

# ESSAY

## THE SUBJECTIVE EXPERIENCE OF PUNISHMENT

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*Suppose two people commit the same crime and are sentenced to equal terms in the same prison facility. I argue that they have identical punishments in name only. One may experience incarceration as challenging but tolerable while the other is thoroughly tormented by it. Even though people vary substantially in their experiences of punishment, our sentencing laws pay little attention to such differences.*

*I make two central claims: First, a successful justification of punishment must take account of offenders' subjective experiences when assessing punishment severity. Second, we have certain obligations to consider actual or anticipated punishment experience at sentencing, at least when we can do so in a cost-effective, administrable manner. Though it may seem impossible or prohibitively expensive to take punishment experience into account, we should not accept this excuse too quickly. In civil litigation, we often make assessments of emotional distress. Even if we cannot calibrate the punishments of individual offenders, we could enact broad policies that are better at taking punishment experience into account than those we have now.*

*I do not argue that more sensitive offenders should receive shorter prison sentences than less sensitive offenders who commit crimes of equal blameworthiness. I do, however, argue that when they are given equal prison terms, more sensitive offenders receive harsher punishments than less sensitive offenders and that it is a mistake to believe that both kinds of offenders receive punishments proportional to their desert.*

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#### INTRODUCTION

Suppose that Sensitive and Insensitive commit the same crime under the same circumstances. They are both convicted and sentenced to spend four years in identical prison facilities. In fact, their lives are alike in all pertinent respects, except that Sensitive is tormented by prison life and lives in a constant state of fear and distress, while Insensitive, living under the same conditions, finds prison life merely difficult and unpleasant. Though Sensitive and Insensitive have sentences that are identical in name—four years of incarceration—and the circumstances surrounding their punishments appear identical to a casual observer, their punishment experiences are quite different in severity.

Many theorists provide a retributive justification for punishment, claiming that offenders deserve to suffer for their crimes. They typically also believe that an offender's suffering should be proportional to the seriousness of his offense. Hence, murderers should be punished more than thieves, who should be punished more than jaywalkers. Sensitive and Insensitive, however, have committed crimes of equal seriousness, and, on this view, should suffer the same amount. Thus, most retributivists are committed to the perhaps surprising outcome that we ought to take account of the differences in the punishment experiences of people like Sensitive and Insensitive.

Many consequentialist punishment theorists believe that we should punish in order to deter crime, incapacitate offenders, and rehabilitate criminals. They do not seek to maximize punishment because punishment itself has negative consequences. Among those negative conse-

quences, many consequentialists directly incorporate offenders' negative subjective experiences into their assessments of the societal costs of punishment. More generally, for reasons that I will explain, consequentialists cannot optimize their deterrence strategies without taking account of people's anticipated subjective experiences. Therefore, consequentialists are also committed to the view that we ought to take punishment experience into account.

I will defend two central claims. The first claim is that subjective experience matters. Ordinarily, one should not knowingly or intentionally inflict distress on a person without some justification for doing so. This is particularly true of the serious sorts of distress that characterize typical punishments. For a purported justification of punishment to be successful, it must take account of offenders' negative subjective experiences or else be vulnerable to the charge that it fails to justify the full magnitude of the punishments we impose. While some theorists purport to hold objective accounts of punishment that ignore offenders' subjective experiences, such theories are doomed to fail. By ignoring subjective experience, they cannot justify the amount of distress that punishment inflicts on offenders, and so they cannot justify punishment more generally.

Despite the seriousness of this critique, punishment theorists have largely ignored questions about how we should assess punishment severity and whether the hard treatment of punishment should ultimately be understood in objective terms (e.g., as a deprivation of liberty) or subjective terms (e.g., as certain kinds of physical or emotional distress) or as some combination of both of these. This is so, even though Jeremy Bentham staked out a clear subjective position more than two hundred years ago. According to Bentham,

[O]wing to the different manners and degrees in which persons under different circumstances are affected by the same exciting cause, a punishment which is the same in name will not always either really produce, or even so much as appear to others to produce, in two different persons the same degree of pain.<sup>1</sup>

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1. Jeremy Bentham, *The Principles of Morals and Legislation* 182 (Prometheus Books 1988) (1789); cf. Immanuel Kant, *Metaphysical Elements of Justice* 139 (John Ladd trans., Hackett Publ'g Co., 2d ed. 1999) (1797) (stating that proportional punishment can be achieved "if regard is had to the special sensibilities of the higher classes"). Before 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., Richard Davies trans., Cambridge Univ. Press 1995) (1764) (arguing that "the measure of punishment is not the sensitivity of the criminal, but the harm done to the public").

Modern writers have generally made only brief reference to the problem. See, e.g., Leo Katz, *Ill-Gotten Gains: Evasion, Blackmail, Fraud, and Kindred Puzzles of the Law* 155–56 (1996); Nigel Walker, *Why Punish?* 99–105 (1991); Douglas N. Husak, *Already Punished Enough*, 18 *Phil. Topics* 79, 82 (1990) [hereinafter Husak, *Already*]; Mary Sigler, *Just Deserts, Prison Rape, and the Pleasing Fiction of Guideline Sentencing*, 38 *Ariz. St. L.J.* 561, 576–77 (2006); Andrew von Hirsch et al., *Punishments in the Community and the*

My second central claim is that we have certain obligations to take subjective experience into account when sentencing or when establishing sentencing policies. Given the uses to which most punishment theories put the concept of punishment severity, these theories imply that we are obligated to subjectively calibrate punishment, at least when we can do so in a cost-effective, administrable manner.

Though people vary substantially in their experiences of punishment,<sup>2</sup> our sentencing laws pay little attention to such differences. While judges may surreptitiously calibrate sentences based on their expectations of offenders' punishment experiences, if they do, their analysis is usually hidden from the public eye where it cannot be challenged on appellate review. There is, therefore, a disconnect between the way that we ought to understand punishment severity and the way that we typically assess punishment severity for sentencing purposes. While determinate sentencing systems have long limited judges' opportunities to consider characteristics of offenders that are likely to affect their future punishment experiences, the disconnect is worth reevaluating now that recent United States Supreme Court decisions have increased judges' sentencing discretion.<sup>3</sup>

The nature of the obligation to calibrate will vary from theory to theory, and so the costs and other complexities of calibrating punishments may relieve us of an obligation to calibrate the punishments of individual offenders. Importantly, however, we cannot easily excuse ourselves from the obligation to take account of punishment experience by appeal to costs and administrative complications. With one out of every one hun-

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Principles of Desert, 20 Rutgers L.J. 595, 607–08 (1989). More detailed discussion is provided especially by Jesper Ryberg, *The Ethics of Proportionate Punishment* 102–09 (2004), as well as by Norval Morris & Michael Tonry, *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System* 93–108 (1990); Andrew Ashworth & Elaine Player, *Sentencing, Equal Treatment, and the Impact of Sanctions*, in *Fundamentals of Sentencing Theory* 251, 251–61 (Andrew Ashworth & Martin Wasik eds., 1998); and Christine Piper, *Should Impact Constitute Mitigation?: Structured Discretion Versus Mercy*, 2007 *Crim. L. Rev.* 141, 142–47.

2. See, e.g., Kenneth Adams, *Adjusting to Prison Life*, 16 *Crime & Just.* 275, 282–90 (1992) (identifying substantial variation in prisoner coping styles and abilities); Lee H. Bukstel & Peter R. Kilmann, *Psychological Effects of Imprisonment on Confined Individuals*, 88 *Psychol. Bull.* 469, 487 (1980) (“[E]ach individual who experiences prolonged confinement reacts to this situation in an idiosyncratic manner: Some individuals show deterioration . . . , others show improved functioning, whereas others show no appreciable change.”). In cases of long-term confinement, however, inmates may gradually revert to their baseline affective states. See *infra* notes 119–123 and accompanying text.

3. See *United States v. Booker*, 543 U.S. 220, 226–27, 245–46 (2005) (holding that United States Sentencing Guidelines are advisory and cannot constitutionally bind sentencing judges). For useful background on the *Booker* line of cases, see Douglas A. Berman, *Rita*, Reasoned Sentencing, and Resistance to Change, 85 *Denv. U. L. Rev.* 7 (2007).

dred adults in the United States behind bars,<sup>4</sup> modestly inaccurate punishment of every defendant amounts to massively inaccurate punishment overall.

While we cannot perfectly calibrate punishments, in some areas of the law, personal injury cases for example, we do make individualized assessments of experiences like pain and emotional distress. New technologies will make the calibration process progressively more precise and better at detecting cheaters. Even if we are currently unable to make accurate individual calibrations, we can surely craft broad policies that are more subjectively sensitive than those we have now. To the extent that we fail to take account of punishment experience for financial or technological reasons, we should at least acknowledge these reasons, rather than pretending that punishment experience truly is irrelevant to punishment severity.

If I defend my claims successfully, consequentialists will emerge relatively unscathed. When engaging in cost-benefit analysis, consequentialists must take account of the distress that offenders experience, but they have no general commitment to proportionally punish each offender, and so they need not fine-tune individual sentences if doing so figures unfavorably into an all-things-considered cost-benefit analysis. Consequentialists can simply develop general sentencing policies that seek to impose only as much experiential distress as is required to achieve the best consequences overall.

By contrast, I will leave many retributivists in an unappealing position. Retributivists who fail to consider variation in offenders' actual or anticipated experiences of punishment are not measuring punishment severity properly and are therefore punishing disproportionately. Thus, retributivists must either try to individually calibrate offenders' sentences or give up, to some extent, on the goal of proportional punishment. They retreat from proportionality at substantial cost, however. Retributivists who are willing to trade off proportionality for other social goods have weakened their ability to distinguish themselves on principled grounds from consequentialists. Retributive theories of punishment are often claimed to be superior to consequentialist theories on the ground that consequentialist theories permit the possibility that innocent people should, in very unusual cases, be punished. Yet, retributivists are in no better position if they permit the possibility of knowingly or intentionally punishing a person in excess of his deserved punishment. Such retributivists are willing to punish a person who no longer deserves to be pun-

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4. Pew Ctr. on the States, *One in 100: Behind Bars in America 2008*, at 3 (2008), available at <http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf> (on file with the *Columbia Law Review*); see also Solomon Moore, *Justice Dept. Data Show Prison Increases*, N.Y. Times, Dec. 6, 2007, at A26 (reporting Department of Justice data showing that, in 2006, "[a]n estimated 2.38 million people were incarcerated in state and federal facilities"); Sam Roberts, *College Dwellers Outnumber the Imprisoned*, N.Y. Times, Sept. 27, 2007, at A29 (finding that more than two million Americans live in prison).

ished. Whether retributivists decide to better calibrate punishments or to give up on a common notion of proportionality, they must take seriously the fact that offenders vary in their subjective experiences of punishment or else they are left with flawed theories, flawed practices, or both.

In Part I, I show how our punishment practices largely ignore variation in prisoners' punishment experiences. When judges do recognize punishment disparities, their discussion is almost always presented in terms of objective differences in punishment conditions. In Part II, I defend my central claims that: (1) Subjective experience matters, and (2) under prevailing versions of retributivist and consequentialist theories of punishment, we are obligated to take account of punishment experience when sentencing or when crafting sentencing policies. In particular, I argue that punishment severity cannot be understood solely in terms of liberty deprivations that make no reference to offenders' punishment experiences.

Finally, in Part III, I respond to several broad policy concerns, including claims that taking punishment experience into account: (1) is impossible or too costly, (2) violates mental privacy, (3) fails to give offenders adequate notice of their punishments, and (4) leads to unjust wealth discrimination. I do *not* argue that more sensitive (often wealthier) offenders should receive shorter prison sentences than less sensitive (often poorer) offenders who commit crimes of equal seriousness. There may be good policy reasons for sentencing them to equal prison terms. What I do argue is that, when they are given equal prison terms, more sensitive offenders receive harsher punishments than less sensitive offenders and that it is a mistake to believe that both kinds of offenders receive punishments proportional to their desert.

### I. OUR OBJECTIVE PUNISHMENT PRACTICES

In this Part, I argue that our sentencing practices largely ignore variations in the severity of punishments that have identical names. For example, one prisoner may have a small cell and find prison unbearable, while another might have a large cell and find prison tolerable. Both offenders have punishments of "imprisonment," but the severity of their punishments varies considerably. While we sometimes accommodate objectively identifiable variations in punishment (e.g., different prison cell sizes), we are less willing to recognize variations in the experience of a punishment (e.g., the amount of distress caused by confinement in a cell of a particular size).<sup>5</sup>

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5. I argue that we must consider certain experiences of punishment when assessing punishment severity, but I take no particular stand on which mental states we should treat as disvaluable. Disvaluable mental states might include sadness, anxiousness, and boredom, as well as more complicated mental states involving unsatisfied preferences or negative evaluations of other mental states, even when such mental states are not traditionally thought of as experiences. For discussion of some of the relevant

A. *Objective Punishment Variation: The Intermediate Problem*

Offenders can be sentenced to punishments that are identical in name but that differ substantially in their severity. Some such punishments differ in objective, easily observable ways that need not make reference to the experience of the punishment. Consider, for example, the fanciful punishment of “truncation.”<sup>6</sup> People sentenced to truncation are forced to stand upright while the sharp end of a blade speeds horizontally toward them at a height of precisely six feet above the ground. Those shorter than six feet merely feel the passing breeze of a blade above their heads. Those about six feet tall receive a very imprecise haircut. Those much above six feet tall are decapitated. Each person sentenced to truncation receives the same punishment in name: They are all “truncated.” Yet, in the most important ways, truncation punishments differ in severity, and they differ based on an arbitrary characteristic, namely the offender’s height.

As with truncation, incarcerative punishments also vary substantially, and they vary in many ways aside from just their duration.<sup>7</sup> One inmate may be sent to a facility that has large, individual prison cells with windows, while another is sent to a facility with small, shared cells with no natural light. Some prisons have higher rates of physical and sexual violence than others. Such variations in conditions reflect objectively observable features of punishment. We need not carefully assess the psychological states of those who are truncated to realize that they can receive very unequal punishments. There is similarly no debating that a prisoner with a dark, tiny cell and no outside sources of stimulation has a more severe punishment than a prisoner with a well-lit, spacious cell and an internet connection.

These inequities in treatment raise an intermediate problem about punishment variation. Namely, there is a great deal of variation in easily observable, objective features of our punishments that are largely ignored at sentencing. In particular, our sentencing provisions pay fetishistic attention to the duration of terms of incarceration while largely ignoring the many other ways that prison sentences vary.

Nevertheless, courts sometimes accommodate objective differences in prisoners’ likely conditions of confinement. In *United States v. Blarek*, for example, the defendants were, in the court’s words, “two talented decorators whose desires to rise in the ranks of their profession while having access to unlimited funding for their creative endeavors induced them to become the facilitators, through money washing, of a ruthless and notorious Colombian drug cartel’s operations.”<sup>8</sup> The defendants sought a

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complexities, see Mark Kelman, *Hedonic Psychology and the Ambiguities of “Welfare,”* 33 *Phil. & Pub. Aff.* 391, 398–411 (2005).

6. The truncation method of punishment was suggested to me by Adam Elga.

7. See Morris & Tonry, *supra* note 1, at 94–95.

8. 7 F. Supp. 2d 192, 195 (E.D.N.Y. 1998), *aff’d*, 166 F.3d 1202 (2d Cir. 1998).

downward departure from sentencing guidelines on a number of grounds, one of which was that they were more likely to be assaulted in prison because they were “homosexual lovers in a case that has been broadly publicized.”<sup>9</sup> They were, therefore, more “vulnerab[le]” than other prisoners and more likely to be removed from the general prison population for safety reasons. According to the court, “[t]his would amount to a sentence of almost solitary confinement, a penalty more difficult to endure than any ordinary incarceration.”<sup>10</sup> Notably, the court was willing to recognize that certain easily observable features of the defendants’ confinement left them in objectively more severe conditions than most others. They were more likely to be assaulted and more likely to be placed in particularly austere prison conditions.<sup>11</sup>

### B. *Subjective Punishment Variation: The Deep Problem*

My central focus, however, is not on this intermediate problem, as most people would agree that two prisoners who commit the same crime but are sent to radically different prison facilities are, indeed, treated unequally. Such prisoners differ both in their objective conditions of confinement as well as their subjective experiences of their circumstances. Likewise, those who are sentenced to truncation clearly receive unequal punishments, whether punishment is understood in objective or subjective terms.

My central concern is with what I take to be a deeper, more controversial problem of punishment variation. Namely, punishments vary in their severity based on the subjective experience of even those punishments that appear identical to a casual observer.<sup>12</sup> So, for example, even if the defendants in *Blarek* were confined in the same conditions as the general prison population and had the same risk of being assaulted, as interior designers who seem to care quite a bit about their aesthetic surroundings, it is plausible that they would have more difficulty coping in

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9. *Id.* at 211.

10. *Id.*

11. Sentencing courts may depart downward to address circumstances “of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission.” 18 U.S.C. § 3553(b) (2000). On this basis, a number of courts, like the court in *Blarek*, have permitted downward departures for offenders particularly vulnerable to abuse in prison. See, e.g., *United States v. Wilke*, 156 F.3d 749, 752 (7th Cir. 1998) (noting district court’s decision to depart downward where possessor of child pornography claimed heightened vulnerability to abuse); *United States v. Graham*, 83 F.3d 1466, 1481 (D.C. Cir. 1996) (permitting extreme vulnerability to assault as ground for departure but noting that “a defendant’s vulnerability must be so extreme as to substantially affect the severity of confinement, such as where only solitary confinement can protect the defendant from abuse”); *United States v. Lara*, 905 F.2d 599, 601, 605 (2d Cir. 1990) (affirming downward departure based on defendant’s likelihood of victimization given his “diminutive size, immature appearance and bisexual orientation”); see also Sigler, *supra* note 1, at 570–78 (arguing against sentence reductions based on prisoner vulnerability).

12. See, e.g., *Morris & Tonry*, *supra* note 1, at 94 (noting that “two three-year prison sentences may, both objectively and subjectively, be very different”).

prison than most others. Such differences are generally not accommodated in the criminal justice system, at least not in any formal way that is open to public scrutiny.

An imaginary punishment called “dieting” illustrates how objectively identical punishments can vary in their experiential consequences. Those sentenced to dieting are prohibited from eating more than 1,000 calories per day. In objective terms, where we ignore the experience of the punishment, dieting is the same for everyone. In subjective terms, however, the punishment varies considerably. Some would find dieting quite tolerable, while others would find it grossly debilitating.<sup>13</sup> Those sentenced to dieting are not punished equally in a morally relevant sense, even though the objective conditions of the punishment appear identical to a casual observer. Unlike truncation, where differences in treatment are easily described in objective terms, variation in the severity of the dieting punishment is most easily explained in terms of the variation in the subjective experiences of those punished.

Claustrophobes present a compelling real-life case for taking account of punishment experience. Claustrophobia is a kind of anxiety disorder<sup>14</sup> associated with an irrational fear of enclosed spaces.<sup>15</sup> Claustrophobes experience distress, often including panic attacks, arising from fears of entrapment and suffocation.<sup>16</sup> While estimates vary, about four percent of people will develop clinical claustrophobia during their lifetimes.<sup>17</sup> Symptoms are often triggered by a wide variety of enclosed spaces, such as “[s]mall or locked rooms, tunnels, cellars, elevators, subway trains, and crowded places.”<sup>18</sup>

The public seems to have a mixed reaction to the idea that we should take account of extreme sensitivity to confinement caused by claustrophobia. In 1933, Thomas Parker, an unemployed former British soldier, was caught sleeping on a highway and sent to jail.<sup>19</sup> Parker was so disturbed by being in jail that he “fell into a frenzy” and was ordered to enter solitary confinement. As he was being transported to what was called the “silence cell,” he frantically struggled with two guards and somehow injured himself; he died soon afterwards.<sup>20</sup> Though the prison physician

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13. Cf. Aristotle, *Nicomachean Ethics*, bk. II, ch. 6, §§ 7–8, at 24 (Terence Irwin trans., Hackett Publ’g Co., 2d ed. 1999) (n.d.) (recognizing that what constitutes healthy quantity of food is different for experienced wrestler than for novice).

14. Am. Psychiatric Ass’n, *Diagnostic and Statistical Manual of Mental Disorders* 429, 443–50 (4th ed. text rev. 2000). In particular, it is a “situational type” of specific phobia. *Id.* at 445.

15. See Adam S. Radomsky et al., *The Claustrophobia Questionnaire*, 15 *J. Anxiety Disorders* 287, 288 (2001) (describing causes and symptoms of claustrophobia).

16. *Id.*

17. Lars-Goran Ost, *The Claustrophobia Scale: A Psychometric Evaluation*, 45 *Behav. Res. & Therapy* 1053, 1053–54 (2004).

18. Radomsky et al., *supra* note 15, at 288.

19. *Claustrophobia*, *Time*, Aug. 14, 1933, at 30, 30.

20. *Id.*

declared that Parker had been of sound mind and body, Brigadier-General Edward Louis Spears “spoke the shocked opinion of many an Englishman when he uprose in Parliament to berate the prison [warden].”<sup>21</sup> He declared that “Thomas Parker had unquestionably suffered from claustrophobia, the fear of confined places.”<sup>22</sup> The General’s comment seems to imply that Parker’s claustrophobia was a disabling condition for which Parker deserved special treatment.

More recently, Paris Hilton, wealthy socialite and television personality, was sentenced to forty-five days in jail for violating her probation associated with an earlier no-contest plea to alcohol-related reckless driving.<sup>23</sup> A friend of Hilton’s said that when Hilton is in jail, she “can’t breathe, her heart races and she feels like she’s going to pass out.”<sup>24</sup> After a few days in jail, the Los Angeles County Sheriff reassigned Hilton to home confinement due to an undisclosed medical condition (later purported to be claustrophobia).<sup>25</sup> The sentencing judge was dismayed by this turn of events, believing that her release violated the terms of her sentence, which specifically provided that she not be granted work release or home electronic monitoring.<sup>26</sup> Hilton was taken back into custody, where she was briefly placed in a medical facility before returning to the jail where she was previously incarcerated.<sup>27</sup>

Thomas Parker and Paris Hilton are real-life versions of Sensitive. Both Parker and Hilton received short sentences of incarceration, yet the facts suggest that they experienced their sentences as practically unbearable. Parker, due to his claustrophobia, and Hilton, due to claustrophobia or the fact that she was accustomed to living in luxurious surroundings, experienced confinement in a much more frightened and tormented way than would the average person; or so it appears.<sup>28</sup>

21. Id.

22. Id.

23. Lawrence Van Gelder, Probation and Fines for Paris Hilton, *N.Y. Times*, Jan. 23, 2007, at E2; Sharon Waxman, Celebrity Justice Cuts Both Ways for Paris Hilton, *N.Y. Times*, June 9, 2007, at A1.

24. Tina Dirmann, Closet Case?, *The Hum Blog, E! Online*, June 9, 2007, at <http://www.eonline.com/gossip/hum/detail/index.jsp?uuiid=71adcb92-4731-4b0d-9889-4158655ec581> (on file with the *Columbia Law Review*).

25. Susie Boniface, Paris Illness Is Claustrophobia, *Sunday Mirror* (London), June 10, 2007, at 3, available at [http://www.mirror.co.uk/sunday-mirror/tm\\_headline=paris-illness-is-claustrophobia&method=full&objectid=19273224&siteid=98487-name\\_page.html](http://www.mirror.co.uk/sunday-mirror/tm_headline=paris-illness-is-claustrophobia&method=full&objectid=19273224&siteid=98487-name_page.html) (on file with the *Columbia Law Review*); William Booth, Sheriff Releases Paris Hilton . . . For Now Anyhow, *Wash. Post*, June 8, 2007, at C1.

26. Associated Press, Prosecutor, Judge Object to Hilton’s Early Release, *USATODAY.com*, June 7, 2007, at [http://www.usatoday.com/life/people/2007-06-07-paris-prosecutor\\_N.htm](http://www.usatoday.com/life/people/2007-06-07-paris-prosecutor_N.htm) (on file with the *Columbia Law Review*).

27. Scott Michels, Hilton Transferred from Jail Medical Ward, *ABC News*, June 14, 2007, at <http://abcnews.go.com/TheLaw/story?id=3278824> (on file with the *Columbia Law Review*).

28. I discuss the relationship between punishment sensitivity and wealth in more detail infra Part III.D.

Only rarely are courts sympathetic to claims that an offender should receive a shorter sentence due to claustrophobia. I have not found a single case where a judge has mitigated a defendant's sentence solely due to claustrophobia.<sup>29</sup> In many more cases, judges have denied defendants' requests for special treatment on grounds of claustrophobia.<sup>30</sup> Similarly, given the limited resources available for prisoner mental health treatment, prison bureaucrats are likely very hesitant to provide claustrophobes with special accommodations for any length of time.<sup>31</sup>

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29. In *United States v. LiButti*, however, a federal district court judge departed downward from established federal sentencing guidelines due to a variety of factors, one of which was the defendant's claustrophobia. Crim. No. 92-611, 1994 WL 774647, at \*1 (D.N.J. Dec. 23, 1994). Also, in *United States v. Farley*, a former air force officer was convicted of "a single wrongful use of marijuana," and requested a noncustodial sentence because of her documented history of claustrophobia. No. ACM S28899, 1995 WL 261943, at \*1 (A.F. Ct. Crim. App. Apr. 26, 1995). She did, in fact, receive a noncustodial sentence, though it is not clear whether it was granted because of her claustrophobia or for other reasons, like her acceptance of responsibility or her expressions of regret. See id.

30. In *Goetsch v. Berge*, for example, Goetsch challenged the conditions of his confinement under § 1983 and the Eighth Amendment, claiming that prison officials failed to adequately address his claustrophobia. 3 F. App'x 551, 552 (7th Cir. 2001) (nonprecedential). To make out the Eighth Amendment claim, he had to allege: (1) "that there was an objectively serious danger that posed a substantial risk of serious harm to his health or safety" and (2) "that the prison officials were deliberately indifferent to the risk." Id. at 553. The court doubted that his claustrophobia satisfied the first requirement. Importantly, the court stated:

Goetsch has not cited, and we could not find, any cases holding that placing an individual with claustrophobia in such a cell creates an objectively serious danger, and given that confinement of prisoners in cells of limited size is inherent in imprisonment, we are hesitant to make such a finding outside of an extreme case.

Id. More decisively, however, Goetsch failed to satisfy the second prong, which requires a showing that prison officials were deliberately indifferent to the risk posed by his circumstances:

Goetsch needed to allege recklessness on the part of the defendants, not mere negligence or poor judgment. . . . Goetsch asserted merely that he told [a prison crisis worker and a prison doctor] that he was suffering from feelings of claustrophobia and that he wanted to be moved to a bigger cell. He does not allege that he told these defendants that he was clinically diagnosed with claustrophobia, nor that he complained to either of the defendants more than once.

Id. The court also denied his claim because a prison doctor ordered that a window in Goetsch's cell be opened, a step which helped to ameliorate his condition. Id. at 552; see also *United States v. Kwong*, 877 F. Supp. 96, 103 (E.D.N.Y. 1995) (stating that even if court accepted defendant's claim that his claustrophobia would recur, "no reason has been given by the defendant to indicate why this condition should be considered extraordinary" enough to warrant downward departure from sentencing guidelines); *State v. Guiendon*, 273 A.2d 790, 791-92 (N.J. Super. Ct. App. Div. 1971) (denying defendant's claim that ninety days imprisonment was cruel and unusual punishment in light of his asserted claustrophobia because court doubted veracity of his assertion).

31. According to Federal Bureau of Prisons policy, "[t]o ensure *consistent treatment* throughout the system, each institution shall develop a comprehensive approach for managing mentally ill inmates which emphasizes the management of these cases in a regular correctional setting, rather than in a hospitalized setting, as the preferred treatment strategy whenever and wherever feasible." Fed. Bureau of Prisons, U.S. Dep't of

Though we may on rare occasions calibrate the punishment of bona fide claustrophobes, we do not calibrate the treatment of those with symptoms that fall just short of the clinical requirements for the disorder, even though the distress of confinement in small spaces surely extends along a spectrum.

The highly influential United States Sentencing Guidelines Manual (USSG) specifically advises judges not to depart downward from the guidelines based on a number of factors that likely correlate with offenders' experiences in prison. For example, the very process of calibrating punishment with subjective experience seems to be discouraged by a USSG policy which states that unless mental or emotional conditions affect offenders' culpability, they "are not ordinarily relevant in determining whether a departure is warranted."<sup>32</sup> This policy discourages the use of all sorts of data about an offender's likely experience of punishment to justify a downward departure. Similarly, though particularly small or meek offenders may feel more frightened in prison, "[p]hysical condition or appearance, including physique, is not ordinarily relevant in determining whether a departure may be warranted."<sup>33</sup> Moreover, although the

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Justice, P.S. 5310.13, Institution Management of Mentally Ill Inmates § 6, at 3 (1995), available at [http://www.bop.gov/policy/progstat/5310\\_013.pdf](http://www.bop.gov/policy/progstat/5310_013.pdf) (on file with the *Columbia Law Review*) (emphasis added). Apparently, the Bureau construes the "consistent treatment" requirement in objective rather than subjective terms.

32. U.S. Sentencing Guidelines Manual § 5H1.3 (2007) ("Mental and emotional conditions are not ordinarily relevant in determining whether a departure is warranted, except as provided in Chapter Five, Part K, Subpart 2 (Other Grounds for Departure)."). The other ground for departure most likely to relate to mental and emotional conditions is for a "diminished capacity" that "contributed substantially to the commission of the offense." *Id.* § 5K2.13.

33. *Id.* § 5H1.4; see also *United States v. Johnson*, 318 F.3d 821, 826 (8th Cir. 2003) (reversing district court's decision to depart downward on basis of defendant's coronary condition); *United States v. Rabins*, 63 F.3d 721, 728–29 (8th Cir. 1995) (holding that even if defendant were eligible for downward departure for extraordinary physical impairment, it was not clearly erroneous for district court to determine that defendant's HIV-positive status failed to qualify). However, the Guidelines note that "an extraordinary physical impairment may be a reason to depart downward; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment." U.S. Sentencing Guidelines Manual § 5H1.4. While courts sometimes discuss this exception to the general rule in terms of the "hardship" presented by a physical impairment, e.g., *Rabins*, 63 F.3d at 729, courts often do their best to objectivize the requirement by focusing on medical resources available in prison and the effect of incarceration on the inmate's lifespan, see, e.g., *United States v. Krilich*, 257 F.3d 689, 693 (7th Cir. 2001) ("An ailment also might usefully be called 'extraordinary' if it is substantially more dangerous for prisoners than non-prisoners. Then imprisonment would shorten the defendant's life span, making a given term a more harsh punishment than the same term for a healthy person."); *United States v. Albarran*, 233 F.3d 972, 979 (7th Cir. 2000) ("[W]hen considering a departure based upon a physical impairment [the district court] 'must ascertain, through competent medical testimony, that the defendant needs constant medical care, or that the care he does need will not be available to him should he be incarcerated.'" (quoting *United States v. Sherman*, 53 F.3d 782, 787 (7th Cir. 1995))).

suffering an offender experiences in prison likely varies with age,<sup>34</sup> “[a]ge (including youth) is not ordinarily relevant in determining whether a departure is warranted.”<sup>35</sup>

Of course, defendants may still present evidence that prison will be uniquely difficult for them.<sup>36</sup> And even if judges are loathe to accept such arguments explicitly, they may surreptitiously calibrate punishments

34. Elaine Crawley & Richard Sparks, *Older Men in Prison: Survival, Coping, and Identity*, in *The Effects of Imprisonment* 343, 346–47 (Alison Lieblich & Shadd Maruna eds., 2005) (stating that for older prisoners who are unfamiliar with prison culture, “the prison sentence represents nothing short of a disaster, a catastrophe, and, in consequence, they are often in a psychological state of trauma”).

35. U.S. Sentencing Guidelines Manual § 5H1.1. However, “[a]ge may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration.” *Id.* In *United States v. Bergman*, the court stated that the “[d]efendant is 64 years old and in imperfect health, though by no means so ill, from what the court is told, that he could be expected to suffer inordinately more than many others of advanced years who go to prison.” 416 F. Supp. 496, 501 (S.D.N.Y. 1976). The court did not explain why the defendant’s suffering should be compared to the suffering of others of advanced years, nor why his comparative suffering needs to be “inordinately” greater for it to be considered.

36. Consider, for example, the case of the so-called “30-year-old virgin.” Douglas Berman, *Judge Posner and Sentencing the 30-Year-Old Virgin*, *Sentencing Law & Policy Blog*, Jan. 10, 2008, at [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2008/week2/index.html](http://sentencing.typepad.com/sentencing_law_and_policy/2008/week2/index.html) (on file with the *Columbia Law Review*). In that case, *United States v. McIlrath*, 512 F.3d 421 (7th Cir. 2008), the defendant was convicted of traveling across state lines to have sex with a minor (actually a police detective pretending to be a fifteen-year-old girl). Evidence was also presented that the defendant had, on another occasion, “persuaded a twelve-year-old girl to agree to have sex with him, although apparently they never did.” *Id.* at 422. The defendant’s forty-six-month prison sentence was at the bottom of the applicable guideline range, but the defendant claimed it should have been lower still. *Id.*

Notably, a forensic psychologist “opined that prison would be devastating for the defendant; he ‘would have almost no resources for coping with prison life’ and would be a ‘target for predators.’” *Id.* Some of the evidence for the claim that the defendant had poor coping skills seems to have been that the thirty-one-year-old “was a loner who had not had sex until the previous year, with a woman who then rejected him, breaking his heart and (he claimed) precipitating the incidents with the twelve-year-old and (supposed) fifteen-year-old girl.” *Id.*

Nevertheless, the sentencing judge refused to reduce the sentence, and the Seventh Circuit affirmed. *Id.* at 426–27. Judge Richard Posner, writing for the panel, acknowledged that “[t]he defendant’s history and characteristics were relevant in possibly suggesting both that imprisonment would be a more severe punishment for him than for the average Internet sexual predator.” *Id.* at 423–24. However, he added, “As far as we know or the defendant’s lawyer or psychologist attempted to show, the average man who trolls for young girls in Internet chat rooms is no better adjusted than the defendant.” *Id.* at 424. Furthermore, the court noted:

The guidelines sentencing ranges are designed with reference to the average offender in each crime category to which a given range applies. So if a particular defendant is average, his case for a sentence below the range is weak. As far as the record (or our independent research) discloses, the psychological characteristics of our defendant are average for Internet sexual predators.

at sentencing.<sup>37</sup> Judges typically have discretion to impose a sentence within certain boundaries, and they may consciously or unconsciously use that discretion to adjust a sentence based on the experience of punishment that they anticipate an offender will have. Yet, even if they do, we might well be troubled by the exercise of such discretion, particularly when our current regime offers no rules to guide these assessments and no record of them to subsequently present for appellate review. If judges ought to calibrate sentences, then perhaps we should make the practice more public so that advocates can challenge evidence, state actors can be held accountable, and bias can be monitored and minimized.

Even if judges already try to calibrate punishment, they have only limited ability to do so. Courts have rather limited control over the kinds of facilities to which inmates are assigned. Sentencing decisions are usually made by judges while decisions about conditions of incarceration are usually made by prison bureaucrats (under conditions that are generally less open, accountable, and reviewable than they are in the courtroom).<sup>38</sup> Judges can recommend prison assignments, but at least in the federal system, the Bureau of Prisons is under no obligation to follow their recommendations.<sup>39</sup> By giving primary responsibility for sentencing decisions to judges and primary responsibility for decisions about conditions of confinement to prison bureaucrats, we dramatically limit opportunities to calibrate punishments.<sup>40</sup> While judges can generally make good inferences at sentencing about the conditions of confinement that an of-

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Id. (citations omitted). Thus, even though this defendant failed to obtain a “high sensitivity” downward departure, the reasoning in the opinion suggests that arguments about sensitivity can be publicly made and, perhaps on other occasions, accepted.

37. In detailed interviews of over fifty federal judges from the 1980s, many judges expressed the belief that indictment and incarceration have differentially severe impact on white collar criminals. See Stanton Wheeler et al., *Sitting in Judgment: The Sentencing of White Collar Criminals* 144–50 (1988) (“The consensus among judges is that the suffering inflicted by the criminal process is an important factor in the sentencing calculation . . .”). Often the differences were expressed in objective terms (e.g., the white collar criminal can no longer practice his former profession), while other times differences were expressed in more subjective terms (e.g., the white collar criminal is likely to experience higher levels of shame). *Id.* at 146–50. Given the increasing severity of white collar criminal punishments in recent years, one suspects that judges today would be less likely to mitigate punishment based on such sensitivities. See Ellen Podgor, *The Challenge of White Collar Sentencing*, 97 *J. Crim. L. & Criminology* 731, 734, 756–59 (2007) (criticizing trend toward longer sentences for white collar criminals).

38. In the federal prison system, for example, the Bureau of Prisons, not judges, makes prisoner facility assignments. See 18 U.S.C. § 3621(b) (2000) (“The Bureau of Prisons shall designate the place of the prisoner’s imprisonment.”).

39. See *id.*

40. An unusual bit of overlap between the prison system and the sentencing process is permitted by 18 U.S.C. § 3582(c)(1), which states that, under certain circumstances, the director of the Federal Bureau of Prisons can move a sentencing court to reduce a term of imprisonment that has already been imposed. See *id.* § 3582(c)(1); *United States v. Rabins*, 63 F.3d 721, 729 n.15 (8th Cir. 1995) (noting that if defendant’s illness progressed, director of Bureau of Prisons could seek sentence reduction).

fender will likely face, these inferences are sometimes wrong, and offenders bear the brunt of these mistakes.

Some jurisdictions have parole boards that are empowered to release prisoners early under certain circumstances.<sup>41</sup> As a formal matter, however, parole release criteria typically focus on considerations of offender dangerousness, not punishment experience.<sup>42</sup> Nevertheless, it is possible that parole boards do adjust sentences based on their perceptions that an inmate is experiencing punishment in an unforeseen, excessively severe way. If parole boards do calibrate, however, like judges, they do so surreptitiously and in a manner that is unguided by publicly disseminated rules.

## II. THE IMPORTANCE OF SUBJECTIVE EXPERIENCE

In this Part, I present my two central claims. First, in Part II.A, I argue that any successful justification of punishment must recognize that the experience of a punishment matters to the proper assessment of its severity. While some theorists speak of punishment severity solely in objective terms, usually as a deprivation of liberty, I explain why such views ignore a morally salient aspect of punishment and lead to inadequate justifications of punishment.

Then, in Parts II.B and II.C, I argue that prevailing retributivist and consequentialist justifications of punishment imply that we must take punishment experience into account either when sentencing individual offenders or when crafting sentencing policy. Some theorists hold views that include both retributivist and consequentialist elements and must consider subjective experience for a combination of reasons.<sup>43</sup>

### A. *Why Subjective Experience Matters*

Any justification of punishment that ignores subjective experience, whether retributivist or consequentialist, is incomplete and doomed to

41. On parole, see generally Frank O. Bowman III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 *Iowa L. Rev.* 1043, 1051–52 & nn.18–21 (2001) (describing broad discretion historically granted parole boards to determine precise length of inmates' sentences).

42. See, e.g., Cal. Penal Code § 3041(a) (West 2005) (stating that, in addition to other requirements, parole "release date[s] shall be set in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public"); Tex. Bd. of Pardons & Paroles, *Revised Parole Guidelines*, at [http://www.tdcj.state.tx.us/bpp/new\\_parole\\_guidelines/new\\_parole\\_guidelines.html](http://www.tdcj.state.tx.us/bpp/new_parole_guidelines/new_parole_guidelines.html) (last updated July 28, 2008) (on file with the *Columbia Law Review*) (presenting Texas parole point system that seeks to determine risk level associated with offender release).

43. For example, a retributivist-consequentialist might count deserved suffering (or deserved punishment) among the intrinsically valuable states of affairs in the world that should be promoted. Such views are discussed in Michael Moore, *Placing Blame: A General Theory of Criminal Law* 155–59 (1997) [hereinafter Moore, *Placing Blame*], and in Michael T. Cahill, *Retributive Justice in the Real World*, 85 *Wash. U. L. Rev.* 815, 833–36 (2007).

fail. The reason is simple: One should not purposefully or knowingly inflict substantial pain or distress on a person without some justification for doing so.<sup>44</sup> This principle applies to us in our daily lives, as well as to state actors who sentence offenders or run prison facilities. The reason we seek to justify punishment in the first place is to understand why we are permitted to subject offenders to the hard treatment of punishment. If punishment theorists ignore the experiential aspects of prisoners' treatment, then they cannot justify our purposeful or knowing inflictions of distress on prisoners.

One way to see why we must justify our purposeful or knowing inflictions of substantial experiential distress is to imagine what would happen if we did not have such an obligation. Suppose that Sadistic Warden adulterates the prison water supply with a substance that substantially increases prisoners' fear and anxiety. The warden can adjust the water supply to increase the distress of the entire prison population, or he can arbitrarily increase the distress of just particular prisoners. If we could entirely ignore prisoners' subjective experiences, then we would have no moral grounds to object to the warden's actions.

Suppose now that Sadistic Warden does not purposely alter the water supply. Rather, the water supply to part of the prison was adulterated by an environmental contaminant that substantially increases the fear and anxiety of those prisoners whose cells are connected to this part of the water supply. The warden is aware of the problem and could correct it simply by closing a valve. Nevertheless, he chooses not to. In this case, the warden knowingly, though not purposely, increases the distress of some prisoners. Still, most people likely have the intuition that the warden should not knowingly increase the distress of some prisoners without a good reason for doing so.<sup>45</sup>

When we imprison offenders, we knowingly inflict substantial emotional distress. Of course, we do so with some justification. The question is whether we do so with adequate justification, and in order to have adequate justification, we need some sense of the amount of distress we are causing. Suppose a military officer has decided to bomb some location,

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44. We also ought not recklessly inflict such distress, though I can make my argument without appeal to mental states other than knowledge and purposefulness.

45. Defenders of a purely objective account of punishment severity may argue that certain amounts of fear and anxiety interfere with inmates' cognitive liberties. Thus, they might claim, when the water supply induces mental illness, they can account for the blameworthiness of Sadistic Warden's conduct as an unwarranted deprivation of liberty. Yet, such an account of punishment is no longer purely objective. If the account of punishment severity treats Sensitive and Insensitive differently, then it at least partly recognizes my claim that subjective experience matters.

Moreover, one cannot easily limit infringements of cognitive liberty to cases of mental illness. Doing so affords no explanation of why cognitive liberties function in a binary manner, such that they are not infringed at all until a prisoner's distress reaches the critical, yet often arbitrary, point at which we call distress a symptom of mental illness. More troublingly, the limitation to mental illness implies that Sadistic Warden can impose fear and anxiety willy-nilly so long as inmate distress teeters just short of mental illness.

knowing that it will cause the death of innocent civilians. If the officer seeks to justify his decision, he must consider the number of innocent civilians who are likely to die. If the officer denies that such lives matter or refuses to consider good evidence that is available to him about the number of innocent civilians likely to die, then we have reason to doubt that the officer can fully justify his decision. Similarly, if a punishment theorist tells us that subjective experience is irrelevant and that we can ignore good evidence about the amount of distress an offender experiences, then we have reason to doubt that the theorist can fully justify punishment.

By stipulation, Sensitive and Insensitive are alike in all of the objective facts about their punishments. Yet, the state causes emotional distress to Sensitive that it does not cause to Insensitive, even though, let us assume, Sensitive is willing to provide evidence that he is particularly sensitive to punishment. The state, therefore, knowingly inflicts distress on Sensitive that it does not inflict on Insensitive. Again, if a punishment theorist makes no reference to experiential considerations, then the theorist cannot explain why Sensitive justifiably receives a more severe punishment than Insensitive.<sup>46</sup>

It is certainly possible that Sensitive cannot provide sufficiently good evidence of his sensitivity or that there are other practical reasons for sentencing Sensitive and Insensitive to equal terms of imprisonment. Yet, we should not deny that Sensitive's punishment is more severe. As Jesper Ryberg notes, we cannot avoid concerns about variation in punishment experience "simply by claiming that we do not have very precise measuring methods," for "obviously one cannot just redefine what basically counts in some practically convenient but morally arbitrary way."<sup>47</sup> If a punishment justification starts with the view that Sensitive and Insensitive are punished equally, then it affords no opportunity to explain a morally relevant difference in their treatment.

Our willingness to ignore mental states in the punishment-severity context conflicts with our willingness to consider mental states when assessing blameworthiness. Whether a defendant is guilty of murder or manslaughter often turns on a difficult assessment of his intentions months or years before trial, and defendants have tremendous incentives to be silent or untruthful about their intentions at the time they committed homicide. Nevertheless, if the state systematically ignored or refused to examine defendants' intentions, we could reasonably demand an explanation for the state's failure to investigate mental states that bear on accurate assessments of culpability and dangerousness. Similarly, we can reasonably demand that the state recognize that punishment experience matters and take it into account when it is feasible to do so.

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46. The claim made here applies quite generally. So, for example, in order to justify a harsh interrogation tactic, the justification must take account of the physical or emotional distress associated with its use on particular individuals of varying fortitude.

47. Ryberg, *supra* note 1, at 105.

### B. *Retributivism*

There are many different retributive theories of punishment. Typically, retributivists hold that offenders *deserve* to suffer for their crimes.<sup>48</sup> On this view, we are either permitted or, according to some theorists, required to punish offenders in accordance with their “just deserts.”<sup>49</sup> Most retributivists also subscribe to a principle of proportionality,<sup>50</sup> whereby appropriate punishment severity increases with the seriousness of the pertinent offense.<sup>51</sup> Thus, appropriate punishment severity gener-

48. See, e.g., John Kleinig, *Punishment and Desert* 67 (1973) (“The principle that the wrongdoer deserves to suffer seems to accord with our deepest intuitions concerning justice.”); cf. A.M. Quinton, *On Punishment*, 14 *Analysis* 133, 136–37 (1954) (stating that punishment is “infliction of suffering on the guilty”). John Rawls describes retributivists as holding that:

It is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing. That a criminal should be punished follows from his guilt, and the severity of the appropriate punishment depends on the depravity of his act. The state of affairs where a wrongdoer suffers punishment is morally better than the state of affairs where he does not; and it is better irrespective of any of the consequences of punishing him.

John Rawls, *Two Concepts of Rules*, 64 *Phil. Rev.* 3, 4–5 (1955). Some retributivists focus on deserved *suffering*, while others focus on deserved *punishment*. Compare Leo Zaibert, *Punishment and Retribution* 214 (2006) (“To be a retributivist is to recognize that deserved *punishment* is an intrinsic good.” (emphasis added)), with 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). These beliefs do not require that culpable wrongdoers be given their just deserts by being made to suffer by the state through the imposition of punishment.”).

49. See Moore, *Placing Blame*, *supra* note 43, at 78–79 (“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.”).

50. See Ryberg, *supra* note 1, at 5 (“Sometimes proportionalism is even presented as a necessary condition for the classification of a theory as retributivist.”); see also *id.* at 2–4 (noting that many criminal justice systems have adopted proportionate punishment as a central goal); Husak, *Already*, *supra* note 1, at 83 (“A corollary of the ‘just deserts’ theory is the principle of proportionality, according to which the severity of a punishment should be a function of the seriousness of the offense.”). Some theorists distinguish “mandatory” retributivists, who believe that we are *required* to punish in accordance with offenders’ desert, from “permissive” retributivists, who believe that we are permitted but not required to punish in accordance with desert. See John Braithwaite & Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* 34–35 (1990) (describing variety of ways in which retributivists might understand their obligations). Compare Herbert Fingarette, *Punishment and Suffering*, 50 *Proc. & Addresses Am. Phil. Ass’n* 499, 499 (1977) (“I would like to expound 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 . . .”), with J. Angelo Corlett, *Making Sense of Retributivism*, 76 *Philosophy* 77, 78 (2001) (“[S]ometimes the guilty need not be punished at all, or may be punished at a level significantly lower than proportionality dictates.”).

51. Retributivists vary over how we ought to determine the seriousness of an offense. Some focus exclusively on offenders’ mental states related to culpability, while some also consider the outcomes of offenders’ actions that are partly the result of good or bad luck.

ally escalates respectively for petty theft, aggravated assault, rape, and murder.

1. *Three Flavors of Retributivism.* — Retributivists disagree about the sort of suffering that offenders deserve. Experiential-suffering retributivists hold a straightforward view that offenders should be made to suffer in experiential ways; offenders should feel physical and emotional pain and distress. Other retributivists defend a more objective understanding of suffering, largely identifying appropriate punishment with deprivations of liberty while still recognizing experiential distress as a form of retributive suffering. Such views meet my demand that a justification of punishment must recognize that punishment experience matters. I argue, however, that a full-fledged loss-of-liberty retributivism that entirely ignores subjective experience cannot fully justify punishment.

a. *Experiential-Suffering Retributivism.* — When we speak of people suffering, we ordinarily refer to their negative experiential states, like pain, distress, discomfort, anxiety, and boredom. If offenders deserve experiential suffering, then it is easy to see why retributivists must attend to their subjective experiences at sentencing.<sup>52</sup> When Sensitive and

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Some consider offenders' prior good or bad acts as relevant to desert, while others do not. These distinctions will not matter here, as I make claims about proportionality that apply no matter how blameworthiness is assessed.

According to Leo Katz, our judgments of criminal blameworthiness are objective in nature. See Katz, *supra* note 1, at 145–57. For example, we punish the assault of a particular victim more harshly than the theft of his heirloom jewelry, even if this particular victim would rather be assaulted than have his heirlooms stolen. *Id.* at 145–50. If judgments of blameworthiness are objective, one may wonder whether our judgments of punishment severity should also be objective.

To be clear, however, judgments of blameworthiness depend primarily on determinations about beliefs and intentions of an offender, not the experiences of his victim. To the extent that judgments of distress matter at all to culpability, they matter because an offender may have beliefs about a victim's likely distress. More controversially, some theorists would also hold an offender liable for the distress he causes even when such distress outstrips his expectations. But either way, judgments of blameworthiness are fundamentally different from judgments of punishment severity. Thus, even if Katz is right about our judgments of blameworthiness, it does not follow automatically that punishment experience must be assessed in the same way.

Furthermore, I am unconvinced that culpability judgments should be objectively understood. We often distinguish crimes or degrees of crimes based on the amount of experiential distress they are likely to cause. In fact, sentencing guidelines often provide a rather detailed calibration of blameworthiness that depends on the subjectively understood amount of harm the offender caused or some proxy for it. We may fail to make more refined assessments of subjective harms for reasons of practicality and not because of some fundamental feature of the concept of criminal blameworthiness. See Adam J. Kolber, *The Comparative Nature of Punishment* 45–46 (Sept. 29, 2008) (unpublished manuscript, on file with the *Columbia Law Review*), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1266158](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1266158) [hereinafter Kolber, *Comparative Nature*].

52. See K.G. Armstrong, *The Retributivist Hits Back*, 70 *Mind* 471, 478 (1961) (stating that, according to retributivists, “[p]unishment is the infliction of pain”); Nils Christie, *Limits to Pain* 5 (1981) (“[I]mposing punishment within the institution of law means the inflicting of pain, intended as pain.”). Christie elaborates:

Insensitive spend the same amount of time in prison, Sensitive experiences more distress than Insensitive does. Therefore, Sensitive and Insensitive are punished unequally under this view.

The problem can also be formulated without reference to concerns about equality. Not only are they punished unequally, they are also punished incorrectly according to the experiential-suffering retributivist. Sensitive and Insensitive committed offenses of equal seriousness. Assuming that we should punish offenders in proportion to the seriousness of their offenses, failing to consider their distress means that we are inappropriately punishing at least one of them.<sup>53</sup>

The notion that retributive punishment requires experiential calibration comes more naturally to us in the context of corporal punishment, a practice that used to be widespread but has largely, though not entirely, fallen out of favor.<sup>54</sup> If one contemplates corporal punishment, one likely thinks that the severity of corporal punishments should be graded according to the experience the offender has when punishment is inflicted rather than some independent standard that attaches only to the punishment in the abstract. For example, suppose some community pun-

The receiving institutions do not like to be regarded or to regard themselves, as "pain-inflicting" institutions. Still, such a terminology would actually present a very precise message: punishment as administered by the penal law system is the conscious inflicting of pain. Those who are punished are supposed to suffer. . . . It is intended within penal institutions that those at the receiving end shall get something that makes them unhappy, something that hurts.

Christie, *supra*, at 16.

53. Permissive retributivists, who take the principle of proportionality to provide a cap on punishment, are subject to the equality concern but not the inconsistency concern. To avoid inconsistency, such retributivists need only be sure that Sensitive's experience of punishment is at or below the maximum level permitted by a principle of proportionality. Permissive retributivists, however, cannot account for our common intuition that more serious crimes should be punished more severely than less serious crimes, unless, as is typical, they subscribe to a hybrid theory of punishment that incorporates consequentialist reasons for calibrating punishment. I describe these consequentialist reasons *infra* Part II.C; see also *infra* Part II.B.2.c on what I call "banded proportionality."

54. For example, a Saudi woman who was abducted and raped by seven men was recently sentenced to 200 lashes for violating Saudi Arabia's sex segregation laws by being with an unrelated male just prior to the abduction. Associated Press, *Saudis Defend Punishment for Rape Victim*, USATODAY.com, Nov. 21, 2007, at [http://www.usatoday.com/news/world/2007-11-20-saudi-rape\\_N.htm](http://www.usatoday.com/news/world/2007-11-20-saudi-rape_N.htm) (on file with the *Columbia Law Review*). She was subsequently pardoned by the Saudi king, presumably before the punishment was inflicted. See Faiza Saleh Ambah, *Saudi King Pardons Rape Victim Sentenced to 200 Lashes*, Wash. Post, Dec. 18, 2007, at A8; see also Leslie Kaufman, *Parents Defend School's Use of Shock Therapy*, N.Y. Times, Dec. 25, 2007, at A1 (describing electric shock "therapy" used at Massachusetts school intended to help socialize students with severe mental and emotional disorders); Lynda Polgreen, *Nigeria Turns from Harsher Side of Islamic Law*, N.Y. Times, Dec. 1, 2007, at A1 (describing recent practices of stoning and amputation in Nigeria). Compare Graeme Newman, *Just and Painful* 56–67 (2d ed. 1995) (supporting use of electric shocks in lieu of incarcerative punishment), with David Garland, *Punishment and Modern Society* 241–47 (1990) (arguing that, despite some seemingly plausible arguments in favor of corporal punishment, such punishments violate modern sensibilities).

ishes people with painful electric shocks of variable voltage. Suppose too that the pain of a shock at a particular voltage is largely a function of the weight of the offender. People who weigh 100 pounds feel far more pain at a given voltage than do people who weigh 300 pounds. Should a retributivist committed to proportionality punish all people who commit the same crime at the same voltage? Of course not. In order to punish people *equally* for committing the same crime, they must be punished at *different* voltages. The same analysis explains why the 1,000-calorie restriction in the “dieting” punishment is very unequal, even when each dieter consumes the same food.<sup>55</sup>

When we move from corporal punishment to incarcerative punishment, less changes than meets the eye. True, incarceration principally inflicts emotional distress rather than physical distress. But incarceration is also a punishment “of the body” in the very broad sense that it imposes negative experiences on human bodies. So, in an important respect, all of our punishments are corporal punishments.<sup>56</sup> Or, if you prefer, all of our punishments are punishments of the mind, since that is ultimately where punishment is felt. Indeed, some kinds of purely emotional distress are more severe than some kinds of physical distress. A prisoner incarcerated for life has written, seemingly without hyperbole, that he would cut off his right arm just to be able to hug his mother again.<sup>57</sup> There is no obvious reason to calibrate punishments of physical distress but not punishments of emotional distress.<sup>58</sup>

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55. See *supra* note 13 and accompanying text (discussing variation in individuals’ subjective experiences of involuntary fixed-calorie diet).

56. The line between corporal punishment and forms of punishment typically understood in terms of their liberty restrictions is illustratively blended in *Weems v. United States*, 217 U.S. 349 (1910). *Weems* was convicted of falsifying an official document and was sentenced by authorities in the Philippines to, *inter alia*, at least twelve years of “cadena temporal,” requiring offenders to be imprisoned in chains and to labor for the state. *Id.* at 364. The Supreme Court held that the punishment was disproportionate to the crime and therefore violated the Eighth Amendment’s prohibition on cruel and unusual punishment. *Id.* at 375–82. A number of commentators have focused their analysis of the case on the physical aspect of *Weems*’s punishment. See, e.g., Leonard P. Edwards, *Corporal Punishment and the Legal System*, 36 Santa Clara L. Rev. 983, 1017 & n.242 (1996). Yet, the wearing of chains is both a form of physical distress and a deprivation of liberty. Similarly, modern incarceration imposes both distress and deprivation, just less graphically than does the punishment of *cadena temporal*.

57. See Adam Liptak, *In Prison for Life, He Turns M&M’s into an Art Form*, N.Y. Times, July 21, 2006, at A1 (quoting prison artist Donny Johnson).

58. Of course, there may be difficult questions about how to compare and aggregate different kinds of suffering. For example, one inmate may find his surroundings emotionally distressful, while another finds the same surroundings distressful but also derives a sort of spiritual or higher-order pleasure out of his penance. Such cases may require experiential-suffering retributivists to flesh out more of the details of their theory. Cf. Steven Tudor, *Accepting One’s Punishment as Meaningful Suffering*, 20 Law & Phil. 581, 589 (2001) (“In compassion and remorse as modes of meaningful suffering, the sufferings are ‘in themselves’ ‘unwelcome’, but no one who lucidly grasped their proper objects in experiencing such sufferings would simply wish the suffering be gone.”).

b. *Loss-of-Liberty Retributivism*. — Other punishment theorists focus less on the subjective experience of suffering and more on certain deprivations that we impose on offenders in a more objective sense.<sup>59</sup> In a relatively common formulation, offenders deserve not the experience of suffering, but rather deprivations of liberty. According to John Rawls, for example, 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.”<sup>60</sup> So, perhaps punishment consists of deprivations of rights to vote, to associate, to move about freely, and so forth. If so, loss-of-liberty retributivists might claim that offenders like Sensitive and Insensitive are equally deprived of their liberties in prison, and so we need not individually calibrate their punishments.

In Part II.A, I explained at a very general level that such views are inadequate because they fail to justify knowing or intentional inflictions of distress on those punished. But even if an objective account of punishment could somehow overcome my argument, such an account would still be unattractive for five further reasons (many of which apply more specifically to retributivist conceptions of punishment) that I will proceed to explain.

i. *Contrary to Ordinary Understanding of Severity*. — First, the deprivation-of-liberty view of punishment severity deviates from our common-sense intuitions about why we would not want to be punished. If people are asked why they do not want to be in prison, they will probably cite the unpleasant experiences they expect to have there (e.g., they would be sad, scared, and lonely) more than they would reference losses of liberty in the abstract. This is hardly a knockdown objection, but it emphasizes that we naturally think of punishment in experiential terms and that we need some good reasons for understanding punishment severity otherwise.

ii. *Awareness Requirement*. — Second, in order to be punished in a manner recognized by retributivists, a punishment recipient must be aware of his punishment, and his experience of the punishment matters

59. See, e.g., Braithwaite & Pettit, *supra* note 50, at 37–40 (defending objective consequentialist account of punishment); Katz, *supra* note 1, at 155–56 (defending objective explanation of our retributive intuitions).

60. Rawls, *supra* note 48, at 10; see also Robert P. George, *Moralistic Liberalism and Legal Moralism*, 88 Mich. L. Rev. 1415, 1426 (1990) (stating that, according to retributivists, “a criminal may justly be deprived of liberty commensurate with the liberty he wrongfully seized in breaking the law”); J.D. Mabbott, *Professor Flew on Punishment*, 30 *Philosophy* 256, 257 (1955) (“Most punishments nowadays are not afflictions of suffering, either physical or mental. They are the deprivation of a good.”); Andrew von Hirsch, *Seriousness, Severity, and the Living Standard*, in *Principled Sentencing* 185, 189 (Andrew von Hirsch & Andrew Ashworth eds., 2d ed. 1998) (defending living-standard approach to severity assessments where “[p]enalties could be ranked according to the degree to which they typically affect the punished person’s freedom of movement, earning ability, and so forth”); cf. Tudor, *supra* note 58, at 583 (“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).”).

at least to that extent. Consider the case of an unknowing confinee, who is convicted of some crime and sentenced to a week of home confinement. When his sentence commences a month later, let us assume, his front door is barricaded and a guard stands watch to make sure he does not leave his house. Due to a miscommunication between the confinee and his attorney, however, the confinee is unaware that he was sentenced and that his sentence has begun. In fact, over the course of the week, the confinee decides to stay in his house and never discovers that he was locked inside.

Under such circumstances, most people will agree that the confinee has not truly been punished in a retributive sense. If he subsequently discovers that he had been confined and he suffers ongoing stigma for having been so, he may be punished by the ongoing stigma. He has not, however, been subjected to retributive punishment until he becomes aware of his confinement, and he is never subject to custodial punishment.<sup>61</sup> Similarly, a prisoner who falls into a coma due to a congenital illness is not retributively punished by confinement while he is in a coma.<sup>62</sup>

Many theorists, even those who purport to be objectivists, will agree that successful punishment requires awareness that one is being punished. The point here is just that an entirely objective understanding of punishment cannot elegantly account for the fact that those who are successfully punished must be aware of the punishment. After all, if objectivists are willing to examine an offender's subjective awareness of punishment, it is not clear why they artificially refuse to consider the *nature and extent* of his awareness, along with its associated experiential states.

iii. *Selecting Liberties to Lose.* — Third, one must consider subjective responses to punishment when deciding *which* liberty deprivations to use as punishment. The kinds of liberty deprivations that can constitute punishments must be deprivations that the offender finds aversive. So, for example, depriving opera-haters of the right to listen to opera *does* restrict their liberties; it does not, however, constitute punishment.

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61. In the context of the false imprisonment tort, there is virtually universal agreement that the plaintiff must have been aware of the restriction on his liberty in order to succeed. Restatement (Second) of Torts § 42 cmt. a (1964) ("Where . . . the plaintiff is not even subjected to the mental disturbance of being made aware of [the confinement] at the time, his mere dignitary interest in being free . . . is not of sufficient importance to justify the recovery . . . ."); see also Note, A New Conception of Restraint in False Imprisonment, 68 U. Pa. L. Rev. 360, 361 (1920) ("[A person is not] restrained of his liberty . . . when . . . he is permitted to move in the direction in which he desires to go, though had he attempted to move in any other way he would have been prevented. There is . . . no restraint of liberty without submission of the will . . . ."). But cf. W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 11, at 48 (5th ed. 1984) (suggesting that position of Restatement (Second) of Torts is "unduly restrictive," where, for example, a baby is locked in a bank vault and suffers physical illness or death as a result).

62. Prisoners with severe dementia may also be improper subjects for retributive incarceration. See S. Fazel, J. McMillan & I. O'Donnell, Dementia in Prison: Ethical and Legal Implications, 28 J. Med. Ethics 156, 157–58 (2002).

In the O. Henry short story, “*The Cop and the Anthem*,” the protagonist deliberately violates the law in order to be fed and sheltered upon capture.<sup>63</sup> Even though his liberty will be restricted when caught, he is not retributively punished when he is subsequently imprisoned, nor are his real-life counterparts.<sup>64</sup> It is simply implausible that a person can be criminally culpable and *thereby deserve* to receive treatment that the offender affirmatively desires.

Inmates in Vermont recently brought a class action lawsuit complaining that it is unconstitutional to serve them “nutraloaf,” an unpleasant food concoction given to unruly prisoners, without first affording them some formal disciplinary process.<sup>65</sup> Whether or not nutraloaf is intended to be punishment can perhaps be determined by appeal to the beliefs and intentions of prison administrators. But they could not have known or intended for nutraloaf to be punishment unless they also knew or intended it to taste bad. A completely objective account of punishment cannot say much about nutraloaf-type cases. It cannot account for the punishment-like quality of nutraloaf if it cannot make reference to the likely experiences of those who consume it. Moreover, as I explain in the next section, we cannot possibly determine *how severe* a nutraloaf punishment is, if it is a punishment at all, without appealing to those same experiences.

iv. *Nonarbitrary Severity Determinations.* — Those who defend an objective account of punishment must be able to describe why some punishments are more severe than others. They might say, for example, that confinement in a cell of twenty-five square feet is an objectively more severe deprivation of the freedom to move about than is confinement in a cell of fifty square feet. Assessing punishment severity in this way, though, is arbitrary unless one recognizes the different ways that people can experience objectively identical losses of liberty.

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

64. See Associated Press, *Jobless Man Asks Judge for Jail Time*, CNN.com, Oct. 12, 2006, at <http://web.archive.org/web/20061029183540/http://www.cnn.com/2006/LAW/10/12/robber.retirement.ap/index.html> (on file with the *Columbia Law Review*); Kristen Wyatt, *Associated Press, Faced with Debt, Georgia Man Shot Postal Worker in Apparent Bid to Go to Prison*, SignOnSanDiego.com, July 14, 2005, available at <http://www.signonsandiego.com/news/nation/20050714-1509-mailcarriershot.html> (on file with the *Columbia Law Review*). Former Assistant U.S. Attorney Stanley Alpert recounts the following comments by one of his captors during his 1998 kidnapping: “‘I don’t care,’ Sen continued musing. He was philosophical. ‘Prison ain’t so bad. The way I look at it, life is about living. You alive, you living, that’s it. It don’t matter much whether you’re out here or inside, either way you are alive. Prison ain’t shit.’” Stanley N. Alpert, *The Birthday Party: A Memoir of Survival* 60 (2007).

65. Wilson Ring, *Associated Press, Mmm, Nutraloaf: Vermont Supreme Court to Decide if Highly Unpopular Prison Food Is Punishment*, SignOnSanDiego.com, Mar. 22, 2008, available at <http://www.signonsandiego.com/news/nation/20080322-1215-foodor-punishment.html> (on file with the *Columbia Law Review*).

Suppose that Borderline Claustrophobe experiences confinement in a fifty-square-foot cell in the same way that Insensitive experiences confinement in a twenty-five-square-foot cell. If Borderline Claustrophobe and Insensitive are each placed in fifty-square-foot cells, they are not punished equally. Borderline Claustrophobe will experience a much more severe deprivation than Insensitive will. True, they will both have the same amount of space in objective terms. But restricting our space in which to move constitutes punishment in large measure because we like to have such space. Thus, purely objective assessments of punishment severity depend on arbitrary features of the physical world, like square footage and voltage. Square footage and voltage are only rough proxies for things that actually matter. They do not, however, have intrinsic significance.

To make the point more vivid, imagine that two people commit the same crime and that one is eight feet tall and the other is four feet tall. Most of us would agree that they are not punished equally when forced into cramped cells of equal dimensions. Yet, it could be the case that Sensitive and Insensitive have the same physical height as each other but that Sensitive experiences life in a prison cell as would an eight-foot person of average sensitivity, while Insensitive experiences life in a cell as would a four-foot person of average sensitivity. If actual height differences can lead to punishments of different severity, then so should perceptual differences that track everything that matters about actual height differences. Failing to consider the subjective experience of a loss of liberty makes one's punishment practices arbitrary.

Is it possible to give an objective account of the severity of loss-of-liberty punishments that is nonarbitrary? Defenders of loss-of-liberty retributivism might argue that the difference between small and large prison cells is not simply a function of square footage. Rather, there are certain activities that you can do in a large space that you cannot do in a small space. Thus, they might argue, one can give a nonarbitrary, objective account of why small cells lead to greater liberty deprivations than do large cells.

Such an attempt would fail, however. While it may generally be true that there are activities one can do in a large space that one cannot do in a small space, like trace the contours of a regulation squash court, there are also activities one can do in a small space but not a large one, like climb up the walls of a prison cell by pressing one's legs against parallel cell walls. Suppose we were to deprive people of the liberty to engage in one of these activities but not the other. Which liberty deprivation would be more severe? These two intentionally odd and unfamiliar activities illustrate that, in order to decide which liberty is more important, we must appeal at some level to the relative aversiveness of each deprivation. We cannot determine the value of a particular freedom without knowing how that freedom affects the life experiences of human beings. And even if we know how the activities affect a typical person, the objectivist will

have to explain why we should apply an analysis developed for typical people to some actual human being about to be punished.

Of course, our ability to calibrate will be limited for pragmatic reasons.<sup>66</sup> But it is better to recognize the practical, ever-changing limitations on our ability to measure subjective experiences as contingent features of early twenty-first century living rather than to build these limitations into our theory of what punishment is really all about.

v. *Objective Punishment Calibration.* — Finally, even if the loss-of-liberty view could somehow address the preceding concerns, it would not eliminate the obligation to engage in complicated, counterintuitive punishment calibrations. As I describe in detail in “*The Comparative Nature of Punishment*,”<sup>67</sup> punishment severity should be judged by comparing two reference points: an offender’s unpunished baseline condition and his worse punished condition. The severity of the punishment consists of the change in these conditions.

Thus, even under the loss-of-liberty view, we would still have to measure the extent to which prison *deprives* different offenders of their liberty. Under any plausible conception of liberty, people vary in the amount of liberty they have.<sup>68</sup> So, even if offenders have equal liberty at the moment they are imprisoned, they did not have equal liberties outside of prison. Prison, therefore, deprived them of their liberties to different degrees. If I am right that offenders differ in their unpunished baseline levels of liberty, then loss-of-liberty retributivists must take account of both offenders’ baseline liberties as well as their liberties during punishment in order to measure the extent to which they are deprived of liberty. No matter whether one construes the burdens of punishment in objective or subjective terms, given the comparative nature of punishment, some form of individualized measurement is unavoidable. We cannot treat the loss-of-liberty view as preferable to the experiential view on the grounds that only the latter requires calibration.

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66. Andrew von Hirsch argues that the law “generally works with standard cases—and allows limited deviations for certain unusual situations.” Andrew von Hirsch, *Scaling Intermediate Punishments: A Comparison of Two Models*, in *Smart Sentencing: The Emergence of Intermediate Sanctions* 211, 216 (James M. Byrne, Arthur J. Lurigio & Joan Petersilia eds., 1992). He is willing to deviate from “standard judgments [of desert] in special situations (say, of illness or advanced age) that give the penalty an uncharacteristic bite,” but he refuses to do so more generally. *Id.* As he offers no principled reason for limiting concerns about subjective experience to particular domains (like illness and advanced age), von Hirsch seems to be making a concession to pragmatic concerns about sentencing without challenging the underlying theoretical claim that punishment experience affects punishment severity. For similar views, see Morris & Tonry, *supra* note 1, at 96 (arguing that accurately measuring suffering across individuals is so difficult that we ought to think of desert as limiting principle of punishment rather than method of “defining what is the single appropriate punishment”); Ashworth & Player, *supra* note 1, at 260 (“Pragmatically, differences of impact should only be taken into account if they are likely to be significantly outside the normal range of responses to a given sentence.”).

67. See Kolber, *Comparative Nature*, *supra* note 51.

68. See *id.* at 27–33.

Even subjective assessments of punishment severity must take account of offenders' baseline experiential conditions. In the case of Sensitive and Insensitive, I specified that they are alike in all pertinent respects except for their experiences in prison. This allowed us to safely ignore their baseline experiential conditions because we stipulated that they were the same. Ordinarily, however, a full account of punishment severity requires a comparative examination of an offender's baseline condition relative to his punished condition, and this requires proportionalists to calibrate punishment whether punishment is understood subjectively or objectively.<sup>69</sup>

c. *Expressive Versions of Retributivism*. — Expressive theorists purport to place primary emphasis on neither the experience of punishment nor its liberty deprivations. Rather, expressivists emphasize that criminals deserve varying degrees of shame or other forms of community disapproval. According to Joel Feinberg, punishment is, in part

a symbolic way of getting back at the criminal, of expressing a kind of vindictive resentment. . . . Not only does the [incarcerated] criminal feel the naked hostility of his guards and the outside world—that would be fierce enough—but that hostility is self-righteous as well. His punishment bears the aspect of legitimized vengefulness . . . .<sup>70</sup>

Expressivists can focus on the symbolic significance of condemnatory messages in a variety of ways: as the messages are understood by offenders, by society in general, or by some combination of both of these. Yet, so long as expressivists recognize a proportionality requirement, they must also consider punishment experience at sentencing. If the severity of punishment depends on how the condemnatory message is understood by offenders, then it is easy to see why offenders' punishment experiences matter. Those punished by disapproval are not successfully punished unless they are at least aware of their community's disapproval.<sup>71</sup> Furthermore, the extent to which they are punished will vary based on their different reactions to expressions of disapproval. Some are prone to react strongly to feelings of shame, while others are not.

Suppose instead that an expressivist takes an entirely objective view of punishment, claiming that punishment consists in societal messages of

69. The obligation to measure subjective experience in comparative terms may seem to make the task even more difficult. While this may be so, it is also possible that many observable phenomena related to mental distress (e.g., certain symptoms of depression) are themselves manifestations, not of absolute levels of distress, but of changes from a person's baseline. If so, the task of comparatively measuring subjective distress may actually be easier than the task of measuring distress in absolute terms. See *id.* at 40.

70. Joel Feinberg, *The Expressive Function of Punishment*, 49 *Monist* 397, 403 (1965).

71. Those expressivists who consider themselves "communicativists" will surely agree with this claim. See, e.g., R.A. Duff, *Punishment, Communication, and Community* 79–80 (2001) ("[W]e should rather talk of [punishment's] communicative purpose: for communication involves, as expression need not, a *reciprocal* and *rational* engagement.").

disapproval, even when the offender is entirely unmoved by the message.<sup>72</sup> Such a view will suffer from all of the problems that I have already raised about purely objective accounts of punishment severity. Namely, it cannot justify the emotional distress caused by punishment, including the differential distress caused by varied reactions to expressions of disapproval. Moreover, we are unlikely to think that an offender gets what he deserves when he is punished without awareness of his condemnation or without aversion to it. He cannot be punished at the level that *he* deserves by setting punishment levels based on characteristics of *typical* people.

Expressivist views that purport to be entirely objective have a further difficulty: We cannot appropriately evaluate the severity of a communal expression of disapproval unless we know how the offender will experience the condemnation. For example, suppose that an offender is sentenced to truncation<sup>73</sup> or to dieting.<sup>74</sup> Are those very severe condemnations or very light ones? Unless we know more about the circumstances under which the punishments are imposed, the societal condemnation expressed is quite unclear. We can only gain more clarity by filling in relevant details about the offender's experience of the punishment. Thus, it seems that society more severely condemns Sensitive than Insensitive when Sensitive is locked up for the same term as Insensitive. True, people may not investigate the more detailed facts about an objectively defined punishment so as to know its true severity. But surely an offender cannot be said to deserve the vague punishment given by ill-informed societal condemnation any more than an innocent person deserves the culpability judgment of an ill-informed factfinder.

Many expressivist theories of punishment are better classified as consequentialist rather than retributivist.<sup>75</sup> From a consequentialist perspective, there may be reasons to take account of the empirical fact that people often think of punishments in objective terms, even if those assessments are hard to defend under careful theoretical scrutiny.<sup>76</sup> But

72. See, e.g., Jean Hampton, *The Retributive Idea*, in *Forgiveness and Mercy* 111, 130 (1988) (stating that retributivists should punish "even in a situation where neither the wrongdoer nor society will either listen to or believe the [condemnatory message] . . . , and where the victim doesn't need to hear (or will not believe) that message").

73. See *supra* note 6 and accompanying text.

74. See *supra* note 13 and accompanying text.

75. See Braithwaite & Pettit, *supra* note 50, at 48 (noting that "[o]nce retributivist thinkers begin to focus on . . . communication or denunciation . . . as the important achievement of the criminal justice system, it is not clear how they can avoid thinking of those features as values to be promoted" in a consequentialist fashion); Moore, *Placing Blame*, *supra* note 43, at 90 (distinguishing retributivism from "denunciatory theories").

76. Cf. Morris & Tonry, *supra* note 1, at 101 (stating that even though public may fail to properly appreciate differences in experience of punishments of equal terms, "[p]erhaps it is the uninformed public who matter, not the judges and the criminals"); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 *U. Chi. L. Rev.* 591, 592-93 (1996) (arguing that theorists ought to take seriously people's beliefs about expressive nature of different forms of punishments); Dan M. Kahan, *What's Really Wrong with*

even if consequentialists take account of the actual meaning people ascribe to incarceration, flawed as it may be, they cannot do so to the exclusion of the many subjective-experience-dependent consequences that I will identify in Part II.C. Furthermore, where widely held societal beliefs promote insensitivity to suffering (e.g., racism, sexism), we generally seek to change those underlying beliefs rather than enshrine them in official policy. Individual variation in suffering is often difficult to see, but there is no doubt that it occurs.<sup>77</sup> Finally, in order to conclude that we should *act as if* punishments can sensibly be understood in objective terms, we would have to compare the benefits of doing so to the harms of failing to calibrate. This means that we still need to engage in some assessment of subjective experience in order to conclude that we can safely leave it aside.

2. *Three Retributivist Attempts to Exclude Experiential Considerations.* — Even if I convince retributivists that subjective experience matters to assessments of punishment severity, they may nevertheless argue that retributivism permits certain deviations from proportional punishment. Alternatively, they may argue that certain purported deviations are not, in fact, deviations when proportionality is properly construed. Here are three such attempts that I find unsuccessful:

a. *The “Forewarned Is Forearmed” Attempt.* — Retributivists might argue that, even if they do not consider subjective experience at sentencing, offenders have advance notice of their punishments and should take their own anticipated subjective experiences into account when they decide to engage in criminal behavior. So even if it is true, they say, that Sensitive and Insensitive receive different punishments from a subjective perspective, each knew or could anticipate his experience in prison, and each decided to commit the crime anyhow. Sensitive should not be able to complain about his punishment because he could have anticipated what it would be like.<sup>78</sup>

There are two reasons why the “forewarned is forearmed” attempt fails to relieve retributivists of the obligation to take subjective experience

Shaming Sanctions, 84 Tex. L. Rev. 2075, 2086 (2006) (“[C]itizens will expect punishments not only to express condemnation but also to express condemnation in a way that coheres with . . . their more basic cultural commitments.”); Paul H. Robinson & John M. Darley, The Utility of Desert, 91 Nw. U. L. Rev. 453, 456 (1997) (arguing that “desert-based liability . . . based upon the community’s shared principles of justice” promotes law-abiding behavior and that there is consequentialist justification for criminal laws framed in retributive terms); Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1178 (1989) (“When a case is accorded a different disposition from an earlier one, it is important, if the system of justice is to be respected, not only that the later case *be* different, but that it *be seen to be so.*”).

77. See Bukstel & Kilmann, *supra* note 2, at 487 (noting variation in offenders’ psychological reactions to prison); see also Adams, *supra* note 2, at 280 (same).

78. Cf. Dan Markel, Against Mercy, 88 Minn. L. Rev. 1421, 1465–66 (2004) (arguing that we ordinarily need not show mercy to defendants who are “ill, elderly, or dying” even though these conditions make prison unusually severe because offenders can or should anticipate risk of such suffering when they engage in criminal behavior).

into account. First, it is probably false as an empirical matter. People tend to be rather poor predictors of their future affective responses.<sup>79</sup> It is not at all clear that people can accurately assess their own sensitivity before offending.

Second, even if we were excellent predictors of our own sensitivity, for the “forewarned is forearmed” argument to eliminate the obligation to calibrate punishments, retributivists would have to give up the notion of proportionality entirely. The reason is that it is still unfair to give different offenders different punishments for the same crime, even when offenders have accurate advance notice. Recall the punishment of truncation, where afterward some are unharmed, some are dangerously sliced, and some are decapitated. Giving people advance notice that they will be truncated for some offense does not eliminate the unfairness of the punishment. Similarly, suppose that left-handed people receive two-year sentences for murder while right-handed people receive twenty-year sentences. Though lefties and righties may have advance notice of their potential sentences, advance notice only partly alleviates the unfairness of the differential treatment.<sup>80</sup>

To take a real-world example, many have criticized federal sentencing policies for punishing crack cocaine crimes much more harshly than powder cocaine crimes. In fact, the United States Sentencing Commission has recently revised its policies to modestly reduce the disparity.<sup>81</sup> Even though drug offenders are given notice of the differences in penalties, many people continue to advocate a reduction in the sentencing disparity, in part because it seems to exceed the disparity in the seriousness of the underlying offenses. When punishments do not seem to match the seriousness of their corresponding offenses, principles of proportionality are violated. So, while it is true that advance notice of one’s potential criminal liability mitigates certain fairness-related concerns, it certainly does not eliminate them.

b. *The Deliberateness Attempt.* — In *Punishment and Responsibility*, H.L.A. Hart stated that a “standard or central” feature of punishment is

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79. See Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 *Ind. L.J.* 155, 165–81 (2005) (“[P]eople are surprisingly inaccurate at predicting the intensity and duration of [future] emotions”); George Loewenstein & David Schkade, *Wouldn’t It Be Nice? Predicting Future Feelings*, in *Well-Being: The Foundations of Hedonic Psychology* 85, 86 (Daniel Kahneman et al. eds., 1999) (listing “situations in which people systematically mispredict their own future feelings”). See generally Daniel Gilbert, *Stumbling on Happiness* (2006) (discussing systematic errors in predictions of future emotional states).

80. See Larry Alexander, *Consent, Punishment, and Proportionality*, 15 *Phil. & Pub. Aff.* 178, 179 (1986) (arguing that it would violate principles of proportionality to deem particular sanction justified simply by virtue of fact that a person has voluntarily engaged in an offense while knowing applicable sanction).

81. Press Release, U.S. Sentencing Comm’n, *U.S. Sentencing Commission Votes Unanimously to Apply Amendment Retroactively for Crack Cocaine Offenses* (Dec. 11, 2007), available at <http://www.ussc.gov/press/rel121107.htm> (on file with the *Columbia Law Review*).

that it is “intentionally administered.”<sup>82</sup> Adopting this claim, retributivists might argue that we are not obligated to calibrate because variations in punishment experience are not intentionally inflicted and are, therefore, not properly considered part of people’s punishments. So if the state puts an offender in jail and a fire subsequently breaks out in his cell that, through no fault of the state or the inmate, injures the inmate, the inmate’s injury is not part of his punishment because the injury was not intentionally administered. Similarly, if the state puts an offender in jail and he suffers in an unusually severe way, his additional suffering, so the argument goes, should not be thought of as retributive punishment imposed by the state.

Courts frequently must decide what sorts of treatment satisfy the legal definition of “punishment.” When deciding whether prison officials’ treatment of an inmate on some occasion constitutes punishment, courts frequently attempt to distinguish between officials’ intentional and unintentional actions. Judge Richard Posner has summarized the pertinent legal distinction:

The infliction of punishment is a deliberate act intended to chastise or deter. . . . If a guard decided to supplement a prisoner’s official punishment by beating him, this would be punishment, and “cruel and unusual” because the Supreme Court has interpreted the term to forbid unauthorized and disproportionate, as well as barbarous, punishments. . . . But if the guard accidentally stepped on the prisoner’s toe and broke it, this would not be punishment in anything remotely like the accepted meaning of the word . . . .<sup>83</sup>

Thus, the argument continues, in order to constitute punishment, hard treatment must be inflicted deliberately. When we incarcerate offenders, the state takes no position on inmates’ differential subjective experiences of punishment. Therefore, the differential effects of punishment are not part of the state’s act of punishment and need not be considered relevant to determinations of punishment severity.

There are several problems with this argument.<sup>84</sup> Most importantly, as I have demonstrated, the subjective disutility of punishment is not some mere aftereffect of punishment. Rather, it is largely or entirely the punishment itself. Subjective disutility is a necessary component of retributive punishment and constitutes, if not the sole reason for retributive

82. H.L.A. Hart, *Punishment and Responsibility* 4–5 (1968).

83. *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985); see also *Wilson v. Seiter*, 501 U.S. 294, 300 (1991) (quoting *Duckworth*); Alice Ristroph, *State Intentions and the Law of Punishment*, 98 J. Crim. L. & Criminology (forthcoming 2008) (manuscript at 31, on file with the *Columbia Law Review*) (stating that, in order to succeed in Eighth Amendment claim under 42 U.S.C. § 1983, “prisoner plaintiffs must show that prison officials acted with bad intentions—‘deliberate indifference’ to grossly inadequate conditions or ‘malicious and sadistic’ intentions in using force”).

84. See Ryberg, *supra* note 1, at 111–13 (arguing against limiting punishment to intended consequences).

punishment, certainly a major part of it. Given the centrality of suffering to the retributive view, it seems arbitrary to draw a distinction between intended and merely foreseen suffering.

Moreover, as the Sadistic Warden example demonstrated,<sup>85</sup> we are led to very counterintuitive results if prison officials need not justify their knowing impositions of severe emotional distress. If Sadistic Warden knows that prisoners are drinking poisoned water that increases their anxiety and distress, he ought to rectify the situation even if no state official ever intended the water to be poisoned. If he need not justify his knowing impositions of distress, then we have no grounds on which to complain.<sup>86</sup> We incarcerate people when they commit crimes like murder with a knowing, though nonpurposeful, mental state. It seems awfully unfair to hold their custodians to a more lenient standard of responsibility.

Sentences are established through the interactions of legislatures, sentencing commissions, judges, prosecutors, and defense attorneys. These sophisticated actors need not talk to many prisoners or even contemplate the prospect of going to prison for very long to recognize how central emotional distress is to the punishment of incarceration. Though the secluded nature of the prison system shelters us from the suffering of prisoners, and criminal justice systems have evolved so as to separate from view those who administer sentences from those who impose them,<sup>87</sup> everyone knows that punishments will have different effects on different people.

A court that categorically refuses to calibrate punishment even when it has good evidence about offender sensitivities knowingly inflicts distress on an offender that it would not inflict on another who is equally blameworthy. When we are insensitive to punishment variation, we act less like the executioner who accidentally steps on the toes of a condemned person (not punishment) and more like the executioner who refuses to recognize that his method of execution is excruciatingly painful (punishment).<sup>88</sup>

Of course, not all experiential suffering in prison is imposed in a knowing or intentional way. But even if some experiential suffering

85. See *supra* text accompanying notes 44–45.

86. As noted, if the knowing distribution of poisoned water is deemed to unacceptably violate prisoners' liberty interests, then one must explain why the knowing imposition of Sensitive's anxiety and distress is not also an unacceptable liberty violation.

87. See Michel Foucault, *Discipline and Punish* 10 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1975) ("Those who carry out the penalty tend to become an autonomous sector; justice is relieved of responsibility for it by a bureaucratic concealment of the penalty itself."); Markus Dirk Dubber, *The Pain of Punishment*, 44 *Buff. L. Rev.* 545, 548–61 (1996) (describing historical developments in criminal justice systems to shelter those who impose sentences from observing or participating in delivery of punishment).

88. In this Essay, I leave aside discussion of capital punishment as there is substantial disagreement over how we ought to understand the disvalue of death. See Thomas Nagel, *Death*, in *Mortal Questions* 1, 1–10 (1979).

should not count, we must still consider the suffering that does. Only if one believes that experiential suffering should not count at all are we relieved entirely of the obligation to calibrate subjective experience. Such a view, however, is implausible, as it violates the common intuition that we ought not knowingly or intentionally cause people distress without justification.<sup>89</sup> It is this very concern about inflicting distress that leads us to seek a justification for punishment in the first place.

*c. Banded Proportionality.* — As noted, some retributivists believe that the requirement of proportional punishment merely provides a cap on justified punishment.<sup>90</sup> If, for example, proportionality only dictates that murderers spend no more than forty years in prison, one might argue that it makes no difference if Sensitive experiences his twenty-year sentence as Insensitive experiences his thirty-year sentence. Sensitive's punishment, even as experienced, is still below the maximum permissible punishment.

Similarly, one might also believe that proportionality dictates a floor on punishment, such that we ought to punish people at least a certain amount and that the lower limit should be proportional to the seriousness of an offender's crime. Together, these two approaches seem to provide a healthy margin in which to punish that avoids the complications presented by Sensitive and Insensitive.

Even when proportionality is banded in this manner, however, the subjective experience of punishment still matters, at least to the extent that the placement of the bands should be sensitive to punishment experience. More fundamentally, banded views of proportionality fail to capture the common retributive intuition that those who commit more serious crimes should be punished more severely than those who commit less serious crimes. The banded proportionalist cannot give Sensitive a satisfactory answer when he asks why he should receive more punishment than Insensitive.

To rectify this problem, banded proportionalists typically provide some explanation of how we should punish people within the relevant

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89. Occasionally, opponents of retributivism have charged retributivists with punishing the innocent because retributivists permit the undesired suffering of inmates' family members. Cf. A.C. Ewing, *The Morality of Punishment* 43 (1929) ("[I]t is obvious that in most cases the punishment of an offender brings suffering on his family and those closely connected with him, though they are innocent of the offence in question."); Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 *Nw. U. L. Rev.* 843, 879–80 (2002) ("[I]nfliction of punishment on a guilty offender will most likely inflict pain and suffering on his or her friends and family who are innocent of the offense."). Retributivists might respond to the charge by claiming that the suffering of family members was not deliberate. These retributivists wish that the family members did not have to suffer, but alas, their pain was just a foreseen but unintended side effect. This response strikes me as inadequate. More importantly, it is even less convincing when the side-effect suffering that needs to be justified is experienced by inmates themselves—the very people who are supposed to get their just deserts in prison.

90. See *supra* notes 50, 53; see also Ryberg, *supra* note 1, at 192 (describing "limiting proportionalism").

bands. The explanation is usually a consequentialist one.<sup>91</sup> If so, banded proportionalists will have the same sorts of obligations to calibrate as do other consequentialists, as I will describe in Part II.C. If, however, a banded proportionalist rejects consequentialist explanations, then we are entitled to an explanation of why punishment must only be proportional in a banded manner, contrary to the intuitions that seem to underlie our commitment to proportionality in the first place.

3. *Retributivism Summary*. — In *Punishment and Responsibility*, H.L.A. Hart stated that the standard or central case of punishment “must involve pain or other consequences *normally considered* unpleasant.”<sup>92</sup> While it may be typically true that punishment involves consequences normally considered unpleasant, Hart’s comment could be read to suggest that what matters about a punishment is not how it is experienced by an individual but rather how it is normally experienced. I have argued that such a view ignores offenders’ distressful experiences and thereby fails to justify their infliction. To be retributively punished, the person punished must find the punishment aversive and the severity of the punishment is at least partly a function of how aversive he finds it.

When considering fundamental questions about positive value in life, some people hold that everything valuable is experiential (like pleasure, happiness, or other combinations of mental states). Others believe that states of affairs can have objective value, quite apart from our experiences. So, it has been claimed, one is plausibly harmed when one’s spouse cheats, even if the adultery is never detected.<sup>93</sup> Nevertheless, those who adopt an objective approach to value still count certain positive experiences among the objectively valuable features of the world.<sup>94</sup> It would be an odd account of value that did not at least include certain positive mental states.

Similarly, it is an odd account of disvaluable features of the world that does not at least include certain negative mental states. So, even if punishment consists of more than just negative subjective experiences, those negative experiences are still a necessary and usually substantial

91. See, e.g., Norval Morris, Incapacitation Within Limits, *in* *Principled Sentencing*, supra note 60, at 107, 110 (defending “limiting retributivist” view that permits consequentialist punishment variation within retributively determined boundaries).

92. Hart, supra note 82, at 4 (emphasis added).

93. R.M. Hare, *Essays on Philosophical Method* 131 (1971).

94. See, e.g., Peter Railton, Alienation, Consequentialism, and the Demands of Morality, 13 *Phil. & Pub. Aff.* 134, 149 (1984) (identifying “happiness, knowledge, purposeful activity, autonomy, solidarity, respect, and beauty” as “intrinsically” valuable); Thomas M. Scanlon, The Moral Basis of Interpersonal Comparisons, *in* *Interpersonal Comparisons of Well-Being* 17, 23 (Jon Elster & John E. Roemer eds., 1993) [hereinafter Scanlon, *Moral Basis*] (rejecting purely experiential account of value because character of our conscious states “is not the *only* thing of importance”); cf. Derek Parfit, *Reasons and Persons* 4 (1984) (noting that, even for objective theories of self-interest, “happiness and pleasure are at least part of what makes our lives go better for us, and misery and pain are at least part of what makes our lives go worse”).

component of retributive punishment. Inflicting such negative experiences is a harm that requires justification. In order to meet the proportionality requirement, retributivists must measure punishment severity in a manner that is sensitive to individuals' experiences of punishment or else they are punishing people to an extent that exceeds justification.

### C. *Consequentialism*

In the philosophical literature, consequentialism is understood as a broad theory or class of theories that determine morally right actions based on the good and bad consequences of those actions. Many consequentialists understand subjective distress (or something closely correlated with it) to be precisely the sort of consequence we should seek to avoid. Classical utilitarians, for example, associated value with subjective experiences, like happiness and pleasure.<sup>95</sup> Other consequentialists are more objective or pluralistic about what is valuable, but, as I have argued, they must include some positive and negative experiences as among the world's valuable and disvaluable states of affairs.<sup>96</sup> Thus, consequentialists should quite readily accept the *prima facie* case for attending to variation in punishment experience.

Some consequentialists, however, are opaque about their underlying sources of value and disvalue. These narrower versions of consequentialism, common in the criminal law and criminology contexts, focus principally on their shared effort to prevent crime. Rather than offering a general theory of morality, consequentialist punishment theorists seek to justify incarceration based on its instrumental ability to deter crime, incapacitate dangerous criminals, and rehabilitate those likely to reoffend.<sup>97</sup>

Even these versions of consequentialism are obligated to attend to the subjective experience of punishment. Virtually all consequentialists focus particularly on the ability of punishment to deter criminal behavior, both by specifically deterring the particular offender who suffers the punishment from reoffending ("specific deterrence") and by deterring the public in general from engaging in crimes by making the citizenry aware of the likelihood that they will be punished if they engage in prohibited conduct ("general deterrence"). The more negatively people anticipate experiencing punishment, the more likely they are to be deterred.<sup>98</sup>

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95. See, e.g., James Griffin, *Well-Being: Its Meaning, Measurement and Moral Importance* 7–8 (1986); Will Kymlicka, *Contemporary Political Philosophy* 13 (2d ed. 2002).

96. See *supra* text accompanying notes 92–95.

97. Braithwaite and Pettit have used the term "preventionism" to describe the version of consequentialism common to the criminal law literature. See Braithwaite & Pettit, *supra* note 50, at 32. I will speak of consequentialism at a sufficient level of generality that the difference is unlikely to matter.

98. We typically increase the deterrent effect of incarceration by increasing sentence duration, though there is growing evidence that doing so has only a limited incremental deterrent effect. See John Darley & Adam Alter, *Behavioral Issues of Punishment and Deterrence*, in *The Behavioral Foundations of Policy* (Eldar Shafir ed., forthcoming 2008)

Given how central deterrence is to most consequentialists,<sup>99</sup> closely related subjective experiences (like perceived punishment aversiveness) are similarly central. This can be demonstrated in two steps. The first step is illustrated by Sensitive and Insensitive. When they spend equal time in prison, it is quite likely that their punishments achieve different levels of specific deterrence because they differ in their aversion to prison. Similarly, from a general deterrence perspective, people like Sensitive and Insensitive are, it is safe to assume, differentially deterred by the prospect of punishment. People like Sensitive can, to some extent, anticipate that they will have a particularly difficult time in prison and thereby be more easily deterred. Granted, people may not be very good predictors of their own subjective responses to punishment.<sup>100</sup> But even if that is the case, we will still find substantial variation in the amounts that people are deterred by the prospect of punishment.

The argument requires a second step, however. Consequentialists have no general obligation to deter all potential offenders equally. Nor do they seek to maximally deter offenses. Rather, incarceration is costly from a consequentialist perspective—it is financially expensive, it prevents offenders from engaging in more productive activities, and it causes suffering that is itself a consequence generally to be avoided. Consequentialists, therefore, seek to use the punishment of incarceration economically. They generally seek to punish optimally not maximally.

The fuller story for consequentialists looks at both the costs of setting a particular sentence or range of sentences (and we generally have to follow through with our announced punishments) along with the amount of crime we are likely to deter by setting the punishment at that particular level. Suppose that *S* is a group of people anticipatorily sensitive to incarceration and that *I* is a group of people anticipatorily insensitive to punishment. Suppose further that we can optimally deter members of group *S* by establishing an objectively specified punishment scheme *S\**. Suppose too that we can optimally deter members of group *I* by establishing some objectively specified punishment scheme *I\** that is longer (or in other ways harsher) than *S\**. If we can costlessly calibrate punishments, then we can optimally deter both groups by using both punishment

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(manuscript at 14–15, on file with the *Columbia Law Review*). On the other hand, there is increasing evidence that prison has a greater deterrent effect when the conditions of confinement are harsher. See Lawrence Katz, Steven D. Levitt & Ellen Shustorovich, Prison Conditions, Capital Punishment, and Deterrence, 5 *Am. L. & Econ. Rev.* 318, 339–40 (2003). Examples in the text focus on the incremental deterrence of longer sentences but could easily be reframed in terms of the incremental deterrence of harsher conditions of confinement.

99. See Paul H. Robinson & John M. Darley, The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best, 91 *Geo. L.J.* 949, 956–76 (2003) (detailing pervasiveness of deterrence-related arguments in criminal law and sentencing policies).

100. See *supra* note 79.

schemes. But if *S* and *I* are subject to the same punishment scheme, we cannot optimally deter both groups.<sup>101</sup>

A punishment system that cannot customize its deterrent effect at a more individualized level is an awfully blunt instrument. Putting aside for now the costs of the calibration itself, an uncalibrated system will be less effective on consequentialist grounds than a calibrated system. In fact, given that it costs over \$23,000 per year on average to house an inmate,<sup>102</sup> even if calibration is quite costly, it may prove cheap if it allows us to more precisely specify deterrence levels and shorten the total amount of time people need to spend in prison.

Unlike the goal of deterrence, however, other crime-prevention goals may be little furthered by calibration. For example, interests in incapacitating people are largely independent of the subjective experience of the incapacitated. We prevent car thefts by imprisoning people likely to steal cars regardless of how such people are likely to experience their confinement. Similarly, rehabilitationist goals need not depend in any direct or obvious way on the disutility of prisoners' punishment experiences. While it is quite plausible that prison experiences affect rehabilitation efforts, it makes more sense to measure the extent of rehabilitation directly, rather than to measure prisoner experiences in order to estimate rehabilitation. Nevertheless, even when merely seeking to incapacitate, good consequentialists should compare the benefits of incapacitation to the costs of incapacitation, including the distress of the incapacitated person.

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101. So, for example, if we can optimally deter borderline claustrophobes from dumping hazardous waste by setting a penalty of precisely two years of confinement and optimally deter everybody else by setting the penalty at precisely four years of confinement, cost-free punishment calibration allows us to optimally deter everyone. On the other hand, if we must set a single term of incarceration, say three and a half years, then by stipulation, we are no longer optimally deterring either group, assuming that the given optima are unique. (I also make the assumption that we cannot adjust the probability of detecting an offender's criminal conduct based on his likely future punishment experience. If we could, then we might have an additional method of fine-tuning deterrence.)

102. Adam Liptak, *More Than 1 in 100 Adults Are Now in Prison in U.S.*, N.Y. Times, Feb. 29, 2008, at A14; see also Fla. Dep't of Corr., 2005–2006 Annual Report: Budget Summary 21 (2006), available at <http://www.dc.state.fl.us/pub/annual/0506/pdfs/budget.pdf> (on file with the *Columbia Law Review*) (stating that it costs approximately \$19,000 per year to house a Florida inmate in a "major institution"); James J. Stephan, U.S. Dep't of Justice, Bureau of Justice Statistics Special Report: State Prison Expenditures, 2001, at 1 (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/spe01.pdf> (on file with the *Columbia Law Review*) (stating that, in 2001, state prison operating expenditures per prison had national average of \$22,650). Some estimates are much higher, depending presumably on what sorts of costs are included in the calculation. See The Commonwealth of Mass. Governor's Comm'n on Corr. Reform, Strengthening Public Safety, Increasing Accountability, and Instituting Fiscal Responsibility in the Department of Correction 31 (2004), available at [http://www.mass.gov/Eeops/docs/eops/GovCommission\\_Corrections\\_Reform.pdf](http://www.mass.gov/Eeops/docs/eops/GovCommission_Corrections_Reform.pdf) (on file with the *Columbia Law Review*) (stating that it costs average of \$43,000 per year to house a Massachusetts inmate).

Furthermore, were we to ignore deterrence and focus exclusively on incapacitating and rehabilitating criminals, it would likely require us to have much less distressing forms of confinement than we do now. Conditions would have to be as good as possible, consistent with cost-effective incapacitation and rehabilitation. Such a model better captures the aims of our current systems of preventive detention and treatment of the insane than it does our system of punishment. In fact, it is not at all clear that a consequentialist theory of punishment stripped of its deterrence aim should still even be thought of as a theory of *punishment*. In other words, the only way to avoid the obligation to take the subjective experience of punishment into account is to abolish punishment entirely.

### III. BROAD POLICY OBJECTIONS

In Part I, I argued that our punishment practices largely ignore variations in punishment experience, at least as a matter of formal policy. In Part II, I argued that, cost and administrability concerns aside, both retributivists and consequentialists are obligated to take account of our actual or anticipated subjective experiences when setting punishments. Whether the suffering imposed by punishment is *intrinsically* good (a common retributivist claim) or intrinsically bad but *instrumentally* good (a common consequentialist claim), subjective experience matters.

Some people might accept the theoretical implications that I have identified but challenge the feasibility of actually creating a system to better calibrate punishment. In particular, they may raise concerns about the cost and administrability of calibration, as well as the possibility that calibration would infringe cognitive liberties, violate principles of advance notice, and encourage wealth discrimination. In this Part, I address these concerns, arguing that we should not hastily assume that better calibration is infeasible.

#### A. *Cost and Administrability Objections*

The seemingly obvious explanation for our focus on objectively defined punishments is that a system of subjectively calibrated punishments would be impossible or prohibitively expensive to fairly administer. For example, it would be difficult to predict in advance how a particular prisoner will experience punishment; to measure a prisoner's subjective experience while punishment is being imposed; to determine when a prisoner contrives to appear more distressed by punishment or the prospect of punishment than, in fact, he is; and to reach consensus over the kinds of subjective experiences that matter for assessing punishment. I take this to be the strongest set of objections to punishment calibration. Here are six brief responses meant to soften their force:

1. *Experiential Calibration in Tort*. — First, outside the criminal context, we often make difficult assessments of subjective experience in the courtroom. In tort law, for example, we attempt to value subjective feelings of physical pain and emotional distress. Rather than using an objec-

tive pricing mechanism (e.g., \$5,000 for a broken arm and \$10,000 for a broken leg), we attempt to determine how much pain or distress a particular plaintiff has experienced and will experience as a result of the defendant's tortious conduct.<sup>103</sup> We do so, even though plaintiffs have incentives to portray themselves as suffering more than they actually do. Experts routinely testify about plaintiffs' physical and emotional damages and help jurors weed out malingerers. We certainly disagree about how we ought to aggregate the value of various kinds of unpleasant mental states (e.g., physical pain, mental anguish, upsetting memories) and distill them all into a single dimension represented in dollars, but we nevertheless make such valuations all the time. When calculating damages of, say, false imprisonment, we estimate the disvalue of subjective mental states like anguish and humiliation associated with involuntary confinement.<sup>104</sup> So, not only is it possible to estimate the severity of experiences of confinement, we do so quite frequently.

True, assessments of subjective experience can be quite costly. The costs of civil litigation, unlike the costs of criminal adjudication, are borne principally by the parties to the litigation, not by the state. But even the costs of civil litigation are subsidized by the state. Moreover, given the state's role in inflicting the harms of imprisonment, it is not clear why the state should be free from the obligation to pay for the sorts of assessments that are commonly employed by private litigants.

2. *Parole and Funds Already Spent on Assessment.* — Second, prison systems with parole boards offer an opportunity to better calibrate punishments at modest additional cost. Parole boards have made individualized

103. As the Restatement (Second) of Torts states:

There is no direct correspondence between money and harm to the body, feelings or reputation. . . . There is no market price for a scar . . . since the damages are not measured by the amount for which one would be willing to suffer the harm. The discretion of the judge or jury determines the amount of recovery, the only standard being such an amount as a reasonable person would estimate as fair compensation.

Restatement (Second) of Torts § 912 cmt. b (1964). By contrast, workers' compensation programs often have rather specific pricing schedules that correspond to particular forms of injury or disability. See, e.g., Federal Employees' Compensation Act, 5 U.S.C. § 8107(c) (2006) (providing workers' compensation pricing schedule for federal employees, including 312 weeks' compensation for lost arm and 288 weeks' compensation for lost leg).

104. See, e.g., *Kerman v. City of New York*, 374 F.3d 93, 125 (2d Cir. 2004) ("The plaintiff is entitled to compensation for loss of time, for physical discomfort or inconvenience, and for any resulting physical illness or injury to health. Since the injury is in large part a mental one, the plaintiff is entitled to damages for mental suffering, humiliation, and the like." (quoting Keeton et al., supra note 61, at 48)).

Damages associated with wrongful convictions are often, though not always, calculated using objective measures. Compare Tex. Civ. Prac. & Rem. Code Ann. § 103.105 (Vernon 2004) (providing statutory redress to people convicted in error for expenses, lost wages, counseling, and child support payments up to \$500,000), with *Limone v. United States*, 497 F. Supp. 2d 143, 234–49 (D. Mass. 2007) (engaging in detailed analysis of pre- and post-conviction lives of wrongfully imprisoned plaintiffs that "consider[s] the particular story of this case and these plaintiffs' suffering").

determinations of dangerousness for decades, and those determinations are no doubt fraught with many of the same difficulties as determinations of punishment sensitivity. As part of both sorts of determinations, prisoners have incentives to lie and pretend to be less dangerous or in greater distress than they really are. While parole boards typically focus on evaluations of dangerousness, they could also consider offenders' punishment experiences under formal or informal guidelines. It is not at all clear that assessments of punishment experience are much more difficult to make than assessments of dangerousness. Even if they are, prison systems that already have parole boards offer a relatively inexpensive method of calibrating punishment and demonstrate that experiential punishment calibration is not beyond the pale.

We also already spend considerable, if insufficient, funds on psychological evaluations of individual offenders. Disposition plans for juvenile offenders are often based, in part, on detailed psychological evaluations.<sup>105</sup> Most adult offenders, upon entering prison, receive at least cursory psychological evaluations, and the vast majority of prisons continue to make psychiatric assessments of at least some inmates.<sup>106</sup> Thus, the incremental costs of subjective experience assessments are less than one would expect if we were not already paying for psychological assessments of many offenders. And as I mentioned earlier, given the extremely high cost of confining prisoners, if more accurate sentencing determinations allow for shorter sentences in the aggregate, subjective experience assessments could actually reap cost savings.<sup>107</sup>

3. *Calibration in Limited Contexts.* — Third, while administrability concerns may preclude us from calibrating all punishments, there may be categories of offenders for whom individualized calibration is appropriate. For example, psychiatrists have made progress in diagnosing and assessing the severity of claustrophobia and in detecting those who malingering the condition. If so, perhaps subclinical levels of claustrophobia could be taken into consideration as well. Similarly, some offenders are more prone to depression or suicidal ideations than others, and psychiatrists have substantial experience measuring changes in these psychological states and attempting to discover malingerers.<sup>108</sup> Even under the cur-

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105. See, e.g., Thomas Hecker & Laurence Steinberg, Psychological Evaluation at Juvenile Court Disposition, 33 *Prof. Psychol.: Res. & Prac.* 300, 303 (2002).

106. Allen J. Beck & Laura M. Maruschak, U.S. Dep't of Justice, Mental Health Treatment in State Prisons, 2000, at 1 (2001), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/mhtsp00.pdf> (on file with the *Columbia Law Review*) ("Nearly 70% of facilities housing State prison inmates reported that, as a matter of policy, they screen inmates at intake; 65% conduct psychiatric assessments; 51% provide 24-hour mental health care; 71% provide therapy/counseling by trained mental health professionals; 73% distribute psychotropic medications to their inmates . . .").

107. See *supra* Part II.C.

108. See generally Michael Sharpe, Distinguishing Malingering from Psychiatric Disorders, in *Malingering and Illness Deception* 156 (Peter W. Halligan et al. eds., 2003) (discussing techniques to discover feigned psychiatric disorders).

rent system, inmates held in general prison populations sometimes fake physical and mental illness in order to be confined in the modestly better conditions that are typically available in prison medical or psychiatric facilities.<sup>109</sup> We ought to recognize that decisions about confinement conditions are not just medical decisions. They affect fundamental interests in distributing punishment appropriately.

4. *Future Methods of Calibration.* — Fourth, emerging neuroscience technologies hold out the promise that our assessments of individuals' subjective experiences may become more accurate. Using functional magnetic resonance imaging (fMRI), researchers can observe a subject's brain while the subject experiences emotions like happiness, sadness, anger, fear, and disgust, and attempt to find the neural correlates of such emotions.<sup>110</sup> A number of studies purport to have found brain regions that are more active when subjects experience physical pain,<sup>111</sup> and I have argued elsewhere that, in the not-too-distant future, neuroimaging may provide helpful evidence in tort cases in detecting malingered pain.<sup>112</sup> Neuroscientists have also noted structural differences in the brains of people who have experienced chronic depression and in the brains of those under long-term stress that might someday lead us to identify better biological markers of people's experiences.<sup>113</sup>

By all means, current technology leaves much to be desired and intersubjective comparisons of utility are notoriously difficult to make.<sup>114</sup> We are likely a long way from having accurate, practical means of assess-

109. See Video: A Clash of Cultures: Behind Bars, Security Trumps Treatment (Globe Spotlight Team, Boston Globe 2007), at <http://link.brightcove.com/services/link/bcpid1321280271/bclid1333278073/bctid1339217300> (noting that some prisoners intentionally swallow nails and spikes in order to be removed from general population of prisoners).

110. See Lisa Feldman Barrett & Tor D. Wager, *The Structure of Emotion: Evidence from Neuroimaging Studies*, 15 *Current Directions Psychol. Sci.* 79, 79 (2006) ("Neuroimaging techniques . . . have recently opened the door to searching directly for the circuitry that supports emotional processing in humans."); Richard J. Davidson, *Well-Being and Affective Style: Neural Substrates and Biobehavioural Correlates*, 359 *Phil. Transactions Royal Soc'y: Biological Sci.* 1395, 1395 (2004) (describing our improved understanding of neurobiological correlates of emotional affect).

111. See, e.g., E.A. Moulton et al., *Regional Intensive and Temporal Patterns of Functional MRI Activation Distinguishing Noxious and Innocuous Contact Heat*, 93 *J. Neurophysiology* 2183, 2192 (2005).

112. Adam J. Kolber, *Pain Detection and the Privacy of Subjective Experience*, 33 *Am. J.L. & Med.* 433, 441–48 (2007).

113. See Sonia J. Lupien et al., *Stress Hormones and Human Memory Function Across the Lifespan*, 30 *Psychoneuroendocrinology* 225, 238 (2005) ("[C]hronic exposure to elevated levels of [hormones released when a person experiences stress] is related to both memory impairments and a smaller volume of the hippocampus."); Yvette I. Sheline, *Depression Duration but Not Age Predicts Hippocampal Volume Loss in Medically Healthy Women with Recurrent Major Depression*, 19 *J. Neuroscience* 5034, 5039 (1999) (reporting "smaller hippocampal volumes in subjects with a history of depression").

114. See, e.g., Griffin, *supra* note 95, at 106–24; Scanlon, *Moral Basis*, *supra* note 94, at 17.

ing the complicated, evolving sets of experiences associated with punishment. As I have noted, however, we already make assessments of distress in the courtroom, so new technologies hardly need to be perfect in order to improve on methods that we already use.

5. *Calibration Already Built into Sentencing.* — Fifth, in response to the claim that we cannot assess the subjective experience of punishment, at least on some descriptions of our punishment system, we already do. If one believes that we have a proportional, retributive system of punishment, then we must implicitly make determinations about the relative severity of punishments when we place different kinds of punishments along a graded spectrum of punishment options. For example, suppose that crime A is more serious than crime B. If crime A is punished with two months of incarceration and crime B is punished with two years of probation, then we have implicitly determined that the former penalty is more severe than the latter.

Indeed, some courts have been called upon to evaluate exactly these sorts of judgments of comparative punishment severity.<sup>115</sup> We even make these sorts of determinations when we compare punishments of the same modality. For example, suppose crime C is twice as serious as crime D. Then, if one is a proportional, experiential-suffering retributivist, the punishment for crime C should be twice as severe, in experiential terms, as the punishment for crime D.

Interestingly, a punishment that is twice as severe in subjective, experiential terms is not necessarily twice as long. In fact, studies show that perceptions of punishment severity do not increase linearly as terms of incarceration get longer.<sup>116</sup> For example, one group of subjects rated a ten-year prison sentence as thirty times more severe than a one-year sen-

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115. For example, some countries have given appellate courts the power to reduce punishment severity but not to increase it. See S. White, *Assessing the Severity of Sentences on Appeal*, 36 *Mod. L. Rev.* 382, 382 (1973) (“[I]n varying a sentence on appeal the Court of Appeal is limited to passing a sentence . . . which does not exceed in severity the sentence . . . passed on the appellant at his trial.”); see also *Criminal Appeal Act, 1968*, c. 19, §§ 4(3), 11(3) (Eng.), reprinted in 8 *Halsbury’s Statutes of England* 687 (Sir Roland Burrows ed., 3d ed. 1969) (“The Court shall not . . . pass any sentence such that the appellant’s sentence . . . will, in consequence of the appeal, be of greater severity than the sentence (taken as a whole) which was passed at the trial . . .”); *Criminal Procedure Law, 5725-1965*, § 197, 19 *LSI* 158, 182 (1965–65) (Isr.) (“The court shall not increase the penalty imposed on the accused except where the leniency of the sentence was appealed against.”).

116. See Pierre Tremblay, *On Penal Metrics*, 4 *J. Quantitative Criminology* 225, 227–30 (1988). Other studies examining perceptions of punishment severity include Robert E. Harlow, John M. Darley & Paul H. Robinson, *The Severity of Intermediate Penal Sanctions: A Psychophysical Scaling Approach for Obtaining Community Perceptions*, 11 *J. Quantitative Criminology* 71, 71 (1995); Mara F. Schiff, *Gauging the Intensity of Criminal Sanctions: Developing the Criminal Punishment Severity Scale (CPSS)*, 22 *Crim. Just. Rev.* 175, 175 (1997); Leslie Sebba, *Some Explorations in the Scaling of Penalties*, 15 *J. Res. Crime & Delinquency* 247, 247 (1978).

tence.<sup>117</sup> If punishment severity were measured solely in liberty deprivation terms, we would likely expect that ten years' imprisonment would be only ten times as much of a liberty deprivation.

In any event, any proportional, retributive punishment system we use will make implicit determinations about how punishments relate to each other in severity. Because subjective experience constitutes at least part of what makes a sentence severe, we need methods of comparing subjective experiences. The only real choice is whether the calibration occurs at a very general level that applies to everyone or at a more refined level that applies more individually.

6. *Subjectively Sensitive Policies.* — Finally, even if we cannot develop an individualized punishment calibration scheme, we can certainly develop more experientially sensitive punishment policies than we have now. I have already discussed some of these policy areas in passing. For example, I noted that by separating those who sentence from those who administer punishments, we make it very difficult to calibrate sentences. We can easily imagine systems to correct the most unfair effects of this policy. Suppose prison institutions were placed into categories based on the severity of the conditions at the prison (a categorization that might be almost identical to the one we use now to distinguish prison security levels). Then, a prisoner could be given the opportunity to challenge his sentence if he is involuntarily sent to a facility (for reasons unrelated to bad conduct) that is in a more severe category than the one his sentencing judge recommended. Similarly, judges could stipulate alternative sentences in the event an offender is sent to a facility other than the one the judge recommended, so that a prisoner could satisfy his sentence at a different rate depending on his facility.<sup>118</sup>

Of course, the details of any policy changes will depend on whether one adopts a retributive or a consequentialist justification of punishment. Assuming one adopts a retributive view, here are two more areas where we could develop more experientially sensitive punishments:

a. *Recidivism.* — A subjective conception of punishment severity informs the debate among retributivists about whether a repeat offender should be given a longer sentence than a first-time offender who commits the same crime.<sup>119</sup> The recidivism debate tends to focus on whether these two offenders have equal blameworthiness and often neglects an-

117. Tremblay, *supra* note 116, at 229.

118. In fact, state and federal prison systems have experimented with bootcamp-style programs in which prisoners spend several months in particularly demanding "intensive confinement centers" in exchange for shorter sentences or more lenient treatment afterwards. See Jody Klein-Saffran, Bureau of Prisons: Expanding Intermediate Sanctions Through Intensive Confinement Centers 1–2, available at [http://www.bop.gov/news/research\\_projects/published\\_reports/gen\\_program\\_eval/oreprbootcamp2.pdf](http://www.bop.gov/news/research_projects/published_reports/gen_program_eval/oreprbootcamp2.pdf) (last visited Oct. 24, 2008) (on file with the *Columbia Law Review*); Richard Willing, U.S. Prisons to End Boot-Camp Program, *USA Today*, Feb. 3, 2005, at 1A.

119. See George P. Fletcher, *Rethinking Criminal Law* 460–66 (1978) (describing debate and arguing against augmented punishments for recidivists).

other relevant dimension: Namely, a return visit to prison is typically experienced in a less severe way than a first visit. Humans tend to “hedonically adapt” to their circumstances, such that disabling conditions or distressful circumstances tend to get easier over time.<sup>120</sup> In the context of incarceration, prisoners have great difficulty making the initial adjustment to prison life. Men who have been recently jailed report life satisfaction scores below those of homeless Californians and Calcutta sex workers and just above those of Detroit sex workers.<sup>121</sup> In time, however, most prisoners manage to adjust:

[A study of British prisoners] observed generally successful long-term adjustment (although prisoners reported that specific stressors, such as the loss of relationships with people outside the prison, became increasingly difficult to deal with as time passed). . . . [Researchers have also] reported declining dysphoria, a reduction in stress-related problems such as sleep disturbances, and decreasing boredom over the course of prison sentences.

Even inmates placed in solitary confinement for long periods adapt to their circumstances. . . . Indeed, some found it difficult to adjust to release from solitary confinement.<sup>122</sup>

Thus, if one believes that repeat offenders and first-time offenders are equally blameworthy when they commit the same crime, then the repeat offender may nevertheless deserve a more severe sentence in objective terms in order to obtain an equally severe sentence in subjective terms. Alternatively, if one believes that the repeat offender is more blameworthy, then a retributivist has two reasons to increase the duration or harshness of the repeat offender’s punishment.

The full picture is likely more complicated still, because the very fact that an offender has been convicted multiple times may be evidence that he has poor coping skills.<sup>123</sup> If so, the coping difficulties of repeat offenders provide some evidence that they are more sensitive to punishment than average first-time offenders. In any event, one cannot develop retributively appropriate recidivism policies without taking the psychological realities of punishment into account.

120. See Shane Frederick & George Loewenstein, *Hedonic Adaptation*, in *Well-Being: The Foundations of Hedonic Psychology*, supra note 79, at 302, 302–03.

121. Owen J. Flanagan, *The Really Hard Problem: Meaning in a Material World* 153 tbl.5.1 (2007) (citing empirical research on life satisfaction).

122. Frederick & Loewenstein, supra note 120, at 311–12. Research on hedonic adaptation suggests that, after a long enough period of time, prisoners’ affective experiences may not be so different from what they would have been had they not been in prison. If subjective experience is a fundamental part of retributive suffering, then one ought to seriously question the value of long prison sentences to retributivists. While long sentences may be required to exact a certain quantum of suffering, long sentences are also an extraordinarily inefficient method of doing so. So much the worse, perhaps, for retributivism.

123. See Edward Zamble & Frank J. Porporino, *Coping, Behavior, and Adaptation in Prison Inmates* 101–02 (1988).

b. *Monetary Fines*. — A subjective conception of punishment severity can also inform our practices of imposing monetary fines. If monetary fines are a form of *retributive* punishment (as opposed to a tax or a pricing mechanism),<sup>124</sup> then there seems to be little retributive justification for our general practice in the United States of imposing punitive fines that are independent of offenders' experiences of those fines.<sup>125</sup> Most billionaires who receive a \$100 speeding ticket suffer far less from the punishment than those struggling to make ends meet.

Our general practice of using fixed fines is hardly universal, however.<sup>126</sup> In some jurisdictions, fine amounts, sometimes called "day fines" or "unit fines," are calculated as a function of income or ability to pay.<sup>127</sup> For example, in 2002, a Nokia executive in Finland was fined approximately \$100,000 for traveling on his motorcycle at forty-six miles per hour in a thirty-miles-per-hour zone.<sup>128</sup> The fine was calculated as a fraction of his multimillion dollar annual income. Strictly speaking, nobody measured the executive's subjective experience to determine how he perceived the fine. Nevertheless, fines that are a particular fraction of an offender's annual income (or net worth) likely serve as good first approximations of the experiential severity of fine punishments and are relatively easy to implement. The change is easy enough to implement that resistance to the idea probably reflects resistance to the foundational notion that fines should serve as retributive punishments.

7. *Cost and Administrability Summary*. — In summary, cost and administrability concerns present powerful impediments to the creation of a highly individualized system of punishment calibration. Nevertheless, these concerns are tempered by the fact that we explicitly engage in an assessment of subjective experience when making tort damage assessments and implicitly do so when trying to arrange a proportional punishment system. We already have some technologies to help us make inferences about others' subjective states of distress, and the technology is certain to get better in the future. Our assessments of subjective distress need not be perfect in order to be meaningful and helpful. They only need to be more accurate than what we have now.

Having established that subjective experience should matter to both retributivists and consequentialists, we may reasonably expect them to

124. See Robert Cooter, *Prices and Sanctions*, 84 *Colum. L. Rev.* 1523, 1523–25 (1984).

125. Some fines in the United States do appear to be at least roughly calibrated to offenders' punishment experiences. See 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, 6–9 (1999) (describing use of day fines in U.S. jurisdictions).

126. According to ancient Jewish law, offerings made to repent for sins were a function of the sinner's means. *Leviticus* 5:1–11.

127. See Andrew Ashworth, *Sentencing and Criminal Justice* 304–06 (4th ed. 2005).

128. Alan Cowell, *Not in Finland Anymore? More Like Nokialand*, *N.Y. Times*, Feb. 6, 2002, at A3.

promote the adoption of subjectively sensitive criminal justice policies. Many retributivists hold that we are obligated to proportionally punish individual offenders.<sup>129</sup> Given that our punishment system *can* be more subjectively sensitive than it is now, retributivists would seem to be obligated to engage in some forms of individualized punishment calibration.

By contrast, while some consequentialists are also proportionalists, some are not. Consequentialists need not adopt strong proportionality constraints or even any proportionality constraint at all. They may simply weigh the benefits of calibration against its costs. I have argued that measurement costs are not as high as one might have thought and that they are not so out of proportion to the costs of other complicated measurements in which the law already engages, like measurements of mental states related to mens rea or to dangerousness in the criminal justice system or to measurements of mental states related to experiential harm in torts. It may be the case that *individualized* calibration is too expensive from a cost-benefit perspective, but there are likely to be inexpensive subjectively sensitive policies that better achieve consequentialist goals than do our current policies.

On the other hand, consequentialists may be able to argue that, while their considered judgments favor subjectively calibrated punishments, many laypeople have objective punishment intuitions.<sup>130</sup> Laypeople may incorrectly believe that subjectively calibrated punishments are unfair, and this second-order effect of our punishment may itself have negative consequences.<sup>131</sup> Arguably, consequentialists ought to be able to count these reactions in their cost-benefit calculations. Doing so may seem a bit counterintuitive because, as I noted earlier,<sup>132</sup> when widely held societal beliefs promote insensitivity to suffering, we usually try to change those underlying beliefs rather than enshrine them in official policy. Nevertheless, a consequentialist might be able to defend our largely noncalibrated punishments by demonstrating that punishments that contravene lay intuitions will lead to bad consequences. The more fundamental point, however, that moral judgments of punishment severity must take account of subjective experience, would be unaffected. In order for consequentialists to be confident that the costs of calibration exceed the benefits, they must make at least some assessment of the subjective experience of punishment in order to engage in a thorough consequentialist analysis.

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129. See *supra* notes 50–51 and accompanying text.

130. See, e.g., Ashworth, *supra* note 127, at 306 (noting how politicians and media in United Kingdom presented unit fines as unfair by focusing on objective measures of punishment); Piper, *supra* note 1, at 149 (“[M]edia reports would suggest that the public want to ‘see’ equality of treatment for offences which are of similar gravity and believe injustice has been done if an outcome ‘looks’ too lenient or too severe in comparison to known cases.”).

131. Cf. *supra* note 76.

132. See *supra* text accompanying notes 75–77.

## B. *Privacy Objections*

Suppose there were a perfect “hedonimeter” that could accurately predict, at sentencing, a defendant’s future suffering or accurately measure an inmate’s suffering during the course of a sentence. One might argue that, even if such a device existed, its use would violate offenders’ important interests in mental privacy. On this view, our thoughts and feelings are our own in a fundamental sense, and the state should not have privileged access to them.

This is an odd objection. It is like saying, “We are engaged in an enterprise designed to inflict suffering on you, but we are not permitted to measure that suffering for reasons of privacy.” There are several additional reasons why the objection is weak. First, at least in the incarceration context, we already greatly limit privacy rights, including the privacy of offenders’ subjective experiences. For example, we greatly limit prisoners’ opportunities to cry in private or otherwise hide evidence of their subjective states. It is unlikely that measuring prisoners’ subjective states of disutility is more invasive than other kinds of already common invasions of prisoners’ privacy—prisoners are forced to use toilets in public view and are routinely strip searched.<sup>133</sup> Second, there may be plausible health and safety rationales for assessing prisoner emotional distress that outweigh whatever interests prisoners have in keeping their distress private. Finally, even if detailed measurements of prisoner distress were deemed to threaten fundamental privacy interests, many prisoners might waive their privacy rights, such that we could still better calibrate punishments than we do now.

## C. *Notice Objections*

As a matter of fairness and of federal constitutional law, we cannot punish people for their criminal conduct unless they had adequate advance notice of the range of criminal sanctions associated with it.<sup>134</sup> While many offenders actually had very little awareness of the punish-

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133. See, e.g., *Johnson v. Phelan*, 69 F.3d 144, 145, 151 (7th Cir. 1995) (dismissing prisoner’s claim that his constitutional rights were violated by prison policies allowing female guards to see male prisoners naked “in their cells, the shower, and the toilet”); *Mary Anne Case*, *All the World’s the Men’s Room*, 74 U. Chi. L. Rev. 1655, 1660–62 (2007) (discussing *Johnson*); *Kate Murphy*, *After Enron, a Sunless Year in a Tiny Cell*, N.Y. Times, June 20, 2004, § 3, at 5 (describing typical encroachments upon privacy of inmates); see also *Limone v. United States*, 497 F. Supp. 2d 143, 235 (D. Mass. 2007) (noting that prisoners are strip searched after visits with relatives).

134. The Ex Post Facto Clause of the U.S. Constitution prohibits legislatures from enacting a law that “makes more onerous the punishment for crimes committed before its enactment.” *Weaver v. Graham*, 450 U.S. 24, 36 (1981). The Supreme Court has “recognized that central to the *ex post facto* prohibition is a concern for ‘the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.’” *Miller v. Florida*, 482 U.S. 423, 430 (1987) (quoting *Weaver v. Graham*, 450 U.S. 24, 30 (1981)); see also Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. Pa. L. Rev. 335, 336

ments they faced before committing their crimes, some knew in advance and all, at least in principle, could have investigated the potential punishments for particular crimes. If we provide different punishments for different offenders that are in some way calibrated based on subjective experience, it is not at all clear whether people will know or understand in advance the possible sanctions for engaging in criminal conduct. Thus, one might argue, a system that individually calibrates punishment experience would fail to give proper notice to potential offenders.

The objection is difficult to address in the abstract, as there are many ways to give potential offenders advance notice, even if punishment is subjectively calibrated. Here is one impractical response: Suppose we provide for punishments in units of disutility as opposed to, say, dollar fines or years of incarceration. For example, suppose we had a punishment system that assigned 500 disutils to the crime of arson.<sup>135</sup> For Sensitive, let us suppose, 500 disutils could be experienced with a prison term of two years, while Insensitive would have to spend three years in prison to receive a punishment that imposes equal disutility.

What happens if, under such a system, Sensitive or Insensitive claims that he had inadequate notice of the potential punishment associated with arson, given that the statute does not state a precise range of prison terms? If the aversive features of punishment are principally about the subjective disutility they impose, then a sentencing system measured in disutils might actually provide *better* notice than a system of punishment measured in years of incarceration. In this sense, focusing on the subjective experience of punishment highlights a weakness in our current system of giving notice. We specify terms of incarceration in years to people who may have very little conception of what it is like to spend time in prison. By contrast, *if* people could come to know what a certain quantity of disutility feels like, they could, perhaps, more accurately envision what a penalty of 500 disutils is like.

Here is a much more practical solution to the notice objection: We currently use objective time frames, like years in custody, to specify incarcerative punishment ranges. A subjectively sensitive punishment scheme could simply set objectively defined punishment ranges that correspond, on the low end, with a term appropriate for very sensitive offenders and, on the high end, with a term appropriate for very insensitive offenders. While this solution may actually give offenders less notice than

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(2005) (“[C]riminal liability and punishment can be based only upon a prior legislative enactment of a prohibition that is expressed with adequate precision and clarity.”).

135. There are some tricky issues raised by the conversion of disutils into objective terms like sentence duration and confinement conditions. For example, disutils can be experienced: (1) intensely and quickly or (2) less intensely but over a longer period. Perhaps, when disutils are properly understood, people will be indifferent between these possibilities, though I take no position on the matter here.

they would have in the system defined in terms of disutility, it will still satisfy our very modest constitutional notice requirements.<sup>136</sup>

#### D. *Wealth Discrimination Objections*

Compared to the average person, wealthy people are generally accustomed to more spacious environments, more personal property, better food, better medical care, and so on. All else being equal, as an empirical matter, wealthy people are likely to suffer more intensely in prison than those with less wealth who are placed in the same prison conditions. Yet, as Douglas Husak has noted, “[f]ew suggestions are more distasteful to the public than that the privileged, in virtue of their elevated status, should be punished less severely than the disadvantaged.”<sup>137</sup> Similarly, Andrew von Hirsch criticizes an approach to punishment where “the middle-class person is put on probation and the ghetto youth jailed for the same infraction, on the theory that the former’s sensitivities are greater.”<sup>138</sup> Such sentiments are embodied in federal statutes requiring that when the Federal Bureau of Prisons makes prisoner facility assignments, “there shall be no favoritism given to prisoners of high social or economic status.”<sup>139</sup> Such sentiments are also reflected in public opposition to so-called “pay-to-stay” jails that permit inmates to pay a daily fee and receive their own cells in modestly more comfortable surroundings.<sup>140</sup>

Of course, no one is suggesting that wealthy people should be punished less severely than poor people. Proportional retributivists believe that wealthy people should be given punishments that are *equal* to those of all other offenders who are equally blameworthy. At issue, however, is whether “equal” punishment should be understood in objective or subjective terms, and I argue that our assessments of punishment severity must include the augmented subjective distress of sensitive offenders, even when their sensitivities relate to their wealth.

Many people will find this claim counterintuitive. When variation in punishment experience is caused by wealth differences, many people have objective intuitions about punishment severity, as illustrated in cases

136. Our requirements are sufficiently modest that an offender need not have had actual knowledge of the sentencing range associated with his offense, and most offenders probably had little or no such knowledge. Cf. *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (“Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand . . .”).

137. Husak, *Already*, *supra* note 1, at 82.

138. Andrew von Hirsch, *Comm. for the Study of Incarceration, Doing Justice: The Choice of Punishments* 90 (1976).

139. 18 U.S.C. § 3621(b) (2006).

140. See generally Symposium on Pay-to-Stay Programs in Correctional Facilities, 106 *Mich. L. Rev. First Impressions* 55 (2007), at <http://www.michiganlawreview.org/first-impressions/vol106/paytostay.pdf> (on file with the *Columbia Law Review*) (collecting articles on the topic).

like the following: Suppose that Hoity-Toity, a well-to-do man of leisure, commits the same crime as Insensitive, a man who has lived his whole life in cramped living conditions with meager financial resources. If we seek to give them both equal punishments in ways that recognize their subjective experiences, it seems that Hoity-Toity should spend less time in prison (or have an objectively lighter sentence in other ways) than Insensitive because Hoity-Toity has grown accustomed to a higher living standard and will find ordinary incarceration to be much more distressing than Insensitive will. Such a result violates a common intuition that Hoity-Toity and Insensitive should spend the same amount of time in prison.

One way around the problem is simply to deny that Hoity-Toity and Insensitive must receive equal punishments. This response is open to many consequentialists. If one is not a proportionalist about punishment, then one is not obligated to punish Hoity-Toity and Insensitive equally. In that case, one must still admit that wealthy, sensitive offenders are punished more severely than poorer, less sensitive offenders when they have equal prison terms, but one need not engage in a counterintuitive effort to equalize the severity of their punishments.

On the other hand, if I am right that subjective experience matters to assessments of punishment severity, then proportional retributivists are quite possibly committed to the view that Hoity-Toity really should spend less time in prison than Insensitive (or the same amount of time but in better prison conditions). In fact, proportionalists may be discriminating *against* Hoity-Toity when he is punished in objectively the same way that we punish Insensitive.<sup>141</sup> Giving Hoity-Toity a shorter sentence or better accommodations than Insensitive is not favoritism but rather is precisely what is required to treat them *equally*, if one takes seriously the notion of proportional retributivism. So much the worse perhaps for proportional retributivism.

Even though I am not committed to the proportional retributivist view that we must equalize the subjective distress of equally blameworthy offenders, one might still argue that I have a counterintuitive conception of punishment severity. Here are some reasons why the view is not as counterintuitive as it might at first seem. First, many people have the intuition that Hoity-Toity should be in prison *at least* as long as Insensitive. The intuition may be partly explained, however, by the fact that people view Hoity-Toity as more blameworthy than Insensitive even

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141. See John R. Lott, Jr., Do We Punish High Income Criminals Too Heavily?, 30 Econ. Inquiry 583, 584 (1992) (arguing that wealthy people may be overpunished relative to less wealthy people because the wealthy have dramatically reduced postconviction earning potential); cf. Richard A. Posner, Optimal Sentences for White Collar Criminals, 17 Am. Crim. L. Rev. 409, 415 (1979) ("Since the disutility of imprisonment rises with income, this form of punishment will deter the rich man more than the poor one. Stated differently, a nominally uniform prison term has the effect of price discrimination based on income.").

when they commit the same crime. People may believe that Hoity-Toity, because of his wealth, had better alternatives to a life of crime than Insensitive had and that he is, therefore, more culpable. If Hoity-Toity is more culpable than Insensitive, then people may simply have the retributive intuition that Hoity-Toity should be punished more severely in subjective terms than Insensitive.

Second, in scenarios that are closer to real life, wealthy people typically have better legal representation than poor people. If a rich person and a poor person are given the same term of incarceration, one might plausibly believe that the rich person is more blameworthy, since he ended up with the same sentence as the poor person despite having better advocacy. So, our intuitions may be partly explained by the illicit assumption that Hoity-Toity is more blameworthy than Insensitive but that Hoity-Toity used his wealth to tamp down his sentence below what it should have been. Again, if Hoity-Toity is deemed more blameworthy than Insensitive, it is not surprising that people have the intuition that Hoity-Toity should suffer more severely in subjective terms than Insensitive.

These two explanations can be strengthened by the following example: Suppose that Farmer and Insensitive commit the exact same crime under identical circumstances and are sentenced to identical terms of incarceration. Farmer is particularly sensitive to being locked up because he has spent his life as a subsistence farmer, living in wide-open spaces with lots of natural light. Being in prison will be harder for him than for most others. He will grow more depressed than others, he will frequently wake up sweating in the middle of the night, and he will periodically bang on his cell door in fits of panic. So far, we are likely to be rather sympathetic to Farmer, particularly if we are sympathetic to claustrophobia-type cases. If we add the additional fact that Farmer wins the lottery just before he is sentenced (so his wealth does not affect his culpability or the quality of his legal representation), then we are likely to treat the case just as we do the more general case of Sensitive and Insensitive.<sup>142</sup>

Our intuitions in wealth-related cases may also lead us astray because they import broad views about distributive justice that are unrelated to punishment. Sentencing laws certainly offer one method, among many, to rectify preexisting unjust distributions in society. For example, some people are fabulously wealthy, while others fight off crippling debt. We

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142. Nevertheless, these two explanations—that Hoity-Toity has augmented blameworthiness and better legal representation—cannot fully explain common lay intuitions. Many people have the intuition that Hoity-Toity and Insensitive should spend precisely the *same* amount of time in prison. Yet, it would be very coincidental if Hoity-Toity's augmented blameworthiness or better access to legal representation make him deserve augmented experiential distress that ends up giving him his just deserts when he serves the *same* term as Insensitive. To see why, suppose that Super-Hoity-Toity is even richer than Hoity-Toity and is therefore more blameworthy and has even better legal representation. Yet, it is very difficult to explain the intuition that many people have that Insensitive, Hoity-Toity, and Super-Hoity-Toity should all spend exactly the same amount of time in prison when they commit crimes of equal blameworthiness.

may even harbor the view that the wealthy ordinarily deserve their wealth. Yet, when a wealthy person and a poor person commit the same crime, we may take the wealthy person's criminal behavior as evidence that he never really deserved his advantaged life.<sup>143</sup> Thus, we may give him the same objectively defined punishment as the poor person in order to rectify a preexisting inequality. This result, however, derives from some broad theory of distributive justice, not from anything related to the concept of punishment severity.

Admittedly, our intuitions about punishment severity are not univocally subjective. In the vast majority of cases (e.g., claustrophobic inmates and recipients of corporal punishment), our intuitions lean heavily toward subjective conceptions of punishment. In cases where punishment sensitivity arises from wealth differences, however, many have intuitions that lean heavily toward objective conceptions of punishment.

One might try to distinguish these cases based on the nature of the sensitivity at issue. Perhaps the sensitivities of claustrophobes can sometimes be distinguished from the typical sensitivities of the wealthy. Presumably, claustrophobes are not responsible for their sensitivities and do not endorse them. By contrast, wealthy people are sometimes responsible for their sensitivities and likely endorse at least some aspects of their wealthy status.

It is not clear, though, why a person's causing or having previously endorsed a sensitivity necessarily affects our assessments of the person's desert or the severity of his punishment. We do not ordinarily consider wealthy people criminally blameworthy by virtue of their wealthy lifestyles. Suppose a person spends forty years leading a law-abiding, socially productive, affluent life and then commits a crime at age forty-one. Why should the fact that he engaged in an otherwise praiseworthy life for forty years mean that he should have additional distress compared to someone who did not develop the same sensitivities? And even if he endorsed his sensitivities for forty years, why should that matter when he is in prison and no longer endorses his ingrained sensitivities?<sup>144</sup>

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143. This sort of reasoning is evident in *United States v. Bergman*, where Rabbi Bergman argued for leniency at sentencing on the ground that he had already been punished enough by hostile publicity before and after he was indicted:

Defendant's notoriety should not in the last analysis serve to lighten, any more than it may be permitted to aggravate, his sentence. The fact that he has been pilloried by journalists is essentially a consequence of the prestige and privileges he enjoyed before he was exposed as a wrongdoer. The long fall from grace was possible only because of the height he had reached. The suffering from loss of public esteem reflects a body of opinion that the esteem had been, in at least some measure, wrongly bestowed and enjoyed.

416 F. Supp. 496, 502–03 (S.D.N.Y. 1976).

144. When we distribute valuable resources like money, bodily organs, and lifeboats, some have argued that we ought not use purely subjective criteria in assessing just distribution. The claims that others make on us, according to this view, are limited by objective considerations about the reasons supporting their claims. In particular, we need not accommodate people's "expensive tastes." See T.M. Scanlon, *Preference and Urgency*,

One reason we cannot easily blame people for sensitivities that augment their punishment is that sensitivities are not solely features of offenders. They depend both on characteristics of offenders and characteristics of our chosen methods of punishment. Sensitive is highly sensitive to incarceration, while Insensitive is not, but their levels of sensitivity might switch if they were punished by some other form of punishment, like banishment. Similarly, wealthy people are likely to be sensitive to incarceration but insensitive to fixed monetary fines.<sup>145</sup> To the extent that our methods of punishment are arbitrary, sensitivities to those punishments will be as well.

Interestingly, objective intuitions seem stronger in the case of incarceration (where subjective views favor the wealthy) than in the case of fines (where subjective views disfavor the wealthy). It is hard to see how an explanation in terms of causing or endorsing sensitivities can explain these conflicting intuitions. Rather, I suggest, our treatment of wealth-related sensitivities probably reflects broader views about redistributive justice and not views about punishment severity.

Even if there were convincing reasons to discount certain sensitivities, we would still have to take account of offenders' subjective experiences. In fact, we would have the even more onerous obligation to ex-

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72 J. Phil. 655, 659 (1975) [hereinafter Scanlon, Preference]; see also Katz, *supra* note 1, at 155–56; Ronald Dworkin, What Is Equality? Part 1: Equality of Welfare, 10 Phil. & Pub. Aff. 185, 186 (1981). So, for example, according to Thomas Scanlon, “[t]he fact that someone would be willing to forego a decent diet in order to build a monument to his god does not mean that his claim on others for aid in his project has the same strength as a claim for aid obtaining enough to eat.” Scanlon, Preference, *supra*, at 659–60. Similarly, if we seek to distribute valuable resources equally to Hoity-Toity and Insensitive, so the argument goes, we need not buy Hoity-Toity a bottle of fine wine when we buy Insensitive a bottle of root beer, even if we would have to give Hoity-Toity the wine in order for both of them to obtain the same improvement in well-being. Yet, if we do not accommodate “expensive tastes” when distributing valuable resources, why should we accommodate them when distributing punishment resources?

Until the argument is fleshed out in more detail, it is difficult to adequately respond to it. There is no immediate connection between the policies that guide us when distributing goods that people want and the policies that guide us when distributing punishment. I will, however, offer a few brief considerations: First, one may challenge the force of the “expensive tastes” argument even in its traditional context. One may think that equality of distribution should be understood on grounds of subjective welfare, acknowledging that we may then depart from equality so understood for certain consequentialist reasons (e.g., we want to discourage people from developing expensive tastes). Second, as an empirical matter, the “expensive tastes” offenders develop outside of prison are generally very *inexpensive* tastes from the perspective of criminal justice. The people who are most expensive to deter are those who find prison least objectionable. Third, at most, the expensive tastes response could lead us to discount some subjective distress (perhaps where we are partly responsible for the development of that distress), but it does not, by itself, relieve us of the obligation to calibrate distress in general.

145. More calibrated punishments do not necessarily benefit wealthy people. In the case of fines, a switch to subjectively calibrated proportional punishments would be more demanding, in dollar terms, of higher-wealth offenders than lower-wealth offenders. See Husak, *Already*, *supra* note 1, at 93.

amine both offenders' punishment experiences as well as their sensitivities to punishment in order to determine the extent to which an offender caused or endorsed his own sensitivities.

To be clear, I am not arguing that Hoity-Toity must be given a shorter term of incarceration than Insensitive. I do not share the set of retributive beliefs that lead to that conclusion. However, if one accepts a common retributivist line—that people should suffer in proportion to their blameworthiness—and if Hoity-Toity and Insensitive are equally blameworthy, then Hoity-Toity deserves a subjectively equal but objectively less severe punishment than Insensitive, given plausible assumptions about their relative sensitivities to punishment.

If you retain the nagging feeling that the rich and the poor *deserve* equal punishments in objective terms, consider the possibility that you are fixating on our conventional descriptions of punishments, which are typically phrased in objective terms. Imagine, by contrast, the fictitious punishment of “boxing,” where an offender who is boxed is confined to a cell that has dimensions  $n$  by  $n$  by  $n$ , where  $n$  equals the height of the offender. Setting aside the horrendousness of the punishment itself, is it *unfair* when offenders of different heights are boxed? I think not. Yet, in objective terms, offenders who are boxed receive quite different punishments. Nevertheless, it seems fair that taller people should be placed in larger cells than shorter people. Simply by reframing punishment descriptions in subjective terms, we can ease or eliminate perceptions of punishment inequality.

In summary, many people have objectivist intuitions about incarceration when variation in punishment experience is closely tied to wealth. I have argued that these intuitions may be explained away to a large extent if those who hold these intuitions believe that the offenders being compared have different levels of blameworthiness. The objectivist intuition may also be explained away if it imports broader views about wealth inequality and distributive justice that are unrelated to punishment severity. Finally, objective intuitions are weakened when objectively different but subjectively calibrated punishments are given the same name, as would be the case if we had punishments like “boxing.” The potential punishment of “boxing” reveals that our objective-leaning intuitions may focus fetishistically on the way punishments are named without looking at their substance.

#### CONCLUSION

I have argued that there is a disconnect between our laws governing punishment and our theoretical attempts to justify punishment. Specifically, punishment sensitivity is rarely acknowledged as a factor to consider at sentencing or when crafting sentencing policy, even though, as I have argued, any successful justification of punishment must take subjective experience into account.

Many retributivists claim that one's punishment should be proportional to the seriousness of one's offense. So, if retributivists ignore subjective experience, they may be punishing people above or below the amount of punishment dictated by the requirement of proportionality. When they overpunish, they take people who no longer owe a punishment debt to society and punish them nonetheless. Retributivists believe it is anathema to punish the innocent, and this begins to sound awfully close. Relying on a purely objective conception of punishment will be of no help. Such a conception fails to justify the very real subjective distress that is an essential aspect of punishment. If one finds unacceptable the implications of proportional, retributive punishment when subjective experience is taken seriously, then my claims can be viewed as providing a *reductio*-style argument against certain forms of retributivism.

Many consequentialists are quite receptive to the claim that they are prima facie obligated to take account of actual or anticipated subjective experiences. Rather, their concerns are likely to center around the costs of calibration. I have argued that the costs of calibration are not necessarily prohibitive, particularly if punishments are made more subjectively sensitive at the policy level. At the same time, I acknowledge that a plausible consequentialist defense of the status quo could be mounted by appeal to second-order negative consequences arising out of popular perceptions of punishment that happen to be objective in nature and are difficult to change. Consequentialists will owe us an explanation of why these perceptions, confused as they may be, ought to be given weight when we seek to eradicate other sorts of confused perceptions related to human suffering. But perhaps such an explanation could be presented. Importantly, however, even consequentialists who believe that, all things considered, we ought not calibrate punishment must still concede that subjective experience matters. Unless consequentialists have assessed the amount of experiential distress caused by some punishment policy, they cannot confidently conclude that the benefits of the policy exceed its costs.

Both retributivists and consequentialists should recognize that subjective experience matters in assessments of punishment severity and take at least modest steps toward calibrating punishment, either through individualized measurements or, far more feasibly, by enacting punishment policies that are more subjectively sensitive than those we have now. We can surely do a better job of crafting policies that reflect what the mind and brain sciences tell us about punishment experience. We already give judges discretion to sentence within certain boundaries, and they are probably already calibrating punishments to some degree. Our choice may be less about *whether* we calibrate punishment at all and more about whether we do so in a haphazard, clandestine way or in a manner that is open to review and criticism.