterintuitive feature of retributivism casts doubt on retributivism more generally.⁴⁷

2. Consequentialist Punishment Severity

While many retributivists believe that deserved punishment is intrinsically good, independent of its other effects on an offender or on society in general, consequentialists hold that the emotional distress and the liberty deprivations that we impose as part of punishment are bad in and of themselves.⁴⁸ In order to justify those negative consequences, they must be outweighed by other positive consequences. For example, the negative consequences of placing a person in confinement and depriving him of an opportunity to see his family and work at a regular job may be justified by the positive consequences that result from deterring crime, incapacitating dangerous people, and rehabilitating offenders.

Like retributivists, consequentialists make use of the concept of punishment severity. Consequentialists take the disvalue of punishment to be one of the bad consequences associated with punishment that must be justified by other good consequences. So, in addition to the bad consequences of punishment like the financial costs of confining prisoners and the loss of their economic productivity, consequentialists must also include some measure of the magnitude of punishment vis-à-vis the offender himself (e.g., his emotional distress or his loss of liberty). If consequentialists do not measure an

⁴⁷ See *infra* Part III.

⁴⁸ For example, in Bentham's defense of utilitarian punishment, he treats the pain and suffering of prisoners as a consequence to be minimized. BENTHAM, *supra* note 2, at 182.

offender's emotional distress or lost liberty, then they will fail to do a proper cost-benefit analysis. Thus, consequentialists, like retributivists, must have a method of measuring punishment severity.⁴⁹

Unlike most retributivists, however, most consequentialists do not have abiding commitments to proportional punishment. So consequentialists are not generally obligated to calibrate each offender's punishment in accordance with his blameworthiness. Of course, consequentialists must still measure punishment severity comparatively. They seek to increase good consequences relative to bad consequences in the aggregate. Somewhere in their cost-benefit calculations, when consequentialists consider the negative consequences of punishment burdens on offenders, they must assess the magnitude of those burdens by aggregating the comparatively-understood punishment severity of each person punished. Otherwise, they will fail to properly account for the full range of harms caused by punishment. Therefore, consequentialists must engage in comparative accounting but do not have a general commitment to comparative individualized sentencing. They need not use the results of the assessment of each offender's baseline condition and anticipated punishment condition to automatically dictate anything about a particular offender's sentence.

3. The Currency of Punishment

The bottom line is that a comparative approach to punishment severity forces us to reexamine aspects of both retributivism and consequentialism. The full implications of comparative sentencing depend further still on whether we understand the currency of punishment in principally objective or subjective terms, a topic I address in the next two sections. To the extent that punishment is understood in objective terms (as a deprivation of liberty, for example), then measurements of punishment severity require an assessment of an offender's baseline liberties compared to his liberties when punished. Similarly, to the extent that punishment is understood in subjective terms (like physical or emotional distress), then assessments of punishment severity require an assessment of an offender's baseline experiential states compared to his experiential states as a result of his punishment.

I will describe each of these views about the currency of punishment in turn. We will see that the retributive commitment to proportionality produces some

⁴⁹ Consequentialists must not only properly account for punishment severity but must also take account of people's *perceptions* of punishment severity. Those perceptions affect decisions about whether or not to engage in criminal behavior and should be considered in deterrence-oriented policymaking. Of course, the ways people in fact perceive punishment severity may or may not correspond with our considered views about how they ought to measure punishment severity. Thus, consequentialists must separately consider both how we ought to measure punishment severity and how people, in fact, assess punishment severity. See Kolber, *supra* note 2, at 216-19.

very strange results, particularly when the currency of punishment is understood in objective terms.⁵⁰

B. *The Objective Account of Punishment*

Most criminal law theorists have not taken a stand on the precise nature of punishment burdens. Nevertheless, many have made comments that describe punishment severity in objective terms as, for example, a deprivation of liberty.⁵¹ According to John Rawls, under the proper conditions, “a person is said to suffer punishment whenever he is legally deprived of some of the normal rights of a citizen.”⁵² Andrew von Hirsch similarly speaks of punishment severity as a liberty deprivation, arguing that we should rank the severity of punishments “according to the degree to which they typically affect the punished person’s freedom of movement, earning ability, and so forth.”⁵³

J.D. Mabbott argued that punishment should be exacted by means of liberty deprivations.⁵⁴ Mabbott wrote, “Most punishments nowadays are not afflictions of suffering, either physical or mental. They are the deprivation of a good. . . . Imprisonment and fine are deprivations of liberty and property. The death sentence is deprivation of life; and in this extreme case every attempt is made to exclude suffering.”⁵⁵ According to Mabbott, unlike corporal punishments that “inflict[] positive suffering,”⁵⁶ modern punishments simply remove from the prisoner “something desired.”⁵⁷

While some have charged that retributivism is barbaric for treating the imposition of suffering as intrinsically good, according to Mabbott, understanding punishment as a mere deprivation ameliorates claims of barbarism and thereby strengthens the retributive justification of punishment:

It is a standard objection of the retributive theory that retributive punishment simply adds evil to evil. . . . I can weaken the standard objection. The world is a worse place the more evil there is in it and

⁵⁰ One might also hold a hybrid view of punishment severity that examines both objective and subjective aspects of punishment. Such a view has to assess *both* objective and subjective offender baselines.

⁵¹ See, e.g., Robert P. George, *Moralistic Liberalism and Legal Moralism*, 88 MICH. L. REV. 1415, 1426 (1990) (“[A] criminal may justly be deprived of liberty commensurate with the liberty he wrongfully seized in breaking the law.”); Kenneth W. Simons, *On Equality, Bias Crimes, and Just Deserts*, 91 J. CRIM. L. & CRIMINOLOGY 237, 243 (2000) (“When the state imposes criminal sanctions, it deprives the offender of property or liberty, and it accompanies that deprivation with a solemn moral condemnation.”).

⁵² John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 10 (1955).

⁵³ Andrew von Hirsch, *Seriousness, Severity, and the Living Standard*, in PRINCIPLED SENTENCING 185, 189 (Andrew von Hirsch & Andrew Ashworth eds., 1998).

⁵⁴ J.D. Mabbott, *Professor Flew on Punishment*, 30 PHILOSOPHY 256, 256-58 (1955).

⁵⁵ *Id.* at 257.

⁵⁶ *Id.* at 257-58.

⁵⁷ *Id.* at 257.

perhaps the more suffering there is in it. But it does not seem to me necessarily a worse place whenever men are deprived of something they would like to retain; and this is the essence of modern punishment.⁵⁸

Leo Katz has defended an objective view of punishment severity perhaps more explicitly than anyone else. He argues that “certain kinds of harms are to be objectively rather than subjectively judged,” including the harms associated with punishment.⁵⁹ As part of his argument, Katz states that a subjective conception of suffering would presumably produce the odd result that we are required “to punish more harshly the happy-go-lucky person who tends to make his peace with his surroundings, and who finds happiness wherever he is, than the melancholic person who is miserable no matter where he is.”⁶⁰ Katz identifies a certain counterintuitiveness associated with individually calibrating punishments in accordance with actual or anticipated subjective experiences.

What may seem surprising, however, is that even when proportionalists hold an objective conception of punishment severity, they are still obligated to calibrate punishments for particular offenders. Obligations to calibrate punishment flow not only from the experiential nature of punishment but also from the fact that punishment severity is comparative. Thus, regardless of whether punishment is subjectively or objectively understood, proportionalists have calibration obligations because offenders will differ in their baseline conditions, their punished conditions, or both.

Perhaps the obligation to calibrate should not be so surprising, given that theorists frequently refer to punishments as *deprivations* of liberty. If we take such claims at face value, they seem to imply that punishment severity is comparative in nature. In order to *deprive* offenders of liberty, they must have some greater, baseline level of liberty from which to be deprived.

For the remainder of this section, I will show how people differ in their baseline liberties (and, by implication, that proportionalists are obligated to consider these baselines when sentencing individual offenders). There are, of course, numerous debates about how liberty ought to be conceived, and I have no intention to resolve such issues here. Rather, I will discuss at the highest level of generality three notions of liberty that might be at play when people speak of incarceration as a deprivation of liberty. Namely, I will consider

⁵⁸ *Id.* at 258. Mabbott spoke of liberty deprivation as a *means* of punishment rather than as a *measure* of the ultimate disvalue of punishment. So it is unclear whether Mabbott cared only about punishment severity in terms of liberty deprivations or whether he also countenanced the experiential distress of being deprived of something desired.

⁵⁹ LEO KATZ, *ILL-GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD, AND KINDRED PUZZLES OF THE LAW* 156 (1996). Katz does not explicitly argue that *all* harms associated with punishment are to be understood objectively, though the examples he gives are consistent with that position.

⁶⁰ *Id.* at 155-56. Katz has additional reasons for defending a purely objective view of punishment, *see id.*, and I have additional reasons for finding such a view inadequate, Kolber, *supra* note 2, at 203-08.

deprivations of the liberties people actually have, the liberties they have as a matter of law, and the liberties they ought to have under some ideal account of their rights.⁶¹ On all three conceptions, we vary in our baseline liberties, meaning that punishment proportionalists must consider offender baseline liberties or else fail to punish proportionally.

1. Liberties-in-Fact

One conception of liberty focuses on our ability to take certain actions without interference from others.⁶² I will call this the “liberty-in-fact” conception because it focuses on our freedoms as a descriptive matter, rather than on the liberties we have under the law or the sorts of liberties we ought to have under some normative conception.

Others can interfere with our liberties-in-fact in many ways. For example, they can create obstacles that prevent us from engaging in certain actions. If I want to remove gold from the vaults of Fort Knox, my freedom to do so will be limited by physical barriers as well as by force or threats of force from armed guards. It happens that the obstacles to stealing gold at Fort Knox enforce legal prohibitions on access. But the conception of freedom that I am currently describing is broad enough to capture far more. On this conception, our freedom is also impinged when we try to engage in legal behaviors whenever others interfere with those activities. So, if I try to retrieve the contents of my own safety deposit box at a bank, as is my legal right, bank robbers may interfere with my freedom of access, using either physical restraint or threats of force.

Armed with a thumbnail sketch of this conception of liberty, we can already see why it will require us to examine baseline liberties under a comparative view of punishment. If punishment is a loss of liberty, it must be reducing liberty from some baseline. Yet people differ dramatically in the amount of liberty that they have in their baseline conditions because people differ in the amount that others in fact interfere with their available actions.

a. *The Abducted Drug Dealer*

Consider an extreme case: a drug dealer is abducted by a rival gang. The drug dealer is then held against his will in a walk-in closet for a year. During this time, the drug dealer obviously lives in a state of severely restricted freedom. Suppose that police eventually find the drug dealer, remove him from his rivals’ hideout, and take him into custody. The drug dealer is subsequently tried and convicted for his prior drug trafficking crimes.

If we seek to punish proportionally and take seriously the view that incarceration is a deprivation of liberty, the abducted drug dealer should be

⁶¹ I will use the terms “liberty” and “freedom” interchangeably.

⁶² See Isaiah Berlin, *Two Concepts of Liberty*, in LIBERTY 166, 169 (Henry Hardy ed., 2002) (“I am normally said to be free to the degree to which no man or body of men interferes with my activity.”).

deprived of his liberty to the same extent as any other drug dealer who is equally blameworthy. The abducted drug dealer's baseline, however, is one of extreme liberty deprivation. Under a comparative view, he must be placed in an even smaller cell (or otherwise have a more liberty-constrained sentence) in order to exact the same deprivation of liberty relative to his baseline that we exact from others who commit the same crime. Such a result seems very counterintuitive.⁶³

Importantly, I have so far taken the drug dealer's baseline to be his liberty-deprived condition while abducted. I implicitly used a historical baseline. Alternatively, one might think that the proper baseline should be determined counterfactually as the condition that the drug dealer *would* have been in had he been rescued by police and not punished. This would avoid the calibration requirement previously mentioned. It does not help, however, in the long run. We can simply change the circumstances of the case, such that the police arrest the drug dealer just before a rival gang was about to abduct him. Under this counterfactual baseline approach, the deprivation of liberty-in-fact view is even stranger. It would seem now that the never-abducted drug dealer deserves to be placed in conditions of extreme liberty deprivation because otherwise he would not be sufficiently deprived of his liberty relative to the very limited liberties *he would have had* if he had been abducted instead of incarcerated.

b. *Pervasive Variation in Baseline Liberties*

To fully assess our liberties-in-fact, however, we cannot only examine the physical barriers and threats of force that others create. To meaningfully assess our freedoms, we must also examine our own capacities.⁶⁴ This is true

⁶³ Some retributivists might argue that the abducted drug dealer should not be put into especially harsh conditions because his terrible recent circumstances warrant mercy. *But cf.* Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1431, 1453-73 (2004) (describing "retributivism's hostility toward mercy"). But even if the drug dealer is entitled to mercy, liberty-in-fact retributivists are led to the strange conclusion that we show mercy to the drug dealer by putting him in *ordinary* prison conditions for the *usual* period of time.

According to Gertrude Ezorsky, a proper "[a]ssessment of a criminal's desert after an offense would require that one balance all of his moral wrongs against the suffering of his entire life." Gertrude Ezorsky, *The Ethics of Punishment*, in PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT, at xi, xxvi (Gertrude Ezorsky ed., 1972). On her "whole life view" of desert, the abducted drug dealer may deserve a shorter sentence because of the non-penal suffering he experienced while abducted. In effect, Ezorsky argues, we should use baselines that reflect an offender's entire life history. Since "such reckoning is usually beyond ordinary mortals," she questions whether retributivists can "be certain that when an offender is penalized, he does in fact deserve to be so treated." *Id.* Thus, she and I agree at least on the narrow point that the need to consider offender baselines causes problems for proportional retributivists.

⁶⁴ See LAWRENCE CROCKER, POSITIVE LIBERTY: AN ESSAY IN NORMATIVE POLITICAL PHILOSOPHY 11-15, 31-47 (1980) (recognizing the difficulty in distinguishing between

even in the Fort Knox case. While the gold at Fort Knox is encased in a vault protected by armed guards, my liberties-in-fact are only limited if I lack the means to sneak past the guards and drill through the vault.

In this particular example, most or all of us lack such capacities. But in many other cases, our freedoms-in-fact do vary in important ways based on our capacities. We all have differing degrees of freedom to pick a particular career, to play beach volleyball with friends, and to have intimate sexual relationships. Our freedoms in these domains depend on a willingness of other people to support or at least not prevent the fulfillment of our goals. On this broad notion of freedom, our own skills, charm, knowledge, friendliness, perseverance, and other attributes limit or enhance our freedom depending on how these attributes affect our interactions with others.

In prison, offenders have limited freedoms to move about, to associate with others, to express themselves, and so forth. The extent of the loss of these liberties depends on the freedoms offenders had outside of prison that were limited by being in prison. A person with great freedom to select a career before being sent to prison is restricted much more by prison than someone who had no such options. An inmate with a wide range of willing sex partners outside of prison is more restricted by prison limitations on sexual liberties than is an inmate who did not have any willing partners. Thus, on the broad notion of freedom described here, one would have to engage in a rather far-reaching inquiry into offenders' baseline skills, employment status, social connections, possessions, and many other attributes in order to assess how much their liberties-in-fact are limited by incarceration. Under this view of the currency of punishment, proportionalists have a counterintuitive obligation to calibrate punishment along many dimensions.

2. Liberties-Under-Law

An alternative view of the sort of freedom at issue in the punishment context restricts pertinent losses of liberty to those that we have as a matter of law. This more limited view of freedom reduces the calibration obligations discussed in the prior section. The abducted drug dealer had the same legal rights to move about while he was abducted as did anyone else, even if his freedom of movement was in fact hampered by extralegal physical restraints and threats of force. If we need only examine legal restrictions on his freedom, the obligation to individually calibrate his punishment may seem to disappear.

a. *Property Rights Affect Baselines*

Yet, even if we focus solely on our liberties as constrained by law, proportionalists would still be obligated to engage in baseline calibrations. The reason is that there is substantial variation in our baseline *legal* liberties. One of the legal rights that prisoners are deprived of is the right to enjoy their

liberties limited by physical restraints and liberties limited by incapacities or by inadequate information).

real property and most of their personal property. While inmates in the same unit of a particular prison have roughly equal rights to use property while in prison, those same inmates may have varied substantially in their baseline property rights. Thus, when offenders are sent to prison, they are deprived to different extents. For example, when wealthy media entrepreneur Martha Stewart was sent to prison, she was deprived of her liberties to private property to a much greater degree than her fellow inmates.⁶⁵

In response, one might try to recharacterize the pertinent property rights that prisoners are deprived of. One might say that inmates are deprived not of the legal right to possess or make use of actual, particular property but of the legal right to obtain property through standard channels. While Martha Stewart and the average prisoner were differentially deprived of actual, particular pieces of property in prison, prior to prison, they both had the identical legal right to use standard, legal channels to obtain and possess property.

This response is inadequate, however, because prison deprives offenders of *both* legal rights to particular property as well as legal rights to acquire and possess property through standard channels. Even if offenders are equally deprived of the second set of rights, they are not equally deprived of the first set, as the Martha Stewart example shows. One cannot simply choose how to characterize the rights deprivations of prison any more than a criminal can choose how to characterize the harms that he causes. The person who steals cars and sets them on fire because he likes the spectacle is still a thief, even if he is motivated by the desire to have fun rather than the desire to deprive the victim of property.⁶⁶ Similarly, state actors use force to knowingly deprive prisoners of their property, at least for a period of time. Even if their conduct would not qualify as theft, the knowing deprivation of someone else's property still requires justification. Thus, in order to properly assess punishment severity, we must take account of the extent to which we purposely or knowingly impose limitations on others' property rights when we incarcerate them.

⁶⁵ Stewart's freedom of movement was also more restricted by prison than average. Since she had substantially more private property than the average person, she also had greater freedom to move about (on her own property) than most people. Therefore, when her liberties of motion were equalized with those of her fellow inmates, her liberty of motion was restricted to a greater degree. Cf. G.A. Cohen, *Capitalism, Freedom, and the Proletariat*, in *THE LIBERTY READER* 163, 169-70 (David Miller ed., 2006) (recognizing how one person's private property limits the freedom of movement of everyone else).

⁶⁶ See JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 565 (5th ed. 2009); cf. Mitchell N. Berman, *The Evidentiary Theory of Blackmail: Taking Motives Seriously*, 65 U. CHI. L. REV. 795, 839 (1998) ("The average thief, after all, steals not *in order* to impose a loss on his victim, but for the purpose of obtaining a gain for himself. Yet this conduct, too, appears blameworthy – even absent a law prohibiting it.").

b. *Military Service, Quarantine, and Curfews Affect Baselines*

Differences in baseline property rights happen to be relatively easy to observe but are hardly the only differences we have in our baseline liberties-under-law. Soldiers, for example, do not have the same legal rights to move about freely as do civilians. If we sought to exact equal liberty deprivations from a soldier and from a civilian, all else being equal, we would have to give the soldier an objectively more restrictive sentence than the civilian.

One might respond by arguing that soldiers do not have fewer baseline legal liberties than civilians because soldiers also have certain liberties (for example, some can operate heavy artillery) that civilians do not have. This response merely shifts the problem but does not eliminate the calibration obligation. If soldiers actually have more liberties than civilians, we would have to assess *how much more* liberty they have. So long as soldiers and civilians do not have precisely the same level of legal liberties, proportionalists will still have an obligation to assess differences in their baseline legal liberties.

Quarantine presents a more straightforward example. When a person, through no fault of his own, contracts a contagious illness, he may be lawfully confined against his will for a long period of time.⁶⁷ Suppose that while under quarantine, he commits a crime over the internet. Because his baseline liberty is already quite restricted, proportionalists have to severely curtail his liberties in order to achieve a liberty deprivation that is equal to the deprivation that applies to others who commit the same crime but who do not have unusually restricted baseline liberties.

Of course, consequentialists can offer deterrence reasons for giving more severe sentences to people who have liberty-deprived baselines. If the conditions in quarantine are similar to conditions in prison, we have reason to ramp up the sentence of the quarantined person in order to deter him from committing the crime in the first place. But this is not a rationale to which a proportionalist can appeal. The proportionalist must make the strange claim that the person in quarantine needs to be given especially limited liberties in prison, not to obtain additional deterrence, but simply in order to give him a sentence that is *equal* to that of everyone else who does not have especially restricted baseline liberties.⁶⁸

⁶⁷ See *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (reaffirming “the authority of a State to enact quarantine laws and ‘health laws of every description’”).

⁶⁸ One might argue that the person who is faultlessly in quarantine deserves compensation from the state for his loss of liberty. On this view, we ought not treat the person in quarantine as having diminished baseline liberties because, in theory, his decreased liberties of motion are offset by his increased liberty to use property.

If we *actually* provided such offsetting rights, this argument might work. But if the claim is merely that we ought to provide such compensation and that doing so would establish the proper baseline, then the argument is about our *idealized* baseline liberties, a topic I address in Part II.B.3.

The liberty-under-law conception also has some very odd system-wide implications. Suppose that a jurisdiction issues a mandatory curfew that requires residents to be home by midnight.⁶⁹ The curfew is intended to protect residents' safety and decrease the likelihood of rioting and vandalism. The curfew is not intended to be a punishment, but it does substantially restrict people's liberties. Consider the surprising impact, though, that the curfew has on those who are incarcerated. Once the curfew is instituted, prisoners have more modest deprivations of their liberties relative to those who are not punished. If we take the pertinent baseline to be the liberties that prisoners would have had counterfactually if they were not imprisoned, then it seems that these prisoners have lighter sentences because of the curfew. Moreover, if we sought to maintain punishment proportionality over time, we would have to deprive these prisoners of more liberty as a result of the new curfew law. Alternatively, if we use a historical baseline, we can develop similarly odd results by imagining that some prisoner was under curfew restrictions prior to conviction and sentencing. He would have to be punished longer or under harsher conditions than an equally blameworthy offender who was sent to prison just before the curfew was implemented.

c. *Liberty-Under-Law Approach Too Limited*

The liberty-under-law approach also has a devastating symmetry problem. When it comes to evaluating a person's final condition for purposes of assessing the extent to which he is deprived of liberty, we care very much about his liberties-in-fact, not just his liberties-under-law. A prison escapee is not deprived of liberty for punishment purposes even though his liberties-under-law are at least as limited as they were before he escaped.⁷⁰ A person is only appropriately deprived of liberty when, in fact, he is deprived of liberty. If we care about the escapee's liberties-in-fact when evaluating his end-state punished condition, then it seems we should also care about his liberties-in-fact when assessing his baseline. It is difficult to make sense of an asymmetric version of the phrase "deprivation of liberty," where liberty has a different meaning in the baseline condition than it does in the punished condition. So, attempting to limit the scope of the calibration obligation to legal liberties fails both because the limitation to legal liberties illicitly restricts the scope of liberty deprivations that must be justified and because, even if it did not,

⁶⁹ The City Council of Paterson, New Jersey recently considered implementing a curfew from midnight to seven in the morning. The proposed plan would allow limited exceptions for those who are in transit or need roadside or emergency medical assistance. Meredith Mandell, *Curfew Plan May Be Revived*, HERALD NEWS, Sept. 28, 2009, at A01, available at http://www.northjersey.com/news/Curfew_plan_may_be_revived.html.

⁷⁰ Cf. Cohen, *supra* note 65, at 171 (arguing that if freedom is understood as only being limited when the limitation violates a right, "a properly convicted murderer is not rendered unfree when he is justifiably imprisoned").

offenders differ in their baseline legal liberties, and we would still have to take those baselines into account to punish proportionally.

3. Idealized Liberties

In response to the counterintuitive implications just described, one might argue that relevant baseline liberties should neither be determined by the freedoms that we have in fact, nor by the freedoms we have as a matter of law. Rather, our pertinent baseline liberties are those that we ought to have under some set of idealized circumstances. So, for example, it is irrelevant that the drug dealer discussed earlier had his liberties reduced by a rival gang because, under some set of idealized circumstances, he never would have been abducted.

The idealized liberty approach is difficult to evaluate without more details about some particular idealization of liberty. Nevertheless, it seems likely to only reduce variation in baseline liberty disparities rather than eliminate it. Presumably, even a just, well-functioning society may limit the liberties of members of the military and people under quarantine, so those variations in baseline liberties may persist. Moreover, so long as the pertinent idealized community still has property rights that remotely resemble our own, there will be substantial variation in baseline liberties and, hence, substantial variation in the deprivation caused by incarceration.

Might there be some ideal distribution of property that could serve as a baseline? Consider the following scenario: Wealthy and Destitute commit the same crime under the same circumstances and receive sentences of equal duration in identical prison facilities. Wealthy complains that his punishment is more severe than Destitute's because Wealthy is deprived of substantial property rights, while Destitute is not. The idealized-liberty advocate tells Wealthy that, under some idealized set of circumstances, Wealthy and Destitute have the same baseline property rights. Therefore, they have equal punishments relative to their idealized baseline.

Wealthy will have two very good responses. First, if the idealized baseline has normative force, then we should have equalized Wealthy's property rights with Destitute's before they committed their crimes. In other words, Wealthy asks, "What bit of magic happens at the point of sentencing such that you suddenly have a reason to redistribute my wealth that you did not have before?" The justification for redistributing at the time of sentencing cannot appeal to any difference in the criminal behavior of Wealthy and Destitute because their behavior was identical. Thus, there is no punishment-related reason why Wealthy should be treated the same way as Destitute if we seek to punish them equally.⁷¹ By setting prison terms without considering offenders'

⁷¹ As I mentioned earlier, one might think that Wealthy is more blameworthy when he commits the same crime as Destitute because Wealthy had better alternative options. See *supra* note 3. This may be true in some cases but not in others. If both Wealthy and Destitute genuinely but unreasonably act in self-defense, their wealth likely has little impact

baseline property rights, we implement a radical egalitarianism among prisoners that does not exist outside of prison and that cannot be explained by principles of proportional punishment.

Second, Wealthy says, depriving someone of his property interests constitutes behavior ordinarily considered harmful and in need of justification. Suppose that Destitute had tried to steal money from Wealthy. Presumably, that would be a crime, even if there is some abstract theory under which Wealthy and Destitute should have had the same property rights. A harm of some sort occurs when Destitute infringes Wealthy's actual property interests, even if there is no infringement of Wealthy's rights under some idealized account. Moreover, the harm is measured in a comparative way by comparing the change in Wealthy's assets from before and after Destitute's act of theft. So, when Wealthy's property interests are infringed by the state rather than by Destitute, the state must justify the change in Wealthy's property interests as measured in the usual, comparative way.

Thus, as with the liberty-under-law approach, the idealized liberty approach fails for two reasons. First, attempting to limit the scope of the calibration obligation to our ideal set of liberties illicitly restricts the scope of liberty deprivations that matter to punishment severity and must be justified by a theory of punishment. Second, even if the idealized liberty approach did not illicitly restrict the scope of important liberties, offenders differ even in their idealized liberties. So, the idealized account of liberty still requires us to examine variation in baseline idealized liberties in order to punish proportionally.

Though I believe that all three conceptions of liberty generally do a poor job of identifying the underlying disvalue of punishment,⁷² even if they did a good job, punishment severity would still have to be determined comparatively, because people differ in their baseline levels of all three notions of liberty.

C. *The Subjective Account of Punishment*

Over two hundred years ago, Jeremy Bentham defended a subjective conception of punishment that recognized the severity of punishments in experiential terms like pain and suffering.⁷³ While many theorists never clearly state what they take to be the currency of punishment, at least some seem to agree with Bentham that the currency of punishment is largely

on their blameworthiness during the split-second period in which they act. Moreover, even if wealth generally augments culpability, it would be a cosmic coincidence if Wealthy's financial assets increase his blameworthiness by the precise amount that justifies the increased severity of his sentence relative to Destitute's.

⁷² Kolber, *supra* note 2, at 203-08.

⁷³ BENTHAM, *supra* note 2, at 182. Prior to Bentham, Cesare Beccaria recognized but rejected concerns about variation in offenders' experiences of punishment. See CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 51-52 (Richard Bellamy ed., 1995) (1764).

experiential.⁷⁴ Punishment subjectivists can still recognize the prima facie benefits of liberty. As a general rule, increased liberties tend to boost experiential states, while liberty deprivations tend to worsen them. However, the value of liberty deprivations and enhancements, to a pure subjectivist, is ultimately determined in experiential terms.

1. End-Stage Experiential Calibration

In *The Subjective Experience of Punishment*,⁷⁵ I defended a limited subjectivist position. I argued that even if the disvalue of punishment consists of more than just negative subjective experiences, those experiences are at least part of what makes punishment burdensome.⁷⁶ In order to fully justify punishment, we cannot ignore the contribution those negative subjective experiences make to the harshness of a punishment. Moreover, if we want to punish proportionally, then we have to calibrate punishments to reflect the suffering that offenders actually experience or are expected to experience as a result of being punished.

So, suppose that Sensitive and Insensitive commit the same crime and are sentenced to equal prison terms in identical facilities.⁷⁷ Suppose, too, that they are alike in all pertinent respects, except that Sensitive finds prison life tormenting and unbearable (perhaps he has claustrophobia), while Insensitive finds the same conditions merely unpleasant. If we seek to give Sensitive and Insensitive equal punishments and if punishment is understood at least partly in experiential terms, then we have to ratchet down the severity of Sensitive's sentence or ratchet up the severity of Insensitive's sentence.

While I have not argued that punishment severity must be understood exclusively in subjective terms, negative subjective experiences certainly constitute a very important aspect of punishment severity. I have several reasons for preferring accounts of punishment severity that take subjective experience into consideration over purely objective, liberty deprivation

⁷⁴ See, e.g., NILS CHRISTIE, LIMITS TO PAIN 5 (1981) (“[I]mposing punishment within the institution of law means the inflicting of pain, intended as pain.”); K.G. ARMSTRONG, *The Retributivist Hits Back*, 70 MIND 471, 478 (1961) (stating that, for retributivists, “[p]unishment is the infliction of pain”). Many others have recognized negative subjective experiences as among the disvaluable aspects of punishment. See, e.g., H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 4 (1968) (“[T]he standard or central case of ‘punishment’ must involve pain or other consequences normally considered unpleasant.”); HUSAK, *supra* note 43, at 972 (“If I am correct, our retributive beliefs only require that culpable wrongdoers be given their just deserts by being made to suffer (or to receive a hardship or deprivation).”); STEVEN TUDOR, *Accepting One’s Punishment as Meaningful Suffering*, 20 LAW & PHIL. 581, 583 (2001) (“[I] take it to be uncontroversial that punishment, by definition, involves suffering (whether ‘positively’ through the imposition of something unpleasant or ‘negatively’ through the deprivation of something valued).”).

⁷⁵ Kolber, *supra* note 2.

⁷⁶ *Id.* at 215-16.

⁷⁷ See *id.* at 183.

accounts.⁷⁸ By far, the most important is that pure loss-of-liberty accounts fail to justify punishment. Since they leave subjective experience out of the equation, they cannot justify the knowing or intentional inflictions of emotional distress that punishment causes.

If we could knowingly or intentionally inflict substantial distress without justification, then we would have no moral grounds to criticize prison wardens who purposely or knowingly cause distress. A sadistic warden could put a chemical into prisoners' drinking water that makes half the inmates feel intense anxiety and distress, and we would have no grounds to complain.⁷⁹ Similarly, an uncaring warden could discover that such a substance was already in the prison drinking water and do nothing about it. The warden would have no obligation to fix the water supply, even if he could do so costlessly by closing a valve that feeds the contaminant into the plumbing. If we need not justify the experiential distress we knowingly or intentionally cause people, we have no moral grounds to criticize sadistic or uncaring wardens.

Purely objective accounts of punishment severity have further problems. First, they fail to capture the experiential reasons many of us intuitively give for seeking to avoid punishment. We say that prison would be upsetting, we would miss our families, we would hate the taste of the food, and so forth. Objective accounts do a poor job of capturing these intuitions.

Second, subjective experience matters at least to the extent that a person who is unaware that he is being punished is, in fact, not being punished at all. If a person is unknowingly sentenced to a week of home confinement, but happens to stay home of his own accord during the week of his confinement, he has not been retributively punished. Given that awareness matters to punishment, it seems likely that other subjective states related to awareness may also be important.

Third, loss-of-liberty retributivists cannot give a good account of the *particular* liberties that prisoners should be deprived of without relying on subjective experience. A group of Vermont inmates recently challenged the practice of serving "Nutraloaf," a foul-tasting food concoction given to misbehaving prisoners, without first affording them some formal disciplinary process.⁸⁰ Part of what makes Nutraloaf a potential punishment is that people

⁷⁸ See *id.* at 203-08.

⁷⁹ See *id.* at 197, 213. We cannot criticize the sadistic warden solely on objective grounds by saying that he violates prisoners' rights to clean, healthy water. Doing so simply incorporates prohibitions on knowingly or purposely inflicting substantial distress into our conception of liberty. If we do that, Sensitive can argue that he is deprived of his liberty to a greater extent than Insensitive when they are placed in the same conditions because Sensitive's right to clean, healthy prison conditions is violated. The liberty deprivation view would no longer be a purely objective view and would collapse, in some respects, into the experiential view.

⁸⁰ See *Borden v. Hofmann*, 974 A.2d 1249, 1256-57 (Vt. 2009) (holding that a Vermont statute entitles prisoners to some disciplinary process before they are assigned to a Nutraloaf-and-water dietary regimen). Courts faced with similar issues have not always

hate its taste, and prison officials know that. A pure loss-of-liberty view cannot tell us what should count as a loss-of-liberty without appealing to subjective experience. While depriving people who hate opera of the right to go to the opera does reduce their liberty, it does not punish opera haters.

Finally, loss-of-liberty accounts use arbitrary grounds for assessing punishment severity. They focus on features of punishment, like the square footage of a prison cell, that have no independent moral significance. What is bad about living in a small cell is principally the experience of living there. Of course, square footage and other objective features about prisons and prisoners may be good proxies for facts about human experience. Nevertheless, when pressed, we should acknowledge that these objective features are mostly just rough substitutes for what really matters in the punishment context: namely, the negative experiences associated with the punishment.

After all, someday, we will have better measurements of subjective experience. Even now, we have some techniques to measure affective states like claustrophobia,⁸¹ and mental health professionals are already called upon to assess prisoners' levels of distress, even though inmates often have incentives to malingering in order to be placed in more comfortable prison hospital conditions.⁸² In tort cases, we routinely measure affective states associated with physical and emotional distress. In the future, techniques to measure experiences will be both more accurate and more resistant to cheating than those we have now.⁸³ We should "recognize the practical, ever-changing limitations on our ability to measure subjective experiences as contingent features of early twenty-first century living rather than . . . build these limitations into our theory of what punishment is really all about."⁸⁴

2. Baseline Experiential Calibration

Notice that I have so far focused on the need to consider offenders' experiences *during* punishment. For example, I argued that Sensitive's

reached the same conclusion. *Id.* at 1255. One cannot deny, however, that correction officials' beliefs about the taste of Nutraloaf bear on whether the regimen constitutes punishment.

⁸¹ See, e.g., Lars-Göran Öst, *The Claustrophobia Scale: A Psychometric Evaluation*, 45 BEHAV. RES. & THERAPY 1053, 1053-54 (2006).

⁸² See Video: A Clash of Cultures: Behind Bars, Security Trumps Treatment (Globe Spotlight Team, Boston Globe 2007), available at <http://www.boston.com/multimedia/2007/12/09spotlight/interactiveplayer2.html> (stating that prisoners have intentionally swallowed nails and spikes in order to be sent to the comparatively better conditions in prison hospitals).

⁸³ See Adam J. Kolber, *The Experiential Future of the Law* (Oct. 13, 2009) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1488444; see also Adam J. Kolber, *Pain Detection and the Privacy of Subjective Experience*, 33 AM. J.L. & MED. 433, 441-49 (2007) (arguing that emerging neuroimaging techniques may, in the not-so-distant future, improve our assessments of other people's pain).

⁸⁴ Kolber, *supra* note 2, at 207.

punishment is more severe than Insensitive's based on their different experiences in prison. But I can only safely make that assumption because I stipulated that, aside from their experiences in prison, Sensitive and Insensitive are alike in all pertinent respects. I, therefore, assumed that they had identical baselines in order to show that Sensitive's punishment was, all things considered, more severe.

In other cases, however, we must take baseline experiential conditions into account. Suppose that Contented leads a happy life and takes pleasure in his job, his hobbies, and his family life.⁸⁵ Dispirited, however, experiences frequent bouts of depression and has periodically contemplated suicide. Suppose further that Contented and Dispirited commit crimes for which they are equally blameworthy. They are sentenced to equal prison terms in identical facilities where they have identical experiences. Unlike Sensitive and Insensitive, they differ in their baseline experiential conditions but have identical experiential conditions while incarcerated.

Even though Contented and Dispirited are alike in their experiential conditions in prison, Contented is punished more severely because he had a better baseline experiential condition. Prison worsens Contented's condition much more than Dispirited's. If we seek to punish them equally, we need to calibrate punishment based on their baseline experiential states. When we look at both the Contented/Dispirited case and the Sensitive/Insensitive case, we see that, even under an experiential conception of punishment severity, we still have to measure sentence severity by comparing offenders' baseline and punished conditions. Thus, whether one is an objectivist or a subjectivist about punishment severity, punishment baselines matter.

On the bright side, there are four admittedly speculative reasons why experiential calibration may be easier or otherwise better than liberty-deprivation calibration (aside from the fact that punishment cannot be fully justified in liberty-deprivation terms).⁸⁶ First, it is not at all clear how we measure amounts of liberty.⁸⁷ Suppose one prisoner has more freedom to move about than another, but the second prisoner has greater freedom of expression than the first. At least in experiential terms, we can make some estimates about which freedoms people prefer or make them happy. I doubt

⁸⁵ The scenario described here is similar to Leo Katz's "happy-go-lucky" example. See *supra* text accompanying note 60.

⁸⁶ As I have only defended a limited subjectivist view, I have not excluded the possibility that punishment may include non-experiential harms (like liberty deprivations of which offenders are unaware) that we must justify as well. If punishment includes both experiential and non-experiential harms, then proportionalists must comparatively assess both sorts of harm, even if it is difficult to do so.

⁸⁷ See Robert Sugden, *Opportunity as a Space for Individuality: Its Value and the Impossibility of Measuring It*, 113 *ETHICS* 783, 784-85 (2003).

we can compare the value of liberties without surreptitiously examining experiential facts.⁸⁸

Second, though it may seem like the comparative nature of punishment makes experiential assessment twice as difficult, in some respects, it may make assessments easier. Presumably, some observable phenomena related to our experiential conditions reflect *changes* in those conditions. A lot depends on the details of how we construe human experience. For example, perhaps crying is a better indication of the change in a person's experiential condition than it is of the person's experiential condition in some more absolute sense. Similarly, perhaps hormonal and other physiological changes in the body also reflect changes in our experiential conditions. Until we have a more detailed account of how we should measure experiential conditions, it is at least possible that it is easier to measure changes in those conditions than the conditions themselves.⁸⁹

Third, subjective variation in punishment severity may grow smaller over time, while objective variation is likely to remain relatively constant. As a general matter, people's experiential conditions, along certain dimensions, tend to revert to a set point. Humans "hedonically adapt" to their conditions, so that a year after winning the lottery, winners tend to report about the same life satisfaction as everyone else.⁹⁰ Similarly, those who are paralyzed in car accidents tend to revert, if not to their pre-accident level of life satisfaction, at least somewhere close to it.⁹¹ Hedonic adaptation also occurs in prisons,⁹² meaning that long prison sentences are likely to do a poor job of exacting retributive suffering.⁹³ After a long period of time, prisoners are likely to revert, to some degree, to their baseline experiential conditions. This means that, from a subjective point of view, what seem like disproportional punishments may well become less disproportional over time, a feature that purely objective accounts of punishment lack.

Finally, and perhaps most importantly, experiential calibration is less likely to have the counterintuitive socioeconomic implications that a more objective account has. Recall that Wealthy has far more assets than Destitute. When

⁸⁸ Even rights denominated in dollars cannot meaningfully be compared to each other without considering how people value those dollars. Due to the declining marginal value of money, most people value the liberty to spend \$100,000 less than 100 times the amount that they value the liberty to spend \$1000.

⁸⁹ Functional brain imaging, for example, gives us more meaningful information about *changes* in subjects' experiential states (over very short time frames) than it does about those experiences in any absolute sense. See MARK F. BEAR ET AL., *NEUROSCIENCE: EXPLORING THE BRAIN* 178-79 (3d ed. 2007).

⁹⁰ Philip Brickman, Dan Coates & Ronnie Janoff-Bulman, *Lottery Winners and Accident Victims: Is Happiness Relative?*, 36 J. PERSONALITY & SOC. PSYCHOL. 917, 920-21 (1978).

⁹¹ See Shane Frederick & George Loewenstein, *Hedonic Adaptation*, in *WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY* 302, 312 (Daniel Kahneman et al. eds., 1999).

⁹² *Id.* at 311-12.

⁹³ Kolber, *supra* note 2, at 225 & n.122.

they are both imprisoned for equal periods of time in identical conditions, Wealthy has a substantially greater deprivation of his rights to property. On the experiential account, it also seems likely that Wealthy will experience greater distress in prison than Destitute. But this is by no means certain. The variation in the baseline between Wealthy and Destitute in experiential terms may be much smaller than the variation in terms of property rights, since there is only a weak correlation between wealth and life satisfaction.⁹⁴ Similarly, coping skills, likely a large determinant of punishment experience, have no clear or obvious relationship to wealth. So, comparative experiential calibration is less likely to have counterintuitive socioeconomic effects than comparative, objective calibration.

Moreover, were we to examine experiential baseline and punishment conditions and then punish people proportionately, any resulting disproportionate socioeconomic impact would be indirect. Subjectivists are not actually calibrating based on socioeconomic differences; they are calibrating based on experiential states which may happen to correlate with wealth. By contrast, on the objective account, the fact that one person has more wealth than another *directly* affects the extent to which he is punished by imprisonment. His wealth increases his baseline rights to property, meaning that prison causes him a greater deprivation of liberty.

III. RETREATING FROM PROPORTIONALITY

In Part I, I argued that the comparative conception of punishment severity is inescapable. In Part II, I described the strange implications of such a view for objectivists and subjectivists when they try to punish proportionally. Overall, I think that the comparative nature of punishment makes a purely objective notion of proportionality untenable. By contrast, a comparative, subjective account of punishment leads to surprising conclusions for proportionalists, though some might find them acceptable.

So, proportionalists might seek refuge in the somewhat strange land of experiential punishment calibration. In this Part, however, I explore an alternative. Those who find the implications of punishment calibration too bizarre may decide instead to give up on the traditional conception of proportionality. While this will prove to be an appealing option for most consequentialists, it comes at a substantial cost to retributivists.

A. *The Retributive Superiority Claim*

In retreating from proportionality, retributivists risk losing the central feature of their theory that is often thought to make it more appealing than consequentialism. Frequently, retributivists purport to reject consequentialism

⁹⁴ See Michael Argyle, *Causes and Correlates of Happiness*, in WELL-BEING, *supra* note 91, at 353, 356-59.

precisely because consequentialism permits disproportional punishment.⁹⁵ Suppose, for example, that Eric has committed some offense, and according to some set of desert principles, he should receive a ten-year prison sentence. Consequentialists, who generally ignore considerations of desert, might instead have grounds for punishing him for fifteen years or for only five years. Such deviations from proportionality strike retributivists as unfair. Retributivism's central "superiority claim" is that consequentialism, unlike retributivism, violates principles of proportional punishment.

1. Four Failed Attempts to Maintain the Retributive Superiority Claim

Before giving up on the superiority claim entirely, retributivists may make a few failed efforts at retreating from proportionality while still striving to maintain the core proportionality instinct underlying retributivism. The question becomes, "Can retributivists refuse to calibrate punishment in comparative terms and still maintain the superiority claim?" I will describe four attempts to do that and why they fail.

a. *The Forewarned Is Forearmed Attempt*

One might grant that there are substantial variations in people's baseline conditions that we ignore at sentencing. Nevertheless, one might argue, we are permitted to deviate from proportionality because people have advance notice of the sorts of punishments they face. People are aware or should be aware of their baseline conditions as well as the conditions that they would likely face in prison. So, even though a wealthy person may be punished more harshly than a poor person when they commit crimes of equal blameworthiness and receive sentences of equal duration, the wealthy person foresaw or could have foreseen his augmented penalty.

As an empirical matter, however, this claim may be false. People will often be mistaken about the severity of prison sentences that correspond with their intended crimes. Regardless, there is a much more devastating problem. The "forewarned is forearmed" response does not merely retreat from proportionality; it essentially gives up on the goal entirely. The reason is that the mere fact of being aware of one's punishment does not eliminate disproportionality.⁹⁶

To see why, suppose that we punish murderers with five years of incarceration if they are right-handed and fifteen years of incarceration if they are left-handed. Even though righties and lefties would have advance notice of their penalties, this sentencing scheme still seems unfair and disproportionate. If retributivism allows us to incarcerate righties for five years and lefties for

⁹⁵ See, e.g., VON HIRSCH & ASHWORTH, *supra* note 45, at 4 (explaining that deterrence-oriented sentencing schemes have the drawback of paying insufficient attention to proportionality).

⁹⁶ See Larry Alexander, *Consent, Punishment, and Proportionality*, 15 PHIL. & PUB. AFF. 178, 179 (1986); Kolber, *supra* note 2, at 210-11.

fifteen years for identical crimes, then retributivism hardly seems better from a proportionality perspective than the sort of disproportional punishments that consequentialism allows.

Consequentialists might disproportionately punish Eric (who deserves ten years) for either five years or fifteen years in order to achieve goals (like general deterrence) that are unrelated to his blameworthiness. Similarly, when retributivists fail to consider baselines, they punish people differentially based on factors (like baseline property rights) that are also unrelated to blameworthiness. Thus, even if the “forewarned is forearmed” response eases the unfairness of disproportional punishments, it does not eliminate their unfairness and certainly does not eliminate their disproportionality.

b. *The Deliberateness Attempt*

Another form of retreat asserts that we need not justify those aspects of punishment that are neither intended nor foreseen. If, for example, a prisoner is accidentally burned in a prison fire, we need not justify the burning of the prisoner in terms of his culpability. To the extent that the prisoner has had a more severe prison term than someone of equal blameworthiness, it is not a genuine violation of proportionality (or alternatively, it is an acceptable violation of proportionality) because the state need not justify features of punishment that are entirely accidental. Similarly, so the argument goes, we need not justify the aspects of punishment that are augmented by offenders’ baseline characteristics.

Such an explanation will fail, however, to avert the proportionalist’s obligation to calibrate punishments. The reason is that the state *knows* there are variations in prisoners’ baseline wealth and other characteristics, even if the full, comparative range of harms associated with prison are not an *intended* aspect of punishment.⁹⁷ When we harm people knowingly, we need to have a justification for doing so. Retributivists who claim that they can ignore the full, comparative range of harms to inmates simply because those harms are unintended have failed to fully justify those punishments.⁹⁸

⁹⁷ Many retributivists *know* that any punishment system will occasionally punish the innocent or otherwise punish in excess of desert. They insist, however, that punishment may still be permissible so long as the state does not knowingly punish any *particular* offender in excess of desert.

The problem I have identified, however, applies to particular offenders. At sentencing, offenders with unusually good baseline conditions are happy to offer evidence that a given sentence will harm them more than others. By refusing to consider such evidence, courts are knowingly sentencing particular offenders without regard to the baseline-related harms their sentences will impose.

⁹⁸ Theorists disagree about whether actors are responsible only for those harms which they brought about purposely, knowingly, recklessly, or negligently or whether they are also responsible for certain harms they cause by chance. See *generally* MORAL LUCK (Daniel Statman ed., 1993). My argument does not depend on any precise determination of which mental states are culpable or whether we are responsible for the results of our actions that

Consider a non-state-actor who knowingly deprives people of their property. If a street thug sets your car on fire because he likes to see explosions, he has violated your property rights without justification.⁹⁹ Assuming he knew that he would destroy your car, it will not help him to claim that he merely sought to cause an explosion and did not intend the full range of harm that he caused. Similarly, the sophisticated state actors who establish and administer the criminal justice system are aware of many of the liberty deprivations and inflictions of emotional distress associated with incarceration. They know about these harms, even if they are unintended. Retributivists who seek to justify imprisonment cannot artificially carve out foreseen harms from the scope of harms that require justification.

Similarly, some theorists understand punishment principally as an expression of disapproval.¹⁰⁰ Yet, even they cannot ignore punishment baselines. Suppose that we seek to punish equally blameworthy offenders with equal expressions of disapproval. If each offender has a different baseline, equal expressions of disapproval mean that they should end up in different situations. In the introduction, I described one child who has a 100-jellybean baseline and another with a 20-jellybean baseline. If we leave each child with only 5 jellybeans, we have not equally expressed disapproval. Unless retributivists are willing to calibrate sentences based on offender baselines, they are not punishing in proportion to desert and must give up on the superiority claim.

c. *The Banded Proportionality Attempt*

A number of so-called “limiting retributivists” claim that desert merely provides a limit on the amount that we can justifiably punish someone (and perhaps provides a floor on the amount of punishment we are obligated to impose).¹⁰¹ For example, the punishment for aggravated assault might warrant a maximum of ten years of incarceration and a minimum of one-year incarceration. When the bands are widely spread out, we might be able to

extend beyond our control. I argue that state actors *knowingly* ignore changes they cause to offenders’ punished conditions relative to their baseline conditions, and there is no dispute that actors must justify harms they knowingly cause. If we must also justify results caused recklessly, negligently, or without any culpability, then state actors have even more conduct for which they may be called to account. See RYBERG, *supra* note 2, at 112 (arguing that the severity of punishment depends on more than just the intended consequences of punitive actions).

⁹⁹ See *supra* text accompanying note 66.

¹⁰⁰ See, e.g., Joel Feinberg, *The Expressive Function of Punishment*, 49 *MONIST* 397, 403 (1965); see also Kolber, *supra* note 2, at 208-10 (explaining why expressivists cannot ignore the subjective experience of punishment).

¹⁰¹ See RYBERG, *supra* note 2, at 192; cf. NORVAL MORRIS & MICHAEL TONRY, *BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM* 96 (1990) (arguing that desert should be understood as a limiting principle of punishment rather than a method of “defining what is the single appropriate punishment”).

avoid careful punishment calibration so long as offenders' true punishment severity falls within the wide bands.

Such an approach might avoid calibration obligations but does so by giving up in large measure on the goal of proportional punishment. Under the banded form of retributivism in this example, there are no desert grounds to complain if three people commit aggravated assault with equal blameworthiness and one is sentenced to incarceration for ten years, another for five, and another still for just one. When the offender who gets a ten-year sentence complains that someone else got a one-year sentence, the limiting retributivist must say that all three people, who are equally blameworthy, received a deserved sentence (or, at least, a *not undeserved* sentence). So, to begin with, banded proportionality largely gives up on the notion of proportionality and can do little to support the superiority claim.

Moreover, as in my aggravated assault example, limiting retributivists will have to adopt very wide punishment bands because offenders have wide variation in their baseline and punished conditions. Some offenders do just fine in prison while others are driven to take their own lives. If the bands are not sufficiently far apart, then there is a substantial risk that even the limiting retributivist is punishing disproportionately when punishments are not properly calibrated to individual offenders.

d. *Cost and Administrative Complexity Attempt*

It is also tempting to blame our failure to issue proportional, calibrated punishments on the costs and other administrative complications of doing so. Assuming we could even agree upon the currency of punishment, we would still have to assess and monitor this disvalue both before and during punishment (and perhaps even counterfactually by assessing the condition offenders would have been in if they were not punished).¹⁰² Moreover, offenders will have incentives to malingering whenever we seek to make these assessments in order to shorten their sentences.

As noted, however, certain kinds of calibration are really not that difficult to accomplish, and we are willing to make similarly complex calibrations in tort and contract contexts where the stakes for being wrong are generally lower.¹⁰³ Furthermore, we make difficult determinations in the criminal context all the time when assessing mental states associated with blameworthiness and when assessing dangerousness in parole contexts.¹⁰⁴ Certainly, we could enact general policies that make our punishments better calibrated than they are now.¹⁰⁵

The real reason that we fail to better calibrate our punishments may not be just that calibration is difficult and expensive. Rather, I suspect, people simply

¹⁰² There are also good reasons to consider the *aftereffects* of punishment.

¹⁰³ See Kolber, *supra* note 2, at 219-27.

¹⁰⁴ See *id.* at 220-21.

¹⁰⁵ *Id.* at 219-27.

have persistent absolutist intuitions about punishment that deviate from the dictates of a coherent conception of proportionality.

We can see this by imagining a case where one offender clearly has a more severe sentence than another because of his excellent baseline condition. Suppose that Frank has tremendous happiness and freedom outside of prison relative to other people, no matter how you understand the concepts of happiness or freedom. Perhaps he lives in a jurisdiction with few legal restrictions, is extraordinarily wealthy, and is so beloved that people regularly accede to his wishes. Now suppose that Frank and an ordinary person who lives in a typical jurisdiction commit federal crimes for which they are equally blameworthy and are sent to identical prisons where they have identical experiences. Should Frank have a sentence that is shorter or less restrictive than the ordinary person's sentence because Frank had so much more happiness and freedom before he was punished? I suspect that most people will say no, even if we knew all of this information *costlessly*. Cost is probably a red herring. People have deep-seated absolutist intuitions about the severity of incarceration, even though such intuitions do not fit with a coherent scheme to justify punishment.

Even if I am wrong about people's intuitions, the cost and administrative complexity objection does not do a good job of maintaining the retributive superiority claim. If retributivists do not punish proportionally because of financial costs, then they have not meaningfully distinguished themselves from consequentialists who also give up on proportionality whenever its benefits fail to justify its costs.

To sum up, I described four efforts to avoid the calibration obligation while maintaining the retributive superiority claim. All have failed. Our intuitions of proportionality in the incarceration context are not merely off by a little bit. To the extent that we have absolute punishment intuitions, those intuitions depend on features of offenders – namely, their conditions during or immediately after punishment – that have no direct relevance to the properly-measured severity of their punishments.

Imagine if monetary fines ignored offender baselines. We could not possibly say whether a fine was appropriate merely by looking at an offender's wealth after he pays his fine. An end-state, punished condition only tells us something about the severity of a punishment if we know something about the offender's baseline condition. Otherwise, an offender's end-state, punished condition tells us nothing about the severity of his punishment.

2. Punishing the Innocent

Some might say that I have mischaracterized the retributivist's central claim to superiority over consequentialism. It is not just that consequentialism allows for over-punishing and under-punishing the guilty relative to what they deserve; rather, consequentialism, at least in principle, permits the punishment of entirely innocent people.

In fact, however, punishing innocent people is just a specialized case of over-punishment in which a person with no blameworthiness is punished in excess of desert. Punishing the innocent does not differ in principle from other cases of over-punishment. Suppose that one person commits a crime that deserves precisely five years of incarceration but is instead sentenced to ten years. A second person commits no crime but is mistakenly sentenced to five years. Both are over-punished by five years.

Is one form of over-punishment worse than the other? To some extent, yes. The stigma associated with incarceration and the difficulty of coping in prison are not spread out evenly during the course of a prison term. The guilty offender who is over-punished by five years will likely undergo the worst portion of his sentence during the five years of punishment that he deserved. Moreover, the over-punished offender is less likely to be aware of the fact that his sentence is unjust than is the entirely innocent person. So, while a five-year sentence may well be worse for the innocent than the guilty, it is a difference in degree not in kind.

To make this clearer, imagine that the justly convicted offender who spends ten years in prison was actually sentenced by a judge to five years in prison. Due to some clerical error, however, the sentence is recorded as ten years and the mistake is, for whatever reason, never discovered.¹⁰⁶ In that case, it is especially clear that the difference between five years of over-punishment and five years of punishing the innocent is only a difference in degree of undeserved punishment severity and not a difference in kind. Therefore, the retributive claim to superiority has no special grounding when framed in terms of the punishment of the innocent.

B. *The Significance of Recognizing the Comparative Nature of Punishment*

When it comes to incarceration, our current sentencing system has a duration fetish. We determine the severity of a sentence based almost entirely on its duration while largely ignoring how prison conditions affect sentence severity. Whether punishment ultimately consists of liberty deprivations, distressing experiences, or both, there is no justification for focusing only on the duration of incarceration at the expense of the many other factors that affect punishment severity. Surely ten months spent at a minimum security prison are likely to be less severe than nine months spent at a maximum security prison. Given that our real-world punishments are disproportional even when we look only at absolute, end-state conditions, we should not be surprised that our punishments are also disproportional when we consider offender baselines.

Our duration fetish may be explained, in part, by certain incapacitacionist intuitions about prison. Regardless of one's experiences or liberties in prison, the amount of incapacitation we obtain by incarcerating an offender is directly proportional to the term of the offender's sentence. Though it is admittedly

¹⁰⁶ See RYBERG, *supra* note 2, at 112.

speculative, we may find it difficult to be true proportionalists about prison because we treat prison sentences as distributing amounts of incapacitation rather than liberty deprivations more generally.

As I have shown, however, we do not get to choose how to characterize the harsh ways we treat offenders. If we purposely or knowingly deprive them of liberties or cause them distressing experiences, we must justify such treatment. Theorists can use the term “punishment” to refer only to intentional sanctions if they so wish. But punishments like imprisonment consist of both intentional sanctions as well as other forms of harsh treatment that are known or foreseen. Theorists that only justify the intentional aspects of punishment cannot justify the wide variety of sanctions we knowingly impose, such as the deprivation of an offender’s baseline property rights.

Moreover, we know that theorists are ignoring important aspects of punishment when they ignore punishment baselines. If you or I regularly deprived others of their rights or knowingly caused them substantial distress, we would have to give a justification for doing so. If we did not have a justification, in many cases, we could be forced to pay damages for the harms we caused. The magnitude of such harms would be determined based on plaintiffs’ baseline conditions. Similarly, when the government knowingly deprives citizens of their rights or causes them experiential harms, it must have a justification for doing so.

When we recognize the importance of offender baselines to the process of justifying punishment, we see that the magnitude of disparate treatment under current sentencing regimes is even greater than one might have otherwise expected. Even though there are easy-to-recognize disparities in end-state prison conditions, it is possible that the disparities in our baseline conditions are even larger than the variation in our end-state punished conditions. When we look at punishment severity solely from an absolute perspective, we hide the true extent of the disparity in our punishments and overstate the plausibility of retributivism’s central claim to superiority over consequentialism.

CONCLUSION

Retributivists generally purport to have strong commitments to proportionality. When pressed on the details of what a proportional punishment system looks like, however, a commitment to genuinely proportional punishments leads to counterintuitive results. When punishment is understood principally in subjective terms, perhaps these counterintuitive results are acceptable. When punishment is understood as a deprivation of liberty, however, the results seem little short of absurd.

If retributivists continue to focus on incarcerative punishments in absolute terms, the sentences that emerge will not be proportional in a way that recognizes the full extent of those sentences. Such retributivists are vulnerable to the charge that they have failed to adequately justify their punishments because they have failed to properly recognize the severity of the punishments they impose. Moreover, by giving up their claims to a coherent account of

proportionality, they must also give up retributivism's central claim of superiority over consequentialism. While there may be other reasons to prefer retributivism to consequentialism, the case for proportional retributivism is now substantially weaker. When punishment severity is properly understood, we are not especially motivated to dispense equal punishments to equally blameworthy offenders.