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The normative weight of individual sensitivity to punishment

Normatywne znaczenie indywidualnej wrażliwości na karę

Abstract: This article examines the normative relevance of individual sensitivity to punishment, focussing on prison sentences. While financial penalties are widely accepted as requiring adjustment to individual means, there is significantly less normative consensus on whether custodial sentences should reflect differences in personal vulnerability. The author explores whether considerations of fairness and proportionality justify a more systematic inclusion of the subjective experience of suffering. The discussion addresses both practical and principled objections, paying particular attention to the risk of introducing class justice: differential treatment based on socioeconomic background. The article concludes that heightened sensitivity may justifiably be treated as a mitigating factor, where it is important that the court addresses the issue openly rather than disguising it by embedding it within a network of other, presumably less controversial factors.

Keywords: punishment theories, individual sensitivity, proportionality, sentencing, hard treatment

Abstrakt: Artykuł poświęcony jest analizie normatywnego znaczenia indywidualnej wrażliwości na karę i skupia się na karze pozbawienia wolności. Podczas gdy w przypadku sankcji finansowych powszechnie akceptuje się konieczność ich dostosowania do sytuacji majątkowej sprawcy, znacznie mniejszy jest konsensus co do tego, czy kary izolacyjne powinny uwzględniać różnice w osobistej podatności na dolegliwość. Autor rozważa, czy względy sprawiedliwości i proporcjonalności uzasadniają bardziej systematyczne uwzględnianie subiektywnego doświadczenia cierpienia. Dyskusja obejmuje zarówno argumenty praktyczne, jak i główne zastrzeżenia, ze szczególnym uwzględnieniem ryzyka wprowadzenia sprawiedliwości klasowej, czyli zróżnicowanego traktowania ze względu na pochodzenie społeczno-ekonomiczne. W konkluzjach autor stwierdza, że zwiększona wrażliwość może być słusznie traktowana jako okoliczność łagodząca, pod warunkiem że sąd odniesie się do tej kwestii wprost, a nie będzie ukrywał jej wśród innych, rzekomo mniej kontrowersyjnych, czynników.

Słowa kluczowe: teorie kary, indywidualna wrażliwość, proporcjonalność, wymiar kary, dolegliwość kary

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Introduction: Hard treatment and its distribution

Punishment involves a variety of restrictions, discomforts, suffering and other forms of deprivation. A typical example is imprisonment, where the sociology of prisons famously led to the term "pains of imprisonment" (Sykes 2007: 63–83), capturing the layered nature of the suffering imposed by incarceration.[1] In normative theorising about punishment, however, it is more common to use the broader term "hard treatment." This concept more clearly conveys that pain and discomfort are not merely an epiphenomenon or unintended side-effects of punishment, but rather its integral elements – something deliberately inflicted by the state as part of its penal response.

Hard treatment should be understood as a linguistic convention, an umbrella expression encompassing the various unpleasant experiences inherent in the practice of punishment. It ought not to be associated exclusively with authoritarian prison regimes, where strict discipline prevails and living conditions are reduced to the bare minimum. Even a modern correctional facility, offering nutritious meals, decent bedding and a range of structured activities, still entails a significant intrusion into personal autonomy. In this sense, hard treatment does not refer merely to outdated or inhumane prison environments, but more broadly to the restrictions, discomforts and forms of suffering that stem from the deprivation of liberty, self-determination and – whether temporarily or more lastingly – access to life opportunities.

It is a well-known fact that individuals differ in their thresholds for pain and in their reactions to suffering. Dentists can confirm that there are extraordinary individuals who can endure molar extraction without local anaesthesia, while others may feel faint at the mere sight of a tray of dental instruments. The same applies to the subjective experience of punishment, which can differ markedly from person to person (Kolber 2009). Imprisonment, as the most prominent example, may be unpleasant yet tolerable for one individual, while for another, it may verge on the unbearable (Kolber 2019: 571). This raises a crucial normative question, whether the demands of fairness and justice require that such individual sensitivity to punishment be taken into account at sentencing.

This question has been well resolved for one type of punishment, at least: the monetary fine. The system of day fines is designed to account for individual sensitivity to financial loss. Day fines are based on the principle that the total fine should correspond to the financial capacity of the individual; by imposing higher absolute amounts on the wealthy than on the poor, the aim is to ensure that the

[1] It is worth noting Ben Crewe's re-evaluation of the pains of imprisonment, carried out some half a century after Gresham M. Sykes's seminal account (Crewe 2011). Crewe argues that, although imprisonment has become less overtly harsh and authoritarian, it has grown more psychologically burdensome. He suggests that prisoners today experience subtler but more deeply internalised pressures, adding to Sykes's original list a new dimension of suffering which he refers to as "ontological insecurity" – a form of distress linked to uncertainty, anxiety and the erosion of personal stability under the conditions of long-term confinement.

punishment causes a roughly equal degree of discomfort or burden for everyone, irrespective of their financial status.

It would be tempting to claim that fines and imprisonment are not comparable in this respect. While the subjective value of money is clearly influenced by one's financial situation, it could be argued that the passage of time is, in principle, the same for everyone. Time is often considered one of the most egalitarian metrics, as everyone has exactly 24 hours in a day (Eriksson, Goodin 2007: 125). However, the burdens of imprisonment do not lie in the mere passage of time, but in the deprivations and constraints imposed within that time frame. The ability to cope with these deprivations and constraints varies from individual to individual, depending on factors such as physical and psychological constitution, as well as life experiences prior to imprisonment. Generally, it can be said that the experience of imprisonment will be more distressing for those accustomed to a comfortable life than for those whose previous life was one of constant struggle for survival.

At this point, we might encounter a clash of intuitions concerning fairness and justice. One intuition suggests that proportionality in sentencing must account for individual sensitivity to punishment, as it affects the overall amount of subjectively experienced hardship that a person endures. To ignore individual sensitivity would effectively mean punishing more harshly those who are more sensitive to suffering. The other intuition, however, warns against taking individual sensitivity to punishment into account, fearing that it might inadvertently open the door to class justice infiltrating sentencing decisions. By class justice, I refer to the practice of treating individuals differently within the legal system based on their socioeconomic status, where the punishment might vary not due to the nature or severity of the crime committed, but because of the defendant's background or financial standing. The concern is that considering an individual's heightened sensitivity to hardship might lead to unequal treatment: those who are more accustomed to a comfortable life – and thus less able to endure the deprivations of imprisonment – could be treated more leniently, while those from more disadvantaged backgrounds, who may be more accustomed to hardship, could face harsher sentences. In modern constitutional democracies, such differential treatment based on socioeconomic status is considered a taboo at all stages of legal proceedings, including sentencing.

How is this clash of intuitions to be resolved, and what would be the right normative answer to this judicial dilemma? Since individual differences in sensitivity to hard treatment are at the heart of the problem, one might try to resolve the issue by reformulating punishment itself. If it no longer contained hard treatment, the problem of individual sensitivity would cease to be relevant. But is it even conceptually possible to conceive of a punishment that does not involve some form of unpleasant treatment?

1. Hard treatment challenge

Hard treatment being an integral part of punishment is often taken for granted – after all, a punishment that does not hurt would arguably not qualify as punishment at all. At the same time, this idea can cause a certain discomfort, especially among those who work professionally with punishment, even in a purely academic setting. The discomfort resembles cognitive dissonance: most people have a natural aversion to the deliberate infliction of suffering. And yet, the fact remains that the justice system routinely sends people to prison and, in doing so, intentionally imposes distress and hardship.

This tension is addressed by theories of punishment, at least abstractly. These theories seek to justify punishment and the hard treatment it involves as either fair or beneficial, or ideally both. Since not everything that produces beneficial outcomes is necessarily ethically justifiable, theories of punishment also take up the question of legitimacy; they aim to explain why, despite the tangible infringements of the offender's rights, the person being punished has no compelling grounds for protest or objection. These explanations vary: because they are guilty; because the norms prescribing punishment were adopted through a democratic process; because, at some point in the past, we (at least hypothetically) entered into a social contract; because we owe loyalty to the state; or because punishment takes away the symbolic advantage the offender allegedly gained by committing the offence (Ambrož 2018).

Nevertheless, although a vast body of literature seeks to legitimize hard treatment as an integral part of state punishment, this idea is once again coming under scrutiny. The renewed controversy has emerged in the context of expressive theories of punishment, which have gained considerable traction in recent decades, including within continental European penal theory. While the expressive dimensions of punishment have long been acknowledged by sociologists (notably by Durkheim 2013), it was Joel Feinberg's pioneering work that brought the notion of punishment as a form of expression to the forefront of normative theorizing about punishment. According to Feinberg, punishment is "a conventional device for the expression of attitudes of resentment and indignation, and of judgements of disapproval and reprobation, on the part either of the punishing authority himself or of those 'in whose name' the punishment is inflicted" (Feinberg 1995: 74).

If it is true that punishment should be understood as a specific form of communication, the question arises as to why it should also include hard treatment. One can express disapproval without wielding a stick, and indeed this is generally considered a more appropriate way of engaging with others (think of the many ways in which non-violent communication has been promoted from kindergarten onwards). Klaus Günther (2014: 16) goes even further, arguing that communication and hard treatment are mutually exclusive: it seems contradictory to emphasise the importance of communication (which is inclusive), but then subject one of the communication partners to hard treatment (which is exclusionary).

More broadly, this question concerns the relationship between the condemnatory statement (censure) and the hard treatment of offenders in expressive theories of punishment. In one view, hard treatment is the means (medium) by which the censure is expressed (Feinberg 1995: 76); in another view, the censure is first expressed verbally and then reinforced symbolically by non-verbal means (Hörnle 2011: 41–43). Both views share a common idea: without hard treatment, punishment would be a mumbling of words that none of the addressees (offender, victim and community) would take seriously.

The starting point, then, is to recognise the limited expressive power of words alone. Language cannot convey everything, and hard treatment steps in where words fall short. From everyday life, we know that verbal messages are often reinforced by non-verbal elements that lend weight and seriousness to what is being said: a promise accompanied by a handshake; a recognition of achievement marked by a formal award ceremony and – if the recipient is fortunate enough – a financial prize; a verbal warning about the harms of smoking supplemented by graphic images of diseased lungs; or a television commercial reminding us that even a simple "thank you" feels more heartfelt when paired with a small gift – a box of chocolates from a global confectionery brand.

These non-verbal additions are largely matters of social convention. And if they are conventional, then they might be alterable or replaceable. We can imagine celebrating without champagne, but can we imagine censuring offenders without imposing some form of inconvenience or distress?

Perhaps in theory. Some authors (Hanna 2008: 137–139; Günther 2014: 17) view hard treatment as a historically contingent convention for expressing censure, one that could, in principle, be replaced or substituted by less drastic measures, such as the criminal procedure itself[2] or, in particular, a guilty verdict. But would this suffice? Tatjana Hörnle (2019: 218–219) points out that in today's egalitarian and secular societies, judges cannot be expected to have the full authority to ensure that their words are taken seriously. While there have been efforts to emphasise the special communicative status of the court (the robes and the architecture of courtrooms), even such a solemn atmosphere will usually not be enough to adequately convey the seriousness of the censure in words alone. In this respect, expressivism is not fundamentally different from retributive or preventive theories

[2] It is undeniable that the criminal procedure itself can carry significant expressive power, conveying society's condemnation of the crime through various forms of symbolism (e.g. the practice of handcuffing defendants when they are brought to the main hearing, even when this is not strictly necessary for security reasons). However, arguing that the criminal procedure itself suffices to express censure is formally problematic: as long as the criminal proceedings are ongoing, the individual's guilt has not yet been established, meaning it is, at least from a formal perspective, too early to express censure. To address this issue, Nathan Hanna (2008: 137) proposes the following solution: while the criminal proceedings are still underway, they do not express censure towards the specific defendant, but towards the person who committed the offence. A conviction, if it is reached, serves as a formal equation between the accused and the person whom society has censured. I view this as more of a rhetorical device than a solution to the underlying problem.

of punishment. While it aims to distinguish itself by prioritising communication over retribution or deterrence, this communication is ultimately supported by the same firm hand of unpleasant treatment.

Authors who view hard treatment as an indispensable element of punishment typically assign it two key functions: it serves as a symbolic reinforcement of censure (the amplifying function) and as a means of calibrating its severity (the grading function) (von Hirsch 2019: 88–89). Both functions support the broader view that punishment is, at its core, a communicative enterprise. Yet, the necessity of hard treatment can also be defended on grounds that go beyond the now widely endorsed expressive theories of punishment. Traditional preventive rationales for criminal sanctions cannot be neglected; sanctions that involve a degree of hardship are generally assumed to be more effective at deterring future misconduct than hypothetical, entirely painless alternatives. Put differently, the prospect of facing only verbal condemnation and possibly compensating the victim is far less dissuasive than the threat of more tangible deprivations, such as imprisonment.

2. Sparing the more sensitive? Conceptual considerations

Given the above, it seems likely that hard treatment will continue to accompany punishment for the foreseeable future. And whenever individuals are subjected to such treatment, the question of how they will endure it arises. One thing is certain: when blows are being dealt, it matters greatly whether the recipient is a robust sumo wrestler or a frail, undernourished boy. Does this also imply that courts ought to take an individual's sensitivity into account when determining prison sentences?

There is a body of literature that answers this question with a straightforward "No," offering a bundle of practical and principled reasons. Alec Walen (2021) identifies four main practical reasons against considering individual sensitivities when imposing prison sentences: firstly, it could invite defendants to game the system, for example by simulating increased sensitivity; secondly, it might be perceived as unfair, since those who claim to be extra-sensitive could appear to receive undue leniency; thirdly, it could undermine the predictability of punishment; and finally, it could lead to an abuse of sentencers' powers, allowing for arbitrary or inconsistent sentencing.

Furthermore, there are two main principled reasons against taking individual sensitivity into account. Criminal sanctions are known in advance, and if a person is aware of their sensitivities to punishment, which they can reasonably foresee, they may be expected to exercise extra caution in avoiding criminal behaviour (Markel, Flanders 2010: 961). Additionally, there is a distinction between the purposive and collateral consequences of punishment (Markel, Flanders 2010: 961). Any additional suffering experienced by more vulnerable convicts is not intentionally

inflicted by the courts, but rather results from a combination of circumstances. Therefore, formally speaking, it should not be considered an inherent part of the sentence imposed by the court.

Evaluating these arguments is best done from the bottom up. The view that the additional suffering of the more vulnerable is irrelevant because it is not caused on purpose is hardly convincing. From the perspective of the person being punished, the discussion on the fine nuances of the psychological attitude with which their punisher imposes the punishment seems rather irrelevant. In other words, for more sensitive convicts, the explanation that their additional suffering is caused by a conditional intent (*dolus eventualis*) provides little consolation. The fact that the actual effects of a measure or sentence are more important than the "mental attitude" of the imposing authority is evident in the regulation of pre-trial detention, for example (Kolber 2019: 580). Courts do not impose pre-trial detention for punitive purposes. However, pre-trial detention is as stressful and restrictive for the person concerned as a custodial sentence, and no-one today questions the reasonableness or fairness of counting time spent in pre-trial detention towards a custodial sentence, despite the fundamentally different purposes of each.

Nor is it particularly convincing to argue that criminal sanctions are known in advance and are therefore avoidable by anyone, including more sensitive individuals. This line of reasoning suffers from the same flaw as all attempts to justify the legitimacy of punishment by merely pointing to the fact that penalties are known in advance and therefore avoidable. An excessively harsh or even cruel treatment does not become ethically acceptable simply because it is known in advance and could have been avoided by a rational and disciplined individual (Hörnle 2011: 52). The fact that punishment is foreseeable does not mitigate its potential harm or alter the ethical considerations surrounding its severity. In other words, acknowledging the potential for avoidance does not inherently justify the punitive measures themselves.

What about the practical challenges of taking individual sensitivities into account during sentencing? It is reasonable to expect that a system in which heightened sensitivity influences sentencing outcomes could incentivise defendants to portray themselves as particularly sensitive individuals. This should not come as a surprise: when people face the prospect of a significant restriction of their freedom and autonomy, they have strong reasons to take advantage of any leniency the penal system may offer. The same holds true for defences and mitigating circumstances, which defendants frequently invoke, even in cases where the factual basis for them is doubtful. It is, of course, the court's responsibility to assess such claims and to distinguish between those that are substantiated and those that are merely simulated. The same standard should apply to claims of heightened sensitivity. It is certainly possible that, in doing so, decision-makers may overstep or misuse their authority. However, I would argue that this possibility alone should not be a cause for particular concern. Any legal mechanism that vests discretion in decision-makers is, by its nature, open to potential misuse, but that, in itself, does not constitute a sufficient reason to reject it outright.

Still, assessing individual sensibilities with sufficient precision is undoubtedly challenging. Reactions to the deprivations of the prison environment only become apparent during imprisonment, and they tend to fluctuate over time. The literature on imprisonment also highlights the phenomenon of hedonic adaptation, the idea that individuals may, over time, return to a baseline level of subjective well-being. While such adaptation might occur after the initial phase of incarceration, recent criminological research has cast doubt on the possibility of full hedonic adjustment within the prison context (Wildeman, Turney, Schnittker 2014).

In other words, the response to altered living conditions in prison – as well as the possibilities and limits of adaptation, and the temporal dynamics involved – is a highly individual matter, one that courts can hardly predict with sufficient precision at the sentencing stage. If such individual sensitivities were to be taken into account, sentencing would need to become more flexible, allowing for the individual's actual responses during imprisonment to play a role in the final outcome. In practical terms, however, such a system of relatively indeterminate sentences would be difficult to implement, and it would run counter to the principle of predictability, which is an essential component of legal certainty.

Finally, one must take seriously the concern that shorter prison sentences or more comfortable living conditions for vulnerable offenders might be perceived by the public as unjustified privileges. This impression becomes especially likely when defendants used to a life of luxury are treated more leniently, based on their presumed greater sensitivity. In the penological literature, this dilemma is known as the "Paris Hilton problem" (Montag, Sobek 2014). She was initially issued a caution for a traffic offence, namely reckless drink-driving. However, after failing to comply with the conditions attached to the caution, the court converted it into a custodial sentence of 45 days. For someone used to a much higher standard of living, the prison environment proved particularly distressing. According to reports, Paris Hilton experienced episodes of claustrophobia. One of her lawyers claimed that, in light of her circumstances, the punishment was disproportionately harsh (Cohen 2007).

Public reaction to Hilton's heightened sensitivity was largely unsympathetic. Few seemed moved enough to argue that her punishment should have been mitigated. In this regard, it is worth highlighting the findings of an empirical study by Josef Montag and Tomáš Sobek (2014), which shows that people across different political affiliations and income levels tend to reject the idea that an individual's accustomed comfort should play any role in sentencing decisions. This is, of course, "only" an expression of public opinion. While opinion polls are not a sound basis for shaping sentencing policy, certain basic intuitions about fairness cannot be dismissed without putting at risk the criminal justice system's credibility and the public's trust in it.

This brings us to one of the central tensions in the justification of punishment more broadly, and in sentencing decisions in particular. If individual sensitivity is declared irrelevant, two people may end up being punished unequally for the

same offence: the more sensitive one more harshly than the less sensitive. Yet, once we agree that sensitivity should be taken into account, we face two difficulties: the challenge of assessing individual sensitivity with sufficient precision and the risk of creating the impression that certain defendants are being granted preferential treatment.

Can this tension be resolved?

3. Fairness intuition, class justice and the principle of equal treatment

When we consult our intuition about the fairness of punishment sensitivity and sentencing, the picture that emerges is often complex and ambivalent. Much depends on the specific details of whichever case we take as the starting point of our reflection, particularly the causes to which we attribute the individual's heightened sensitivity. The factors contributing to heightened sensitivity are diverse and may include age (McLennan et al. 2025), social and demographic background (Logan et al. 2019), mental health disorders (Armas, Spicknall, Sheehan 2025), identifying as LGBT (Morgan et al. 2025) or having been convicted of a sexual offence (van den Berg et al. 2018). When considering the role of increased sensitivity in sentencing, these underlying factors are often taken into account, whether consciously or unconsciously. For instance, discussions with students in an elective course on penal sanctions reveal considerable leniency towards offenders whose sensitivity is linked to age or illness, and significantly less towards those perceived to suffer from "rich kid syndrome."[3]

Can these intuitive standpoints be rationally justified, and how do they correspond to existing sentencing rules? Sentencing provisions usually do not address the issue directly. The Slovenian sentencing scheme, for example, only vaguely empowers the courts to take into account "the offender's personal circumstances" as mitigating circumstances (Article 49(2) of the Criminal Code). In this respect, the literature (Nerat 2021: 731) refers to the state of the offender's health as one of these "personal circumstances" and cites case law in which the court considered as a mitigating circumstance the fact that the offender was a pensioner with a disability.

The consideration of illness or old age as a mitigating circumstance is usually taken for granted and rarely subjected to a more thorough reflection on why the

[3] Naturally, both examples represent ideal-typical extremes, deliberate abstractions intended to provoke reflection and debate. In reality, there are numerous grey zones and "mixed cases" in between, where decisions become far more complex (e.g. where should we draw the line between ordinary sensitivity and pathological hypersensitivity?). Moreover, sustained debate often brings to light underlying biases that shape our judgments, such as a conscious or unconscious aversion towards those who have enjoyed a life of excessive comfort.

sick and the elderly should be spared in sentencing. We can imagine two argumentative paths that one might take. It could be argued that old age and illness in themselves entail a certain amount of hardship (past and present suffering), which it seems fair for the court to take into account when imposing a sentence. Such a view would be close to the all-encompassing idea of metaphysical justice or a moral ledger, where past and present suffering creates some sort of "credit," which may partially balance the ledger and thus has to be considered each time the court imposes a sentence. Such meticulous and all-encompassing bookkeeping of our past sins, merits and suffering may perhaps serve as the basis for the Final Judgment, but it is clear that secular courts lack a precise, holistic insight into an individual's "account of past suffering," and therefore such an ambitious idea of justice is impossible to put into practice.

The second, less ambitious argumentative path is that the reason for leniency is simply that the sick and the old find it harder to tolerate the concrete limitations of imprisonment. It could be said that this leniency is not only an expression of a "gentlemanly gesture," "mercy" or "humanity," but can also be defended in a purely formal way, by reference to the legal principle of proportionality. Punishment is, by its very nature, a deprivation, which is a relative concept: the same restrictions affect the sick and the old more than the healthy and the young.

Up to this point, the discussion has remained relatively uncontroversial. However, age and illness are not the only factors that can make prison conditions more difficult to endure. The challenge with other sources of heightened vulnerability lies, first of all, in their relative intangibility. As decision-makers, we tend to feel more secure when our judgments can be anchored in an officially confirmed medical diagnosis (preferably accompanied by its Latin designation), or at least in an unambiguous numerical indicator such as chronological age. A further complication arises from the fact that a person's pre-incarceration living conditions may significantly shape their experience of punishment. It is here that the slope becomes slippery: the concern emerges that one's socioeconomic background might begin to influence sentencing decisions and the allocation of prison regimes, raising the spectre of *Klassenjustiz*.[4]

As elsewhere, there can be a certain gap between the spoken and the unspoken, the declarative and the factual. At the declaratory level, socioeconomic class is nowadays declared an absolute taboo in the assessment and execution of sentences (Pallin 1982: 54; Meier 2006: 205). However, it is not excluded that the criterion of social class is expressed indirectly, through other, morally less loaded concepts, such as personality orderliness.

In the Slovenian prison system, for instance, white-collar convicts may relatively quickly gain access to the semi-open and open wards of penitentiaries. The

[4] The refusal to adapt the selection, calibration and enforcement of sanctions to an individual's socioeconomic status is a relatively recent development. For a thorough historical account of how penal sanctions were once adjusted according to the status of the convicted person (see Whitman 2005: 79–150).

key justification for such transfers often rests on the aforementioned notion of personality orderliness. However, without questioning the sincerity of this reasoning, one may reasonably suspect that another, less readily acknowledged factor plays a role: namely, the tacit assumption that such convicts would find the conditions in a closed ward disproportionately difficult to endure, certainly more so than their generally hardier counterparts from the world of street crime.[5]

This suggests that certain ostensibly neutral criteria – such as personality orderliness – may, in practice, serve as proxies for broader patterns of social differentiation. While these criteria are not explicitly linked to socioeconomic status, their application may correlate with it in ways that reflect systemic tendencies whereby class-related factors influence penal outcomes through indirect channels.

This aspect is rarely acknowledged explicitly, as the idea that those used to better might somehow deserve better would likely provoke public outrage. The aforementioned statement by Paris Hilton's lawyer, that his client finds prison harder to bear than the average convict, might be accurate. And yet, empirical research suggests that the vast majority of people would not favour a more lenient approach on these grounds (Montag, Sobek 2014). This implies a broader acceptance of the fact that, in such cases, more vulnerable individuals may end up being punished more severely in terms of how they experience it.

Paris Hilton and the transfer of white-collar offenders to more lenient prison regimes are merely two ideal-typical examples selected for illustrative purposes. Any potential special sensitivity to imprisonment, however, is not limited to celebrities or members of the economic elite – it may concern the entire imprisoned middle class. What do we currently know about the specific hardships that imprisonment entails for this group of offenders?

Andrzej Uhl (2024) argues that imprisoned members of the middle class experience incarceration in qualitatively distinctive ways that remain largely overlooked in prison sociology. Upon entry, middle-class prisoners often suffer an acute shock and abrupt relative deprivation due to the sudden loss of status and accustomed living standards (Uhl 2024: 182). Although the special sensitivity hypothesis has been empirically challenged, Andrzej Uhl suggests that middle-class prisoners may experience a specific form of suffering characterised by double exclusion: they are simultaneously expelled from the law-abiding community and perceived as outsiders of the prisoner subculture (Uhl 2024: 188). This social marginality produces adaptation difficulties distinct from those faced by street offenders.

At the same time, middle-class prisoners often mobilise imported cultural, social and organisational capital to cope with institutional constraints. Drawing on Bourdieu's theory of capital, Andrzej Uhl shows that educated and professionally

[5] There is a lively debate in the literature concerning the alleged special sensitivity of white-collar offenders. In the European context, this issue has been addressed in particular by Andrzej Uhl, who, based on empirical research, demonstrates that white-collar offenders are generally sufficiently resourceful and socially skilled to adapt well, even to prison conditions (Uhl 2023). Elsewhere, Andrzej Uhl is even more explicit, characterising the hypothesis of the special sensitivity of white-collar offenders as a neoliberal dogma (Uhl 2020: 36).

experienced prisoners may treat prison as another form of bureaucracy, which demands compliance, negotiation with staff and non-confrontational adaptation strategies (Uhl 2024: 188–189). Their conformity and maintenance of a non-criminal identity might enable relatively stable adjustment (Uhl 2024: 186–187). The central point convincingly advanced by Andrzej Uhl is that the issue is not black and white. While certain aspects of imprisonment may be particularly painful for middle-class offenders, their social skills and cultural capital may at the same time enable forms of adaptation that render the prison experience more bearable.

Within the limits of this article, I cannot delve further into the empirical literature on middle-class prison experiences. I therefore confine myself to the normative question of how the justice system should respond in cases in which an individual's heightened sensitivity to imprisonment appears relatively uncontroversial. What we face here is a tension between two competing intuitions about the fairness of punishment: one that holds the subjective experience of punishment to be morally relevant and worthy of consideration, and another that resists accommodating such considerations when they would entail a more lenient treatment of otherwise privileged offenders. The latter intuition appears to carry greater normative weight in the public imagination.

Why is this so? Among other factors, the prevalence of the second intuition may be explained by the human expectation that, in a world rife with glaring inequalities, individuals should be treated in a manner that appears formally equal in at least some extreme circumstances, such as when sentenced before the court or when serving a prison sentence. There is some reassurance in the idea that we are all in the same boat when it comes to certain, extreme situations – much like the Danse Macabre fresco, where, in a grotesque procession, both a king and a beggar walk equally helpless, paired with their respective bony companions.

The tension between the competing intuitions described above is not an isolated occurrence within the field of sentencing and punishment. Similar conflicts arise, for instance, when we assess the mitigating circumstances that influenced a defendant's actions. Our readiness to treat a given circumstance as mitigating appears to depend not only on its causal strength, but also on the degree of sympathy or antipathy it evokes in us. Put simply, a person may be driven to commit a property offence either by deprivation or by greed, yet few would be inclined to treat greed as a mitigating factor, even if both motives exert a comparable influence. In this context, Michael Moore (2016: 60) observes that our ideological orientations shape how we evaluate mitigating circumstances, often carrying more weight than the mere causal relevance of a particular factor in the defendant's conduct.

A similar dynamic can be observed in our willingness to take into account an individual's heightened sensitivity to hard treatment. In practice, our assessment tends to reflect not only the extent of that sensitivity, but also the degree to which we find its underlying causes sympathetic or relatable. This response may not be strictly rational, yet it appears so deeply rooted in human intuition and prevailing notions of justice that the criminal justice system can neither ignore it nor fully

eliminate its influence. Rather than attempting to suppress such intuitive reactions, it may be more productive to understand how they shape our judgments.

Conclusion

What, then, can we conclude about the problem of increased individual sensitivity to the burdens of punishment? As long as the imposition of hard treatment remains a central element of the state's response to crime, this issue will remain relevant, not merely as a question of compassion or mercy, but as a matter of proportionality in the strict, legal sense of the term. It is therefore important to address it openly: in judicial reasonings, in the practical administration of prison sentences and in theoretical reflections on the justification of punishment.

True, individual sensitivity is elusive and cannot be measured with precision. But that alone is no reason to disregard it. After all, we are equally unable to determine the amount of defendant's culpability with mathematical accuracy – yet we do not exclude it from sentencing. Instead, we rely on rational and reasoned deliberation to assess it, knowing full well that it resists precise quantification.

Increased individual sensitivity should therefore be taken into account in principle, with possible limitations in cases where this would risk undermining public confidence in the fair administration of justice.[6] In any case, however, the following points should be borne in mind. Any punitive leniency shown towards the more sensitive has a dangerous flip side: it can serve as an alibi for punishing more harshly those who appear more robust, those who seem better able to endure suffering. It is therefore all the more important that the penal policy of the courts remains generally moderate, and that the conditions of imprisonment are decent. While this does not resolve the problem of relative differences in sensitivity, it does help prevent the brutalisation of punishment for those deemed less sensitive.

Even in ideal contexts, such as moderate sentencing policies and relatively good prison conditions, there will always be individuals for whom the hardships of punishment are particularly burdensome. While it is now largely uncontroversial to show leniency towards the elderly or those who are seriously ill, there seems to be no compelling reason to limit the consideration of increased sensitivity to this group alone.

An extension of this consideration beyond those boundaries can proceed along two paths. On the one hand, courts may exercise their discretion and take punitive sensitivity into account without naming it explicitly – embedding it in-

[6] The proposed solution could be described as a "principled stance tempered by pragmatic reasons" (this concise formulation owes much to the insights of an anonymous reviewer). Since it entails a pragmatic compromise, it is likely to raise more than a few critical eyebrows. Yet in the field of sentencing and punishment, (temporary) compromises are sometimes simply the most that can realistically be achieved.

stead within a network of other, presumably less controversial factors. Something along these lines is proposed by Franz Streng (2012: 359), who first rejects the idea that heightened sensitivity should influence sentencing, but then suggestively adds that, in such cases, the offender's culpability is often lower and the preventive needs less pressing – thus allowing for a more lenient sentence without explicitly invoking increased sensitivity. In this way, sensitivity is taken into account *de facto*, while remaining unspoken, thus avoiding any "irritation" of the public's legal sensibilities. This kind of compromise may be pragmatic, but it can hardly be described as transparent.

On the other hand, courts may choose to address the problem of heightened sensitivity openly in the reasoning of the judgment, thereby inviting commentary and critique from the prosecution, higher courts, academic observers and the press. The second route is undoubtedly more demanding and riskier for the decision-maker, but it is also the only approach that aligns with the principle of transparency, according to which sentencing decisions must be justified openly.

Would such an open-handed approach be too risky for the courts? Some courts are indeed capable of meeting this challenge and can afford to do so. A notable example is the German Federal Court of Justice (BGH), which, in one of its rulings (2 StR 106/98 1998), confronted the issue directly and took the position that heightened sensitivity must be considered in sentencing. According to the court, this consideration does not violate the principle of equality – quite the contrary: it follows from that very principle that such sensitivity must be taken into account. If a sentence affects a defendant substantially more harshly than someone who does not share the same personal circumstances, then – in order to ensure approximate equality in the effect of the sentence – a reduction in the sentence must be made to create a balance. In the court's view, heightened sensitivity must surpass a certain threshold. Only circumstances of substantial weight may be considered in sentencing, and a reduction in punishment is only warranted if the defendant's increased sensitivity results in a measurable difference in the burden imposed by the sentence. Once this threshold is met, such heightened sensitivity is, in principle, to be considered a mitigating factor. The court does not attribute normative relevance to the causes of heightened sensitivity; indeed, it does not engage with them at all. As for the offender's prior awareness of their own susceptibility, the court holds that a reduction in sentence may not be denied (apart from exceptional cases) on the grounds that the offender acted knowingly despite being aware of their heightened sensitivity to punishment.

Broadly speaking, the court appears to have adopted a bold stance on the matter, demonstrating a notable resilience to the expectations of public opinion. As always, though, what matters are not only the general principles, but also the practical details. One of the most important among these is the threshold at which heightened sensitivity becomes significant enough to warrant consideration. In the present case, the court held that the offender's pregnancy did not meet the required threshold. The impression remains that the bar for recognising heightened sensitivity as a relevant sentencing factor was set exceptionally high.

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