

The Prison Experience

The “glorified film strip” about Eastern State Penitentiary (ESP) that we watched in class a couple weeks ago made clear that the judges, juries, and prosecutors who impose and recommend punishments for convicted criminals are not the same people who are responsible for the conditions under which these punishments are carried out. Maybe corrections officials should be more involved with the sentencing process, or judges should be required to tour the prisons and jails to which they sentence those convicted in their courtroom. Perhaps one of these would allow those sentencing to factor in all the subjective factors of punishment and see the full picture of what a prison sentence is. I agree with Prof. Adam J. Kolber of the University of San Diego in his essay “The Subjective Experience of Punishment:” Judges and juries should take into account the extra harsh and unbearable prison life that they may be subjecting another person to when imposing and recommending sentences.

Indeed, everyone does not experience and cope with the same adversity in the same way. If sentence proportionality and consistency is a goal for our criminal justice system, not factoring in the more severe punishments that some experience in prison, such as rape and physical attacks and constant fear, thwarts this objective. Perhaps more publicity and reforms in prison conditions could decrease the national average prison sentence imposed for each type of crime, which appears to have increased significantly since 1990 and done little to deter crime or control the costs of our nation’s penal systems. *See* “Time Served: The High Cost, Low Return of Longer Prison Terms”, Pew Center for the States, 2012. As Prof. Berman mentioned in class, murderers and those on death row get much more attention than then those imprisoned for committing much less violent or high profile crimes. Little, if any, media attention is devoted to the lives of those serving outrageous sentences for relatively minor or nonviolent crimes. I find it alarming that the U.S. has the largest prison population in the world and we really have nothing good to show for this position.

As our society’s notions of evil and criminality have changed, so too have our notions and goals of punishment. Prison was apparently conceived as an alternative to the previously favored sentences of death, incapacitation and exile as a way for convicts to reform and re-enter society. However, we seem to have given up on reform and rehabilitation and prefer to just incarcerate criminals out of sight and mind for longer and longer, making it more difficult for

such people to re-assimilate into the outside world after longer periods of time. Rehabilitation sentencing seems to require judgment of whether a certain convict is redeemable and how long such redemption would take. It seems ridiculous to us now that prison officials at ESP expected inmates to serve their sentences in complete silence and severely punished those who broke that silence willingly and even those who could not help it due to mental health issues. When the prison was first opened, this type of (silent) punishment was an experiment, meant to help inmates reform themselves and possibly find their way to God. Obviously, the experiment was not too successful and this practice was eventually ended, but the conditions of that prison and of so many operating today are not ideal. Though prison is indeed not the Four Seasons, people deserve to live with some dignity and security while being confined against their will for an ever increasing amount of time.

Should Subjective Prison Experience Be Factored Into A Person's Punishment?

The law should factor in a person's subjective experience in jail when considering the length of a prison sentence. While there are a variety of theories of punishment to consider when deciding the value of a prison sentence, the main theories are all better served by considering subjective experience of prison sentences.

A retributivist considers punishment a means for giving a guilty person the punishment he has "earned" by committing a crime. Therefore, both the harshness and length of the punishment are relevant in determining whether this earned punishment has been accomplished. A person's subjective experience in jail, therefore, is extremely important in determining how much a prisoner has, in fact, suffered for his wrongdoing. A simple measurement of the length of the sentence without consideration of severity may lead to consistent lengths of sentences, but it would also lead to a much more inconsistent result of overall suffering.

A utilitarian considers punishment a means for deterrence. This deterrence is specific (to deter this specific defendant) or general (to deter the general population from committing this crime). A utilitarian would argue that a certain level of severity in punishment is required to ensure that this specific defendant will understand his mistake and be deterred from repeating the same crime in the future.

Of course, assessing whether specific deterrence has been accomplished would favor an examination of this specific defendant's experience in prison, rather than an objective view of the length of his sentence. Serving a shorter sentence may

deter one defendant more than another, and one might have had a less severe sentence, which means he suffered an overall less severe sentence for commission of the same crime.

Some people favor punishment's primary goal as rehabilitation of the defendant. In other words, criminal punishment and prison time should be used as a means to making that defendant a functional, contributing member of society. If this is the goal, a look at the subjective experience of a prisoner in jail is a very important component of the assessment of this goal being reached. Some may learn their lesson and the necessary skills for rehabilitation quicker. Some may not respond to the hostile prison environment. And perhaps most importantly, some who have been rehabilitated, but then after too much time spent in the damaging prison environment, have fallen back into old ways or developed new harmful habits.

Regardless of one's adopted theory of punishment, it is clear that a prisoner's subjective experience in jail is a necessary piece of the puzzle in assessing the harshness of his sentencing. The day-to-day life of a man in a low security facility with many amenities is going to have a wildly different experience than a man in a high security prison with fewer amenities. Pretending otherwise is not only naïve, but unfair and counterproductive to the theories of criminal justice and punishment.

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Can/Should the Law Deal With Difference Subjective Experiences of Prison

For my second mini-paper I chose to address the question Professor Berman posed regarding the subjective experience of prison for individuals and what, if anything, the law can or should do in response. In order to address this question I utilized the materials Professor Berman posted on the class blog and an article posted in addition to those materials, while also thinking through some of the information I picked up from viewing the video on Eastern State Penitentiary. As I thought about how I wanted to write on this issue, I found myself less interested in the theoretical and abstract argument in favor of more practical ideas. I think that the theoretical side is very important to matters of crime and punishment, but due to my lack of a really solid base understanding of the subject and my unfortunate cynicism that the theoretical side may not actually matter much in today's real world, I find the practical side of things of greater relevance.

I do not think that the criminal justice system should be used to subjectively "punish" people who have been found guilty of crimes. In other areas of the law we use the "reasonable person standard" and do not take issues of hypersensitivity into account. We do this, I believe, because the line drawing issue that would follow from trying to look solely at the individual would be inadequate, disparate, and unfair. Indeed, unless we are prepared to do a psychological examination (and maybe even multiple) of each individual we send to prison it would be very easy to "game" the system.

Beyond that, however, prison was never intended to be a walk in the park. The old adage "if you can't do the time don't do the crime" seems obvious here. While it is possibly unfair that some individuals can handle the current prison system better than others, perhaps that should be a deterrent factor to those criminals who fear prison. Now, I of course am not in any way advocating prison rape, but am speaking more to Adam Kluber's hypothetical of two people who commit the exact same crime who are, however, dissimilar in their ability to cope with confinement. When it comes to sexual assault in prison, I do think that strong mechanisms are required to ensure that prisoners are not raped. Indeed, I think that the Constitution demands it because one's "pursuit of happiness" does not end at the jailhouse gates.

As I stated, the retributivist side of me does not think subjective prison experiences should really be considered by the law because by the time the individual is behind bars, I think that (taking the innocence argument out) the individual has lost their right to really have a say in their punishment (obviously so long as they are being treated within the confines of the Constitution). The Constitution requires due process of the law prior to being deprived of liberty. By the time the individual is behind bars, they have been afforded their due process rights and have, for a limited time, lost some of their rights.

I suppose the only way in which I think the subjective experience of a defendant should really come in to play is at sentencing when a judge must determine how effective certain punishment should be. For instance, if it appears that an individual committed a burglary in order to feed his drug addiction, the law should consider how effective prison would be on reforming this individual. Perhaps prison would not be effective on this individual because as soon as he

gets out the underlying issues behind his addiction and the addiction itself still may remain. If we really want to prevent recidivism perhaps we need to send this defendant to a rehab center so he can receive counseling.

In light of all of this, I think the issue of a person's subjective experiences matter less once they are in prison but are of paramount importance prior to prison. Often a person's subjective prison experiences are influenced by their experiences prior to prison and this is the timeframe that we must keep in mind when evaluating punishment.

If we take the "Rape In American Prisons" article, for example, we see that John Doe 1's story, while tragic, may have been avoidable. He was born to a single drug-addicted mother who did not want him and even tried to kill him. He suffered from some mental illnesses and had even attempted suicide. He plead "no contest" to molesting a child because he believed that it equated to "not guilty." By looking at John Doe 1's past we see that better access to child services, drug treatment, therapists/psychologists, medicine, or more effective counsel may have kept John Doe 1 out of prison in the first place. If we look at the adolescent experiences of many individuals who end up in prison, most will probably actually look very similar. This reflects a systemic failure and should really be the focus of utilizing the law in respect to the subjective experiences of prisoners because by the time these individuals are actually in prison they have lost many of their rights and, unfortunately, most of their political clout.

The Subjective Experience of Prison

The subject of this paper is whether or not the law could or should consider the subjective experience of imprisonment in some way. The first answer is a simple one: yes, the law could, and to some extent already does, consider the subjective experience, at least informally. In sentencing decisions, judges and juries already consider factors that tend to show a subjectively different experience in prison. Generally, older people face shorter sentences as a result of their age; people with dependents are shown more compassion, as their prison stay will not only affect the offender, but his children or other dependants as well. In general, the law most definitely could consider the subjective experience of prison. The more difficult question to answer is whether the law should consider the subjective experience.

The first sub-issue to be considered is whether, as a matter of policy, the law should consider the subjective experience of prison. This issue, in my view, turns on the question of whether deterrence, both specific and general, is the main objective of criminal justice policy, and whether actual deterrence can be better achieved as a result of the law using the subjective experience of prison. This is where my opinion is probably inapposite in comparison to the majority of scholars and practitioners. Personally, I don't think that deterrence should be the main objective of criminal justice, because I don't believe that prison acts to deter felons from committing future crimes, or deters others from committing similar crimes, to the extent that deterrence advocates would like to believe. Because the relative efficacy of considering the subjective experience of prison rests mainly on the idea that deterrence is effective and should be a main goal of criminal justice, I personally don't think the law should consider the subjective experience of prison.

Let us consider, though, a world where prison actually deters offenders and potential offenders in the way that advocates of deterrence would like to believe. In this world, a sentence should not only fit the crime, it should fit the offender. The subjective experience of prison should be considered because no offender is going to suffer the same way in prison. To be entirely callous, let us consider this from an economic perspective. If we assume that each person suffers at least some form of disutility from entering and staying in prison, the level of disutility will vary from prisoner to prisoner. In an economic sense, the level at which disutility reaches the point where it will act as a successful deterrent will also vary from prisoner to prisoner. As a result, the only way to punish people, with the goal of deterring the offender and

other, no more and no less than is necessary necessarily depends on the subjective experience of prison. If one offender suffers greater disutility on a daily or yearly basis by being in prison, generally less prison time will result to achieve an ideal deterrent effect. On the other hand, if an offender's level of disutility where deterrence will be successful is extremely high (as though this person has a higher threshold for pain or incarceration), more time in prison will generally result in a greater deterrence. In this world, failing to consider the subjective experience of prison would lead to generally ineffectual sentencing and fail to meet the policy goal of deterrence.

The last sub-issue would be, if we assume that deterrence works and is a main goal of criminal justice, would considering the subjective experience of prison be feasible. This question must, at this time, be answered in the negative. While each trial could use investigators to research an offender's background and expert witnesses to argue over the perfect sentence to adequately deter, and legislatures could require this as a matter of law, the potential inaccuracy of this system would undermine it entirely. While psychologists could determine how important being out prison could be for someone, or determine which personality types will feel in prison, we can't know with much accuracy what the subjective experience would be for any offender, at least not in any objective, cognizable way. If psychologists could come up with a relatively foolproof method for determining each specific offenders disutility from being in prison, then perhaps the law should be able to consider the subjective experience of prison. Because our society does not have that ability at this time, the law should not consider the subjective experience of prison.

Whether the law should deal with the subjective experience of prison is a question that warrants the response of another question before it can be answered. Such question is, what is the law's primary purpose when it comes to sentencing law? Unfortunately, it cannot be said with clarity what is the primary purpose of sentencing law in our country, whether it be the rehabilitation of the criminal, deterrence, or retributivism. However, given the respective goals of each purpose, it can be said that only if we are concerned with the rehabilitation of the criminal can we determine that the law should deal with the subjective experience of prison. In fact, if we are to say that the law is primarily concerned with the rehabilitation of the criminal then we are by logic compelled to deal with the subjective experience of prison. The other purposes do not require such a conclusion. Including an assessment of the subjective experience of prison when dealing with deterrence or retributivism would directly contradict these purposes of punishment. For these reasons, only if rehabilitation is our goal in a sentencing system should the subjective experience of prison be considered.

The goal of the rehabilitative purpose itself is aimed at the betterment of the individual criminal. It is through the reformation of the criminal that society is better served. The individual is shown the criminal nature of his actions and he is then given the tools to not only change his behavior but his mentality. An individual that has been successfully rehabilitated, will not only cease his criminal behavior but will no longer have a necessity to recur to crime because he has been taught the skills to solve his problems in other ways. However, if his experience in prison is one of constant fear and discomfort, the criminal is unlikely to focus on the reasons he is incarcerated in the first

place, which are so he can learn how to be a productive member of society. A criminal that is constantly distracted by a need to survive will never have an interest, much less learn the skills necessary to be reintroduced to society. On the contrary, this constant fear will drive the criminal to further acts of violence and reinforce his criminal mentality. If a penal system is to successfully rehabilitate the criminal, it must consider what the criminal's individual experience in the prison is. When prisoner is comfortable and secure he can focus on attaining the skills and mentality necessary to be reintroduced. Issues of disparity would not be a problem but would be welcomed because of the understanding that every individual learns differently. Every aspect of the experience would be crucial in enabling the criminal to be rehabilitated. Because, of the importance of the subjective experience of the criminal in rehabilitation the consideration of the prison conditions is essential under this sentencing purpose.

While rehabilitation compels the consideration of the subject experience of prison, the purposes of deterrence and retribution are contradicted by this consideration. If society would consider the subjective experience of prison and act on this consideration, the deterrence purpose would be completely destroyed. Under deterrence, society sends a message to everyone that a specific action is discouraged by way of punishment. If the punishment is comfortable and offers opportunities (some of which are not offered to everyone in the outside world, for example education) many people would have no incentive to engage in the discouraged action. On the contrary, some people may be better off by engaging in such actions. Likewise it would be difficult for retribution to serve its goal when a criminal is more comfortable than he would

otherwise be in the outside world. Therefore, only if we are concerned with rehabilitation of the criminal should we consider the subjective experience of prison when sentencing.

Whether or not the law should consider the subjective experience of prison depends in large part on one's view of the purposes of punishment. If rehabilitation is a primary goal of criminal sentencing, then the answer to the question is undoubtedly yes—the law should consider the subjective experience. The same goes for retribution and deterrence. But if the purpose of punishment is primarily to incapacitate the offender, then the subjective experience of prison becomes largely insignificant.

Rehabilitation would be more likely achieved if the law considered subjectivity. Some criminals, like drug offenders, would undoubtedly benefit from drug rehabilitation programs. Others, such as child pornographers, may need therapy and counseling. For criminals who commit the same crimes, one may respond better to community service while another may benefit from spiritual instruction. Unfortunately, as the casebook notes, “jurisdictions have always recognized the importance of rehabilitating criminals, but they have rarely devoted sufficient money and energy to the programs most likely to succeed.” This needs to change if we want to improve the rehabilitative effects of prison.

Like rehabilitation, the goal of retribution is also better served by considering the subjective experience of prison. “Just deserts” is an important retributivist concept. Criminals should be given the punishment they deserve and it should not be harsher than necessary. A one-size-fits-all punishment for every robber, for instance, fails to consider that some robbers may be more deserving of harsher sentences in harsher conditions than others. Depending on the facts and circumstances of the crime, and other mitigating factors considered under the sentencing guidelines, some offenders deserve a prison experience that is less severe. This differentiation

already occurs to some extent (e.g., getting incarcerated in a maximum security prison, having certain privileges like work release, or being put in solitary confinement).

Deterrence is a third purpose of punishment that calls for consideration of the subjective experience. If we want to deter crime, it makes sense to give individuals punishments they subjectively consider to be negative. Perhaps the most extreme example of this—and certainly one that should not be condoned—is prison rape. It is commonly understood that the more serious crimes carry punishments in federal prisons, which have higher rates of sexual assault among inmates. According to deterrence theory, this would make someone think twice about committing a crime that could land him or her in a federal prison. Subjectivity may be especially deterrent for certain types of criminals, such as white-collar offenders, because it would favor harsher punishments than Club Fed for some.

Of all the goals of punishment, incapacitation is the only one that does not clearly favor subjectivity. Considering the subjective experience of prison becomes less important if the primary goal is to simply get criminals off the streets and into cells. But even if incapacitation is the primary goal of punishment, an argument can be made for subjectivity because some sentences are better suited to incapacitate offenders than others. For instance, a criminal who has shown the ability to escape in the past should be housed in a higher security prison and be given less time outside the cell than others.

I think most people—myself included—see the purpose of punishment as more than just incapacitation. Rehabilitation, retribution, and deterrence are also important goals of criminal sentencing. All of these goals would be better served if the law considered the subjective experience of prison.

Subjective Experiences of Punishment: Not All Sentences Are Created Equal

In 2009, Adam J. Kolber, Associate Professor of Law at the University of San Diego, published an article in the Columbia Law Review entitled “The Subjective Experience of Punishment.”¹ Kolber’s thesis argues that though two people may receive the same punishment, those two individuals will experience the punishment in vastly different manners. Kolber asserts that American sentencing laws pay scant attention to these individual differences. His controversial article sparked much debate in criminal sentencing academia: should federal sentencing law deal with the subjective experiences of criminals when evaluating the severity of their punishments? That is to say, ought juries, judges, and legislatures take measure to ensure that the punishment not only fits the *crime*, but fits the *criminal* as well?

Consider the recent case of Jodi Arias, who murdered her boyfriend by viciously slitting his throat (almost decapitating him) in 2008. Arias stated on the record that she would “prefer to die sooner than later” and that she views “death [as] the ultimate freedom.”² Arias did not want to live the rest of her days in prison, but after two hung juries, the most recent of which reportedly voted 11-1 in favor of the death penalty, Judge Sherry Stephens is set to sentence Arias to life in prison on April 13. The fact remains to be seen whether or not Arias will receive a possibility of parole after twenty-five years. For Arias, the punishment may match the crime, but it does not match her stated preference of death. Should lawmakers, or society, care that a brutal murderer did not receive her preferred punishment?

This precise question was the subject of great debate following the publication of Kolber’s article, prompting philosophical discussions of what it means to ‘suffer.’ Hardcore retributivists argue that criminals *should* suffer for their wrongdoings, and regardless of either stated preferences, or of how that individual may subjectively experience his or her punishment, ought to be punished swiftly as justice requires. Kolber argues (from a utilitarian perspective) that society must factor subjective experiences of prisoners into the sentencing calculation in order to properly justify subjecting a dignified human to punishment. Furthermore, Kolber’s article seems to imply, individualized justice requires subjective considerations, which will ultimately serve society in the end. By customizing a criminal’s sentence, the justice system increases the chances that the individual will make it through that punishment successfully and therefore have a higher chance of returning to be a productive and contributing member of society.

As a utilitarian, I find Kolber’s thesis both interesting to consider as well as compelling. However, I take issue with Kolber’s first contention regarding the inadequacy of our current system of

¹ <http://columbialawreview.org/wp-content/uploads/2014/04/109-1-Kolber.pdf>.

² http://www.huffingtonpost.com/2013/05/08/jodi-arias-death-is-the-ultimate-freedom_n_3241432.html.

punishment justification somewhat troubling. When we sentence, we are not picking random folks off of the street and imposing isolating punishment on them. These lawbreakers have already violated some social norm; this is the justification that the legal system uses to defend the imposition of punishment. Kolber, however, finds this justification, without some *more* consideration of the subjective experience for the individual, to be insufficient. To be clear, I think Kolber's goal here is laudable, but the litany of problems that his ambitious scheme presents creates concern. Consider the prohibitive expense involved in determining exactly how each offender would experience punishment, as well as the administrative costs associated with the extra time required for judges and juries to deliberate and mete out said punishments. Furthermore, subjective considerations could actually create *more* disparity within sentencing than already exists (i.e. wealth disparity).

In my opinion, the disconnect is perhaps less between the punishment and theoretical justifications therefor, as Kolber argues, but rather centers more on the issue of over sentencing from the outset. The American criminal justice system strives to operate on calculable, consistent penalties. The problem inherent in subjective considerations, then, is that no single punishment can be known before it is experienced. How do we navigate this uncharted territory with first-time offenders? Furthermore, if a subjective consideration of a recidivist criminal is that the person has already undergone incarceration once and therefore is more 'adept' to a punishment lifestyle, is this consideration not redundant? Judges can consider past criminal history and punishment as an aggravating factor when settling on a sentence. Ultimately, Kolber's goal is worthy but the complications render a complete subjective system overhaul untenable. By reducing penal severity at the outset, perhaps some of these 'subjective' concerns could be eliminated altogether.

For now, perhaps the legal system could shift slowly toward achieving Kolber's vision of subjective considerations during punishment, however this would necessarily involve some value judgment about exactly which considerations are worth the expended time and energy. In my opinion, for example, a good place to start would be addressing unique concerns of patients with mental and behavioral health disabilities; other evaluators may not prioritize this as a primary concern. Smaller steps toward Kolber's vision might include continuously educating judges to the harsh realities of prison and encouraging correctional officers to develop 'penal consciousness.' Since much of Kolber's view stems from concern regarding excess judge discretion, systematizing experiences of prison, perhaps by rating them according to harshness of the institution or length of the sentence, could be a positive step. In my opinion, however, 'regular assessments of how hard an inmate is taking prison life,' is a prescription that looks pretty on paper but will not be carried out effectively in practice.

The law should consider the subjective experience of prison in same way when determining the individual sentences of convicted persons. Regardless of the theory of punishment behind imprisonment - whether it be retribution, rehabilitation, deterrence, etc. - we want the sentence to be effective and efficient. And although handing down sentences without considering the subjective impact it has on the individual is easy, it isn't necessarily effective or even fair. If we impose sentences based upon their relative negative impact upon the individual, then ignoring subjective experience makes no sense at all. If two individuals are convicted of the same crime and receive the same sentence, but one person experiences great negative impact from the sentence while the other experiences only a minimal negative impact, then those sentences are hardly "fair." I believe that as a society, we have the ability to be more conscious about what is fair, beyond the length of imprisonment as prescribed by a statute. We have the ability to look at a wide variety of factors in determining punishment. In fact, we already do with sentencing hearing and presentence investigations. However, we largely don't consider the subjective impact the imprisonment has on the individual both during and after imprisonment. I think this is ignorant and irresponsible.

In 2012, Lori Sexton studied 80 male and female prisoners in Ohio prisons, and looked at many factors in her analysis of by imprisonment subjectively affects each individual.¹ She looked at concrete punishments (presence or lack of prison amenities, meal and food changes, removal of privileges, administrative sanctions, etc.) and symbolic punishments, which are losses and deprivations representative of something larger (simply being in prison, loss of autonomy, loss of self, loss of humanity, loss of family). From data she gathered, Sexton found that the severity of punishment and saliency of punishment exist on a continuum, and generally, prisoners see their punishment as one of four things:

1. Low saliency, low severity = Punishment as a part of life (found with females under direct supervision)
2. High saliency, low severity = Punishment as a separate life (found with males under direct supervision)
3. Low saliency, high severity = Punishment as a suspension of life (found males under indirect supervision)
4. High saliency, high punishment = Punishment as death (found with females under indirect supervision)

Sexton's study suggests that punishment is perceived vastly differently depending on a variety of many factors - including the gender of the imprisoned and the type of supervision employed in the prison. Thus,

¹Lori Sexton, *Under the Penal Gaze: An Empirical Examination of Penal Consciousness Among Prison Inmates*, Report to the National Institute of Justice under Grant No. 2010-IJ-CX-0002 (2012)

the same punishment served in one prison may have greatly different subjective effects if served in another prison in the same state. Additionally, perceiving your punishment as “death” is greatly different than perceiving your punishment just as a part of life. This difference was contemplated by Bronsteen, Buccafusco, and Masur, who spoke of “hedonic adaptation,” which can reduce the negative experience of imprisonment that comes with more severe sentences.² They also stated that we must consider that negativity extends beyond imprisonment, and into post-prison life. Formally-convicted felons have a difficult time adjusting back into society, receiving jobs, and just fighting the social stigma that comes with being a felon.

To ignore the fact that punishments have vastly different effects on people would be to ignore any effectiveness and fairness ideals that the penal system strives towards. However, we must be careful in distinguishing subjective experiences. For example, prisoners who are abnormally tall or large will have a greatly negative experience in the somewhat small prison cells, as compared to a prisoner of average height or size (a blog posting dated January 28, 2011 looked at a prisoner described as a 6-foot 9-inch “giant” who couldn’t even fit on the cell bed). This negativity is for the most part, out of the prisoner’s control, and it would be unfair to force such person to experience greater negativity than intended by the sentence itself merely because of that person’s height. In contrast, prisoners who have a greatly negative experience merely because prison is an inconvenience should not be considered in a subjective analysis (a blog posting dated June 14, 2012 looked at Floyd Mayweather, who during his 3-month sentence complained that he was experienced great negativity and subjective unfairness; this is partly due to his refusal to eat the prison food, drink tap water instead of filtered water, and work out in the prison’s recreation facilities, which were understandably less than state-of-the-art).

Ultimately, the goal is to prevent sentences from having widely different effects merely because we refuse to look at the subjective impact the sentences have upon the individual. When prescribing a sentence, the legislature has a certain level of negativity inherent with the sentence in mind. The courts also have this in mind when they impose the sentences. However, it is clear that the negativity in mind does not match the actual negativity imposed. When considering the negativity of sentences upon the prisoner, the results are unpredictable, uneven, unreliable, and not uniform whatsoever. However, this can be changed if there are some modest steps taken to considering more factors when sentencing an individual. We must realize that sentencing is subjective and imprisonment has different effects upon different people. In order to promote fairness, uniformity, and effectiveness, sentences must be looked at subjectively under the law when imposed.

² From a blog post dated October 19, 2010

Convicts subjectively may feel prison time differently. Depending on the character of the convict, what one person may experience in four years could be the same subjective punishment that another convict may experience in just one year.¹ However, this is also subject to the particular prison that the convict is sent to. One prison may be harsher or inflict more punishment than another prison but this is not factored into the many subject analyses.

In the last century, prisons have become a more widely used method of punishment, and their growth has been very quick along with their problems. Instead of becoming center of rehabilitation for convicts, prisons have become “warehouses” for those society deems unfit that actually takes prisoners farther away from being able to “cope with modern society.”² While many say prison reform ended in the 1980s, others say it continues on today.³ In either case, during this period a variety of prisons have developed including the “super-max” security prison as the most stringent prison. Judges are to consider seven factors when sentencing a prison, including the nature and circumstance of the crime, the sentencing range, other kinds of sentences, or the need for restitution to the victim.⁴ But, the type of prison, once it is decided that prison is the proper form of punishment, is not a factor and it should be.

¹ David Gray, Punishment as Suffering, 63 Vand. L. Rev. 1619, 1620-21 (Nov. 2010)

² Daniel L. Low, Nonprofit Private Prisons: The Next Generation of Prison Management, 29 New Eng. J. on Crim & Civ. Confinement 1, 1 (2003).

³Wikel-Meredith Weidman, Comment, The Culture of Judicial Deference and the Problem of Supermax Prisons, 51 UCLA L. Rev. 1505, 1506 (June, 2004) is in contrast to the statements made by the Institute For The Future (video on blog). Regardless, prison reform remains at least a topic of discussion prevalent in the news and politics.

⁴ 18 USC § 3553(a) (2014)

Judges, reviewing a defendant's appeal of the prison, have a difficult task in evaluating the subjective impact of the prison on the convict but at the same time balancing the goals of punishment.⁵ Society wants punishment to be harsh, but super-max prisons are not the only prisons available to rehabilitate the defendant, incapacitate the defendant and serve as deterrents (both general and specific deterrent). When evaluating a prisoner's appeal, judges have typically look at the subjective characteristics of the inmate, and not the prison itself in determining if that prison is right for punishment.⁶

Another issue is the rise of private for-profit prisons. Seen as a way to reduce the costs compared to government prisons, private prisons have done little to promote rehabilitation.⁷ This is a result of the fact private prisons have no incentive to do so, the goal is simply to hold the prisoners for a period of time before they are released. One solution is creating non-profit prisons that still meets the goal of incapacitation but also with incentives placed on rehabilitation.⁸

Even if the introduction of non-profit prisons isn't the solution, judges should consider the type of prison which they are sending a defendant to serve his sentence at. Not all prisons are equal. Five years to one defendant may subjectively different from defendant to another, and so five years at one prison may be subjectively different than five years at a different prison.

⁵ Weidman, supra, at 1506.

⁶ Id. at 1541-42.

⁷ Low, supra, at 2.

⁸ Id. at 5.

Punishment and the Subjective Prison Experience

The individual offender's potential subjective experience of prison should not be taken into account at the time sentencing determinations are to be made. While different theories of punishment may, on their face, seem to indicate that an offender's potential subjective experience of prison should be a factor in making sentencing determinations, there are also reasons under these theories to not take potential subjective experience into consideration. This mini-paper will discuss several different theories of punishment and conclude that the consideration of an offender's potential subjective experience to prison would be improper under each.

Deterrence Theory

Deterrence theory is based on the philosophy that the reason for punishment is to deter both the individual offender (specific deterrence) and the public (general deterrence) from committing the same or similar crimes. For the punishment of an individual offender to be just under the deterrence theory, the punishment should not exceed what is necessary to deter the individual from committing the crime again in the future. It would seem, therefore, that an offender's potential subjective experience of prison must be taken into account if the purpose of punishment is individual deterrence. Such an approach, however, would completely eliminate the effectiveness of general deterrence. For general deterrence to work, potential offenders must be able to engage in a cost-benefit analysis regarding potential punishment for the contemplated crime. It is at this point that the potential offender should take into account their own potential subjective experience of prison and determine whether "the crime is worth the time." When looked at from this perspective, it is the potential offender who ultimately commits a crime that decides the punishment necessary for individual deterrence to occur based on their potential subjective experience of prison. As such, both specific deterrence and general deterrence theories of punishment are advanced by not taking into account the offender's potential subjective experience of prison at sentencing.

Rehabilitative Theory

Adherence to a rehabilitative theory of punishment also makes it unnecessary to take an offender's potential subjective experience of prison into account when making a sentencing determination. Under a rehabilitative theory of punishment, rather, it is an individual's subjective experience of prison and the offender's moral culpability for the crime committed that set the lower and upper bounds of punishment. At sentencing, therefore, the judge should set the upper bound of punishment for the offender based upon the offender's moral culpability for the crime that was committed. Any difference in subjective experience of prison for the offender then would contribute to the offender's desires to "rehabilitate himself". The more difficult prison is for the offender, therefore, the more incentive the offender has to "rehabilitate himself" and receive early release from prison through a probation program.

Retributive Theory

On its face, the retributive theory of punishment appears to have the strongest argument for considering an offender's potential subjective experience of prison when making a sentencing determination. The retributive theory of punishment requires that the punishment be equal to the offender's moral culpability for the crime committed. This begs the question, what exactly is "the punishment?" If the punishment is the prison experience, then it would be necessary for an offender's potential subjective experience to be taken into account at sentencing to guarantee that the punishment is proportional to the moral culpability of the crime that was committed. If the punishment, however, is simply the deprivation of the offender's liberty, there is no reason to take into account the offender's

potential subjective experience of prison in making a sentencing determination. The latter approach is better because it focuses the sentencing on the punishment that is being given out by the offended party, in this case the State. As the State is the offended party, the State should not be responsible for factors which contribute to the offender's subjective experience of prison which are outside the State's control. In theory, therefore, as long as the State deprives each offender of their liberty in an identical manner and also in proportion to their level of moral culpability for the crime committed, retributive ideals are fulfilled without considering an offender's potential subjective experience of prison. To the extent that the State does not treat each offender the same way, corrections should be made through policy changes and not by judges at sentencing who are guessing what an offender's potential subjective experience of prison might be.

How does the architectural design of a prison reflect its primary goals?

On February 26th we watched a movie about the foundations of the prison system in the US. The video focused on two prisons, Auburn and Eastern State, both of which had unique architectural designs. But how did the prison layout reflect the prison's primary purpose and founding philosophy? Are today's prisons optimally designed to rehabilitate prisoners or just to remove criminals from society? Has any one prison design proven to be more or less effective in achieving the goals of rehabilitation, deterrence, retribution, etc.?

Auburn Prison opened in 1816 and has since become infamous for a number of reasons, including exceedingly brutal punishments (beatings and floggings), militaristic administration, and the execution of prisoners via electrocution. By the 1820's, the prison had developed the "Auburn System" (also known as the Silent "System"), which became the model for many prisons across the country. The hallmark of the Auburn System was complete silence, group labor, and solitary cells.

While there may have been secondary goals of reformation or possible rehabilitation, the real purpose and "philosophy" driving the development of the Auburn System was purely economic; the administration wanted to be self-sufficient and to turn a profit for the state. I believe this underlying economic goal was reflected in the architectural design of the prison, mainly the large factory-like environment. Unlike at Eastern State, Auburn permitted prisoners to work outside of their small cells in "congregate workshops," allowing prisoners to silently work together to produce more inventory and increase profit margins. After completing their daily work, prisoners would be returned to their very small (but economically practical) cells. Although the Auburn System eventually fell into disfavor, it was the "ideal prison model" for almost a century due in large part to its cheap construction, low-cost maintenance, and its economic goals/philosophies.

Pennsylvania's Eastern State Prison was built in 1832 and quickly became known as an "architectural marvel" and model for prisons across the country. Eastern State attempted to use philosopher Jeremy Bentham's "Panopticon" as an architectural model by having hallways radiate from a central guard tower. Theoretically, this would allow the guards to easily monitor the prisoners and make them feel like they were always being watched. This design was chosen because unlike the Auburn System, Eastern State's "Work System" emphasized total isolation and silence. Prisoners were kept in solitary confinement and conducted their work inside their cells instead of in congregate workshops. Many believed that allowing prisoners to work silently in their cells would lead to "self-reflection and remorse" while simultaneously achieving the prison's primary goal of solitary confinement.

Unfortunately, although Eastern State's intentions *might* have originally been more admirable than Auburn's economic incentives, within five years of its inception Eastern State was investigated for the abuse of prisoners and the immoral conduct of guards. Additionally, by the 1850's the prison began to face overcrowding and this severely inhibited the ability of Eastern State to keep all prisoners in solitary confinement.

Although opinions vary greatly on the subject, the research seems to indicate that panopticon layouts (like Eastern State) breed animosity amongst prisoners and cause them to feel disconnected or estranged from the prison staff. However, due to the more pressing issues of overcrowding, inmate violence, etc., the US is not overly concerned with the effective nature of prison design or how prison conditions influence inmate behavior. Additionally, it is important to note that even if the US decides to conduct research to better understand how prison architecture affects the lives and well being of prisoners, a massive overhaul of the system (to build new prisons) is essentially impossible at this juncture.

Could the law consider the subjective experience of imprisonment in some way?

The point of the criminal justice system is to combat crime. The book tells us at page 167 that the basic objective of the 1984 Sentencing reform Act was to “enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system. Fairness is the issue that we all are grappling with, so what is fair? Googling the definition of fair does not really help. Dictionary.com lists fair as “free from bias, dishonesty, or injustice” or also “proper under the rules.” These do not really get us any closer to what is fair. Each person’s definition is different and that is what has become so apparent in this class. Every crime is different as is every offender.

I am not going to sit here and pretend like prison is a fair place, it is decidedly *not*. But what some people have done to put themselves there is not fair either, think about the victims. I think that the answer to *should* the law consider the subjective experience of imprisonment must be no for this reason. The answer to *can* the law consider the subjective expectations is also no.

Trial and sentencing are two mostly different animals. Trial is where there are rules of evidence and a jury of a person’s “peers” will decide on their guilt. Sentencing is where those rules all but go out the window, which is bad and good. This is the extent that a person’s subjective experiences can be taken into consideration I think. At this stage if it is relevant (which does not really matter to sentencing, only kind of) the defense attorney can make the argument that the person is not really all that violent, bring in evidence that he or she was able to be paroled out one time or was let out early due to good behavior. This is really the only extent to which sentencing can/should take into account a person’s subjective experiences in prison.

There are a wide range of programs once in prison that take care of the rest of the subjective experiences of prison. For instance, if a person needs mental help they get mental help. If a person is being beaten, or they are being the bully – there is separation. I am not making the argument that these are perfect, again I am not naïve enough to think that these even work a majority of the time, but they are there. Prison reform is needed, reform is always needed in all areas, let's be honest. But should we make prisons our number one priority? Sure, prisons are important, criminals are people too, but maybe we should focus on the criminal justice system itself.

I feel like some people are quick to boo-hoo the system, innocent people being locked up. And that *is* a tragedy. How can we make that better, can we actually get a jury that reflects an accurate cross section? I think these are more important and then maybe there will be a trickle-down effect. Fixing the other problems that come first, unfair trials, etc. Take it a step further, how to we get people to stop committing crimes? There are social problems that are at issue too.

While people's subjective experiences in prison are important, I think that there are already programs in place to deal with these. People's actions have consequences and for whatever reason, a person is being placed in prison. There are very few people that I truly feel bad for: the mentally unhealthy and those who are found guilty when they are not. These are the problems that need tackled first. Then, we can move on and think about the other problems.

Can or Should the Law Deal With the Subjective Experience of Prison?

Beginning with the question of whether or not the law can deal with the subjective experience of prisons, it may be possible if society is willing to spend more money to do it. In class two questions were raised as to whether prison conditions could be subjectively the same for every prisoner and whether the subjective loss due to conditions outside the prison could be the same for every prisoner. The answer to the second question is obviously no. There is no feasible way to account for everything that goes on outside the prison walls. That could only be accomplished if everyone's subjective experience in life were the same. It does seem "possible," however, to structure a sentencing system where everyone's anticipated subjective experience is the same. Or in other words, the prison sentence itself would be designed to start everyone off at a certain base level experience and then only situations which arose once incarceration had already begun would affect it.

Determining this base level might be accomplished by employing society's knowledge of psychology. Prisons and their conditions could be assessed in a way that determines their psychological value. For example, if the world were full of Floyd Mayweathers, tap water would go on the list of conditions increasing a prisoner's discomfort. Adding a water filter would go on the list of ways to decrease their discomfort. Once prisons and their conditions are assessed, each newly convicted defendant would also need to be assessed. Each would have to be evaluated by a psychologist to determine their emotional and mental state entering prison and what would be likely to cause this particular individual discomfort. Then, based on that evaluation, prisoners could be sentenced and placed in prisons with conditions that would start them off at society's desired base level.

This system does have some logistical drawbacks though which make it a utopian solution. First, this solution is imagined under the assumption that psychologists are able to conduct this sort of evaluation, and if they are able, that they are able to conduct the evaluation accurately. Second, it would cost society a large amount of money to assess every prison and society is already unwilling to pay to adequately assess prisons for safety and operational standards now. Third, the costs of performing a psychological evaluation of every current prisoner would be astronomical, not to mention the cost of evaluating each newly convicted defendant. Finally, this process would drastically slow down the trial process. Society would need to assess every defendant before placing them in pre-trial detention to assure that the

defendant is not unduly harmed while awaiting trial. Therefore, the law likely can deal with the subjective experience of prisons but that does not mean it is feasible.

Next, there is the question of whether or not the law should deal with the subjective experience of prisons. Up to this point society has really only discussed the goals behind sentencing. Determining whether or not the law should deal with the subjective experience of prisons would require society to focus less on the goal of sentencing and more on what the sentence itself should be like. Should prison be like time-out is for children where the punishment is being separated? If that is the case, then every prisoner should start off at a baseline level of zero and the length of the sentence would be increased based on the gravity of the crime. Or, should prison include a certain level of discomfort? If society decides that a certain level of discomfort should be inherent in the prison system, this decision leads to yet another string of discussion questions. Should everyone be subjected to the same level of discomfort, or should the level of discomfort be increased with the gravity of the crime committed? Would society decrease sentence length and increase the level of discomfort in order to reduce the prison population faster?

Under our current sentencing system and the use of solitary confinement for the most violent offenders, society currently increases both the length and the level of discomfort depending on the gravity of the crime. If society were forced to discuss these issues, would it keep the current system? Would it adopt the European opinion (that the U.S. is effectively torturing its inmates through the use of solitary confinement) and then set the baseline at zero? Or, would society decide to do something in the middle?

Unfortunately, it is unlikely that citizens of the United States or even Ohio will be willing to sit down and actually have this conversation. Obviously educated individuals such as ourselves have set aside the time to have these discussions but the average citizen is not likely to do so. It is uncomfortable to talk about this topic because if we, as a society discuss the topic, we will not likely be able to deny that we are in effect forcing prisoners at most facilities to live in a state of more discomfort than that with which we are comfortable. Punishment or correction is necessary in some form but deciding on that form is not an easy task. So, even though the law likely could and should deal with the subjective experience of prisons in some way, the best that can likely be accomplished right now is sanitary prisons that do not abuse their prisoners.

Mini-Paper 4: Convicts' Subjective Experiences of Prison Sentences

This week's mini-paper concerns whether the criminal justice system can or should consider a convict's subjective experience of suffering in making a sentencing decision. I take this question to be asking something like the following: if a judge could comprehend and appreciate every unique feature about a convict's physiological and psychological make-up, and how each uniqueness would affect that convict's subjective experience of suffering throughout the course of their sentence, would it be just and appropriate for the judge to account for those uniquenesses in fashioning the convict's sentence? Further, the prompt appears to be asking for an answer to the related question of whether or not we believe that such a situation is possible. Both questions appear to have obvious answers.

First, the theoretical question of whether or not it would be favorable for an omniscient judge to account for a convict's unique personal make up and prior experiences in fashioning a sentence, so that the convict's subjective experience of suffering was equal to that of other individuals convicted of similar crimes. Of course such a scenario would be preferable to the judge turning a blind eye to the uniquenesses of the individual convict.

Both individual and equal justice could be advanced in the imagined scenario. Equal justice would be furthered, because individuals who committed similar crimes would find their sentences similarly unpleasant. Our system, it seems, already attempts to attain this goal, by giving prison sentences of similar length to similar offenders. The added insight would simply improve upon sentencing judges' ability to fashion similar sentences. The imagined scenario simply gives judges something more akin to a scalpel, with which to craft similar sentences, rather than leaving judges with the gardening shears (similar sentencing length) with which they currently work. Individual justice would also be furthered, because judges would be able to make sure that individuals with unique sensitivities did not suffer more than necessary, because of some overlooked personal attribute which would make their sentence particularly unpleasant for them. Similarly, individuals with callouses or personal attributes which allowed them to endure their sentence without suffering as much as others, could have their sentences intensified accordingly. In summary, as to the first question, if judges were omniscient, I can imagine no reason why they should ignore the personal uniquenesses of convicts, which could affect the way that they subjectively experience their sentence.

However, as to the second question, of whether such a situation is likely or possible, to a similar degree of certainty, I believe the answer must be a resounding no. Both theoretical and

practical hurdles to such a situation seem insurmountable. As to the theoretical hurdles, the list of factors which could affect an inmate's subjective experience of their sentence is seemingly endless: the person's childhood experiences, level of patience, ability to get along with others, sensitivity to physical pain, sensitivity to psychological pain, the type of prison they were sent to, the prison's geographical location, whom the inmate was assigned as a bunkmate, what friends the person might make in prison, how extroverted the inmate was, etc. There are just so many factors which affect how a person will subjectively experience their stay in prison, that judges would need supercomputers, advanced algorithms, and accurate information on a seemingly infinite number of personal facts about each inmate. Further, judges would need to be able to accurately predict what decisions the convict before them would make once they got to prison, as these decisions too would affect that convict's subjective experience of their sentence. It seems obvious, then, that there is just too much information required; judges will never be in a position to accurately predict, nonetheless know for certain, ahead of time, how an individual will subjectively experience their stay in prison.

Furthermore, the practical hurdles to such a scenario, seem equally insurmountable. The resources that would be necessary to adequately dig into each convict's past, assess their psychological state, appreciate their physical strengths and weaknesses, etc. would be staggering. Medical doctors, psychologists, and investigators are expensive. Given the financial strain that the criminal justice system constantly finds itself under, it seems unlikely if not impossible that taxpayers would ever allocate the money necessary for an investigation into each convict's life. Also, each of these actors would need time to conduct their investigations and assessments, and would need access to sometimes dangerous convicts. I imagine it would take months to conduct such an investigation accurately and responsibly, and as such it seems that for many convicts the investigation into how they would subjectively experience prison would take longer to compile than the sentence they would ultimately be serving. The practical hurdles to establishing the scenario as imagined seem just as problematic as the theoretical ones.

The tragically ironic answer, then, to the prompt for this paper, is that if judges could know how the convicts they sentence would subjectively experience their prison terms, both individual and equal justice would be furthered. However, it seems practically and theoretically impossible, because of the time, money, and access required, that judges will ever be in a situation where they can assess how convicts will subjectively experience their prison terms.