

Happiness and Punishment

JOHN BRONSTEEN

New findings in hedonic psychology have implications for punishment theory. Specifically, these findings suggest that criminals adapt surprisingly well to fines and even to incarceration, but that incarceration negatively affects post-prison life in ways that tend to be unadaptable. These results increase the difficulty of using adjustments in the size of a fine or the length of a prison sentence to tailor a punishment to fit a crime. Because such adjustments are our primary means of crafting proportional punishments, and because such proportionality is important to retributive and utilitarian theories of punishment, a problem with their effectiveness could necessitate a rethinking of penal assumptions.

A substantial body of psychological evidence suggests that there is no strong link between money and happiness.¹ For example, one longitudinal study tracked people over a period of nine years, comparing the happiness of those who lost at least half a standard deviation of their annual income to those whose incomes increased or stayed constant.² Not only was the former group not unhappier, it was actually happier (although not statistically significantly so).³ Taking a criminal's money via a monetary fine therefore is likely to inflict less harm than would be the case absent people's ability to adapt to such changed financial circumstances. Moreover, because such adaptation is

¹ For a review of the extensive literature, see Diener, Ed & Robert Biswas-Diener, "Will Money Increase Subjective Well-Being: A Literature Review and Guide to Needed Research", 57 *Soc. Indicators Res.* 119 (2002). The one major exception is that people living in poverty tend to be less happy as a result. Above the poverty line, money correlates only very weakly with subjective well-being.

² Diener, Ed et al., "The Relationship between Income and Subjective Well-Being: Relative or Absolute?" 28 *Soc. Indicators Res.* 195 (1993).

³ *Id.* at 209. Other studies have found positive but very weak correlations between happiness and income.

not anticipated,⁴ fines presumably inflict less harm than is expected by either criminals or policymakers. Increasing the amount of a fine thus may not meaningfully increase the degree of harm imposed.

The effects of adaptation on imprisonment are more complicated. Inmates do adapt to being in prison in much the same way that people adapt to disabilities,⁵ so lengthening a prison term does not increase the harm imposed by as large an amount as is expected.⁶ However, spending any time in prison has negative effects on life after prison that are not similarly mitigated by adaptation. Released inmates are more likely to be unemployed than they were before going to prison,⁷ are likely to lose social ties to family and friends,⁸ and are likely to contract a number of serious, chronic diseases.⁹ Unlike monetary losses and

⁴ See Wilson, Timothy D. & Gilbert, Daniel T., "Affective Forecasting: Knowing What to Want", 14 *Current Directions in Psychol. Sci* 131 (2005).

⁵ See Frederick, Shane & Loewenstein, George, "Hedonic Adaptation", in *Well-being: The Foundations of Hedonic Psychology* (Daniel Kahneman et al., eds. 1999), at 311-12 ("Although incarceration is *designed* to be unpleasant, most of the research on adjustment to prison life points to considerable adaptation following a difficult initial adjustment period.") For an early review of the literature, see Bukstel, Lee H. & Kilmann, Peter R., "Psychological Effects of Imprisonment on Confined Individuals", 88 *Psychol. Bull.* 469 (1980).

⁶ See, e.g., Flanagan, Timothy J., "The Pains of Long-Term Imprisonment", 20 *Brit. J. Criminology* 148 (1980); MacKenzie, Doris L. & Goodstein, Lynne, "Long-term Incarceration Impacts and Characteristics of Long-term Offenders", 12 *crim. Just. & Behav.* 395 (1985); Zamble, Edward & Porporino, Frank J., *Coping, Behaviour and Adaptation in Prison Inmates* (1988); Dhami, Mandeep K. et al., "Adaptation to Imprisonment: Indigenous or Imported?" 34 *Crim. Just. & Behav.* 1085 (2007).

⁷ See, e.g., Western, Bruce et al., "The Labor Market Consequences of Incarceration", 47 *Crime & Delinquency* 410 (2000); Kling, Jeffrey R., "Incarceration Length, Employment, and Earnings", 96 *Am. Econ. Rev.* 863 (2006); See also Pager, Devah, *Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration*, (2007).

⁸ See, e.g., Huebner, Beth M., "The Effect of Incarceration on Marriage and Work over the Life Course", 22 *JUST. Q.* 281 (2005).

⁹ See, e.g., Schnittker, Jason & John, Andrea, "Enduring Stigma: The Long-Term Effects of Incarceration on Health", 48 *J. Health & Soc. Behav.* 115, 117 (2007); Massoglia, Michael, "Incarceration as Exposure: The Prison, Infectious Disease, and Other Stress-Related Illnesses", 49 *J. Health & Soc. Behav.* 56 (2008).

incarceration itself, unemployment and loss of social ties create persistent decreases in happiness that are not adaptable.¹⁰ Even a short prison term, therefore, has severe negative effects on happiness that may persist long after the inmate has been released.

These findings curtail our ability to make a punishment more or less severe by adjusting the size of a fine or the length of a prison term. Larger fines may well fail to inflict a meaningfully larger degree of harm than do smaller fines. And although longer prison sentences are presumably worse for the offender than shorter ones, they seem not to be as much worse as is believed: Our capacity to adapt to some things but not to others makes being in prison less bad, and being released from prison less good, than we expect.

The penal system relies principally on adjustments in the size of fines and the length of prison sentences to tailor punishments to crimes. And all major theories of criminal punishment consider some sort of proportional tailoring to be necessary. A standard utilitarian approach, for example, is to impose the least amount of punishment necessary to achieve a desired level of deterrence.¹¹ Imposing greater punishment than that would decrease utility both by harming the criminal more and by passing along to taxpayers the cost of, for example, keeping an inmate incarcerated. In addition, if prison is less painful than expected but post-prison life is worse, the punitive distinction between varying sentence lengths begins to diminish: a ten-year sentence is not nearly five times worse than a two-year sentence. This can greatly complicate efforts to achieve marginal deterrence by punishing worse crimes more harshly than minor crimes. More generally, if our primary means of adjusting the severity of punishment is less effective than it is thought

¹⁰ See, e.g., Lucas, Richard A. et al., "Unemployment Alters the Set Point for Life Satisfaction", 15 *Psychol Sci.* 8, 11 (2004); Frederick & Loewenstein, *supra* note 5, at 314-15.

¹¹ See Frase, Richard S., "Punishment Purposes", 58 *Stan. L. Rev.* 67, 68 (2005) (explaining that most modern systems set punishment "not only [by reference to] traditional crime-control purposes such as deterrence, incapacitation, and rehabilitation, but also a concept known as parsimony—a preference for the least severe alternative that will achieve the purposes of the sentence").

to be, that restricts our ability to meet the goals of utilitarian punishment theory.

Retributive punishment theory also relies on proportionality. It demands that only the guilty may be punished, that excessive punishment of the guilty is tantamount to punishment of the innocent, and that more serious crimes deserve and require more severe punishments than less serious crimes.¹² These demands, like the goals of utilitarian theories, are rendered more difficult to meet if we are less capable than expected of adjusting the severity of punishments by the traditional means of changing the size of fines and the length of incarcerations.

The foregoing discussion has associated the severity of punishment with the amount of harm imposed on an offender.¹³ Although harm is not the only way to measure the severity of a punishment, it is at the very least an important consideration. If we were insensitive to the harm imposed on offenders, then we would be less troubled by torture or by punishments whose severity seems radically out of step with that of the crime (e.g., life imprisonment for loitering). So long as we do care about the suffering visited upon offenders by punishment, we must take account of the unanticipated effects on that suffering of hedonic adaptation.

¹² See, e.g., Moore, Michael, *Placing Blame: A General Theory of the Criminal Law* 88 (1997) (“[R]etributivists at some point have to answer the ‘how much’ and ‘what type’ questions for punishments of specific offences and they are committed to the principle that punishment should be graded in proportion to desert . . .”).

¹³ See Kolber, Adam, “The Subjective Experience of Punishment”, *Colum L. Rev.* (forthcoming 2009), available at <http://ssrn.com/abstract=1090337>, at 5 (“[A] successful theory of punishment must take account of offenders’ subjective experiences when assessing punishment severity.”).