

## Getting Proportionality in Perspective: Philosophy, History and Institutions

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Abstract:

This essay revisits the conceptual debates about proportionality and its moral and political force, setting these debates in historical and institutional context. It argues that the conceptual, moral, political and practical questions about proportionality are inextricably linked, and that this insight should lead us away from the dominant conception of proportionality as a moral precept and towards a political conception of proportionality which is inevitably shaped by prevailing conceptions of *what proportionality is for* and, in modern democracies, is grounded in democratic practices and the institutional structure of democratic states. This insight has important implications for the prevailing disciplinary division of labour in the criminal justice field, calling into question whether the tendency to separate conceptual and philosophical from social theories of punishment is appropriate. In conclusion, the paper considers the conditions under which stable constraints on the state's power to punish, and accountability mechanisms adequate to guaranteeing the fittingness of punishment by reference to democratically endorsed standards – which I take to be the key animating concerns of contemporary appeals to proportionality – are most likely to be realised, and conversely where they are likely to be most under threat. This I take to be both an important issue in itself, and a case study in the interaction between concept and context.

\* With many thanks to Michael Tonry, Matt Matravers, Jacco Bomhoff, Stephanie Classmann and the reviewers for *Crime and Justice* for exceptionally helpful comments on a draft; to my colleagues in the LSE Criminal Law and Criminal Justice Theory Group for searching and constructive discussion; and to Maria David for both helpful comments and exemplary research assistance.

‘This man’s life sentence for a failed attempt to steal a set of three hedge clippers is grossly out of proportion to the crime and serves no legitimate penal purpose.’

Chief Justice Bernette Johnson, *Louisiana v Bryant* [2020]

‘We have found that the principles according to which crime is punished are very vague, that the methods of carrying out retribution are fitful, governed by chance and personal passion rather than by any system of fixed institutions.’

Bronislaw Malikowski, *Crime and Custom in Savage Society* (1926)

Few concepts have had such prominence in modern thinking about the philosophy and practice of punishment as that of proportionality. Those defending not only deontological but also consequentialist and mixed theories of punishment have all subscribed to versions of proportionality, both as a constraint on the state’s power to punish and as a substantive norm shaping our conception of what punishment is apt. And formalised sentencing frameworks have often been motivated and informed by the aspiration to articulate a proportionate penalty scale. Yet while (almost) everyone agrees that proportionality in punishment is important, there is little consensus on basic questions such as the conceptual contours of proportionality; its upshot for institutional design; its policy implications; and its capacity effectively to constrain or direct penal power. Indeed Chief Justice Johnson’s ringing reference to proportionality quoted above displays precisely this ambivalence, representing as it does both the salience and intuitive appeal of proportionality and its

ultimate indeterminacy: her assessment of the Louisiana habitual offender laws as implicated in a lengthy history of racial injustice and as sanctioning grossly disproportionate and hence unjust penalties was not shared by her colleagues, and Mr Bryant's life sentence was upheld (State of Louisiana v Fair Wayne Bryant 300 So. 3d 392 [La. 2020]). The contingency of proportionality assessments is a product not only of the cultural, historical and spatial differences evoked by anthropological work such as Malinowski's, but of moral and political disagreement within most forms of social order, while Malinowski's framing of his interpretation of crime and punishment in Trobriand society is a telling reminder that institutions geared to tempering punishment in a principled way have long been ideologically constructed as an index of 'civilisation'.

In this essay, I revisit the conceptual debates about proportionality and its moral and political force, setting these debates in historical and institutional context. I do so with a view to arguing that the conceptual, moral, political and practical questions about proportionality are inextricably linked, and that this insight should lead us away from the dominant conception of proportionality as a moral precept and towards a political conception of proportionality which is inevitably shaped by prevailing conceptions of *what proportionality is for* and, in modern democracies, is grounded in democratic practices and the institutional structure of democratic states. This insight has important implications for the prevailing disciplinary division of labour in the criminal justice field, calling into question whether the tendency to separate conceptual and philosophical from social theories of punishment is appropriate. In conclusion, I then consider the conditions under which stable constraints on the state's power to punish, and accountability mechanisms adequate to guaranteeing the fittingness and fairness of punishment by reference to democratically

endorsed standards – which I take to be the key animating concerns of contemporary appeals to proportionality – are most likely to be realised, and conversely where they are likely to be most under threat. This I take to be both an important project in itself, and a methodological case study in the interaction between concept and context. I consider in particular in this context the implications of phenomena such as populism, and the institutional conditions which best help to strike the delicate balance between the democratic legitimisation of punishment and the protection of unpopular or otherwise vulnerable groups.

The essay proceeds as follows. In the first section, I offer a characterisation of proportionality, and summarise its place in debates about appropriate penalties notwithstanding the pervasive acknowledgement of proportionality's conceptual conundra and practical limitations. Drawing on Matt Matravers's (2020) distinction between moral and political conceptions of proportionality and the rather different implications of each, I move on in the second section to concentrate on proportionality understood as a political and social construct, paying attention to variations over time and space, setting out an understanding of proportionality in modern democracies as speaking to concerns with both individual fairness and the institutionalisation of adequate constraints on the state's power to punish; offering an account of the reasons underpinning proportionality's salience in modern Western debates about punishment right across the spectrum of penal philosophies and public policies; and considering the implications of this account for methodology in criminal justice studies. In the final section, I review what is understood about the broad conditions under which appeals to proportionality can be adequately

institutionalised, and consider how far those conditions have been affected by the waves of populism shaping the political cultures of many countries in recent years.

## I. Characterising (and Demoralising) Proportionality

On the face of it, an appeal to proportionality amounts to a claim that there exists a broad moral or practical equivalence or comparability between two different phenomena: a wrongful act and a punishment; an assault and a reaction in self-defence; a piece of negligent conduct and an award of damages; a *prima facie* discriminatory impact and a compensating legitimate purpose; a perceived social problem or danger and a governmental response which imposes certain social costs or impinges upon certain rights. As such, proportionality is an essentially analogical concept (Lacey 2016b).<sup>1</sup> Across many legal fields – human rights and public law, the law of civil obligations as well as criminal law – mechanisms of social regulation which are backed up by the state via its legal system have sought to ground and express their legitimacy in terms of an appeal to proportionality or have had their validity adjudicated in these terms (Bomhoff 2013; Cohen-Eliya and Porat 2013; Jackson and Tushnet eds. 2018). Yet more broadly, in social and interpersonal life quite generally, proportionality is invoked or implied in practices such as marking exams and coming to judgments on the quality of conduct – evaluations with practical consequences

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<sup>1</sup> This way of thinking about proportionality embraces both what Antony Duff (2020b) has called prospective and retrospective proportionality: criminalising power or penal policy as proportionate to relevant social harms, advantages, legitimate purposes; a particular instance of punishment as proportionate to a past offence.

which imply power, albeit not state power, which calls to be exercised appropriately in accordance with established and known criteria.

In the criminal justice sphere, appeals to proportionality in penal philosophy and sentencing theory have, of course, acquired a particular salience in many countries since the 1970s in the wake of the justice movement's reaction against the widespread discretion and indeterminacy of the post-war rehabilitative ideal, and its instantiation of an influential conception of punishment founded in the meting out of just deserts (Matravers 2019). In its strongest form, desert theory claims to provide not only a conception of the proper contours of the state's power to punish, but a moral reason for punishment: the infliction of (proportionate) punishment simply is the morally right response to crime (Moore 1998). More often, however, desert theorists espouse a 'weaker' form of retributivism: in effect a 'mixed' theory of punishment in which proportionality to desert sets an upper limit on punishment, giving a licence to punish whose legitimate exercise is conditional on its potential to serve other valued social ends such as special or general deterrence, incapacitation, reform or the coordination of conduct and the internalization of norms (Morris 1974; von Hirsch 1976, 1993, 2019; Tonry 2020*a*, 2020*b*). And in the assessment of what level of penalty is appropriate in light of the expected consequences, proportionality judgments are still seen as relevant. In communicative theories of punishment, too, proportionality underpins the apt measure of censure (Duff 2001 – though see the more modest role envisaged in Duff 2020*b*); while in Hart's famous mixed theory of punishment, proportionality, alongside responsibility, is the touchstone of justice in distribution (Hart 1968). Less obviously, much the same is true of the fully consequentialist theories originating in Bentham's utilitarianism (Bentham 1970 [1781]), in which the assessment of

proportionality is grounded in a quasi-scientific, prospective measure of the balance of pleasure over pain to be produced by any particular quality and amount of punishment. In this conception, disproportionate penalties are those which produce sub-optimal motivations and incentives as given by the foundational felicific calculus, notably those which deploy a greater degree of penal force than would be needed to produce the optimal reduction in crime via deterrence or incapacitation, given the anticipated costs of both crime and penalty.

Amid the extensive discussion of these vastly different theories of punishment, it is often overlooked that the appeal to proportionality as providing guidance on the appropriate level of punishment is very often founded in, or is presented as, or is capable of being traced back to, a basic claim about what is morally right, beyond which no further inquiry can be made or reason given. For a strong retributivist, the moral appropriateness of a deserved, proportional punishment is axiomatic: and any weaker, hybrid account which sees proportionality as substantively contributing to the appropriateness of a particular penalty is drawing an analogy for which it is difficult to produce reasons other than moral axioms or intuitions. For the utilitarian, the need to design the penalty scale proportioning incentives to the optimization of happiness or preference satisfaction – a precept which casts proportionality judgments as in essence empirical matters – is simply an upshot of, and epiphenomenal to, the principle of utility, itself founded in a timeless, axiomatic moral truth, albeit one that in Bentham's vision is born of an empirical theory of human psychology and motivation.<sup>2</sup>

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<sup>2</sup> Hence, the principle of utility once accepted, its upshot of a principle of parsimony in punishment, combined with the empirical quality of the measure of utility, can more readily be accommodated within a political as

This view of proportionality as shaping the appropriate substance of penalties, which I refer to, following Matravers (2020), as ‘moral proportionality’, may be contrasted with the view of proportionality understood more generally as concerned with defining the contours of the state’s power to punish – ‘political proportionality’. Political proportionality is shaped not exclusively by appeals to morality but also by reference to an understanding of the state, its institutions and its relations with its subjects. In the remainder of this section, I review some well-known difficulties with moral proportionality, before turning to political proportionality and how it may best be understood. Moral proportionality has been thought of as particularly central within just deserts theories of punishment, whether weak or strong, and I accordingly focus in the rest of this section on work broadly located within the neo-retributive, desert tradition.

Claims about the moral proportionality of punishment as contributing to its substantive justification face a number of well-known challenges. Most obviously, in order to build the case for just punishment, such claims must establish the moral equivalence of a certain penalty and a certain offence, organised into scales of relative severity governing both a hierarchy of offences and a hierarchy of penalties; the penalty scale must itself be anchored at either end of that scale in order that its absolute judgment of ‘cardinal’ proportionality can be established; and a moral currency of equivalence as between a particular offence and a particular penalty, linking up the two scales, must be established (Matravers 2020; Tonry 2020a, 2020b). For however widely shared intuitions about the relative seriousness

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distinct from a moral conception of proportionality, implying as it does limits on the state’s legitimate power to punish shaped in part by, for example, political preferences and popular views.



of criminal harms and wrongs and hence their fair ordinal ranking within a penalty scale, absent a means for anchoring the scale in terms of a substantive, cardinal conception of desert, the appeal to proportionality is rootless and hence destined to be indeterminate. (Matravers 2019). So, while I touch on questions of fair ordinal proportionality from time to time, my primary concern is with desert theory's central assumption about the meaningfulness of an appeal to cardinal proportionality.

While it is widely agreed that the absolute and relative seriousness of offences is shaped by both culpability and harm (von Hirsch 1976; Ashworth and von Hirsch 2005), each of these two components, and the balance of importance between them, is contested: does negligence or an avoidable failure of due diligence in relation to a given harm equate to or differ from a subjective awareness of risk of that same harm coupled with a willingness to take that risk? Indeed, do we even have a way of translating these two very different components in one common measure which can be operationalised in assessments of proportionality (Husak 2020)? Is the intentional bringing about of a harm more culpable than a reckless or negligent one? Should components such as harm which feed into a judgment of proportionality be understood objectively or subjectively (Lippke 2020)? And should proportionality be understood in absolute or in relative terms (Duus-Otterstrom 2020)?

Adding to the complexity inherent in the moral conception of proportionality itself are a set of questions relating to the range of facts and circumstances bearing on the offender which a proportionality judgment must take into account. Should the offender's culpability be judged in terms of his or her broader social context or strictly in relation to his or her

opportunities and state of mind in strict relation to the alleged offence at issue: and if a judgment of 'desert' is at issue, is this in relation to the offence alone or should it be judged against the backcloth of the alleged offender's broader life (Kolber 2020) or circumstances (Morse 2000)? Should the passage of a long period of time between the alleged offence and the time of sentencing be regarded as affecting the level of a proportionate penalty (Roberts 2020)? Does the offender's particular vulnerability to or fear of a particular penalty or type of penalty, or its unusually severe implications for their families or for third parties, affect what amounts to a proportionate penalty; and do special vulnerabilities or invulnerabilities of victims of a crime affect its severity – in other words, is proportionality objective or subjective: absolute or relative to particular contexts (Husak 2020)? And does the relative or absolute seriousness of offences change over time, along with changing moral attitudes (Tonry 2020*a*, 2020*b*) or popular opinion (Matravers 2014)?

In the light of these complexities, each of them raising questions of real practical and normative significance, it is not surprising that even those sympathetic to retributive approaches of punishment have in recent years taken care to acknowledge the limitations of appeals to proportionality, 'getting proportionality into perspective' by refining or qualifying the significance of the concept in a range of ways (Tonry 2020*a*). For example, Antony Duff has suggested that framing the question of justice in punishment in terms of appropriateness or the aspiration to avoid disproportionate punishments may have advantages over straightforward appeals to proportionality,<sup>3</sup> which may blur our appreciation of the broader meaning of punishment which is central to communicative

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<sup>3</sup> Duff's suggestion resonates with Jacco Bomhoff's argument that, in the constitutional sphere, appeals to proportionality are best understood as expressing a sensibility of intolerance for wrong outcomes (Bomhoff 2018).

theories such as his own (Duff 2020*b*, p. 31). And in recent work, Matt Matravers has made a deft attempt to sidestep the various difficulties encountered by an appeal to proportionality by reorienting the debate in terms of the distinction between moral and political conceptions of proportionality and of a focus on the latter.

As Matravers crisply summarises the issue, '[t]he claim that punishment ought to be proportionate has an undeniable intuitive appeal. However... it provides no guidance for what ought to be done, as it leaves open the question "Proportionate to what?"' (Matravers 2020, p. 76). Assessments of proportionality, Matravers rightly concludes, can be made 'only once we specify the purpose of [the relevant] action or policy' (ibid.): in other words, once we have established *what proportionality is for*. Matravers illustrates this point with a simple but instructive example about the practice of grading: whether something counts as an injustice flowing from a 'disproportionate' grade might well be thought to depend on whether the grading is for the purposes of summative assessment – i.e. its whole purpose is to evaluate the standard of the work submitted; or whether it is a formative assessment, – i.e. its purpose may also be to encourage, motivate, build confidence – all goals which might temper the grader's judgment of the mark.<sup>4</sup> In much of the penal philosophy literature, as Matravers points out, the implicit assumption is that criminal judgment is in the business of summative assessment: moral proportionality is nested within a view of the purposes of criminal law, and of criminal justice more generally, which is often dubbed 'legal moralism'. Legal moralism is the view that criminal law articulates genuinely moral demands, not only in the obvious sense that there is a substantive overlap

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<sup>4</sup> At first sight, this might be thought to map onto Duff's distinction between retrospective and prospective proportionality; but note that the example of summative assessment, like that of punishment, may admit of or call for both prospective and retrospective constraints simultaneously.

between the content of key criminal offence and moral wrongs (Moore 1998), but also in the broader sense that conduct proscribed by a fair criminal justice system itself becomes conduct from which citizens have a moral obligation to refrain. Moreover the origin of this obligation – whether in relation to what might be thought of as *mala in se* or *mala prohibita* – is the state’s political responsibility to censure public wrongs: what we might call a form of political legal moralism (Duff 2020a). In the most sophisticated exposition of this approach, Duff (2018) has argued that, even though the scope of criminal law may range well beyond that of morality, the distinctive civic goods which it underwrites imply that the upholding of criminal legal standards carries the force of moral obligation. On this view, criminal judgment is accordingly centrally concerned with the business of moral blame and censure, albeit filtered through a distinctive conception of public wrong and civil order. In this context, the intuitive appeal of proportionality is undoubtedly strong, and its ultimate indeterminacy, hence, troubling.

But what if, as Matravers suggests, criminal justice is better compared with the case of formative assessment, and the relevant conception of proportionality is given by the political justification for that practice? In addition to the large tradition of ‘mixed’ theories of punishment incorporating some substantive forward looking element (Hart 1968; Morris 1974; Lacey 1988; Braithwaite and Pettit 1990; von Hirsch 1993), on which Matravers (2020) founds his argument, recent developments in criminal law theory have seen a burgeoning of theories which turn away from even the moderated, ‘thin’, political legal moralism of Duff and seek to recover and further develop the more neutral conceptions of criminal justice common before the retributive revival of the 1970s; and to situate criminal justice in its historical, political and institutional context (Lacey 2004, 2016a).

For example, in previous work with Hanna Pickard (Lacey and Pickard 2013, 2015*b*), we have argued that, while the criminal justice system does indeed respond to forms of conduct defined in state criminal law as harmful or wrongful, and as a result entails distinctive state responsibilities towards victims of crime, over and above general welfare responsibilities (Lacey and Pickard 2018), the basic rationale of the system is that of public regulation in the pursuit of distinctive civic goods, including, crucially, harm reduction. The practices of criminal holding to account are premised on offender agency, which underpins both the capacity to take responsibility and to work towards behavioral change; hence not only the more familiar concepts of rehabilitation and reintegration, but also the more radical idea of forgiveness, should be central to criminal justice as a regulative institution (Lacey and Pickard 2015*a*). The point of criminal justice, on this view, is not exclusively or even primarily backward-looking: to blame and punish those who are morally responsible for past wrongdoing or to censure public wrongs. Its point is, rather, importantly forward-looking: to hold responsible and to account, as a way of regulating behaviour, reducing harm, and upholding approved legal standards protecting the public against harms and wrongs (Lacey 2004; Lacey and Pickard 2021).

Ours is far from being the only such model of criminal justice. Indeed, in recent years there has been what is often referred to as a ‘political’ or ‘public law’ turn in criminal law theory, developing a wide range of purposive, regulatory interpretations of criminal justice.

Lindsay Farmer has elaborated a subtle argument about the role of modern criminal law in underpinning conceptions of civil order which shift over time and place (Farmer 2016); while Vincent Chiao (2016, 2019) – as discussed by Matravers (2020) – holds that criminal law in

the modern administrative welfare state exists fundamentally to sustain cooperation with public institutions, and should be supported to the extent (and only to the extent) that we have good reason to value the social order established by those institutions (Chiao 2019: cf. Thorburn 2019). In these more fully 'political' theories of criminal law and criminal justice (see also Ramsay 2012), the burden of justification is inextricably linked with that of the state and its power: if the state is fundamentally unjust, or corrupt, or lacks the competence effectively to use its regulatory tools to coordinate social behaviour, the legitimacy of its criminal justice authority and with it the justification of state criminalization and punishment falls away.<sup>5</sup> But where the state is behaving within the four corners of its democratic mandate, criminalization and punishment are important mechanisms which underwrite the compliance of each person by mandating the reciprocal forbearance of others (Matravers 2020, p. 79).

In his elegant version of this approach, Matravers argues that one of the tasks of the state is, in effect, to construct and stabilise a consensus around criteria of proportionality and of what counts as proportional censure. Pickard and I would avoid the language of censure, which in our view harks back to the very legal moralism which we think should be rejected. I would also be cautious about the language of 'consensus', which might be taken to refer to or to depend upon moral homogeneity, whereas what is surely at issue in a political conception of proportionality is a decision-making structure capable of producing relatively stable equilibria via compromise between different views and interests. Agreement or consensus about that structure may be necessary, but the point of the structure is to

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<sup>5</sup> An implication also entertained by Duff's political legal moralism.

produce outcomes whose procedural legitimacy is such that even those who disagree with them are prepared to live with them pending the next iteration of political debate. But I agree with Matravers that if proportionality is to make any sense in the criminal justice context, it must be seen as something to be made and coordinated on, rather than something to be 'discovered' in the metaphysical domain of moral realism. And once we have 'demoralised' proportionality in this way, we are confronted with a series of questions about the conditions under which proportionality can best be institutionalised. These questions in turn raise questions about the key purposes which we expect proportionality to serve.

The appeal of proportionality, seen in political rather than moral terms, lies in whatever capacity it has, or its supposed capacity, to define the contours of the state's power to punish and thereby to foster democratic accountability and the legitimacy of punishment. So it is important to ask whether and under what conditions proportionality is indeed the most suitable concept within which to frame accountability mechanisms in relation to the state's power to punish – and why, conversely, the appeal to proportionality continues to resonate so strongly notwithstanding the many difficulties which arise in any effort to work out its concrete implications. In the next section, I turn to history, to consider what light the historical trajectory of appeals to proportionality can shed on these questions, before turning in the following section to consider how far they can be illuminated by comparative research. In each of these sections, I am concerned to illustrate the importance of an effort to interpret the emergence and appeal of normative, philosophical arguments about punishment against the background of broadly sociological or otherwise empirical understandings of punishment's social role in different forms of society, and of the

conditions of existence of institutional arrangements suitable to the stable delivery of proportionality's underlying aims.

## II. Historicising Proportionality

The appeal to proportionality as part of the project of constructing specifically modern legal orders finds expression, as we have seen, in many aspects of legal governance. But its most prominent history undoubtedly lies in the criminal law, notably as part of an effort to build a modern equivalent to the premodern retributive ethic captured by the *lex talionis* and forms of discretionary, often monarchical, power. Indeed, Thomas Jefferson's 1778 *Bill for Proportioning Crimes and Punishments* in the early formation of the United States combines in a striking way the appeal to proportionality in a democratic context with a continuing commitment to talionic punishments: 'Whosoever on purpose and of malice forethought shall maim another, or shall disfigure him, by cutting out or disabling the tongue, slitting or cutting off a nose, lip or ear, branding, or otherwise, shall be maimed or disfigured in like sort: or if that cannot be for want of the same part, then as nearly as may be in some other part of at least equal value and estimation in the opinion of a jury'. (Jefferson 1950 [1778], cited in Whitman 2014: n. 16). Note in particular the way in which Jefferson's statement bridges moral and political conceptions of proportionality: the 'like sort' or 'equal value' is set by 'the estimation of a jury' – prefiguring a continuing struggle to reconcile a popular, democratic input to proportionality judgments with their promise to temper penal power. In the 'neoclassical' revival of retributivism, repackaged in the modernised form of 'just deserts' in the 1970s, the appeal to proportionality takes a very specific institutional form,



realised through the technical mode of procedural mechanisms such as sentencing guideline systems or presumptive sentence statutes. In each case, however, the work being done by the appeal to proportionality is similar: it evokes the sorts of clarity about the parameters of state power emblematic of a modern commitment to legality or the rule of law, and does so by implicit appeal to some natural order or rational relationship between one thing – a crime – and another – a penalty. Appeals to proportionality in modern law accordingly derive a good part of their power from the way in which they connect the exercise of legal power with doctrines and ideas of reason, fairness, fittingness and order circulating within broader political and indeed cultural discourse (Cohen-Eliya and Porat 2013; Bomhoff 2018).

The appeal to proportionality is not, of course, exclusively a modern phenomenon. By the time Jefferson was framing his Bill, proportionality had already long featured in just war theory in both classical and natural law traditions.<sup>6</sup> But from the 17<sup>th</sup> Century, it began to be more specifically associated with the image of legitimate governance, alongside acceptance of the idea that that legitimacy was itself founded on the rational pursuit of reasonable ends. Hence we might cite, for example, the role of rationality, order and proportionality not merely in the treatises of Beccaria (2009) [1764] and Bentham (1970) [1781] or the reforms of Jefferson (1950) [1778], but also, yet earlier, in Montesquieu (1989) [1748] – all of them core founders of the political projects of the Enlightenment and its long aftermath. Moreover, these images of order, proportion and reason surface regularly in

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<sup>6</sup> This much longer history of appeals to proportionality in just war theory in both classical and natural law traditions, like the graduated fines of ecclesiastical law, hence present a fascinating precursor to modern, rationalist approaches to proportionality in penal theory: see Poole (2010); Whitman (2014).

cultural texts such as novels, in which authors debated the excesses of arbitrary power under the *ancien régime*.<sup>7</sup>

As Hanna Pickard and I have argued in previous work (2015b), the capacity of appeals to proportionality to define and constrain power is contingent upon its articulation with cultural and institutional features of the surrounding context. In an effort to understand the way in which contemporary appeals to proportionality – generally conceived as a limiting principle - in criminal justice have had such different effects in different countries, we contrasted the cultural and institutional structure of not only different contemporary advanced democracies, but also early modern systems in which a more symbolic, less rationalist conception of proportionality seems to have been at work in legitimising and stabilising broadly talionic punishments.<sup>8</sup> In essence, we argued that the capacity of early modern systems to coordinate punishment in such a way that it was perceived as fitting to the crime derived from a hierarchical social order, an association of certain forms of penal and political authority with the sacred, and the currency of a distinctive symbolism of equivalence. Though inconsistent with modern ideas of proportionality, particularly in the discretionary power which implied uneven application of penalties, we suggested that these three features of the context in which penal practice went forward in very different societies sheds light on how substantive criteria of fittingness or equivalence depend upon background social and cultural conditions. We then drew on this analysis to argue that the neoclassical revival of the late 20<sup>th</sup> Century was problematic from its inception, because the

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<sup>7</sup> A particularly apposite example would be William Godwin's *Things as They Are, or, The Adventures of Caleb Williams* (1794): see Lacey (2008b), pp.28, 63-8.

<sup>8</sup> Pace Engle (2012) the *lex talionis* is in my view a clear case of distributive justice in Aristotle's sense, and accordingly a close analogue of proportionality. On the logic of early punishments, see in particular Spierenburg (1984).

metaphors of 'desert' and proportionality, particularly in certain countries, were no longer so obviously grounded in the widely shared symbolic systems representing agreed social norms, or in the forms of political or religious authority, which previously animated and stabilised substantive judgments of equivalence or fittingness.

In the further analysis developed below, I expand Pickard's and my thesis by paying greater attention to the importance of the effort to understand cultural as well as the institutional conditions which underpin the specifically modern appeal of proportionality notwithstanding the widely acknowledged paradox that its key attraction – the promise of determinacy and hence both limited and, aspirationally, fitting punishments – depends on a moral metaphysics or ontology in which few modern penal philosophers believe, and indeed which many proponents of proportionality specifically reject. But for present purposes, the key aspect of our original argument lies in its identification of a move, in the transition to modernity, from a conception of fittingness grounded in appeals to divine command or natural reason – a form of vertical authority if you like – to a conception of fittingness grounded in the more horizontal – still allegedly 'objective', but purportedly more rational – concept of proportionality. In relation to punishment, Beccaria (2009) [1764] and Bentham (1970) [1781] are, with good reason, thought of as the key figures in this modernisation of the rationale of the state's exercise of its power towards a neoclassical aspiration, though even here there is significant variation. Beccaria is of particular importance in that his work stands as an important modern source of both of the two main ideas that have coincided and competed with one another as justifications of state punishment. These are, first, the argument that punishment is in some sense a morally appropriate equivalent to an offence, and is thus constrained by the requirement of proportionality, reviving ancient ideas of a

natural order (an argument to be found in pure retributive form in the work of, for example, Kant (2017) [1797], who further saw the imposition of deserved punishment as obligatory rather than merely permissible); and, second, the rationalist, ‘scientific’, utilitarian argument that punishment, as a *prima facie* evil, can only be justified by (proportionate) countervailing good consequences, achieved through specific or general deterrence, incapacitation, rehabilitation, restitution or moral education (an argument worked out, with extraordinary rigour, by Bentham).<sup>9</sup> Indeed I would suggest that this quasi-scientific, utilitarian underpinning of proportionality may well explain much of its contemporary appeal, including to those defending mixed theories and forms of weak retributivism.

There is, on reflection, something quite ironic about the fact that the political aesthetic of modern reason in punishment attached itself to such an unsuitable concept. As we saw in the previous section, even modern retributivists generally agree that there is no ‘natural’ or metaphysical relationship between any particular offence and a deserved penalty; hence the ostensibly ‘scientific’ promise of certainty via a metric which the appeal to proportionality evoked and drew rhetorically from the mathematical domains in which it had a determinate meaning, was in this sense always chimerical. As many commentators have noted, this is among the reasons why the retributive metaphors of proportionality or commensurability in punishment, in which so many hopes of even-handedness and moderation rested only 40 years ago, proved insubstantial under late twentieth Century conditions in a significant number of countries (Matravers 2019).

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<sup>9</sup> As explained above, (and once again in contrast to Engle [2012]), I regard the utilitarian tradition as containing a distinctive iteration of the appeal to proportionality – as indeed is explicit in Bentham’s *Introduction to the Principles of Morals and Legislation* (1970) [1781].

It is nevertheless worth reflecting in somewhat greater depth on the questions of just how the retributive metaphor of proportionality worked in pre-modern social orders; and on why its power and appeal not only survived the disappearance of those conditions but adapted to the modern context in a way which is anything but chimerical. For this will help us to work towards an understanding of the contemporary conditions in which the metaphor of proportionality can help to justify, underpin and stabilise institutional arrangements where it connects with a larger shared frame of common meaning and about legitimate authority (Tyler and Boeckmann 1997; Maruna 2001, 2011; Hough and Roberts 2017).

In addressing this question, it is useful to look more closely at the retributive systems which predated the modern push towards rationalism, let alone consequentialism, in punishment, or which continue to exist in parts of the world whose penal practices were less decisively affected by the processes of modernisation and democratisation which swept Europe and the United States in the 18<sup>th</sup> and 19<sup>th</sup> Centuries. In many of their earlier forms, retributive ideas related to wider frameworks of social and ethical meaning diffused within prevailing social and political systems and institutional practices.<sup>10</sup> And an effort to understand the nature of the lost cosmology which lent meaning to early modern punishments may help to explain such capacity as they enjoyed to institutionalise a practice of retributive punishments within clear parameters. To recap – and taking as a core example the *lex talionis*, but bearing in mind the analogies with other systems such as the corporal penalties typical of the early modern criminal justice systems of Europe and the system of penalties

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<sup>10</sup> For example, see Peters' (2005, pp. 69-102) discussion of the theory and practice of Islamic criminal law during the Ottoman period.

prescribed by *Sharia* law – Pickard and I (Lacey and Pickard 2015*b*) suggested that these systems had at least three distinctive features key to their capacity to legitimate penal power. The first was what I will call a *symbolism of equivalence*: to contemporaries, prescribed punishments related in some intuitively meaningful way to the wrong done (and typically did so independently of any psychological judgments of responsibility such as those which complicate the assessment of culpability in modern desert theory); the second was a *social ontology of status hierarchy* which rendered the legitimation of punishment a far less pressing issue than it is in individualistic, liberal societies (Lacey 1988), and which helped to legitimate a strikingly broad array of discretionary powers such as the royal prerogative of mercy (which, as in many early or pre-modern systems, in fact underpinned a very incomplete enforcement of the threatened symbolically equivalent penalties); and the third was a *vision of penal authority tied to the sacred* – whether through religious doctrines of damnation, expiation, atonement, penitence and so on, or through a vision of political authority marked by symbols of supra-human or highly particular human authority such as the ‘divinity’ or ‘majesty’, or, in Durkheimian terms, through the reaffirmation of a shared *conscience collective* by the deployment of widely recognised ritual forms (Durkheim 1902, 1997 [1893]; Garland 1990).

The idea that there might be anything to be learnt of relevance to penal reform today from early modern penal systems may seem outlandish. The implicit Western post-Enlightenment self-understanding, in both penal thinking and political thinking, is after all that the last three centuries have been, albeit with horrifying setbacks, an era of progress and of increasing civilisation, not least in our practices of punishment (Elias 1978, 1982 [1939]). That progress is associated with a recasting of what we might call the cosmologies,

or systems of symbolic meaning, which animated and legitimised older practices of punishment and state authority, as atavistic, arbitrary, pre-modern, part of the *ancien regime*. In the process of modernisation, those symbolic systems were either fully rejected as irrational or uncivilised, or demoted in political importance. But if they were indeed important in stabilising punishment, it follows that efforts at penal reform have been occluded by a failure either to appreciate their importance or to acknowledge the impossibility of reviving them by an act of political will. Moreover, even as it has failed to deliver on the ‘scientific’ promise of certainty,<sup>11</sup> the dominant, rationalistic post-Enlightenment mindset has arguably blunted our sensibility to the ways in which ritual remains key to how punishment works, albeit in new and ostensibly rationalised forms.<sup>12</sup> This raises difficult questions about the implications of the diversity or fragmentation of the systems of shared meaning typical in individualistic, heterogeneous and secularised western democracies for our efforts to reach agreement on the appropriate form and contours of punishment under contemporary conditions.

As Durkheim recognised long ago, the huge social transformation entailed by the emergence of ever more elaborated divisions of labour in modern societies would

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<sup>11</sup> Indeed, in the view of some commentators, penalty has failed to deliver on even its most basic commitments, with what is in effect penal power spilling well beyond the conceptual contours of punishment as conceived in standard penal philosophies: Fassin 2018.

<sup>12</sup> Sally Engle Merry’s (2016) classic anthropological study of quantification, indicators, standard-setting and benchmarking in fields such as the assessment of states’ human rights practices, like the extensive literature on the so-called ‘audit’ society (Power 1997) and on formalised systems of regulatory assessment more generally of course bear close comparison with the issues arising in the effort to institutionalise proportionality in modern punishment. They, too, represent formalised systems which legitimate power in part through their evocation of rational, scientific and objective measures while pushing into the background complex substantive questions about how the measures have been constructed. My aim in this article is to direct attention to the fact that these underlying substantive questions can only be settled in the political realm, rather than by appeal to pre-political criteria of fittingness. I am grateful to Jacco Bomhoff for prompting me to think about the relevance of this broader literature.

fundamentally change the conditions for social cooperation and solidarity. And while his conception of the emergence of a form of organic solidarity based on inter-dependence and reciprocity was arguably over-simplified as well as over-optimistic in terms of its anticipated upshot for moderation in punishment, his theory remains of huge importance in its effort to understand how punishment would continue to be stabilised and legitimised by forms of ritual framed within a new, modern symbolism. In Durkheimian terms, we could understand the continuing – yet transformed – appeal of proportionality as speaking precisely to this emerging modern imaginary of fairness as grounded in reason, while the emergence of human rights meshes closely with his conception of the individual as the locus of the modern imaginary of the sacred – a conception which itself resonates strongly with a vision of penal proportionality as tailored to individual desert. Hence, as I argue in more detail below, it is precisely in the diverse family of social theories of punishment which attend to both the full range of its social functions and to its symbolic form and its status as a form of cultural expression that we need to look if we are to fully grasp both the importance, and the limits, of the concept of proportionality developed within and deployed by the philosophical theories (Durkheim 1902; Foucault 1977; Whitman 2003).

If we look back to the early modern English penalties which seem so cruel, horrifying and indeed disproportionate today, we can nonetheless acknowledge that they found their form, and took their place, within a composite view of political authority which itself drew on religious symbols, doctrines and values, as well as being stabilised by a *rigid status hierarchy* and an *authoritarian system of governance*. This was, of course, by modern standards an unduly hierarchical and undemocratic world; and the rituals which elaborated different forms of capital penalty, as well as the different forms of corporal penalty such as



branding, pillorying and so on strike us, for good reason, as deeply inhumane. But the worldview from which they proceeded was one in which the symbols of state and penal authority were strongly bound up within a *broader cosmology of authority and right*, itself often bound up with claims about divine or traditional legitimation, and one which commanded respect well beyond the elite.

How else are we to make sense, to take just a few examples, of the widespread popular participation in the drama of the scaffold, not only as crowds witnessing executions (Gatrell 1994), but as consumers of the many forms of popular culture – the criminal autobiographies which, finally transmuted into an early form of the realist novel (Lacey 2008*b*); the Newgate Ordinary's widely read reports on the spiritual condition and conduct of the condemned in the run-up to execution; of the street ballads and pamphlets which were preoccupied with not only the drama of justice being done but also the condemned offender's reception of the punishment, with scaffold speeches often – and ideally – consisting in confession and penitence, transforming execution into a potential scene of redemption within Christian cosmology? Indeed, many historians' accounts of the behaviour of the scaffold crowd and of the choreography of the procession and execution process suggest that the offender's confession was key to the successful enactment of what amounted to a highly ritualised form of drama (Spierenburg 1984; Ignatieff 1980; Garland 1990, 2017; King 2000, 2006).

The vision of legitimate power and authority which underpinned the early modern English penal system did not, of course, consist only or even primarily in Christian doctrines. But there can be little doubt that this world of widely shared deference to authority, and vision

of authority as vested with, broadly, sacred significance – think, for example, of the conception of ‘majesty’ – made a certain sense of penal practices, constituting penalty as one among many social rituals in which that hierarchical authority was enacted. Within this system of meaning, as Hay has persuasively argued (Hay 1977), prerogatives such as pardoning and mercy, highly discretionary and unevenly applied though they were, made sense within the prevailing cultural, moral and political economy, in particular its acceptance of status hierarchy and its vision of the sacred authority of monarchical power. As the source and form of political authority has been subject to a process of systematisation and rationalisation in the construction of the modern nation state, older forms of ordering and of meaning-making have been eroded.<sup>13</sup> From the middle of the 18<sup>th</sup> Century, the self-evidence of punishment was under challenge as a result of the emergence of more egalitarian and democratic ideas in Europe and North America. Moreover, the form of punishment was being reshaped by the growth of sentiments opposed to the public display of violence (Elias 1978, 1982 [1939]; Garland 1990); and the growing regulatory ambitions of a more organised state. For both moral and prudential reasons, the banal violence of the early modern penalties began to be questioned, and the seeds of a modern penal system focused on doing justice but also on disciplining the subjects of punishment in a more rational and systematic way, notably through the invention of the prison, were planted.

Equally important, the *symbolism of equivalence* which underpins the *lex talionis*, *sharia* justice or the corporal and capital penalties perhaps most vividly exemplified by Foucault’s

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<sup>13</sup> Sharia systems offer contemporary examples of surviving systems of prescribed, fixed, retributive punishments grounded within a theological system of meaning which, along with characteristically authoritarian political systems, helps to stabilise them.

famous portrayal of the execution of the regicide Damiens in the opening pages of *Discipline and Punish* (1977) have, for the majority of those living in Western countries, lost their persuasive appeal. The effort to build a modern equivalent to the *lex talionis* has taken either the moral form of abstract appeals to proportionality, or the technical form of procedural mechanisms such as sentencing guideline systems – the criminal justice expression of the late modern ‘seductions of quantification’ (Engle Merry 2016) or the ‘rituals of verification’ institutionalised in the ‘audit society’ (Power 1997). That those systems produce staggeringly different judgments of what counts as a ‘proportional’ penalty for, say, theft, rape or manslaughter, in countries such as Sweden and the United States – countries which, for all their differences, share many features of political and social culture and economic development – alerts us that an appeal to proportionality in itself, in a world which has largely moved away from attachment to physical symbols of penal equivalence, from the established markers of status hierarchy which underpinned deference to established political authority as such, and from a view of political authority as invested with sacred power, no longer has its premodern capacity to shape the construction of norms adequate to define the parameters state punishment. Indeed, one might argue that it represents an intuitively shared starting point precisely because it is virtually indeterminate: in other words, it simply defers the crucial and complicated processes of meaning-making, agreement-building and institutional development. What gives it its apparent determinacy, of course, is its implicit appeal to moral realism or to pre-political notions of fittingness. And, perhaps, the continuing resonance of proportionality relates or responds to an underlying discomfort about the inescapable fact that punishment evokes deep emotional responses (Garland 2001) and involves the brute exercise of force. But the real struggle for fairness, democratic legitimacy and moderation in punishment lies in the political realm: in

the effort to establish mechanisms for deliberation and compromise over what count as fitting penalties, and to situate the appeal to proportionality within a more coordinate, horizontal imaginary of political authority and legitimacy: one in which a key component is a widely shared recognition of the burden of justification which the state bears in relation to the punishment of the individual, and in relation to the adequate institutionalization of the parameters of its own power to punish. And, conversely, this effort needs to be grounded in not only a clear view of the limits of the appeal to proportionality, but also an understanding of just why that appeal continues to resonate.

### III. Contextualising Proportionality

What is the potential of the modern, rationalist appeal to proportionality to define the parameters of penal power in practice? Empirical studies indicate a noteworthy degree of agreement, even across different countries, on the relative seriousness of standard offences – so-called ‘ordinal proportionality’ (Robinson and Darley 2007; Robinson and Kurzban 2007; Robinson, Kurzban, and Jones 2007). But they reveal no such consensus about what this implies in terms of what penalty is suitable – ‘cardinal proportionality’.<sup>14</sup> Nor does this empirical consensus answer the question of how to team up relatively more or less serious offences with the penalty scale. In ‘core’ areas of criminal law, appeals to ordinal proportionality provide some basis for institutional arrangements such as sentencing

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<sup>14</sup> It is further the case that, while there is also evidence that the perceived severity of an offence predicts the intensity of the response judged by experimental subjects to be appropriate, perceived severity does not predict whether subjects opt for a punitive or a reparative response: Petersen et al. 2010; for further discussion, see Lacey and Pickard (2015a).

guidelines.<sup>15</sup> The coordination of powerful epistemic communities in the legal and political spheres allowed for a concrete institutionalisation of agreed norms of proportionality through the enactment of the various programmes of sentencing reform launched in many jurisdictions in the wake of the just deserts movement. And these provide plentiful examples of the institutionalisation of stable relativities between penalties. To this extent, proportionality has indeed been successfully concretised in the criminal justice context of many modern political systems, providing for a degree of certainty and stability in penalty as mandated by an attachment to both principles of legality and the modern sensibility towards the need for rational justification of power. But the lack of any comparable consensus about cardinal proportionality implies that appeals to proportionality cannot be a successful basis *in and of themselves* for institutionalising substantive criteria of a punishment's 'fittingness': the actual content and level of the scale as a whole cannot be constrained by an appeal to proportionality in the absence of consensus or, more realistically, compromise around conventions about where the scale should be pitched (a degree of coordination moreover which both common sense and empirical research show to be lacking in many social contexts [Robinson and Kurzban 2007]). Hence the constraining power of the appeal to proportionality is contingent upon other aspects of the context and system in which it operates – notably the institutional capacity of the system to support the achievement of political compromises adequate to command legitimacy and to stabilise penal practices.

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<sup>15</sup> Even ordinal proportionality may be much harder to motivate beyond 'standard' offences, and hence across the wide terrain of so-called 'regulatory' offences or areas such as corporate crime. And yet more widely, changing attitudes, at different paces in different countries, relating to offences as disparate as driving under the influence of alcohol, insider trading and various forms of sexual conduct may complicate assessments of ordinal proportionality even in areas traditionally regarded as *mala in se*.

What can comparative analysis<sup>16</sup> teach us about which features of context and system matter, given the very uneven realization of the aspiration to limit and temper punishment via the appeal to proportionality? Almost half a century after its inception, the practical impact of the justice model presents a mixed picture, and in liberal market countries such as England and Wales, Scotland, Australia and New Zealand – and most spectacularly in the United States – the scale of punishment increased relentlessly in the last decades of the 20<sup>th</sup> Century notwithstanding substantial efforts to codify determinacy in punishment. This upswing in punitiveness has a number of different dimensions, of which I mention only the most obvious. The imprisonment rate per hundred thousand of the population soared as a result of both increasing flows of defendants through the criminal courts and a decisive rise in sentence levels, particularly for certain categories of offence; and in many countries – again, particularly the United States – there has been an accompanying rise in the scale and intensity of non-carceral penal surveillance and of de facto punitive post-sentence disqualifications of various kinds (Garland ed. 2001, 2017; American Academy of Arts and Sciences 2010; Pfaff 2012; National Research Council 2014; Reitz ed. 2018). Mandatory sentencing systems have become a common feature of these liberal market systems, and many of the sentencing guideline systems designed to foster the determinacy sought by the justice model led to longer sentences as a result of the political choice to structure them around very high tariff scales, and to reduce judicial discretion to temper sentence severity. It is tempting to interpret this as a reflection of Jefferson’s early invocation of ‘the jury’s estimation’ of proportionality, and indeed there is persuasive evidence of the role played by

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<sup>16</sup> The fruitfulness of such a comparative analysis also pertains in relation to constitutional appeals to proportionality, which Bomhoff (2018) has persuasively argued to raise important ‘comparative comparative’ questions about whether, for example, systematic differences in the shape and efficacy of appeals to proportionality in criminal justice help to explain the development and impact of proportionality tests in constitutional law, and vice versa.

popular opinion in shaping this development (Enns 2016). But, as has been widely confirmed in empirical research, this is far from a complete explanation, given that popular judgments of proportionality or aptness in punishment are strongly dependent on the degree to which the offence is contextualised: people are more inclined to punish severely in the abstract than when confronted with the concrete realities of crime, which of course typically feature a range of background injustices bearing on the offender as much as the victim (Robinson and Kurzban 2007; Hough and Roberts 2017).

In addition, prison conditions in many of these countries, and again most spectacularly in the United States, have deteriorated, with not only overcrowding but deliberately punitive and restrictive regimes often displacing or undermining the work of longstanding ameliorative programmes focused on education, vocational training, drug and alcohol treatment and therapeutic interventions (Lynch 2009; Shalev 2009). The upshot of these various developments has been an intensification of the already close relationship between punishment and inequality (Gottschalk 2006, 2015; Western 2006; Sampson 2012; Lacey and Soskice 2020a); with particular implications for social polarization and for inequalities and injustices running along the fault lines of race (Tonry 2011; Alexander 2012; Lerman and Weaver 2014). Several of the countries in which the justice model had the most decisive influence on policy have also seen a continuation or even acceleration of practices, such as indeterminate sentencing and preventive justice, which were thought to express the more extreme injustices and disrespect for the rights and agency of the offender that characterised the rehabilitative ideal, in principle and in practice (Garland 2001; Whitman 2003; Simon 2007; Ashworth and Zedner 2014). And while the causal mechanisms are of course complex (Ashworth 2017), the fact that, even in the context of the application of

human rights standards of proportionality, the appeal to proportionality can be as readily used as a basis for arguing for an *increase* as for a *decrease* in penal or other state power reminds us that implications of cardinal proportionality's lack of determinate criteria cannot be escaped.<sup>17</sup> The acceleration of punitiveness, to be clear, was not an upshot of the justice model itself – as demonstrated by its very different impact in, for example, the Nordic countries, in which prospective understandings of proportionality relative to the humane aims of the penal system predominate (Lappi-Seppälä 2020). But it may have been fostered in the liberal market countries by a misplaced faith in the appeal to moral proportionality, combined with a stigmatising punitive affect encouraged by that allegedly moral grounding, and by insufficient attention being paid to the cultural, political and socio-economic dynamics which exerted upward pressure on penalty scales.

In Sweden and the other Nordic countries which also moved towards sentencing guidelines and other institutional arrangements counselled by the justice model's version of neoclassical retributivism, which emphasises the importance of responsible agency and of humanity in punishment, (Jareborg and von Hirsch 1991; Pratt and Eriksson 2013; Lappi-Seppälä 2020) the increase in the scale and intensity of punishment has been far less marked. Clearly, both trends in crime and concern about crime, as well as distinct penological traditions and sentencing institutions (Ashworth and von Hirsch 2005; Ashworth 2010), are at issue here. But the very different impact of the justice model in different countries also raises important questions about the cultural, political, social and institutional

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<sup>17</sup> Indeed in his ongoing doctoral research at LSE, Mattia Pinto has found that in, for example, human trafficking cases, appeals to proportionality have generally been used to promote longer penalties on the basis that they are necessary both to reflect the severity of trafficking as a human rights violation and in order to deliver justice to victims. On the fallacy that victims have a right that 'their' offender receive a certain penalty, see Lacey and Pickard 2018. I am grateful to Mattia Pinto for discussion on this point.



conditions under which appeals to proportionality invite an escalation of insatiable affective blame, and those under which it may have the capacity to temper and constrain penal power in accordance with the established purposes of the criminal process (Tonry ed. 2007).

Bearing in mind my assumption that the basic motivations behind modern appeals to proportionality lie in the dual concerns with, first, setting clear parameters for the state's power to punish and, second, ensuring fairness in the degree of punishment according to established criteria – Ignatieff's 'just measure of pain' (Ignatieff 1980) – and by reference to publicly established and democratically legitimated norms – what do these comparative insights suggest by way of hypotheses about the conditions most conducive to the effective institutionalisation of proportionality in criminal justice? I would suggest that, drawing on both comparative and historical insights, as well as the rich array of social theories of punishment over the last two centuries, we can identify four key sets of variables which shape how far the ideals and goals underlying punishment generally and the appeal to proportionality in particular can be met in different criminal justice systems. These are *institutional conditions; socio-cultural conditions; political conditions; and economic and geo-political conditions*. In the remainder of this section, I discuss each of these in turn.

#### *A. Institutional Conditions*

As already suggested by my brief resume of historical and comparative evidence, there are vast differences in the way in which criminal justice systems are embedded within institutional frameworks: not only the institutional framework of criminal justice itself, but also the articulation of that institutional framework with political institutions at local, regional and national levels (Miller 2008; Barker 2009). This makes a very substantial

difference to the capacity of a criminal justice system not only to reach the sort of compromise necessary to institutionalise fair and transparent constraints on punishment over time, but also to produce that compromise via the substantial democratic negotiation necessary to lend it stability and legitimation. Of course, all democratic systems develop their criminal justice policy through mechanisms in some way sensitive to popular legitimation. But just how they do so turns out to matter a great deal. As I have argued in earlier work (Lacey 2008a, 2010, 2012), countries whose economic and, particularly, political systems provide for and operate by means of dense institutional networks of bargaining and coordination enjoy a distinctive set of resources enabling them to arrive at political compromises coordinating on standards for punishment which can then be sustained over lengthy periods of time. How successfully different groups are incorporated within both social system and production regime, and how effectively the latter is stabilised by welfare institutions, are also key differences here (Esping-Andersen 1990, 1996; Hall and Soskice 2001). But perhaps the most significant difference is that identified long ago by political scientist Arendt Lijphart (Lijphart 1984, 1999), in his distinction between political systems which are oriented to ‘consensus’ or compromise, and those organised more centrally around competition.

In particular, countries with proportionally representative electoral systems – themselves, of course, premised on a prior political compromise about the apt mechanisms of ‘proportion’ between the electorate and its representatives – and whose main political parties represent stable sectoral interests are, *other things equal*, better adapted to produce stable penal policy compromises as an inherent part of a system itself oriented to bargaining and compromise; and in several such systems this orientation to bargaining and

coordination also bridges the political system and the professional bureaucracies which are so crucial in the development and delivery of criminal justice policy: the judiciary, the prosecution service, the professionals working in the penal system (Downes 1988; Savelsberg 1994, 1999; Lacey, Soskice, and Hope 2018). Penal policies in these systems are indeed embedded in and emerge from democratic processes and carry democratic legitimation; but the relevant democratic mechanisms are very far from Jefferson's 'estimation of the jury': political proportionality as direct responsiveness to popular opinion.

Of course, the mechanisms of democratic legitimation of penal policy in the competitive, majoritarian political systems with 'first past the post' election systems and, typically, two main political parties, are themselves mediated via complex institutional structures; but they are characteristically more open to direct penal policy responsiveness to popular opinion, whether via mechanisms such as referenda or, particularly where crime and punishment become matters of high political salience, an 'arms race' between two parties as to which can show itself to be 'toughest' on law and order. It follows that these systems are more vulnerable to what has been dubbed 'penal populism' (Pratt 2006). Crucially, the competitive quality of these political systems, along with their meagre institutional capacity for coordination, makes it difficult under such conditions for either party to escape the electoral logic of increasing punitiveness once crime has, for whatever reason, become politically salient. In these circumstances, the aspirations underlying the appeal to proportionality are extremely hard to institutionalise. This is particularly starkly the case in the United States, where the electoral dynamics just sketched are magnified by a uniquely diffused system of electoral democracy at not only federal and state but also local levels,

featuring weak party discipline and stretching not only to the selection of candidates for political office but also to that of many officials directly or proximately concerned in the development and delivery of criminal justice policy, magnifying the penal arms race accordingly (Lacey and Soskice 2015, 2018, 2020*b*).

In the more closely coordinated countries with consensus-oriented political systems, policy horizons accordingly tend to be longer term as interests within a proportionally representative system have to be bargained out in the process of coalition-formation.

Voters can accordingly have some confidence in the credibility of policy platforms on which parties stand for office (Iversen and Soskice 2006). It follows that these political systems not only depend on, and set up incentives encouraging actors to, compromise, but also foster the sort of stability and group cohesion which underpins greater expected 'Associational Value': a term used by psychologists to refer to the expected value for members of society of future interactions with others, including offenders (Lacey and Pickard 2015*a*, 2015*b*).

This implies that the capacity of such systems to limit punishment is dependent not on abstract appeals to proportionality but on social and political cohesion which fosters high Associational Value between citizens and hence an orientation towards reconciliation – conditions which are met to a greater degree in the coordinated systems of northern Europe and the Nordic countries than in the Anglo-Saxon, liberal market countries (Lacey and Pickard 2015*b*). What I want to emphasise is that it is not merely psychological conditions which foster an orientation to reconciliation, through sustaining dense networks of mutual Associational Value, but also institutional arrangements that foster the capacity to broker stable political compromises. For such bargains are undoubtedly better institutionally supported in coordinated market economies whose production regimes are

premised on investment in long term relationships; in proportionally representative, consensus-oriented political systems in which there is a longer time frame for policy making; and in social democratic welfare systems which symbolise mutual dependency and which foster solidarity and relatively low levels of social inequality.

Of course, this is not to say that these systems are without their own difficulties. As Vanessa Barker in particular has pointed out (Barker 2013, 2018), the Nordic countries' strong solidarity is increasingly focused specifically on citizens, within an emerging genre of 'Nordic Nationalism', with adverse consequences for the integration of cultural, political or geographical outsiders. The institutional structure of different societies has a decisive impact not only on the extent to which stable political compromises around the contours of and fairness in punishment can be constructed, but whom they apply to. It does so by affecting the opportunities and incentives of key actors such as judges, prosecutors, police officers, victims of crime – and indeed all of us who vote on criminal justice policy. Whether positive, negative or ambivalent in its upshot, the importance of trying to understand the nature of this institutional impact is evident.

### *B. Socio-cultural Conditions*

Not only macro-level social theories such as those of Emil Durkheim or Norbert Elias, but also empirical comparative sociology and anthropological insights into the variety of ways in which social groups organise and understand their own penal practices, point to the distinct importance of socio-cultural conditions in shaping penal practices and, accordingly, in facilitating or impeding the pursuit of the goals and aspirations underlying appeals to proportionality. In addition, historical research illustrates how discursive frames,

institutional structures and political and professional interests intersect to shape and stabilise criminal law and penal culture (Garland 1985; Radzinowicz and Hood 1990; Wiener 1991; Whitman 2003). We know, for example, that societies featuring relatively high levels of social solidarity as measured by factors such as union membership or generosity of welfare provision; of relatively small size and recognition of interdependence; featuring high levels of social trust and of trust in political institutions and actors tend also to be those featuring relatively moderate and stable practices of punishment, which we can in turn take as proxies for a successful political compromise around what count as proportional punishments (Beckett and Western 2001; Sutton 2004; Lacey and Soskice 2020a). We also know that certain cultural and religious traditions conduce to particular attitudes to punishment (Erikson 1966; Tonry 2004, 2007; Cusac 2009;), and that managing these differences will add to the complex political challenge of coordinating on and institutionalising a compromise about what counts as proportionality. Likewise, we know that prevailing discriminatory attitudes and institutional practices, particularly structured around race or class, militate in many societies against the realisation of fairness in the application of penal norms to stigmatised groups.

Of course, these correlations do not explain the relevant causal mechanisms; but the macro social theories provide a strong basis for constructing hypotheses which could in principle be tested. Note that the important issue, from the point of view of the political conception of proportionality and of what proportionality is for which I have defended here, is not so much the level at which the 'just measure of pain' is set; but rather the success with which a social order can manage the process of arriving at a compromise about this, and embed that compromise in stable institutional arrangements which are universally applied. So while I

would still defend Pickard's and my claim that societies featuring high expected Associational Value can be expected, other things equal, to produce more moderate and reintegrative penal institutions – a political aspiration which I strongly affirm – this is a broader claim than the one made in this paper: my argument here being simply that proportionality is best understood as relating to the democratic legitimation, procedural fairness and stability of penal policy over time, and that prevailing levels of Associational Value likewise play a role in favouring or impeding these aspirations.

### *C. Political Conditions*

It follows from what has already been said that levels of trust in the political system, as well as the competence – and the perceived competence – of legislators and other elected officials, alongside levels of trust in the professional bureaucracy, are key conditions shaping the prospects for institutionalising appeals to proportionality (Savelsberg 1994, 1999; Roth 2009). And while a range of social, institutional and political conditions shape the 'strength' or 'weakness' of states at particular times, Bomhoff's suggestion that stronger states in which higher levels of confidence in both politics and expertise may have provided, ironically, more favourable conditions for the development of effective public law doctrines of proportionality as limits on state power has an obvious relevance in relation also to the effort to temper penal power. In this context, a particular challenge arises from forms of populism which engender distrust in political elites. There is, of course, an important sense in which we can question whether, for all its insistence on the will of 'we the people', populism is consistent with democracy, given the faith it places in the populist leader to embody that will, and its widely recognised consequent tendency towards authoritarianism (Muller 2016; Mudde and Rovira Kaltwasser 2017; Lacey 2019). But if we think of populism

as a spectrum, there can be no doubt that societies with substantial populist movements, particularly where attended by electoral success (as in the election of Donald Trump to the US presidency) or featuring populist political parties which may have influence beyond their size when holding the balance of power in coalition governments – are less well equipped to produce through political deliberation and then to institutionalise stable and transparent parameters for punishment. Understanding the origins of populism, then, is of key importance to the any effort to realise the values to which the appeal to proportionality aspires.

#### *D. Economic and Geo-political Conditions*

The broad tradition of political-economic theories of punishment, albeit unduly monolithic in their original, Marxian form (Rusche and Kirchheimer 1968 [1939]; Rusche 1978 [1933]), give strong reason to think that broad economic conditions have important implications for penal policy and the form which punishment takes in particular social orders (Melossi and Pavarini 1981; Garland 1990; Lacey 2008a; de Giorgi 2006). Again, with the important caveat about other things being equal, economic stability and prosperity, growth, low unemployment, and the successful incorporation of all social groups into the economy, and conversely the opposite of these conditions, all have an important impact on the development of penal policies (Lacey et al. eds. 2020). And of course these economic conditions are themselves shaped by a broader geo-political context, with factors such as peaceful international relations, and the degree of autonomy or interdependence of national economic systems (Garland 1996), key factors shaping penal developments. This has of course been widely debated in relation to the impact of globalisation on penal policy, particularly in the wake of the oil crisis of the 1970s and radical deindustrialisation in many



of the OECD countries (de Giorgi 2006), with Loic Wacquant, drawing on Pierre Bourdieu's distinction between the 'left and right hands' of the state, suggesting that these developments have prompted states to develop their penal power at the expense of their welfare infrastructure and practices (Bourdieu 1992; Wacquant 2009). This stretches, I would argue, to an influence on the capacity to institutionalise a democratically legitimate political compromise oriented to the goals underlying appeals to proportionality. Under conditions of economic instability, the risks of social polarisation and of rising social and economic inequality, and the demonisation of excluded or otherwise stigmatised groups – particularly in circumstances of widespread prevailing prejudices, or of populist political movements – present substantial obstacles in the path of democratic compromise around stable and even-handedly applied norms of proportionality. These insights produce, unfortunately, no simple policy prescription for how best to facilitate the achievement of the ends and values which animate the appeal to proportionality. But understanding this contingency and contextual dependence is itself of fundamental importance to their effective pursuit.

#### IV. In Conclusion: Keeping Proportionality in Perspective...

There is, to sum up, no doubt that proportionality stands for deeply held convictions and aspirations, as well as for hugely consequential policy decisions which every society must make about its criminal justice system. The philosophical debate about the conceptual contours of proportionality has been of real importance in clarifying both the decisions which have to be made, and why they matter. But what has been thought of as

proportionality is not, in the context of judgments about criminalization and punishment, a naturally existing relationship. Rather, it is a product of political and social construction, cultural meaning-making, and institution-building. It follows that the purported appeal to a naturally existing relationship is a proper object of careful critical analysis. Proportionality, moreover, does not have an independent effect: where it 'works' to define the parameters of punishment, this is because of its articulation of, and resonance with, deeper conventions, mentalities, normative systems, political institutions, and social structures. The challenge, accordingly, is to try to understand the conditions under which proportionality both gains its appeal and has some potential to shape and constrain power: whether through consensus within a powerful epistemic community such as a judiciary, or through its being situated within detailed rules, doctrines and institutional arrangements. The appeal to proportionality in contemporary criminal justice amounts to no more than a first step in the crucial and complicated processes of meaning-making, consensus-building and institutional development necessary to limit punishment and appropriate to current conceptions of political and social authority. As Bomhoff aptly puts it in the constitutional law context, 'We still do not know ... what it means to live in "an age of proportionality"' (Bomhoff 2018, p. 169). As we work towards a better understanding of the conditions under which, in differently structured modern legal and social systems, appeals to proportionality are most likely to have the limiting effect which they claim, we must be alive to the power of those appeals to obscure the realities of power by holding out a promise of limits which remains purely rhetorical, or in which the apparent determinacy of a metric in fact obscures substantive judgments whose basis should be transparent and subject to political debate and accountability.

## Reference list

- Alexander, Michelle. 2012. *The New Jim Crow: Mass Incarceration in the Age of Colourblindness*. New York: The New Press.
- American Academy of Arts and Sciences. 2010. *The Challenge of Mass Imprisonment in America Daedalus* 139(3)1–147.
- Ashworth, Andrew. 2010. "Sentencing Guidelines and the Sentencing Council." *Criminal Law Review* 5:389–401.
- Ashworth, Andrew. 2017. "Prisons, Proportionality and Recent Penal History." *Modern Law Review* 80: 473.
- Ashworth, Andrew and Andrew von Hirsch. 2005. *Proportionate Sentencing: Exploring the Principles*. Oxford: Oxford University Press.
- Ashworth, Andrew and Lucia Zedner. 2014. *Preventive Justice*. Oxford: Oxford University Press.
- Barker, Vanessa. 2009. *The Politics of Punishment: How the Democratic Process Shapes the Way America Punishes Offenders*. New York: Oxford University Press.
- Barker, Vanessa. 2013. "Nordic Exceptionalism revisited: Explaining the paradox of a Janus-faced penal regime." *Theoretical Criminology* 17(1):5–25.
- Barker, Vanessa. 2018. *Nordic Nationalism and Penal Order: Walling the Welfare State*. London: Routledge.
- Beccaria, Cesare. 2009 [1764]. *On Crime and Punishments*. United States of America: Seven Treasures Publications.
- Beckett, Katherine and Bruce Western. 2001. "Governing Social Marginality." In *Mass Imprisonment: Social Causes and Consequences*, edited by David Garland. London: SAGE.

- Bentham, Jeremy. 1970 [1781]. *An Introduction to the Principles of Morals and Legislation*, edited by H.L.A Hart and J.H. Burns. London: Athlone Press.
- Bomhoff, Jacco. 2013. *Balancing Constitutional Rights: The Origin and Meanings of Post-War Legal Discourse*. Cambridge: Cambridge University Press.
- Bomhoff, Jacco. 2018. "Beyond Proportionality: Thinking Comparatively About Constitutional Review and Punitiveness." In *Proportionality: New Frontiers, New Challenges*, edited by Vicki C. Jackson and Mark Tushnet. Cambridge: Cambridge University Press.
- Bourdieu, Pierre. 1992. "The Left Hand and the Right Hand of the State." <http://www.variant.org.uk/32texts/bourdieu32.html>
- Braithwaite, John and Philip Pettit. 1990. *Not Just Deserts*. Oxford: Oxford University Press.
- Chiao, Vincent. 2016. "What is the criminal law for?" *Law and Philosophy* 35:137–163.
- Chiao, Vincent. 2019. *Criminal Law in the Age of the Administrative State*. New York, NY: Oxford University Press.
- Cohen-Eliya, Moshe and Iddo Porat. 2013. *Proportionality and Constitutional Culture*. Cambridge: Cambridge University Press.
- Cusac, Anne-Marie. 2009. *Cruel and Unusual: The Culture of Punishment in America*. New Haven, CT: Yale University Press.
- De Giorgi, Alessandro. 2006. *Rethinking the Political Economy of Punishment*. Aldershot: Ashgate.
- Downes, David. 1988. *Contrasts in Tolerance*. Oxford: Clarendon Press.
- Duff, R. Antony. 2001. *Punishment Communication and Community*. Oxford: Oxford University Press.

- Duff, R. Antony. 2018. *The Realm of Criminal Law*. Oxford: Oxford University Press.
- Duff, R. Antony. 2020a. "Defending the Realm of Criminal Law." *Criminal Law and Philosophy* 14(3):465–500.
- Duff, R. Antony. 2020b. "Proportionality and the Criminal Law: Proportionality of What to What?" In *Proportionality in Crime Control and Criminal Justice*, edited by Emmanouil Billis, Nandor Knust, and Jon Petter Rui. Oxford: Hart Publishing.
- Durkheim, Émile. 1997 [1893]. *The Division of Labour in Society*, translated by WD Halls. New York, NY: Free Press.
- Durkheim, Émile. 1902. "Two Laws of Penal Evolution." *L'Année Sociologique* 4:65–95.
- Duus-Otterstrom, Goran. 2020. "Weighing Relative and Absolute Proportionality in Punishment." In *Of One-Eyed and Toothless Miscreants*, edited by Michael Tonry. New York, NY: Oxford University Press.
- Elias, Norbert. 1978, 1982 [1939] *The Civilising Process (i. The History of Manners; ii. State Formation and Civilization)*. Oxford: Oxford University Press.
- Engle, Eric. 2012. "The History of the General Principle of Proportionality: An Overview." *Dartmouth Law Journal* 10:1–11.
- Engle Merry, Sally. 2016. *The Seductions of Quantification: Measuring Human Rights, Gender Violence and Sex Trafficking*. Chicago: Chicago University Press.
- Enns, Peter K. 2016. *Incarceration Nation*. New York, NY: Cambridge University Press.
- Erikson, Kai T. 1966. *Wayward Puritans: A Study in the Sociology of Deviance*. London: John Wiley and Sons.
- Esping-Andersen, Gøsta. 1990. *The Three Worlds of Welfare Capitalism*. Cambridge: Polity Press.
- Esping-Andersen, Gøsta. 1996. *Welfare States in Transition*. London: SAGE.

- Farmer, Lindsay. 2016. *Making the Modern Criminal Law*. Oxford: Oxford University Press.
- Fassin, Didier. 2018. *The Will to Punish*. New York: Oxford University Press.
- Foucault, Michel. 1977. *Discipline and Punish*, translated by A. Sheridan. Harmondsworth: Penguin.
- Garland, David. 1985. *Punishment and Welfare*. Aldershot: Dartmouth.
- Garland, David. 1990. *Punishment and Modern Society*. Oxford: Oxford University Press.
- Garland, David. 1996. "The Limits of the Sovereign State." *British Journal of Criminology* 36(4):445–71.
- Garland, David. 2001. *The Culture of Control*. Oxford: Oxford University Press.
- Garland, David, ed. 2001. *Mass Imprisonment: Social Causes and Consequences*. London: SAGE.
- Garland, David. 2017. "Penal Power: Its Forms, Functions and Foundations." *Journal of the British Academy* 5:1–35. <https://doi.org/10.5871/jba/005.001>
- Gatrell, V.A.C. 1994. *The Hanging Tree: Execution and the English People*. Oxford: Oxford University Press.
- Gottschalk, Marie. 2006. *The Prison and the Gallows*. Cambridge: Cambridge University Press.
- Gottschalk, Marie. 2015. *Caught: The Prison State and the Lockdown of American Politics*. Princeton: Princeton University Press.
- Hall, Peter A. and David Soskice. 2001. "An Introduction to the Varieties of Capitalism." In *Varieties of Capitalism*, edited by Peter A. Hall and David Soskice. Oxford: Oxford University Press.
- Hart, H.L.A. 1968. *Punishment and Responsibility*. Oxford: Clarendon Press.

- Hay, Douglas. 1977. "Property, Authority and Criminal Law." In *Albion's Fatal Tree*, edited by Douglas Hay, Peter Linebaugh, John Rule, E. P. Thompson, and Calvin Winslow. Harmondsworth: Penguin.
- Hough, Mike and Julian V. Roberts. 2017. "Public Opinion, Crime and Criminal Justice." In *The Oxford Handbook of Criminology*, edited by Alison Liebling, Shadd Maruna, and Lesley McAra. Oxford: Oxford University Press.
- Husak, Douglas. 2020. "The Metric of Punishment Severity: A Puzzle about the Principle of Proportionality." In *Of One-Eyed and Toothless Miscreants*, edited by Michael Tonry. New York, NY: Oxford University Press.
- Ignatieff, Michael. 1980. *A Just Measure of Pain: The Penitentiary in the Industrial Revolution 1750–1850*. Harmondsworth: Penguin.
- Iversen, Torben and David Soskice. 2006. "Electoral Institutions and the Politics of Coalitions: Why Some Democracies Redistribute More Than Others." *American Political Science Review* 100(2):165–81.
- Jackson, Vicki C. and Mark Tushnet, eds. 2018. *Proportionality: New Frontiers, New Challenges*. Cambridge: Cambridge University Press.
- Jareborg, Nils and Andrew von Hirsch. 1991. "Gauging Criminal Harm: A Living Standard Analysis." *Oxford Journal of Legal Studies* 11(1): 1–38.
- Jefferson, Thomas. 1950 [1778]. "A Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital." In *The Papers of Thomas Jefferson*, edited by Julian P. Boyd. Princeton, NJ: Princeton Press.
- Kant, Immanuel. 2017 [1797]. *The Metaphysics of Morals*, edited by Lara Denis. Cambridge: Cambridge University Press.
- King, Peter. 2000. *Crime, Justice and Discretion 1740–1820*. Oxford: Oxford University Press.
- King, Peter. 2006. *Crime and Law in England 1750–1840*. Cambridge: Cambridge University Press.

- Kolber, Adam J. 2020. "The Time-Frame Challenge to Retributivism." In *Of One-Eyed and Toothless Miscreants*, edited by Michael Tonry. New York, NY: Oxford University Press.
- Lacey, Nicola. 1988. *State Punishment: Political Principles and Community Values*. London: Routledge.
- Lacey, Nicola. 2004. "Criminalization as Regulation." In *Regulating Law*, edited by Christine Parker, Colin Scott, Nicola Lacey, and John Braithwaite. Oxford: Oxford University Press.
- Lacey, Nicola. 2008a. *The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies*. Cambridge: Cambridge University Press.
- Lacey, Nicola. 2008b. "Women, Crime and Character: From Moll Flanders to Tess of the d'Urbervilles." Oxford: Oxford University Press.
- Lacey, Nicola. 2010. "American Imprisonment in Comparative Perspective." *Daedalus* 139(3):102–114.
- Lacey, Nicola. 2012. "Political Systems and Criminal Justice: The Prisoners' Dilemma After the Coalition." *Current Legal Problems* 65(1):203–239.
- Lacey, Nicola. 2016a. *In Search of Criminal Responsibility: Ideas, Interests and Institutions*. Oxford: Oxford University Press.
- Lacey, Nicola. 2016b. "The Metaphor of Proportionality." *Journal of Law and Society* 43(1):27–44.
- Lacey, Nicola. 2019. "Populism and the Rule of Law." *Annual Review of Law and Social Science* 15:79–96. <https://doi.org/10.1146/annurev-lawsocsci-101518-042919>
- Lacey, Nicola and Hanna Pickard. 2013. "From the Consulting Room to the Court Room? Taking the Clinical Model of Responsibility Without Blame into the Legal Realm." *Oxford Journal of Legal Studies* 33(1):1–29.
- Lacey, Nicola and Hanna Pickard. 2015a. "To Blame or to Forgive? Reconciling Punishment



- and Forgiveness in Criminal Justice." *Oxford Journal of Legal Studies* 35(4):665–696.
- Lacey, Nicola and Hanna Pickard. 2015b. "The Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems." *Modern Law Review* 78(2):216–240.
- Lacey, Nicola and Hanna Pickard. 2018. "A Dual-Process Approach to Criminal Law: Victims and the Clinical Model of Responsibility without Blame." *Journal of Political Philosophy* 27(2): 229–251.
- Lacey, Nicola and Hanna Pickard. 2021. "Why Standing to Blame May Be Lost but Authority to Hold Accountable Retained: Criminal Law as a Regulative Public Institution." *The Monist* 104(2):265–280. <https://doi.org/10.1093/monist/onaa028>
- Lacey, Nicola and David Soskice. 2015. "Crime, Punishment and Segregation in the United States: The Paradox of Local Democracy." *Punishment and Society* 17(4):454–481.
- Lacey, Nicola and David Soskice. 2018. "American Exceptionalism in Crime, Punishment, and Disadvantage: Race, Federalization, and Politicization in the Perspective of Local Autonomy." In *American Exceptionalism in Crime and Punishment*, edited by Kevin R. Reitz. New York, NY: Oxford University Press.
- Lacey, Nicola and David Soskice. 2020a. "Tracing the Links between Crime, Punishment and Inequality: A Challenge for the Social Sciences." In *Tracing the Relationship between Crime, Punishment and Inequality: Space, Time, and Politics*, edited by Nicola Lacey, David Soskice, Leonidas K. Cheliotis and Sappho Xenakis. Oxford: Oxford University Press.
- Lacey, Nicola and David Soskice. 2020b. "American Exceptionalism in Inequality and Poverty: A (Tentative) Historical Explanation." In *Tracing the Relationship between Crime, Punishment and Inequality: Space, Time, and Politics*, edited by Nicola Lacey, David Soskice, Leonidas K. Cheliotis and Sappho Xenakis. Oxford: Oxford University Press.
- Lacey Nicola, David Soskice, and David Hope. 2018. "Understanding the Determinants of Penal Policy: Crime, Culture and Comparative Political Economy." *Annual Review of*

*Criminology* 1(1):195–217.

Lacey, Nicola, David Soskice, Leonidas K. Cheliotis and Sappho Xenakis, eds. 2020. *Tracing the Relationship between Crime, Punishment and Inequality: Space, Time, and Politics*. Oxford: Oxford University Press.

Lappi-Seppälä, Tapio. 2020. "Humane Neoclassicism: Proportionality and Other Values in Nordic Sentencing." In *Of One-Eyed and Toothless Miscreants*, edited by Michael Tonry. New York, NY: Oxford University Press.

Lerman, Amy E. and Vesla M. Weaver. 2014. *Arresting Citizenship: The Democratic Consequences of American Crime Control*. Chicago, IL: The University of Chicago Press.

Lijphart, Arend. 1984. *Democracies: Patterns of Majoritarian and Consensus Governments in Twenty-One Countries*. New Haven, CT: Yale University Press.

Lijphart, Arend. 1999. *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*. New Haven, CT: Yale University Press.

Lippke, Richard L. 2020. "Penal Severity and the Modern State." In *Of One-Eyed and Toothless Miscreants*, edited by Michael Tonry. New York, NY: Oxford University Press.

Lynch, Mona Pauline. 2009. *Sunbelt Justice: Arizona and the Transformation of American Punishment*. Stanford, CA: Stanford University Press.

Malinowski, Bronisław. 1966 [1926]. *Crime and Custom in a Savage Society*. Totowa, NJ: Rowman and Allanheld.

Maruna, Shadd. 2001. *Making Good: How Ex-Convicts Reform and Rebuild Their Lives*. Washington, DC: American Psychological Association.

Maruna, Shadd. 2011. "Reentry as a Rite of Passage." *Punishment and Society* 13(1): 3–28.

Matravers, Matt. 2014. "Proportionality Theory and Popular Opinion." In *Popular Punishment: on the Normative Significance of Public Opinion for Penal Theory*,

edited by Jesper Ryberg and Julian V. Roberts. New York, NY: Oxford University Press.

Matravers, Matt. 2019. "Rootless Desert and Unanchored Censure". In *Penal Censure: Engagements Within and Beyond Desert Theory*, edited by Antje du Bois-Pedain and Anthony E. Bottoms. Oxford: Hart Publishing.

Matravers, Matt. 2020. "The Place of Proportionality in Penal Theory: Or Rethinking Thinking about Punishment." In *Of One-Eyed and Toothless Miscreants*, edited by Michael Tonry. New York, NY: Oxford University Press.

Melossi, Dario and Massimo Pavarini. 1981. *The Prison and the Factory*. London: Macmillan.

Miller, Lisa L. 2008. *The Perils of Federalism: Race, Poverty, and the Politics of Crime Control*. New York, NY: Oxford University Press.

Montesquieu, Charles-Louis de Secondat. 1989 [1748]. *The Spirit of the Laws*. Cambridge: Cambridge University Press.

Moore, Michael S. 1998. *Placing Blame*. Oxford: Oxford University Press.

Morris, Norval. 1974. *The Future of Imprisonment*. London: University of Chicago Press.

Morse, Stephen. 2000. "Deprivation and Desert." In *From Social Justice to Criminal Justice: Poverty in the Administration of Criminal Law*, edited by William C. Heffernan and John Kleinig. New York, NY: Oxford University Press.

Mudde Cas and Cristóbal Rovira Kaltwasser. 2017. *Populism: A Very Short Introduction*. New York, NY: Oxford University Press

Muller, Jan-Werner. 2016. *What is Populism?* Philadelphia, PA: University of Pennsylvania Press.

National Research Council. 2014. *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. Washington, DC: The National Academies Press.  
<https://doi.org/10.17226/18613>.

- Peters, Rudolph. 2005. *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century*. Cambridge: Cambridge University Press.
- Petersen, Michael Bang, Aaron Sell, John Tooby, and Leda Cosmides. 2010. "Evolutionary Psychology and Criminal Justice: A Recalibration Theory of Punishment and Reconciliation." In *Human Morality and Sociality: Evolutionary and Comparative Perspectives*, edited by Henrik Hogh-Oleson. New York, NY: Palgrave MacMillan.
- Pfaff, John. 2012. "The Micro and Macro Causes of Prison Growth." *Georgia State University Law Review* 28(4):1237–71.
- Poole, Thomas. 2010. "Proportionality in Perspective." *New Zealand Law Review* (2)369–91.
- Power, Michael. 1997. *The Audit Society: Rituals of Verification*. Oxford: Oxford University Press.
- Pratt, John. 2006. *Penal Populism*. London: Routledge.
- Pratt, John and Anna Eriksson. 2013. *Contrasts in Punishment: An Explanation of Anglophone Excess and Nordic Exceptionalism*. London: Routledge.
- Radzinowicz, Leon and Roger Hood. 1990. *The Emergence of Penal Policy in Victorian and Edwardian England*. Oxford: Clarendon Press.
- Ramsay, Peter. 2012. *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law*. Oxford: Oxford University Press.
- Reitz, Kevin, ed. 2018. *American Exceptionalism in Crime and Punishment*. New York: Oxford University Press.
- Roberts, Julian V. 2020. "The Time of Punishment: Proportionality and the Sentencing of Historical Crimes." In *Of One-Eyed and Toothless Miscreants*, edited by Michael Tonry. New York, NY: Oxford University Press.
- Robinson, Paul H. and John M. Darley. 2007. "Intuitions of Justice: Implications for Criminal Law and Justice Policy." *Southern California Law Review* 81(1):1–68.

- Robinson, Paul H. and Robert O. Kurzban. 2007. "Concordance and Conflict in Intuitions of Justice." *Minnesota Law Review* 91(6):1831–1907.
- Robinson, Paul H., Robert O. Kurzban, and Owen D. Jones. 2007. "The Origins of Shared Intuitions of Justice." *Vanderbilt Law Review* 60(6):1633–88.
- Roth, Randolph. 2009. *American Homicide*. Cambridge, MA: Belknap, Harvard University Press.
- Rusche, Georg. 1978 [1933]. "Labor Market and Penal Sanction." *Crime and Justice* 10:2–8.
- Rusche, Georg and Otto Kirchheime. 1968 [1939]. *Punishment and Social Structure*. New York, NY: Russell Sage.
- Sampson, Robert J. 2012. *Great American City: Chicago and the Enduring Neighbourhood Effect*. Chicago, IL: Chicago University Press.
- Savelsberg, Joachim J. 1994. "Knowledge, Domination, and Criminal Punishment." *American Journal of Sociology* 99(4):911–43.
- Savelsberg, Joachim J. 1999. "Knowledge, Domination and Criminal Punishment Revisited." *Punishment and Society* 1(1):45–70.
- Shalev, Sharon. 2009. *Supermax: Controlling Risk Through Solitary Confinement*. London: Willan.
- Simon, Jonathan. 2007. *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear*. New York: Oxford University Press.
- Spierenburg, Peter. 1984. *The Spectacle of Suffering: Executions and the Evolution of Repression*. Cambridge: Cambridge University Press.
- Sutton, John. 2004. "The Political Economy of Imprisonment in Affluent Western Democracies, 1960–1990." *American Sociological Review* 69(2):170–89.

- Thorburn, Malcolm. 2019. "Criminal Punishment and the Right to Rule." *The University of Toronto Law Journal* 70(1):44–63.
- Tonry, Michael. 2004. *Thinking about Crime: Sense and Sensibility in American Penal Culture*. New York, NY: Oxford University Press.
- Tonry, Michael. 2007. "Determinants of Penal Policies." In *Crime, Punishment and Politics in a Comparative Perspective. Crime and Justice: A Review of Research*, Vol. 36, edited by Michael Tonry. Chicago: University of Chicago Press.
- Tonry, Michael, ed. 2007. *Crime, Punishment and Politics in a Comparative Perspective. Crime and Justice: A Review of Research*, Vol. 36. Chicago: University of Chicago Press.
- Tonry, Michael. 2011. *Punishing Race: A Continuing American Dilemma*. New York, NY: Oxford University Press.
- Tonry, Michael. 2020a. 'Proportionality', in *Doing Justice, Preventing Crime*, edited by Michael Tonry. New York: Oxford University Press.  
DOI:10.1093/oso/9780195320503.003.0003
- Tonry, Michael. 2020b. "Is Proportionality in Punishment Possible, and Achievable?" In *Of One-Eyed and Toothless Miscreants*, edited by Michael Tonry. New York, NY: Oxford University Press.
- Tyler, Tom R. and Robert J. Boeckmann. 1997. "Three strikes and you are out, but why? The psychology of public support for punishing rule breakers." *Law and Society Review*, 31(2):237–65.
- Von Hirsch, Andrew. 1976. *Doing Justice: The Choice of Punishments*. New York, NY: Hill and Wang.
- Von Hirsch, Andrew. 1993. *Censure and Sanctions*. New York, NY: Oxford University Press.
- Von Hirsch, Andrew. 2019. *Deserved Criminal Sentences*. London: Hart Publishing.

- Wacquant, Loïc J. D. 2009. *Punishing the Poor: The Neoliberal Government of Social Insecurity*. Durham: Duke University Press.
- Western, Bruce. 2006. *Punishment and Inequality in America*. New York: Russell Sage.
- Whitman, James Q. 2003. *Harsh Justice*. Oxford: Oxford University Press.
- Whitman, James Q. 2014. "The Transition to Modernity." In *The Oxford Handbook of Criminal Law*, edited by Markus Dirk Dubber and Tatjana Hörnle. Oxford: Oxford University Press.
- Wiener, Martin L. 1991. *Reconstructing Criminal: Culture, Law and Policy in England, 1830–1914*. Cambridge: Cambridge University Press.

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