Hard Time

*Different prisoners experience punishment differently. So why don't we treat them differently?*

By Christopher Beam

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Ever since Dutch prisoner Angelo MacD. was sent to the big house in September 2010 for fraud, he has had one complaint: It's not big enough.

MacD., described by his lawyer as a "giant," has filed suit in The Hague because his cell is too small. The prisoner is 6 feet 9 inches tall, 500 pounds, and "a meter wide and a meter deep," with barely enough room to turn around in his cell, said his lawyer: "He is not obese. He is a giant. He even walks like a giant, like out of the comic books." MacD. (a nickname) argues that confining him to an ordinary cell violates the European Convention on Human Rights.

The case highlights a larger issue, so to speak: Not all prisoners experience punishment the same way. Sometimes the difference is emotional, as with Paris Hilton when she claimed she had claustrophobia and couldn't do jail time after a 2007 arrest for DUI. (She was reassigned to house arrest.) Sometimes it's physical, as with the Dutch prisoner. Either way, sentencing doesn't take into account the subjective experience of prisoners.

Some may argue that this is precisely the point of incarceration: Punishment is meted out according to the crime, not the criminal. If prison is harder on some prisoners than others, well, maybe they should have thought about that before they robbed a bank. But there is another perspective, articulated by Adam Kolber, a law professor at Brooklyn Law School. "We have certain obligations to take subjective experience into account when sentencing or when establishing sentencing policies," writes Kolber in a 2009 article in the Columbia Law Review, "The Subjective Experience of Punishment."

Kolber describes the hypothetical cases of two prisoners, "Sensitive" and "Insensitive." Both are sentenced to prison for committing the same crime. But Sensitive is more, well, sensitive to the harsh prison environment—more anxious, fearful, and easily depressed. Insensitive, meanwhile, adapts quickly to the new environment. Each day in prison therefore inflicts more suffering on Sensitive than on Insensitive. If we're trying to punish both men equally, Kolber argues, shouldn't it follow that Sensitive gets a lighter sentence than Insensitive? Otherwise, from a subjective perspective, one prisoner is getting a harsher punishment for the same crime.

Of course, prisons already give certain prisoners special treatment. Celebrities such as Lindsay Lohan are often segregated from other prisoners for safety reasons. Same with sexual deviants, who might be assaulted by their fellow inmates. Prisoners with mental health issues might get placed in a special psychiatric ward. A paraplegic prisoner might get access to a lower bunk. If a person is genuinely claustrophobic—or is really good at pretending he is—he may get reassigned.

That's not enough, argues Kolber. Right now, prisons make accommodations for prisoners only in the most extreme cases, while ignoring the differences in sensitivity between prisoners whose conditions are less extreme. For example, someone with a diagnosable anxiety disorder might get special treatment, while someone who is merely anxious does not. Ideally, says Kolber, we'd
measure factors like anxiety along a spectrum—the more anxious you are, the harsher your experience of prison, the lighter your sentence. (And, less charitably, the opposite: The more resilient you are, the more time you should serve.)

All this may sound great in theory. But how would we actually measure the amount of trauma a prisoner will undergo in jail? How do we sort out sensitive souls from fakers? And at what cost? Kolber points out that the torts system assesses trauma all the time. Whenever a plaintiff sues, it's always for a dollar figure that correlates to some amount of physical or emotional damage. Just as experts assess the psychological damage wrought by, say, a pedophile priest, they could also assess the likely damage of a 10-year prison sentence. As far as cost, prisoners undergo psychological assessments all the time, Kolber says. Assessing their sensitivity to confinement would be just another factor to consider.

There's also an equal-treatment issue. Wealthy people, accustomed to comfort, tend to be more sensitive to prison life than poor people. It follows, according to Kolber's logic, that they should get lighter sentences for the same crime. In his paper, Kolber doesn't explicitly argue for this outcome. "There may be good policy reasons for sentencing them to equal prison terms," he writes, such as avoiding the perception of discrimination. "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."

There's still a line-drawing problem, though. Once we start accounting for every prisoner's subjective experience, where do we stop? Literate people can pass the time in prison by reading. Should they get harsher sentences than illiterate people, who are more prone to boredom? Or consider a basic necessity like food. Inmates in Vermont sued in 2008 over the prison food called "nutraloaf," arguing that it tasted so bad that it constituted cruel and unusual punishment. But what if I like nutraloaf? Should I get a longer sentence? Sentences based on subjective experience could also cause collateral injustices. Isn't it unfair to deprive someone of their freedom longer simply because they were born less anxious?

Calibrating sentences based on subjective experience could have only a limited effect, anyway. Some scholars argue that "hedonic adaptation"—our tendency to acclimate to bad situations—reduces perceived sentencing differences. Even if you give someone a slightly longer sentence, it won't actually feel that much longer.

Another rebuttal to Kolber might go like this: Inequality is built into the prison system. There are 50 state systems, a federal system, and various city and county jails. Some states punish drug crimes more harshly than others. Some have the death penalty while others don't. If we want to level the playing field for all prisoners, we could start by focusing on these gaping inequalities, rather than the relatively minor differences in punishment that result from subjective experience.

Kolber argues that, at the very least, we should acknowledge that every prisoner—and therefore every punishment—is different. Right now, if a judge thinks a convict will have an especially rough time in jail, he can lighten the sentence. That's fine, says Kolber, but we should systematize those calibrations, rather than leaving them to the whim of a judge. Maybe that means rating different prisons by levels of harshness, and adjusting sentences accordingly. Maybe it means regular assessments of how hard an inmate is taking prison life. Whatever the solution, he says, we should stop pretending that a year in jail is a year in jail is a year in jail.