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The Metaphor of Proportionality

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The idea of proportionality has figured prominently in moral, legal and political theory. It has been central to the articulation of an ideal of limited punishment in modern legal orders. And it has assumed a central place in judicial and academic efforts to lay down standards for legitimate state conduct in a range of areas within human rights, administrative and private law. In this paper, setting out from a broad view of the role of metaphor, I map histories of proportionality in different spheres (law, politics, culture), spaces (nation states and regions) and legal areas (criminal, public, international and private law), before moving on to consider the conditions under which abstract ideas like proportionality assume a salience within particular spheres of legal or political discourse. Focusing on the case of appeals to proportionality in criminal justice, I then go on to develop an argument about the conditions under which they enjoy some capacity to coordinate expectations or beliefs, and consider how far this thesis might be generalizable to other fields.

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The idea of proportionality has figured prominently in modern moral, legal and political theory. It has been central to the articulation of an ideal of limited punishment in modern legal orders. And, particularly in recent years, it has assumed a central place in the judicial and academic efforts to lay down standards for legitimate state conduct, and for judicial oversight of the exercise of power in a range of areas within human rights, administrative, public international and private law. But what role is this pervasive metaphor playing in law and legal discourse, and what explains the extraordinary recent upswing in its fortunes? In this paper, I aim to tackle these questions. Setting out from a broad view of the role of metaphor in legal and other social discourses, I map out histories of proportionality in different spheres (law, politics, culture), spaces (nation states and regions) and legal areas (criminal, public and private law), before moving on to consider the conditions under which abstract ideas like proportionality assume a salience within particular spheres of legal or political discourse. Focusing on the case of appeals to proportionality in criminal justice, I then go on to develop an argument about the conditions under which they enjoy some capacity to coordinate expectations or beliefs, and consider how far this thesis might be generalizable to other fields. In doing so, I clarify the relationship between my argument in this paper and that in a recent paper co-authored with Hanna Pickard, in which we argued that scholars of criminal justice have been apt to be misled by the apparently determinate power of an idea whose force in fact ultimately depends on a surrounding infrastructure of attitudes and institutions.¹

THREE PRELIMINARY QUESTIONS

Before embarking on this project, three preliminary matters must be addressed. First, we need to resolve the question of how we should understand the idea of metaphor in and beyond law, and in particular the degree to which metaphor is distinct within language. Second, we need to give an account of why the appeal to metaphor in law and legal discourse might be thought to be of distinctive importance to law and society scholarship – an issue which immediately invites reflection on the roles or functions of metaphor within the production of legal meaning and the exercise of legal power. And third, we need some account of the history, contours and role of proportionality, understood as one of the foundational metaphors of modern law. I shall take each of these questions in turn.

Starting, then, with our first question, we can set out from the standard dictionary definition of metaphor as a figure of speech in which one thing stands in for or represents – etymologically, carries over, transfers, carries across – something else to which it does not directly refer. As such, metaphor has much in common with similes, analogies, symbols such as images, parables.² In each case, meaning is conveyed by the drawing of a connection between ostensibly different phenomena. And the centrality of both imagery and metaphorical language to law – to both its operations in language and our view of it and its significance – is immediately apparent: scales of justice; the image of justice as blind; ‘chains’ of causation are just three obvious examples mentioned at various points in this collection.

But there is nonetheless a puzzle here, and though we should not allow it to paralyse the important enterprise of analysing the role of metaphor in law, we must nonetheless pause

¹ N. Lacey and H. Pickard, ‘The Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems’, (2015) 78(2) *Modern Law Rev.* 216.

² Hence the role of metaphor in lending authority and persuasiveness to law is comparable to that of images: C. Douzinas and L. Nead (eds.), *Law and the Image: The Authority of Art and the Aesthetics of Law* (1999); A. Gearey, *Law and Aesthetics* (2001); L. Mulcahy, *Legal Architecture: Justice, due process and the place of law* (2011).

to acknowledge it. This puzzle lies in the argument – familiar in influential post-structuralist work, but also a matter of common sense³ – that in some sense language is inevitably metaphorical, in that words stand in for things – objects, ideas, situations – which they are not. This complicates the idea of a ‘literal’ correspondence between word and phenomenon to which metaphor purportedly stands in contrast, and hence suggests that the metaphoricity of language may occupy a spectrum rather than presenting a discrete category of linguistic usage. Moreover this complication seems particularly apposite to legal language, in which so many concepts – ‘contract’ would be a good example – constitute at once discrete legal entities identified by and with a particular term, and broader social arrangements and ideas which are implicitly invoked in the deployment of that legal term.

While acknowledging this inevitably metaphorical tinge to legal language, I propose in what follows to handle the complication which it implies by simply stipulating that my focus will be on instances of metaphor in and around law in which the appeal to an idea, object or situation, which is not literally that referred to, is playing a certain role in transmitting meaning. The distinctive force of metaphor, in my account, lies in the way it assists in the legitimation of the relevant legal arrangement and/or in the coordination of social expectations around that arrangement.⁴ This it achieves by implicitly making reference to a web of connections reaching well beyond its ostensible point or points of reference. (Note that on this approach the metaphoricity of a particular instance of legal language is contingent and may change over time: for example, while the terms ‘contract’ and ‘crime’ are undoubtedly metaphorical in this sense, the term ‘tort’ is arguably no longer so to a vast number of English law’s subjects.) In taking this stipulative route out of the potential dilemma posed by my first question, I am of course also suggesting an answer to my second question about the distinctive role of metaphor in law. If law’s metaphors are playing an important role in legitimating and coordinating legal arrangements, then they are central to both the significance of law and the stability of law’s place in the constitution of social relations.

Third and finally, then, what do I mean by ‘proportionality’, and what justifies my particular focus on appeals to proportionality among the myriad metaphors which populate legal discourse and social, cultural and political discourse about law? On the face of it, this focus may seem odd, given proportionality’s origins in ancient mathematics, from which it travelled into aesthetics.⁵ But proportionality also has a long history in legal and political realms, where it featured in the ancient worlds of Greece, India and Rome, notably as a part of just war theory: the proposition that the anticipated benefits of waging a war must be proportionate to the harm risked, just as the treatment of those caught up in war must be governed by norms of proportionality.⁶ And, I shall argue, this fascinating blend of political,

³ This argument is taken up in more detail in N. Lacey, ‘Community in Legal Theory: Idea, Ideal or Ideology?’ (1995) 15 *Studies in Law, Politics and Society* 105.

⁴ Cf. the account of the power of metaphor presented in G. Lakoff’s and M. Johnson’s classic *Metaphors We Live by* (1980).

⁵ The mathematics of proportion are sometimes argued to have been used in an aesthetic context by the Greek sculptor Polykleitos as early as the 5th Century BC; better established is the role of proportion in the work of Plato and of Euclid in the 1st Century BC, from which it found its way, via Roman thought (see n. 6 below), to the work of artists such as Piero della Francesca and Leonardo da Vinci, in 15th and 16th Century Italy. Da Vinci in particular provided illustrations for Lucia Pacioli’s *De Divina Proportione* in 1509, and is often credited with inventing the term ‘sectio aurea’, or the ‘golden section’, ‘golden mean’ or ‘golden ratio’, widely used in Renaissance art and still exerting influence in modern times – the most spectacular instance perhaps being Le Corbusier’s Modulor system of architectural proportion.

⁶ The appeal to proportionality in just war theory may be found in Cicero’s *De Officiis* Book 1, as in his *Treatise on the Commonwealth* and *Treatise on the Laws*, and in the Sanskrit epic the *Mahabharata*; it also features in the just war theories of Augustine, Aquinas, Grotius, Hobbes and Locke, among many others. A number of recent articles have set recent appeals to proportionality in the context of this much longer intellectual history:

logical and aesthetic meaning assumed a particular salience in the construction of modern ideas of the rule of law in Europe from the 17th Century on.

It is useful to set out from a clear formal meaning to proportionality. An appeal to proportionality indicates a claim about the existence of 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, and hence, while not a metaphor in the strict sense of the term, nonetheless presents a paradigm of what we might call the method of metaphor: in other words, it conveys meaning by evoking a relationship between two different phenomena.⁷ And precisely because of this method of claiming equivalence or comparability between two different things, the upshot of an appeal to proportionality depends either on surrounding social consensus about that comparability or on institutional mechanisms or arrangements which can produce, stabilise and legitimate a particular judgment of ‘proportional’ equivalence – an issue to which I will return below.

Note, however, that the very word, or concept, of proportionality arguably at least begins this work of legitimation or justification, because of the way in which an appeal to proportionality evokes an ideal of harmony, natural (quasi-geometric) order or coherence founded on reason and issuing in fairness, social justice and limits on power. And, notwithstanding its ancient origins, proportionality has assumed a distinctive importance in the self-conception of modern social orders, contributing to what Charles Taylor has called a ‘modern social imaginary’.⁸ This is why, for example, appeals to proportionality loom so large in the foundational texts of modern political philosophy. Proportionality stands as a key concept in the long history of efforts not only to modernise and temper punishment or to rationalise and civilise the retributive approach which dominated pre-modern punishment, but also more generally as a source of the discursive legitimation of power. This it achieves by purporting to bring discretionary power within limits by establishing a criterion of appropriateness for its exercise, in the form of a normative relationship between an exercise of power and that (the wrongdoing or harm inherent in or proceeding from the relevant conduct) in relation to which the power is being exercised. Hence the concept of proportionality occupies a central place in the work of Enlightenment thinkers and reformers across many nations: Montesquieu, Beccaria, Jefferson and Bentham, to name just four of the most important.⁹

The centrality of appeals to proportionality in underpinning the evolution of modern criminal justice systems and in evoking the notion of rationally limited and appropriately

see for example E. Engle, ‘The History of the General Principle of Proportionality: An Overview’, 10 *Dartmouth Law Journal* 1-11 (2012), which traces the origins of the concept of proportionality in political morality back to Aristotle; and T. Poole, ‘Proportionality in Perspective’, (2010) *New Zealand Law Review* 369, which traces the concept back to the ideas of cosmic order in Plato and republican balance or harmony in Cicero, emphasising its metaphysical or even ‘celestial’ inflection, as well as its role in identifying the political community to which its requirements apply.

⁷ The closely related concept of ‘balancing’ is of course a more central case of metaphor. I have chosen to focus on proportionality because of both its longer history in legal-political discourse and its yet wider reach across different systems and doctrinal areas.

⁸ C. Taylor, *Modern Social Imaginaries* (2004)

⁹ C. L. de Montesquieu, *De l'esprit des loix* (1748); C. Beccaria, *On Crimes and Punishments* [1764] (2009); T. A. Jefferson, ‘A Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital’, in *The Papers of Thomas Jefferson*, ed. J. P. Boyd (1950); J. Bentham, *An Introduction to the Principles of Morals and Legislation* (ed. H.L.A. Hart and J.H. Burns) [1781] (1996). For discussion, see J. Q. Whitman, ‘The Transition to Modernity’, in *The Oxford Handbook of Criminal Law* ed. M. Dubber and T. Hörnle (2014) ch. 5.

exercised power which characterises modern ideas of legality or the rule of law, which form the main object of my interpretation in this paper, would arguably in itself be sufficient to justify selecting proportionality as my focus in this analysis of law's metaphors. But the role of proportionality in discourse within and about law is, of course, not exhausted by the criminal law and, particularly in the legal systems of the continent of Europe,¹⁰ proportionality has long occupied a central position in the construction of legal mechanisms of checking public power, and hence in the articulation of principles of judicial review. Moreover in recent years, appeals to proportionality both in judicial discourse and in political and cultural discourse about law and about law reform have experienced a huge growth, with proportionality tests in public law travelling *via* European legal institutions and via international human rights norms into the common law; and with proportionality in the United States travelling from its Eighth Amendment origins and alternating with the familiar concept of balancing in various areas of constitutional and private law.¹¹ Alongside the continuing renaissance of neoclassical ideas of penal justification, represented in sentencing guideline systems and the espousal of justice- or just desert-based sentencing reform in many jurisdictions,¹² proportionality can therefore claim to be one of the central metaphors underpinning the persuasiveness, legitimacy and coordinating power of modern law.

HISTORIES OF PROPORTIONALITY: A MAP

To engage in any really thorough project of mapping these various histories of proportionality across time, space and subject matter would be a massive task, well beyond the scope of a single paper. It is worth noting that such a project would be a hugely valuable contribution to historicised socio-legal enquiries, and a very useful complement to existing work tracking the genealogy of other social, legal and political concepts of central importance to the trajectory of modern social orders: the individual self and personhood;¹³ human

¹⁰ I. Porat and M. Cohen-Eliya *Proportionality and Constitutional Culture* (2013) ch. 1.

¹¹ For key examples amid an extensive literature indicating the salience of appeals to proportionality in the penal theory literature and its analogous recent deployment in other areas such as human rights, and public, international and private law across many jurisdictions, see R. Alexy, *A Theory of Constitutional Rights* (J. Rivers trans., 2002); A. Barak, *Proportionality: Constitutional Rights and their Limitations* (2012); J. Bomhoff, *Balancing Constitutional Rights* (2013): 10-30; R. S. Frase, 'Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?' (2004) 89 *Minnesota Law Rev.*; A. Ristroph, 'Proportionality as a Principle of Limited Government' (2005) 55 *Duke Law J.* 263. G. Letsas, 'Rescuing Proportionality', in R. Cruft, M. Liao and M. Renzo (eds.), *Philosophical Foundations of Human Rights*, (2014); I. Porat and M. Cohen-Eliya *Proportionality and Constitutional Culture* op. cit. n. 10; E. Thomas Sullivan and R. S. Frase, *Proportionality Principles in American Law: Controlling Excessive Government Actions* (2008); and G. Webber, *The Negotiable Constitution: On the Limitation of Rights* (2009); C. Steiker, 'Prevention as a Limit on the Preventive Justice', in A. Ashworth and L. Zedner (eds.) *Prevention and the Limits of the Criminal Law* (2013) 194; G. Huscroft, B. Miller and G. Webber (eds.), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (2014); K. Moller, *the Global Model of Constitutional Rights* (2015) Chapter 7; V. C. Jackson, 'Constitutional Law in an Age of Proportionality', (2015) 124 *Yale Law J.* 2680.

¹² A. Ashworth, *Sentencing and Criminal Justice* (5th edition 2010); A. Ashworth and A. von Hirsch, *Proportionate Sentencing: Exploring the Principles* (2005); and A. von Hirsch and N. Jareborg, 'Sweden's Sentencing Statute Enacted' (1989) *Criminal Law Rev.* 275.

¹³ C. Taylor, *Sources of the Self: The Making of Modern Identity* (1989); D. Wahrman, *The Making of the Modern Self* (2004); Roy Porter (ed.), *Rewriting the Self: Histories from the Renaissance to the Present* (1997); L. Siedentop, *Inventing the Individual: The Origins of Western Liberalism* (2014). Underlying notions of the subject and its relation to power are, of course, also fundamental to much of Michel Foucault's work, notably in this context *Discipline and Punish: The Birth of the Prison* (transl. A. Sheridan, 1977).

rights;¹⁴ responsible agency.¹⁵ For my purposes in this paper, however, it will be sufficient to draw out of the rationale for a focus on proportionality provided in the previous section a schematic account of the trajectory of metaphors of proportionality across three dimensions. This account will allow us to map the differences of emphasis, meaning and inflection which can arise within the umbrella of a single metaphor, depending on the context in which and purposes for which it is invoked.

1. Appeals to proportionality in different sites: law, politics, culture

The appeal to proportionality as part of the project of constructing specifically modern legal orders finds its most prominent history 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.¹⁶ Indeed, Thomas Jefferson's 1778 *Bill for Proportioning Crimes and Punishments* in the early formation of the United States combines the appeal to proportionality with a continuing commitment to talionic punishments in a striking way: '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. . .'.¹⁷ In the 'neoclassical' revival of retributivism, repackaged in the sanitized form of 'just deserts' in the 1970s, the appeal to proportionality takes a very different 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 metaphor of proportionality is similar: it evokes the sorts of limits on power emblematic of a modern commitment to legality or the rule of law, and does so by implicit appeal to some natural order of rational relationship between one thing – a crime – and another – a penalty.

A similar mechanism is at work in the appeal to proportionality in public law, which is often traced back to Prussian administrative law of the 19th Century,¹⁸ though it undoubtedly has deeper roots in the liberal political thought and ancient sources already reviewed. In the specific context of adjudication, as Porat and Cohen-Eliya explain, proportionality structures decision-making between competing rights and interests by

basically requiring that any interference with rights be justified by not being disproportionate. It consists of four (or three, depending on your perspective) stages:

¹⁴ L. Hunt, *Inventing Human Rights: A History* (2007); C. Douzinas, *The End of Human Rights* (2000); C. Douzinas and C. Gearty (ed.), *The Meanings of Rights: The Philosophy and Social Theory of Human Rights* (2014).

¹⁵ N. Lacey, *Women, Crime and Character: From Moll Flanders to Tess of the d'Urbervilles* (2008); L. Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (forthcoming 2016). Engle (op. cit. n. 6) and Poole (op. cit. n. 6) have made important contributions to the project of mapping proportionality.

¹⁶ The much longer history of appeals to proportionality in just war theory in both classical and natural law traditions presents a fascinating precursor to modern, rationalist approaches to proportionality in penal theory – as indeed do the graduated fines of ecclesiastical law: see in J. Q. Whitman, 'The Transition to Modernity', in M. Dubber and T. Hörnle (eds.), *The Oxford Handbook of Criminal Law* (2014) pp. 84.

¹⁷ T. A. Jefferson, 'A Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital', op. cit. n. 9, quoted in J. Q. Whitman, op. cit. n. 16.

¹⁸ Notably in Article 10(2) of the Prussian General Law of 1794. See Porat and Cohen-Eliya (op. cit. n. 10) ch. 2; Cohen-Eliya and Porat, 'American Balancing and German Proportionality: The Historical Origins' (2010) 8 *International Journal of Constitutional Law* 263; S. Baer, 'Equality: the Jurisprudence of the German Constitutional Court' 5 *Columbia J. of European Law* 249 (1999); M. Loughlin, *Foundations of Public Law* (2010) ch. 14.

whenever the government infringes upon a constitutionally protected right, the proportionality principle requires that the government show, first, that its objective is legitimate and important; second, that the means chosen were rationally connected to achieve that objective (suitability); third, that no less drastic means were available (necessity); and fourth, that the benefit from realizing the objective exceeds the harm to the right (proportionality in the strict sense).

Note that, as in the case of punishment, proportionality is here envisaged as legitimating and facilitating power in the very process of symbolising its constraint.

We must, of course, be open to the possibility that the role of appeals to proportionality, as well as the specific institutional and doctrinal form which they take, has developed in different ways in different substantive areas. But across these undoubted differences, as I shall argue, we see some important common themes, notably in the way in which proportionality invokes ideas of rationally limited power, contributing to the law's claim to play a central role in the delivery of modern governance. Indeed we can usefully think about this in terms of the trajectory of modern political orders and ideologies: as the value attached to individual freedom and the claims of individuals of bearers of civil and political rights - as well as the complexity and ambition of state activity - increase, there is a growing need to develop discourses as well as institutional arrangements capable of legitimating the state's power and bolstering its credentials as both rational and reasonable.

These appeals to the metaphor of proportionality in the law 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. As we have seen, the appeal to proportionality had long featured in just war theory in both classical and natural law traditions; while from the 17th Century, it began to be more specifically associated with the image of legitimate governance. Hence we might cite, for example, the role of rationality, order and proportionality not merely in the treatises of Beccaria and Bentham or the reforms of Jefferson, but also, yet earlier, in Montesquieu¹⁹ - 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 cultural texts such as novels, in which authors debated the excesses of arbitrary power under the *ancien régime*. Consider, for example, Oliver Goldsmith's indictment of the disorder of disproportionality in *The Vicar of Wakefield*, its language reminiscent of Beccaria (whose treatise on crime and punishment was published two years before Goldsmith's novel):

When by indiscriminate penal laws a nation beholds the same punishment affixed to dissimilar degrees of guilt, from perceiving no distinction in the penalty, the people are led to lose all sense of distinction in the crime, and this distinction is the bulwark of all morality; thus the multitude of laws produces new vices, and new vices call for fresh restraints.²⁰

Law, Goldsmith argues, should be made the protector, but not the tyrant of the people.

Of course, appeals to notions of order or 'proper place' may take radically different forms. Take, for example, this passage from Sarah Fielding, talented sister of the (inevitably more famous) playwright, novelist, essayist and magistrate Henry, himself an eloquent critic of the cruelty and irrationality of the excesses of arbitrary power. Fielding extols something

¹⁹ Montesquieu, Beccaria, Jefferson and Bentham, op. cit. n. 9.

²⁰ O. Goldsmith, *The Vicar of Wakefield* [1766] (1974) 150; cf. Beccaria, op. cit. n. 9.

reminiscent of the ontology – and aesthetics - of balance, order and reason to which the metaphor of proportionality invariably appeals:

[I]t is in the power of every Community to attain it [real happiness], if every Member of it would perform the part allotted him by *Nature*, or his *Station in Life*, with a sincere Regard to the Interest and Pleasure of the whole. ...[I]f he acts his Part well, he deserves as much *Applause* – and is as useful a Member of Society – as any other Man whatever: for in every Machine, the smallest Parts conduce as much to the keeping it together, and to regulate its Motions, as the greatest. That the Stage is a Picture of Life, has been observed by almost every body, *especially since* Shakespeare's *Time*: and nothing can make the Metaphor more strong, than the observing every Theatrical Performance spoiled, by the great Desire *each Performer shews of playing the Top-part* – In the Animal and Vegetable World there would be full as much Confusion as there is in human Life, - was not every thing kept in its proper Place.²¹

Note that the ontology which Fielding evokes leaves open the question of the source of its conception of 'proper Place' and harmony, with the reference to 'station in life' suggesting a notion of fixed status relations which was precisely what the emerging ideas of rational and limited governance were straining against. Yet while the metaphor of proportionality evokes a horizontal relationship of equivalence rather than one imposed from above, the very idea of equivalence seems to participate in some sort metaphysical or ontological claim.

1. Appeals to proportionality across space: nations and regions

The idea of proportionality is pervasive in modern, Western legal systems: it transcends the civilian/common law and other classificatory divisions.²² Appeals to proportionality are not, however, invariant across space. (Much the same can be said of the metaphor of balancing, as convincingly demonstrated in Jacco Bomhoff's comparison of US and German constitutional law.)²³ While proportionality, as we have seen, operates explicitly within foundational texts in the emergence of both English and American criminal justice systems, and in the early development of Prussian administrative law, and while strong family resemblances around images of natural order, reason and rationally limited power inform each of these appeals, the trajectories of appeals to proportionality in different jurisdictions have varied widely, and are always coloured by the cultural, political and institutional context in which they arise. Hence, as Porat and Eliya-Cohen have noted, proportionality has had relatively restricted airtime in 20th Century American constitutional law discourse, at just the time during which it has been travelling rapidly across European jurisdictions, including the common law system of England and Wales, in large part as a result of the jurisprudence of the European Court of Human Rights and the parallel and rather different proportionality jurisprudence of the European Court of Justice.²⁴ Conversely, proportionality played a key role in American criminal justice reforms of the 1970s and 1980s, as in the reforms of a wide range of countries from Australia to Sweden. And this variation, of course, raises fascinating questions

²¹ Sarah Fielding, *The Adventures of David Simple Containing an Account of his Travels through the Cities of London and Westminster in Search of a Real Friend* first published 1741 (2007) p 234; Cf H. Fielding, *Tom Jones* [1749] (1998).

²² M. Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (1986).

²³ J. Bomhoff, *Balancing Constitutional Rights* op. cit n. 11 above.

²⁴ Op. cit. n. 10 above, p. 3: Porat and Cohen-Eliya attribute this variation to underlying differences in American and European attitudes to governmental power.

of comparative law - and indeed of comparative social science more generally - about the conditions or events which prompt appeals to proportionality at particular times and in particular places.

2. Appeals to proportionality across different subject matter

Finally, even within legal arenas, as we have already seen, proportionality features in a vast range of areas of law, and has accordingly spawned an enormous literature, particularly over the last 20 years.²⁵ For obvious reasons, it finds its origins in, broadly speaking, public law – operating in criminal justice, in administrative law, and, most recently, in human rights and in areas such as anti-discrimination law, to temper, moderate and legitimate power, bringing it within the limits dictated by ideals of modern democratic governance, keenly attentive to the potential for abuse of public power. Yet it has also found a place in private law – perhaps reflecting the recognition that gross inequalities of private power, along with the increasing involvement of private bodies in exercising public functions and hence wielding quasi-public power, are rendering the development of analogous checks on the power deriving from money or commercial influence – or, at least, the symbolism of such checks - relatively more important. In a world in which power is closely allied with money and ‘spheres of justice’ become increasingly blurred, the traditional distinction between public and private power calls for deconstruction, and necessitates the development of doctrines and practices limiting private as much as public power.²⁶ If private power can, in effect, enable or constrain public rights, then the same legitimation needs which I have argued to underpin the appeal to proportionality in public law resonate in private law. I will return to this issue below.

DECONSTRUCTING PROPORTIONALITY: THE CASE OF CRIMINAL JUSTICE

How should we interpret the pervasive appeal to proportionality across so many areas of legal argumentation in so many contemporary systems? At one level, we might be tempted to deconstruct this as a widespread instance of ideological obfuscation. What have been the effects of the appeal to proportionality, with its promise of determinate limits on power? Might we not argue that what has been thought of as proportionality is, after all, not a naturally existing relationship, but a product of political and social construction, cultural meaning-making, and institution-building, and that the purported appeal to a naturally existing relationship is therefore a proper object of careful critique or even of suspicion? For

²⁵ In addition to the references mentioned at n. 10 above, see N. Emiliou, *The Principle of Proportionality in European Law; A Comparative Study* (1996); D. Beatty, *The Ultimate Rule of Law* (2004); A. Baker ‘Proportionality and Employment Discrimination in the UK’ (2008) *Industrial Law J.* 37(4) 305; V. C. Jackson, ‘Being proportional about proportionality’ (2004) 21 *Constitutional Commentary* 803; A. Stone Sweet and J. Mathews, ‘Proportionality, balancing and global constitutionalism’ (2008) 19 *Columbia J. of Transnational Law* 72, 162; A. Stone Sweet and J. Mathews, ‘All things in proportion? American rights doctrine and the problem of balancing’ (2011) 60 *Emory Law J.* 101; M. Poto, ‘The Principle of Proportionality in Comparative Perspective’ (2007) 8 *German Law J.* 835; M. Andenaes and S. Zleptnig, ‘Proportionality: WTO Law in Comparative Perspective’, 42 *Texas International Law Journal* 371 (2007); A.D. Mitchell, ‘Proportionality and Remedies in WTO Disputes’ (2007) 17(5) *European J. of International Law* 985; D. Grimm, ‘Proportionality in Canadian and German Constitutional Jurisprudence’ (2007) 57 *University of Toronto Law J.* 383; A. Ristroph, ‘Proportionality as a Principle of Limited Government’ (2005) 55 *Duke Law J.* 263. For a useful review of the range and trajectory of appeals to proportionality in different areas of law, see Engle op. cit. n. 6 pp. 6-10.

²⁶ The recent ‘cash for honours’ scandal in British government is a spectacular example of this sort of blurring: on the case for distinctive spheres of justice, see M. Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (1983).

example, the appeal to proportionality in the ‘neoclassical’ retributive revival in the United Kingdom and, most vividly, the United States, has been accompanied by a marked increase in the exercise of the state’s penalising power, inviting the sceptical thought that appeals to proportionality are little more than rhetorical window-dressing. On this view, such appeals are, in the original sense of the term, ideological in that they obscure our view of social reality. It is of particular significance in this context that proportionality operates to legitimate as well as purporting (indeed, by purporting) to constrain the exercise of power.

In a recent paper,²⁷ Hanna Pickard and I mounted precisely this sort of critique of the appeal to proportionality in penal law and policy debate. We argued that the capacity of appeals to proportionality to limit power was 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 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.²⁸ 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 20th century was problematic from its inception, because the 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.

We might summarise these developments as moving from a conception of fittingness grounded in appeals to divine command or 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, Beccaria²⁹ and Bentham³⁰ 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 which 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, who further saw the imposition of deserved punishment as obligatory rather than merely permissible); and, second, the

²⁷ Lacey and Pickard op cit n. 1.

²⁸ Pace Engle, op. cit. n. 6, 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 P. C. Spierenburg, *The Spectacle of Suffering: Executions and the Evolution of Repression: from a Preindustrial Metropolis to the European Experience* (1984).

²⁹ C. Beccaria, *On Crimes and Punishments* (op. cit. n. 9).

³⁰ J. Bentham, *An Introduction to the Principles of Morals and Legislation* (op. cit. n. 9).

utilitarian argument that punishment, as a *prima facie* evil, can only be justified by countervailing good consequences, achieved through specific or general deterrence, incapacitation, rehabilitation, restitution or moral education (an argument worked out, with a rigour approaching obsession, by Bentham).³¹

But what is the potential of this modernist, rationalist appeal to proportionality to limit penal power in practice? Empirical studies indicate a noteworthy degree of consensus, even across different countries, on the relative seriousness of standard offences – so-called ‘ordinal proportionality’.³² But they reveal no such consensus about what this implies in terms of what penalty is suitable – ‘cardinal proportionality’.³³ In ‘core’ areas of criminal law, appeals to ordinal proportionality may therefore provide some basis for institutional arrangements such as sentencing guidelines.³⁴ The consensus 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 successful institutionalisation of stable relativities between penalties. To this extent, proportionality has indeed been successfully concretised in the criminal justice context. But the lack of any comparable consensus about cardinal proportionality implies that appeals to proportionality are unlikely to be a successful basis *in and of themselves* for institutionalising substantive criteria of a punishment’s ‘fitness’: the actual content and level of the scale as a whole cannot be constrained by an appeal to proportionality in the absence of consensus around conventions about where the scale should be pitched (consensus moreover which both common sense and empirical research show to be lacking in many social contexts).³⁵ Hence the constraining power of the appeal to proportionality is contingent upon other aspects of the context and system in which it operates.

Proportionality, in short, does not have an independent effect: where it ‘works’ to limit punishment, this is because of its articulation of, and resonance with, deeper conventions, 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 limit power: whether through consensus within a powerful epistemic community such as a judiciary, and/or through its being situated within detailed rules, doctrines and institutional arrangements.

³¹ Again *pace* Engle (op. cit. n. 6), I would 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* op. cit. n. 9.

³² P. H. Robinson, R. Kurzban, and O.D. Jones, ‘The origins of shared intuitions of justice’ (2007) *Vanderbilt Law R.* 60, 1633; P. H. Robinson and J. M. Darley ‘Intuitions of Justice: Implications for Criminal Law and Justice Policy’ (2007) 81 *Southern California Law Rev.* 1; and P. H. Robinson and R. O. Kurzban (2007) ‘Concordance and Conflict in Intuitions of Justice’ 91 *Minnesota Law Rev.* 1831-1907.

³³ 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: M. Bang Petersen, A. Sell, J. Tooby and L. Cosmides ‘Evolutionary psychology and criminal justice: A recalibrational theory of punishment and reconciliation’ in *Human Morality and Sociality: Evolutionary and Comparative Perspectives*, ed. H. Hogh-Oleson (2010) 72. See below for discussion; and N. Lacey and H. Pickard, ‘To blame or to forgive? Reconciling punishment and forgiveness in criminal justice’ (2015) *Oxford J. of Legal Studies* doi: 10.1093/ojls/gqv012.

³⁴ 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*.

³⁵ Op. cit. n.32 and 33.

RECONSTRUCTING PROPORTIONALITY

In effect, then, Pickard's and my deconstruction of the appeal to proportionality in contemporary criminal justice claimed that this metaphorical trope 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. In early modern systems, state authority was invested with, if not explicitly theological, at least some form of sacredness; and social orders were formed around a cosmology or system of meaning in which there appears to have been a remarkable degree of consensus about appropriate penalties notwithstanding their disproportionate use against the poor, in a context of extraordinary levels of inequality and deprivation. Of course, by the latter part of the 18th Century the legitimacy of the relevant social, political and penal systems was under question, and they were comprehensively reformed over the following century. But this process of rationalising and modernising reform undoubtedly extinguished certain governmental resources which cannot be revived in contemporary conditions.

What relevance does this argument about appeals to proportionality in the context of criminal justice have for other areas of law in which they increasingly feature? Needless to say, there are likely to be significant differences attendant on the different functions, doctrinal structure and institutional embedding of different areas of law. Yet some of the same problems and opportunities can be observed – and in particular, the challenge of grounding and making concrete the power-constraining potential of appeals to proportionality. The institutional solutions and background conditions may be different, but the basic structure of the challenge is similar. What is more, as Poole notes,³⁶ it is far from clear that modern appeals to proportionality have really abandoned the metaphysical pretensions of their classical forbears. And giving a clear shape to a renewed vision of that underlying cosmology in more sceptical, rationalist times is no easy task. As Poole elaborates:

The task of the decision-maker applying proportionality is to identify those elements and values and then to fashion them in a way that produces a harmony of the parts and therefore justice. Now, this task (or at least the first stage of it) might not be too difficult in practice. The values at stake might be obvious. But where they are not, there is a danger that either the judges would be rudderless or the direction they steered would not have been agreed already by the polity at large. Both problems loom larger for us (perhaps) than for those who articulated the classical model.³⁷

In light of this difficulty, our task must be one of more thoroughgoing institutional and normative reconstruction which coheres with the resources which are now regarded as legitimate and meaningful.

Our deconstruction of appeals to proportionality, however, is not inconsistent with a recognition of the need to engage in that sort of reconstructive project. In this concluding section, I want to suggest that such a project must engage with two further questions. First, it must ask what has prompted the resurgence of appeals to proportionality in so many countries and across so many doctrinal areas – while holding in mind the likelihood that there will be different explanations across different areas. Second, it must work towards a better understanding of the conditions under which, in differently structured modern legal and social systems, appeals to the metaphor of proportionality are most likely to have the limiting

³⁶ Poole, *op. cit.* n. 6, p. 389.

³⁷ *Id.* p. 390.

effect which they claim – and, conversely, it must be alive to the power of this metaphor to obscure the realities of power by holding out a promise of limits which remains purely rhetorical.

Turning to the first question: why has proportionality experienced such a marked increase in its pervasiveness as one of law’s legitimating metaphors? As we would expect, the reasons vary across doctrinal areas. In criminal justice, the resurgence of appeals to proportionality has been a function of the neoclassical revival in the wake of the collapse of the rehabilitative ideal in the US, Britain, Australia and many other European and Nordic countries. It has also been a tool wielded by legislators in an effort to constrain judicial discretion. In public law, the growth of appeals to proportionality has been a product of the rapid growth of the field of human rights and has delivered significant interpretive power to judges. This set of developments was of course prompted in large part by the traumatic abuses of governmental power which culminated in the Second World War. The determination to avoid future such excesses directly informed the development of the United Nations and of the European Convention of Human Rights. These political developments have been further underpinned by transnational legal institutions such as the European Court of Human Rights and, in a separate line of development, the European Court of Justice, which have allowed concepts nested within a particular system to travel to other systems, adapting themselves in the process to their new environments, and which have increased the power and significance of judicial review of governmental power at both national and transnational levels. In public international law, again fostered by its engagement with human rights norms and by the growth of humanitarian law and the explosion of specialist courts, the longstanding role of proportionality in just war theory has experienced a renewed momentum and a wider significance. Moreover ideas of proportionality have found their way into entirely new areas such as the regulation of international trade, *via* the framework of the World Trade Organisation. So one might simply regard the current pervasiveness of the metaphor of proportionality as the outcome of a number of contingent and, to some extent, unrelated institutional developments.

But to see the current emphasis on proportionality exclusively in these terms would, I think, be to beg the question of just why this metaphor – out of many others which might have had a resonance in relation to the need to limit punishment - has such appeal, and in doing so to miss something of importance to socio-legal studies. Certainly, there is much merit to Stone Sweet’s and Mathews’ suggestion³⁸ that proportionality tests appeal to judges because of their capacity to underpin a wide measure of judicial discretion: indeed, this is precisely an upshot of the indeterminacy of the concept of proportionality already noted in our discussion of criminal justice. But there is surely more to be said about why, specifically, this particular discretion-legitimating concept has gained such traction. Speculative though any such suggestion may be, I would like to argue that there is indeed some more general significance to the current salience of proportionality across systems and contexts. Just as there was a certain counter-intuitiveness to the resurgence of ideas of ‘community’ in the 1980s, as politics in the advanced democracies was moving in an ever more individualistic and even libertarian direction,³⁹ much the same might be said about the pervasive appeal to proportionality in a world ever more organised around the sway of unconstrained market forces and the naked power of money. Greater and greater numbers of the world’s inhabitants experience themselves as living in a market culture – sometimes loosely characterised as ‘neoliberal’ - apparently intent, in Wendy Brown’s resonant phrase, on *Undoing the Demos*.⁴⁰ And many advanced democracies have witnessed a significant

³⁸ Op. cit. n. 25

³⁹ See N. Lacey op. cit. n. 3

⁴⁰ W. Brown, *Undoing the Demos: Neoliberalism’s Stealth Revolution* (2015).

attenuation of the welfare and other social and political institutions designed to provide a measure of distributive justice and to counter pure market power. In such a context, the idea that we have in place legal arrangements still capable of constraining – indeed proportioning – power along the lines of longstanding constitutional aspirations may have particular force – just as the warm if unspecific appeal to ‘community’ provided a comforting fantasy of connection and interdependence in an increasingly atomistic and competitive world of ‘ontological insecurity’.⁴¹ This speculative thesis would speak in particular to proportionality’s expansion into the terrain of private law.

If this speculation has any merit, it implies that we must attend carefully to the dangers as well as the positive potential of law’s metaphors. For it is precisely through their method of carrying meaning over from one thing to another that they bear the potential to mislead: to conjure up a legitimating image which is distant from the realities of the power relations embedded in law as enforced. And here, to move to our second question, it becomes truly important to focus on context, and in particular on the features of different contexts which affect the capacity of appeals to metaphors such as proportionality to deliver the values or outcomes to which they aspire and through which they add their persuasive and legitimating force to legal discourse. In criminal justice as elsewhere,⁴² it is where metaphors such as proportionality are articulated with widely held attitudes or well established institutional practices which help to coordinate expectations that they hold their greatest potential to limit power in something like the way that their rhetorical force promises. Our evaluation of law’s metaphors, in short, must not be confined to their conceptual structure, their discursive form or even their doctrinal elaboration: it must also attend to the institutional arrangements which provide the framework for their interpretation and enforcement; and to the interests and power relations which shape their development and implementation.

⁴¹ A. Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (1991).

⁴² See Lacey and Pickard, *op. cit.* n. 1.