

Annexe B11 Publique : Copie des références doctrinales

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Proportionality - An Unattainable Ideal in the Criminal Justice System

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Abstract

In spite of its centrality in the criminal justice system, the principle of proportionality is poorly defined, and its role in judicial sentencing rests on shaky ground. The idea that criminal sanctions should be imposed only in proportion to those crimes to which they seek to respond is well recognised and ostensibly applied in most modern legal systems. However, by examining the role of proportionality in actual judicial sentencing, it is apparent that its application is highly problematic. Indeed, proportionality is founded on criminal punishment theories that are mired in complex and unresolved debates, offering little guidance to judges on the role of proportionality and the way it should be applied in sentencing. Moreover, proportionality competes with other sentencing goals, potentially giving rise to incompatibility when various objectives of criminal punishment are prescribed by sentencing guidelines. Further, it is crucial to note that crime and punishment are fundamentally disparate matters that do not in themselves possess any common benchmark for comparison vis-à-vis each other. Therefore, any proportionality that may exist between an offence and a sentence must necessarily be sought elsewhere - in social sentiments. Ultimately, the only meaningful and practical 'proportionality' that may exist in criminal punishment can only be the manifestation of society's opinions and moral assumptions. Consequently, the principle of proportionality cannot be an objective ideal to be attained but rather a goal to be continually strived for.

I. Introduction

Intrinsic in the concept of justice is the idea that where the criminal justice system imposes punishments, it should do so only in proportion to the crimes to which it seeks to respond. The principle of proportionality in criminal punishment is a fundamental aspect of most modern legal systems. However, it is ultimately an unattainable ideal and is, at best, a goal to be continually

strived for. This paper seeks to explain the role of proportionality in modern Western legal systems such as Canada and the United States, delve into the problems and difficulties posed by the principle of proportionality, and then explore how this principle may be understood in a more meaningful and practical way.

II. The justice of criminal punishment

A. Scope of this paper

The traditional theory of criminal punishment provides that the state imposes sanctions in response to the breaking of law.¹ This theory finds its basis in the ideas of the Social Contract through which free and rational individuals have collectively consented to relinquish certain rights in order to subsist peaceably in society.² Hence, the state alone, as the embodiment of the body politic, has the right to inflict punishment on its members, and to determine the sort of sanctions to be imposed for different crimes. Nevertheless, it has been argued that even Rousseau, one of the most influential writers on the Social Contract, was ambiguous with regards to the issue of how criminal punishment should be determined.³ Subsequent thinkers have attempted to answer this question with the purposes of criminal justice such as those of deterrence, incapacitation, and rehabilitation.⁴ While it is generally recognised that

1 See generally James Q Whitman, 'Between Self-Defense and Vengeance / Between Social Contract and Monopoly of Violence' (2004) 39 Tulsa L Rev 901, 913-917.

2 *ibid.*

3 For more on the debate over what Rousseau's ideas on punishment were, see Corey Brettschneider, 'Rights Within the Social Contract: Rousseau on Punishment' in Austin Sarat, Lawrence Douglas, Martha Merrill Umphrey (eds), *Law As Punishment / Law As Regulation* (Stanford University Press 2011).

4 Richard S Frase, 'Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?' (2004) 89 Minn L Rev 571, 592. For a detailed account of how the purposes of criminal punishment have evolved, see Albert W Alschuler, 'The Changing Purposes of Criminal

criminal justice is concerned with such goals of punishment, the underlying issue of how these goals are achieved is shaped and restrained by the concept of proportionality. As such, proportionality is a fundamental principle in criminal sentencing, and the subject of much academic debate over its role in the concept of justice.⁵

B. The Proportionality Principle

Much has been written about the concept of proportionality, which has been held to be the ‘dominant principle driving the determination of sentences’.⁶ Proportionality is considered to be so important in criminal sentencing because it ‘accords with principles of fundamental justice and with the purpose of sentence - to maintain respect for the law and a safe society by imposing just sanctions’.⁷ It ‘embodies, or seems to embody, notions of justice. People have a sense that punishments scaled to the gravity of offences are fairer than punishments that are not. Departures from proportionality - though perhaps eventually justifiable - at least stand in need of defense’.⁸

In seeking to impose what is a just and fair punishment for criminal offences, the mantra ‘the punishment must fit the crime’ has been the prevailing sentiment, that the severity of the penalty should be

Punishment: A Retrospective on the past Century and Some Thoughts about the Next’ (2003) 70 U Chicago L Rev 1.

⁵ See eg Franklin E Zimring, Gordon Hawkins and Sam Kamin, *Punishment and Democracy: Three Strikes and You’re Out in California* (OUP 2001) 190; Margaret Jane Radin, ‘The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause’ (1978) 126 U Pa L Rev 989, 1043-1056; Richard G Singer, ‘Sending Men to Prison: Constitutional Aspects of the Burden of Proof and the Doctrine of the Least Drastic Alternative as Applied to Sentencing Determinations’ (1972) 58 Cornell L Rev 51, 56 and 72-89, cited in Frase (n 4) 596.

⁶ *R v Arcand* [2010] AJ No 1383 (Alta CA) 55 [*R v Arcand*].

⁷ *ibid* 52.

⁸ Andrew von Hirsch, ‘Proportionality in the Philosophy of Punishment’ (1992) 16 Crime and Justice 55, 56.

proportionate to the gravity of the offence committed.⁹ The proportionality principle has long been an intrinsic aspect of criminal justice and is considered at sentencing in different ways. For instance, in jurisdictions like the United States and Canada, concepts such as ‘gross disproportionality’ have been developed from the prohibition of excessive ‘cruel and unusual punishments’ as enshrined in Section 12 of the Canadian Charter of Rights and Freedoms and in the Eighth Amendment to the United States Constitution. Section 12 of the Canadian Charter prescribes that ‘[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment’,¹⁰ and the relevant section of the Eighth Amendment to the United States Constitution provides that ‘[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted’.¹¹ Further, proportionality at judicial sentencing has been specifically identified in judicial guidelines such as the Canadian Criminal Code. For example, Section 718.1 of the Code provides that ‘[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender’.¹²

Nevertheless, despite this strong recognition of the importance of proportionality in criminal justice, ‘the law with respect to proportionality in sentencing is confused, and what the law can be discerned rests on weak foundations’.¹³ As a result, the application of the proportionality principle in judicial cases has been criticised. For instance, the decisions

9 Andrew von Hirsch, ‘Proportionality in the Philosophy of Punishment: From “Why Punish?” to “How Much?”’ (1990) 1 Criminal Law Forum 259, 262; Ronen Perry, ‘The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory’ (2006) 73 Tenn L Rev 177.

10 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982 being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 12 [Charter].

11 US Const amend VIII.

12 Canadian *Criminal Code*, RS C 1985, c C-46, s 718.1.

13 Steven Grossman, ‘Proportionality in Non-Capital Sentencing: The Supreme Court’s Tortured Approach to Cruel and Unusual Punishment’ (1994) 84 Ken L Rev 107, 107-108.

of the United States Supreme Court on gross disproportionality based on Eighth Amendment infringements have been considered to be significantly flawed,¹⁴ in particular because of the lack of ‘a constitutional standard consistent with accepted philosophical justifications of punishment and embodying principles’.¹⁵ Indeed, there are many underlying problems inherent in the attempt to apply the proportionality principle to sentencing, posing several difficulties to the criminal justice system.

III. Difficulties posed by the proportionality principle

There are several problems arising from the concept of proportionality, and four particular issues shall be considered in this section: (a) The vague definitions and theories of proportionality in the law, (b) the irreconcilability of other sentencing goals with the proportionality principle, (c) the inherently different natures of crime and punishment, and (d) the underlying character of the proportionality principle as a manifestation of mere opinions and sentiments.

A. Conflicting theories and poor definition in the law

Despite the obvious importance of the proportionality principle in criminal sentencing, the concept of proportionality itself is poorly defined in the law and the theories concerning it are the subject of much unresolved debate. This vague definition is a glaring gap in the criminal justice system. For instance, although the Canadian Criminal Code provides that sentences ‘must be proportionate’ to the severity of the crime and the culpability of the criminal,¹⁶ it does not proceed to elaborate on what ‘proportionate’ might mean with respect to gravity of offence and degree of responsibility, or how such a ‘proportionate’ sentence may be

14 For a thorough discussion on the ‘series of flawed opinions from the Supreme Court’ in ‘all of the modern holdings of the Court in this area’, see *ibid.*

15 Grossman (n 13) 108.

16 Canadian *Criminal Code*, RS C 1985, c C-46, s 718 1.

determined. Similarly, although the United States Supreme Court clearly professes to apply the proportionality principle in criminal sentencing, it has been observed that through its judicial decisions, it 'has never made clear what it means by proportionality in the context of prison sentences'.¹⁷

It is possible that proportionality is assumed to be so self-evident a principle that it does not necessitate elaborate expositions and definitions of its precise meaning and operation. However, to hold such a view would be to overlook the large amount of ongoing debate over the different theories of proportionality. It is more likely, then, that the reason for this lack of clarity concerning the concept of proportionality is that there is a lack of consensus over what the ideal form of proportionality is, what the purposes of punishment (which proportionality is meant to be a means to fulfil) are, and how to derive both of these. Consequently, the ideal form of proportionality and its role in punishment have been the subject of much academic discussion, and several theories have emerged, including that of retributive proportionality, utilitarian proportionality, and the concerns of ordinal and cardinal proportionality.

Retributive proportionality concerns the history of the offender and considers proportionality as a means to the punishment goal of retribution by measuring a sentence according to the offender's blameworthiness.¹⁸ As expressed by Immanuel Kant, one of its supporters,

Juridical punishment can never be administered merely as a means for promoting another good either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime. For one man ought never to be dealt with merely as a means subservient to the purpose of another...Against such treatment his inborn personality has a right

¹⁷ Frase (n 4) 588.

¹⁸ See eg *ibid* 590-592.

to protect him, even though he may be condemned to lose his civil personality. He must first be found guilty and punishable before there can be any thought of drawing from his punishment any benefit for himself or his fellow-citizens. The penal law is a categorical imperative; and woe to him who creeps through the serpent-windings of utilitarianism to discover some advantage that may discharge him from the justice of punishment, or even from the due measure of it, according to the Pharisaic maxim: 'It is better that one man should die than the whole people should perish.' For if justice and righteousness perish, human life would no longer have any value in the world.¹⁹

Retributive proportionality is manifested in two forms. Firstly, 'defining retributivism' determines the punishment as precisely as possible to the severity of the offence, leaving little room for other punishment purposes. The purpose of retribution thus informs the sentencing judge to formulate a punishment which is proportionate to this intended end result. Secondly, 'limiting retributivism' allows other sentencing goals to be considered, merely placing retributive outer limits on the range of possible sentences. This way, the sentencing judge formulates a punishment in order to meet the various goals of punishment, such as social deterrence and denunciation, but then reins in the sentence to conform to the principle of proportionality.

In contrast, utilitarian proportionality is prospective rather than retrospective, with proportionality measured against sentencing goals which concern the future rather than the past, such as deterrence, rehabilitation, and cost to society.²⁰ There are two aspects of utilitarian proportionality.²¹ The first is in terms of 'ends

19 Pincoffs 1966 at 2-3, cited in von Hirsch (n 8) at 60.

20 See eg Frase (n 4) 592-596. See also Michael Cavadino and James Dignan, *The Penal System: An Introduction*, (2nd edn, Sage 1997) 39 (on the debate between retributive and utilitarian proportionality).

21 Frase (n 4) 592-597.

proportionality', which concerns whether the costs of pursuing the goals of the criminal sentence outweigh the benefits to be derived from it (to both society and the individual offender). The other aspect of utilitarian proportionality is 'means proportionality', which assesses whether alternative less costly sanctions are available for achieving the same intended benefit.

As the 18th Century philosopher Cesare Beccaria argued, sanctions should be proportional to the gravity of the offences, as measured by the harm done to society.²² Similarly, Jeremy Bentham asserted that punishments should have a utilitarian function and so must be proportional to the gravity of the crime in order to maximise efficiency in public resource allocation because 'the greater an offence is, the greater reason there is to hazard a severe punishment for the chance of preventing it'.²³ He further explained that 'punishment itself is an evil and should be used as sparingly as possible' and that a form of punishment should not be used if 'the same end may be obtained by means more mild'.²⁴ Since punishment harms and dissatisfies those upon whom it is inflicted, it can only be justified insofar as it produces a net amount of other benefits or satisfaction exceeding the harm. As the concept of utility is wholly consequentialist, the moral concept of 'just deserts' cannot be the reason for punishment. Instead, punishment is only justified inasmuch as its beneficial effects, for instance in deterrence, exceed the harm it produces.

H.L.A. Hart sought to reconcile the two competing ideas of retributive and utilitarian proportionality, suggesting that while 'we can agree that the reason for having a penal system at all is the general betterment of society...we can at the same time maintain with consistency that punishment should only be handed out to those who deserve it, and only

²² Cesare Beccaria, *On Crimes and Punishments* 62-66, as cited in *ibid* 593.

²³ Jeremy Bentham, *The Theory of Legislation* 326, as cited in *ibid* 593.

²⁴ *ibid*.

to the extent of their guilt.²⁵ This synthesis of utilitarianism and retributivism has had significant and current influence on many criminal justice systems.²⁶

These debates²⁷ are useful in answering the questions of *how* proportionality should be applied to criminal punishment and *why* it should be applied in a particular way, *viz.* the fulfilling of the purposes of punishment. However, there is no easy resolution to these debates, and much of the differences between the competing theories stem from a deeper divergence in opinions concerning the criminal justice system. They ‘differ from one another largely in the emphasis they give the principle of proportionality - that is, the requirement that sanctions be proportionate in their severity to the seriousness of offenses’.²⁸ More crucially, however, these debates are focused on the *application* of proportionality, and do not answer the more fundamental questions regarding the basis for the concept of proportionality and what it really means, *viz.* proportional as to *what*. It seems as if proportionality is assumed to be an intrinsic good in and of itself, without a need for deeper analysis of issues such as what it really is, how it is derived, and its appropriateness as a sentencing principle. Consequently, these questions concerning the essence of what proportionality, at its root, is remain ambiguous and unanswered, and this is the first difficulty concerning the proportionality principle.

25 Morris J Fish, ‘An Eye for an Eye: Proportionality as a Moral Principle of Punishment’ (2008) 28 OJLS 57, 66.

26 *ibid* 67.

27 For a more detailed exposition on what Jeremy Bentham, Immanuel Kant, and HLA Hart wrote, respectively, on penal utilitarianism, retributive sanctions, and a reconciliation of both, see von Hirsch (n 8) 57-63.

28 *ibid* 55-56.

B. Inconsistencies between proportionality and the objectives of punishment

Secondly, there is difficulty in reconciling the various goals of punishment with the proportionality principle. Logically, where two different forces direct a criminal sanction, a judge deciding the sentence needs to choose between one and the other in determining the appropriate sentence. Even if we accept the premise that proportionality is an inherent good in the sentencing process, the disparate goals of punishment necessarily lead to different penalties from that produced through applying the proportionality principle. Several policy objectives of criminal punishment seem to demand sentences decidedly *disproportionate* to merely what the severity of the crime and the culpability of the offender would attract. Such a statement is made with the acceptance of the premise that a ‘proportionate’ sentence can be objectively determined from the severity of a crime and the culpability of an offender. As will be explained later in this paper, such a premise is flawed but is what drives sentencing regimes in the criminal justice system today.

For instance, in seeking to expressly ‘denounce’ a crime, a sentence will often need to exceed what is simply ‘proportional’ to the offence because there would be no discernible denouncement if a ‘denouncing sentence’ were exactly the same as a ‘proportionate sentence’. Similarly, the objective of ‘separating offenders from society, where necessary’,²⁹ implies that a criminal should be incarcerated for a period likely longer than what is merely proportionate to his offence. Such a dilemma is illustrated in Title 18 of the United States Code which provides³⁰ that the purposes of a sentence should be ‘to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense’,³¹ as well as ‘to protect the public

²⁹ Canadian *Criminal Code*, RS C 1985, c C-46, s 718(c).

³⁰ 18 USC § 3553.

³¹ 18 USC § 3553 (a)(2)(A).

from further crimes of the defendant'.³² A sentencing judge, then, taking into consideration the full set of sentencing goals, is faced with the question of how to reconcile all the different sanctions that each of these goals would necessitate. It is almost certain that at least in some cases, the punishment prescribed by one sentencing goal will conflict with that of another, compelling the judge to choose one at the expense of the other. This inadvertently compromises the requirements laid down by sentencing guidelines such as Title 18 of the United States Code. Even if there is assumed to be a range of 'proportionate' sentences for each crime within which judges may exercise discretion and take into consideration the other goals of sentencing (i.e. through 'limiting retributivism'), there will inevitably be cases where proportionality and policy objectives contradict in the scale of the punishment to be prescribed. Although there admittedly will be much overlap between what is a 'proportionate' sentence and what is a 'detering' or 'incapacitating' sentence, there will also be instances where they differ. Where proportionality prescribes one form of punishment while other policy objectives requires a different and irreconcilable one, the sentencing judge will have to choose one or the other, and cannot fulfil both.

Compounding this problem, there remains considerable disagreement over the different justifications for punishment and, by extension, between the various sentencing goals. For example, John Kleinig describes the contention concerning whether criminal punishment should be utilitarian or morally informed, a manifestation of the larger debate underlying utilitarian and retributivist proportionality.³³ Punishment is undeniably for the public good, but what is disputed is whether this public good consists in punishing for certain utilitarian goals or for moral concerns of what is 'right', either of which leads to a

³² 18 USC § 3553 (a)(2)(C).

³³ John Kleinig, 'R S Peters on Punishment' (1972) 20 *Brit J of Edu Studies* 259, 265-266.

consideration of ‘proportionality’ differing from the other. Similarly, the competing ideas of rehabilitative and retributive punishment disagree with regards to how punishment should consider the offender: either the evaluation of blameworthiness is a pointless exercise and so punishment should only be meted out for the purpose of rehabilitating the individual, or the punishment should seek to inflict upon the offender a sentence which manifestly reflects the gravity of his or her personal culpability.³⁴

If the evaluation of blameworthiness is recognised as a means of retributive punishment, then proportionality will rightly find its place in assessing the wrongfulness of conduct. It has been argued that the concept of proportionality ‘only has meaning in relation to retributive sentencing goals and that a proportionality requirement makes no sense if the Court is not going to require states to adopt a retributive theory’.³⁵ If, however, as Jeremy Bentham argues, this evaluation of blameworthiness is pointless, and that punishment should instead seek to rehabilitate the offender to change his or her ways and to deter potential offenders in society, then the proportionality principle takes on a fundamentally different role, *viz.* one of assessing the *utility* of the penalty. It is these unsettled disputes over the underlying dynamics of criminal sentencing which lead to fundamental uncertainty over how to sentence. Again, either idea will result in a disparate conception of the ‘proportionality’ to be applied in formulating the criminal sanction.

Thus, the principle of proportionality is founded on vague definitions and unsettled debates over the purposes of punishment that determine the relevance of the principle in the first place. Consequently, if even the very basis of criminal sentencing - *why* sentence, and *how* to sentence - are at the centre of such current and open debate, it is difficult

³⁴ von Hirsch (n 8) 64.

³⁵ Frase (n 4) 588.

for sentencing judges to reconcile all these theories in order to satisfy each of them. Indeed, '[t]he practice of punishment...rests on a plurality of values, not on some one value to the exclusion of all others'.³⁶ As such, a judge under a legal system which purports to dispense punishment in accordance with a range of sentencing goals such as deterrence and denunciation (for instance, in the Canadian Criminal Code) will, at certain points of irreconcilability, have to decide to either mete out a sentence based on proportionality contrary to other policy goals (i.e. 'defining retributivism') or choose other goals contrary to proportionality.

Additionally, legislative involvement in sentencing, such as through the prescription of mandatory minimum prison terms, elevates these problems by reducing the scope of judicial discretion in applying the principle of proportionality in criminal sentencing. For example, some jurisdictions require a mandatory minimum sentence for certain crimes, which the legislature presumably deems to be 'proportionate' to the nature of those crimes but which deprives the judiciary of a wide discretion in determining each individual case on their facts. Because of this, the Supreme Court of Canada in *R v Smith*³⁷ held that the mandatory minimum of a seven-year prison sentence for the importation of drugs was a violation of the right against cruel and unusual punishment as enshrined in Section 12 of the Canadian Charter of Rights and Freedoms³⁸.

Therefore, it is clear that proportionality is, in certain cases, necessarily a defining principle of the judicial sentencing process and may thus be irreconcilable with other sentencing goals. As such, its application in criminal punishment conflicts with the requirement that judges take

36 Hugo Adam Bedau and Erin Kelly, 'Theory of Punishment' (Stanford Encyclopedia of Philosophy, 19 February 2010) <<http://plato.stanford.edu/entries/punishment/#2>> accessed 12 April 2012.

37 *R v Smith* (Edward Dewey) [1987] 1 SCR 1045.

38 Charter (n 10) s 12.

into account other sentencing objectives and legislative prescriptions on judicial sentencing.

C. Meeting crime with punishment - comparing wholly different matters

Also, crime and punishment are inherently separate concepts of entirely different natures, making it impossible to simply compare the two on a scale of ‘proportionality’ against each other on their own. Thus, they require a preceding separate *a priori* judgement on their values from which ideas of ‘proportionality’ can then be scaled.

The definition of crime has been the subject of much intense debate,³⁹ and it is not the ambition of this paper to produce a definitive resolution to it. What it seeks to highlight, however, is the fact that the nature of crime is fundamentally different from the nature of punishment. Descriptively, crime is ‘the point of conflict between the individual and society’⁴⁰ because it ‘is fundamentally a violation of conduct norms which contain sanctions, no matter whether found in the criminal law of a modern state or merely in the working rules of special social groups.’⁴¹ However, the nature of crime is immensely complicated, and involves several approaches in understanding it. One of these is the economic approach which considers most crimes in general to be the generation of losses which can almost never be repaid perfectly.⁴² Although an admittedly simplistic portrayal of crime which may not fit in absolutely every case, the economic approach fits in the general case, and is but one of several approaches to understanding the nature of crime. For instance, theft is the generation of a loss

39 See eg William M Ivins, ‘What is Crime?’ (1911) 1 Reform of the Criminal Law and Procedure 531.

40 *ibid* 531.

41 Walter C Reckless, *Criminal Behavior* (McGraw-Hill 1940) 10.

42 For a detailed exposition of this economic characterization of crime, see Gary S Becker, ‘Crime and Punishment: An Economic Approach’ in Gary S Becker and William M Landes (eds), *Essays in the Economics of Crime and Punishment* (UMI 1974).

of personal property; defamation is the loss of good reputation; rape is the loss of dignity (amongst other things); and homicide is the generation of a loss of life.

Even within this simplistic depiction of crime as the creation of losses, it would be impossible to repay the loss generated by most kinds of crimes, such as the loss of dignity, loss of a bodily function, or loss of life. Moreover, even for crimes where it may be possible for an offender to repay the loss (for example, in cases of theft or fraud), save for minor offences where community service or compensation orders may be meted out, criminal punishment typically does not seek the restitution of a victim, requiring a separate civil suit for that purpose to be filed instead. While restitutive justice may sometimes be considered to be a goal of the criminal sentence, the purposes of punishment are diverse and generally include other objects such as deterrence, retribution, incapacitation, and denunciation which may take precedence over restitution. Moreover, even where restitution is considered, it is often not the sole aspect of the criminal sentence, but merely a part of it, usually meted out with a supplemental punishment in addition to the compensation.⁴³

Moreover, as noted earlier, this economic approach is but one portrayal of crime, and there are several other methods to understanding the intricate nature of crime which are beyond the scope of this paper. These include considerations of the moral wrongfulness of crime, the social stigma of criminal offences, and the philosophy of wrongdoing, all of which contribute to a fuller understanding of the complex nature of crime. From the complexity of the nature of crime then, three conclusions may be drawn. Firstly, that it is difficult to characterise crimes and reduce them to something measurable. Secondly, it is even more difficult to find a common benchmark (or benchmarks) to

43 Lorenn Walker and Leslie Hayashi, 'Pono Kaulike: Reducing Violence with Restorative Justice and Solution-Focused Approaches' (2009) 73:1 Fed Probation J 23.

holistically measure crimes against each other, whether in terms of severity of losses, social stigma, moral wrongfulness, or any other yardstick. Thirdly, it is as a consequence virtually impossible to meaningfully consider the ‘proportionality’ of a crime in terms of a particular form of punishment just by considering crime and punishment without the separate attachment of social values or moral assumptions.

Clearly, the nature of punishment is fundamentally different from that of crime. Punishment, according to the British philosopher Richard Stanley Peters, is ‘the authoritative imposition of something regarded as unpleasant on someone who has committed a breach of rules’⁴⁴ and while criminal punishment is meted out in many different ways, the majority of sanctions take the form of either fines or jail sentences.⁴⁵ The punishing element of monetary fines is the deprivation of a sum of money, which is essentially the generation of a monetary loss for the offender. Because of this, fines are capable of being the only type of punishment potentially suitable for the concept of proportionality to be considered in sentencing in and of itself, where a *proportionate* financial loss is retributively inflicted on an offender as a punishment for having inflicted a financial loss. Because it is possible in those circumstances to mathematically calculate the monetary loss suffered by the victim, it is possible to formulate and impose an equal monetary loss on the offender, thus creating a meaningfully proportionate sanction.⁴⁶ However, monetary fines are but a small segment of criminal punishment in most legal systems; the form of punishment which is the subject of most debates concerning the principle of proportionality is incarceration.

44 Kleinig (n 33) 259 and 267.

45 For further discussion on the forms of punishment, see *ibid* 267-269.

46 Even where such ‘proportionality’ may be formulated, it should be noted that the victim’s losses in terms of factors such as time, opportunities, and legal costs may at best be *estimated* by the sentencing judge, and ultimately render the punishment and the crime at least different to some degree.

The purposes of punishment through imprisonment are manifold and include incapacitation, retribution, deterrence, rehabilitation, and denunciation.⁴⁷ Amongst these, there is dispute over which goals should be considered or ignored, and how much weight or precedence each of them should carry. For instance, Morris Fish argues that retribution should have ‘little or no role to play’ in punishment, and that the purpose of punishment should instead be other utilitarian goals.⁴⁸ With regards to the punishing element of incarceration, however, incarceration is essentially the infliction of pain on the offender - the infliction of psychological and emotional ‘loss’ through the deprivation of one’s liberty, normalcy, privacy, and often (whether intended or not), through the poor and unsafe conditions of prisons, the deprivation of dignity.⁴⁹ Indeed, ‘[a]t the very least, prison is painful, and incarcerated persons often suffer long-term consequences from having been subjected to pain, deprivation, and extremely atypical patterns and norms of living and interacting with others’.⁵⁰ Moreover, ‘[f]or some prisoners, incarceration is so stark and psychologically painful that it represents a form of traumatic stress severe enough to produce post-traumatic stress reactions once released’.⁵¹ In addition to the pain inflicted upon the offender being imprisoned, incarceration also harms the family and children of the sanctioned offender, resulting in a punishing element which far exceeds the *prima facie* sentencing goal and range.⁵² Incarceration, as the

47 Richard S Frase, ‘Punishment Purposes’ (2005) 58 Stan L Rev 67, 70; Craig Haney, ‘The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment’ (2001) US Department of Health and Human Services working papers prepared for the ‘From Prison to Home’ Conference (January 30-31, 2002) 3.

48 Fish (n 25) 65.

49 Haney (n 47) 4-6.

50 *ibid* 4-5.

51 *ibid* 11.

52 For more discussion on this topic, see Joyce A Arditti, Jennifer Lambert-Shute and Karen Joest, ‘Saturday Morning at the Jail: Implications of Incarceration for Families and Children’ (2003) 52 Family Relations 195; Joyce A Arditti, ‘Families

infliction of profound psychological (and in many cases, physical) pain through severe deprivations of action and association, has a destructive effect on an offender's private and family life.⁵³ It also impacts future career prospects,⁵⁴ and leads to other significant post-incarceration consequences on communities⁵⁵ and the offender's health (either through long-term incarceration or through infectious diseases).⁵⁶

As such, when compared to the crimes which offenders are being punished for, the penalty of imprisonment (together with its far-ranging consequences) is too different to be meaningfully measured for 'proportionality'. The nature of crime and the nature of punishments (primarily incarceration) are so disparate that there is no meaningful way to compare the two on any scale on their own. Where one is the generation of losses on the victim of a crime which in most cases cannot be repaid, the other is the infliction of pain on the offender. The two are of

and Incarceration: An Ecological Approach' (2005) 86 J Contemporary Social Services 251; Justin Brooks and Kimberly Bahna, "It's a Family Affair" - The Incarceration of the American Family: Confronting Legal and Social Issues' (1993) 28 USF L Rev 271; Jeremy Travis and Michelle Waul, *Prisoners Once Removed* (Urban Institute 2003) 189-225.

53 See (n 52).

54 Amanda Geller, Irwin Garfinkel and Bruce Western, 'The Effects of Incarceration on Employment and Wages - An Analysis of the Fragile Families Survey' (2006) Center for Research on Child Wellbeing Working Paper 2006-01-FF, <<http://www.saferfoundation.org/files/documents/Princeton-Effect%20of%20Incarceration%20on%20Employment%20and%20Wages.pdf>> accessed 23 April 2013; Bruce Western, 'The Impact of Incarceration on Wage Mobility and Inequality' (2002) 67 American Sociological Rev 526.

55 For a detailed exposition on the effect of incarceration on communities, see Dina R Rose, Todd R Clear and Judith A Ryder, 'Addressing the Unintended Consequences of Incarceration Through Community-Oriented Services at the Neighborhood Level' (2001) 5(3) Corrections Management Quarterly 62; Joan Petersilia, 'When Prisoners Return to Communities: Political, Economic, and Social Consequences' (2000) 65 Fed Probation 3.

56 For a detailed exposition on the effect of incarceration on the imprisoned individual's health, see Jason Schnittker and Andrea John, 'Enduring Stigma: The Long-Term Effects of Incarceration on Health' (2007) 48(2) J Health and Social Behavior 115; Michael Massoglia, 'Incarceration as Exposure: The Prison, Infectious Disease, and Other Stress-Related Illnesses' (2008) 49 J Health and Social Behavior 56.

completely different natures and it is impossible to weigh one against another without a prior conception of what the ‘value’ of losses in terms of emotional and physical pain are, a conception which cannot be based on the distinct natures of crime and punishment on their own, but which must find its basis on some other principle.

Even ‘proportionality’ based on the *lex talionis*, in which the principle of ‘an eye-for-an-eye’ prescribes an identical loss to be meted out as punishment for a loss inflicted by the offender, has been severely criticised. Apart from being a clearly primitive and barbaric form of punishment based on retaliation, the strict literal interpretation of the *lex talionis* has been described as ‘overlooking its historical significance and moral relevance’ such as that of preventing mob justice and vengeful violence.⁵⁷ Modern criminal sanctions no longer call for strict mirror punishments such as the amputation of an arm for causing the loss of another person’s arm; implicitly recognising that criminal justice of this sort no longer has any currency in modern civilised society. Furthermore, as H.L.A. Hart observed,⁵⁸ mirror punishments are impossible in many instances anyway - the crime of theft cannot be punished by a theft, nor can defamation be recompensed by defamation. Because crime and punishment are of such fundamentally different natures, it is impossible to find an appropriate punishment that ‘fits’ any crime based on proportionality alone, and it is impossible and meaningless to claim that a punishment is, on its own, ‘proportionate’ to a crime without an extra and external benchmark to measure it against. What is retained from the *lex talionis*, however, is the fundamental underlying concept of proportionality. Nevertheless, the question which remains to be asked is whether ‘proportionality’ has any meaning if it is not to mirror a crime. Indeed, if *lex talionis* punishments are to be

⁵⁷ Fish (n 25) 57.

⁵⁸ HLA Hart, *Punishment and Responsibility* (OUP 1968) 161.

rejected, wherein lies the concept of ‘proportionality’? It is difficult to see how any sanction can be designed to be ‘proportionate’ to a crime if it does not strive to be a clear mirror of that crime it is meant to punish.

Here, the theories of ordinal and cardinal proportionality offer some insight.⁵⁹ The former is concerned with how offenders of crimes of comparable gravity should be punished with sentences of comparable severity, *viz.* that similar crimes should attract similar penalties. Ordinal proportionality, then, is a matter of how different crimes may be measured against each other. The question which is left open, however, is how does one determine that a maiming, for instance, is ‘comparable’ with a rape, or the crime of defamation with the crime of theft? Fundamentally, the problem of how to compare different crimes remains unresolved. Cardinal proportionality offers a nuanced difference in approach. It is concerned instead with the overall severity levels anchoring the penalty scheme, so that the severity of punishments for the whole range of crimes in the criminal code should be determined in proportion to each other. Within the theory of cardinal proportionality, however, there is also much discussion over how to find anchoring points within the penal system so as to determine these calibrations.⁶⁰ As such, although both ordinal and cardinal proportionality may be useful in helping to formulate a concept of ‘proportionality’ that is meaningful in criminal sentencing, their utility only arises *after* there has first been an understanding of the underlying nature of proportionality as a reflection of social values. Only then can these comparisons and calibrations be measured and anchored.

⁵⁹ von Hirsch (n 9) 282-283.

⁶⁰ For a more detailed discussion on ordinal and cardinal proportionality, see von Hirsch (n 8) 75-84.

D. Meeting crime with punishment - proportionality as a reflection of sentiments

Ultimately, 'proportionality' is a reflection of moral assumptions, opinions, estimates, and, often, the product of conscious or unconscious prejudices and preconceived notions such as racial stereotypes and other perceived correlations between members of a certain class and certain types of crime.⁶¹ As it is impossible to mathematically calculate the value of a crime in terms of a criminal sentence, proportionality can at best be a measure of what is *perceived* to be the values attached to the losses of crime, and the values attached to the pains inflicted by punishment. There is no immediately discernible common benchmark between the gravity of crimes and the severity punishments on their own, so they can only be measured in proportion to each other insofar as they have been scaled according to the values attached to them by society or by the judiciary. As such, it is not crime and punishment themselves which are considered in proportion to each other, but the *values* attached to them which are used to make these comparisons. Therefore, it is possible to strive towards proportionality only after placing the spectrum of crimes and punishments on this scale of social values, from which they may then be compared. This is the only meaningful understanding of what proportionality involves when it is said to be applied in judicial sentencing. 'Proportionality' can only strive to be as proportionate as possible in reflecting these values, and its application can come through two theoretical steps.

Firstly, the different crimes to be sanctioned within the criminal justice system should be measured in proportion to each other according to public sentiment (either through the legislature which prescribes sentencing guidelines or by

⁶¹ See eg Steven E Barkan and Steven F Cohn, 'Racial Prejudice and Support for the Death Penalty by Whites' (1994) 31 *J Research in Crime and Delinquency* 202; Thorsten Sellin, 'Race Prejudice in the Administration of Justice' (1935) 41 *American J Sociology* 212; Philip A Curry and Tilman Klumpp, 'Crime, Punishment, and Prejudice' (2009) 93 *J Public Economics* 73.

the judiciary which forms case law), and then correspondingly set on a scale of varying degrees of severity. In the same way, the different punishments available as criminal sanctions should be set on a scale of proportionality against each other. This is in keeping with the theory of ordinal proportionality, in order to facilitate the conceptualisation of 'similar crimes' and 'similar punishments', where otherwise, objectively on their own, crimes can only differ amongst themselves just as different punishments amongst themselves, and neither can be compared with the other on grounds of similarity because no common benchmark exists. This benchmark must therefore be found not in crime and punishment themselves, but in the *opinions* which society harbours towards them. Indeed, because different crimes are of different natures - since a murder cannot on its own be compared as a measure of similarity to a rape, for instance - they can at best be compared based on society's valuation of their harm or repulsiveness. A rape is so different from murder, and the loss of one's dignity so disparate from the loss of one's life, that it is impossible to judge from the character of a crime itself to objectively say that the loss of a life is necessarily worse than the loss of one's dignity as a person, the remnant of which may be a life of pain and shame. As such, it is the values of each society, reflected in their respective criminal codes, that produce 'proportion' between different offences and sanctions. This proportionality does not exist on its own but is ultimately a reflection of each society's moral assumptions, estimates, opinions, and sentiments. Just as individual members of society harbour each their own value systems and moral assumptions concerning crime and punishment, contributing to general social sentiments toward the concept of justice, so too legislators and judges whose endeavours to achieve just and fair laws and judgements through the principle of proportionality reflect not only their personal value systems, but also that of general society.

In the same way, all available sanctions in the criminal justice system must also be set upon a scale, so that

the severity of each punishment is weighed against other sanctions. Again, such an endeavour will necessarily be done through the consideration of social values in order to determine, for instance, how the severity of a particular monetary fine compares in proportion to an incarceration sentence. How does a \$100,000 fine weigh against a five-year imprisonment term? The proportionality scale of punishments, like that of crimes, will therefore be a scale of the opinions and values that society attaches to them. Therefore, the product of these efforts will be two different scales of proportionality: one scale of the various criminal offences weighed in proportion to each other based on their attached societal values, and another scale of all the punitive sanctions available, weighed against the prevailing sentiments of society to plot them along a proportional range.

Secondly, these two scales - of crimes and of punishments - must be anchored against each other so that there may be points of intersection between the two, from which other offences and sentences may then be meaningfully compared in proportion with each other. This happens either through case law, or through legislation prescribing that a particular crime should attract a particular punishment (or range of punishments), and from which other identified offences and sanctions in the criminal code are then scaled accordingly. On their own, the proportionality scale of crimes do not relate with the proportionality scale of punishments, and in order to compare the two, there needs to be a value judgement of how a crime may measure against a punishment, such that the two may be considered in 'proportion' to each other. For instance, what should be the appropriate punishment meted out for the crime of rape? The crime does not, on its own, prescribe the 'proportionate' punishment it should attract, but social opinions and sentiments may demand a punishment which is, in accordance with moral assumptions, 'proportionate' to that crime. Indeed, '[a]ccording to the principle of proportionality, punishment is supposed to comport with the seriousness of the crime. There does not,

however, seem to be any precise way of fixing the deserved amount of punishment. Armed robbery is a serious crime, but it is not apparent whether its punishment should be two years' confinement, three years' confinement, or some milder or some more severe sanction.⁶² Therefore, this anchoring of the scale of crimes against the scale of punishments ultimately depends on moral assumptions and displays a symbolic valuation of societal sentiments.⁶³

It is clear, therefore, that the concept of proportionality can only be understood meaningfully if it is acknowledged to be the reflection of a society's opinions, values, and moral assumptions. There cannot be proportionality between two things of disparate natures, and in order to compare crime and punishment, one must compare the *sentiments* that people hold towards them. This is the true 'proportionality' which the criminal justice system strives towards. Necessarily, these opinions will be strongly debated and the myriad values of society will undoubtedly wrestle with each other to be applied in the law, but this is the natural exercise of common public policy. For example, the issue over whether the death penalty is a proportionate criminal sanction for certain crimes is an old and still hotly disputed current debate, epitomising the sort of struggles determining proportionality in criminal punishment. There are differing views over whether execution is proportionate to the crimes it is used for, based not on the nature of execution nor of the nature of those crimes alone - since it is impossible to come to any objective conclusion about how a murder, for example, on its own is decidedly either proportionate or disproportionate to the termination of an offender's life through lethal injection - but rather, is based on what society *perceives* the evil of murder to be, and the associated values they attach to the sanctity of human lives, as well as the state's role and responsibilities in these

62 von Hirsch (n 9) 283.

63 *ibid* 283-284.

matters. Similarly, other punitive sanctions such as monetary fines and incarceration are weighed in ‘proportion’ against crimes, based on social sentiments and moral assumptions attached to them. Because proportionality is not an objective truth to be discovered from the natures of crime and punishment on their own, but rather is the manifestation of subjective human sentiments toward the evils of crime and the utility of punitive sanctions, the best that the criminal justice system can do is only to strive ever closer to a ‘proportionality’ which reflects the norms of the society it is meant to serve.

IV. Applying the proportionality principle

Having thus acknowledged that the principle of proportionality is really the reflection of ever-changing social sentiments and moral values rather than an objective conclusion to be derived from a comparison of crimes and punishments on their own, it is clear that proportionality can only ever be strived towards as an ideal, rather than attained completely. The practical application of the proportionality principle therefore raises several issues.

Firstly, given that proportionality in criminal sentencing is a reflection of sentiments, legislators and judges have a large discretion in determining which punishments are ‘proportional’ to different crimes, giving rise to potentially arbitrary results in legislation and judgements. Although the social sentiments and moral assumptions that attach values to crimes and punishments will undoubtedly be restrained by good reasoning and logical explanations in Parliament and courtrooms, because opinions and sentiments are so fluid and subjective, there remains a large potential for abuse. After all, how does a judge determine if the crime of defamation should attract a monetary fine of \$5000 or \$7000? How does the legislature assess the values that society attaches to the incarceration sentences of five years and ten years? While the legislature and judiciary will undoubtedly take into consideration all factors that are possible to be assessed, ultimately, however, these are

estimates at best, and will require the input of norms and values which can be callously arbitrary and unreflecting of the prevailing social sentiments.

Clearly, the most difficult aspect of applying proportionality in criminal justice is in determining what is 'proportional' in the first place, *viz.*, deciding which punishments are considered to correspond to which crimes. There are no easy answers to these questions, which is why judges hear cases individually to decide on the scale of proportionality, taking into consideration all the facts and the social values attached to those facts, just as Parliament debates with the resources it is endowed with in order to determine the best estimates it is able to find. Hence, proportionality is an ideal which is continually strived towards, through which the law endeavours to come as close as possible to reflecting the evolving values of society.

It is through this that the principle of proportionality is able to concurrently set boundaries to limit discretion in criminal sentencing, since it requires judges to take into account the prevailing social sentiments when sentencing. Herein lies the utility of sentencing codes which require judges to impose only proportionate sentences for crimes, not because there exist punishments which naturally correspond with crimes on their own, but because the law needs to reflect social norms.⁶⁴ It is through the consideration of what values are attached to crime and punishment, and the moral assumptions underlying public opinion, that judges may mete out sanctions that fulfil the purpose of the law to 'maintain respect for the law and a safe society by imposing just sanctions'.⁶⁵ As case law develops in particular areas of crime, with each judge establishing a precedence striving ever closer to the values of prevailing social sentiments, a range of proportionality emerges from which sentencing judges cannot depart without evident

⁶⁴ See eg Canadian *Criminal Code*, RS C 1985, c C-46, s 718 1.

⁶⁵ *R v Arcand* (n 6) at 52.

changes in public opinion. This is the meaningful application of proportionality, that judicial discretion is restricted because judges must impose sentences which are proportionate, and this proportionality is established through the consideration of social norms. Thus, proportionality is an ideal and guide for judges, to restrict arbitrary discretion in sentencing, to aid in reflecting prevailing societal opinion towards criminal justice, and to uphold the values which are attached to them by imposing sanctions that are in keeping with these moral assumptions. Indeed, it is only by so doing that the criminal justice system is able to reconcile the proportionality principle with other goals of punishment such as denunciation, deterrence, and rehabilitation, since these are the very sort of concerns which shape and define the social sentiments and values that society attaches to crime and punishment.

As such, proportionality is an enterprise which seeks to come closer and closer to encapsulating and reflecting all of these myriad concerns - concerns over what society opines about crime and punishment and the values they attach to them, concerns about achieving the other goals of punishment, and concerns over limiting judicial discretion so as to reflect the prevailing societal sentiments towards criminal justice. In the application of the proportionality principle, therefore, judges strive towards coming ever closer to the goal of satisfying all of these concerns, so that crime and punishment, although of disparate natures that cannot meaningfully be compared against each other, may be placed on a scale from which they *can* be measured against each other. It is on this scale of proportionality, formulated through the social values and moral assumptions attached to criminal justice, that the meaningful and useful concept of proportionality as an ideal can be found.

V. Conclusion

Proportionality in criminal justice is derived not from merely considering crime and punishment on their own, but through taking into account the social sentiments towards

them, as well as the values attached to crimes and punishments. The application of the proportionality principle, then, is not an objective measurement to be made of criminal offences and sanctions, but is a comparison of the moral assumption that society harbours towards them. Therefore, proportionality can be reached by first scaling crimes and punishments according to these social values, and then by anchoring these two scales against each other, from which calibrations and meaningful comparisons can then be made, and a practical application of proportionality may then be derived. As such, proportionality is never truly *attained*, since it is not an objective truth to be discovered from the observation of criminal offences and punishments, but is an enterprise of striving towards the goal of representing the wide-ranging and evolving values of society.

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