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ORIGINAL PAPER

Putting Proportional Punishment into Perspective

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Abstract
Much has been written about how we should understand proportional punishment. A standardised sentence may, in the presence of pre-existing disadvantage, produce morally significant additional harms. Others argue that modifying a standard punishment to avoid such harm is to show leniency in light of social disadvantage. I disagree: Where the standardised sentence can be amended to minimise unnecessary additional harms at a reasonable cost, while preserving a proportionate amount of punishment, the state has a duty to make the amendment. I articulate a partial reconstruction of proportionality calculations to put proportionality into perspective. Rather than disproportionate leniency, such variation is demanded by principles of political equality and by proportionality itself, if we take seriously the principle of punishing like cases alike.

Keywords Proportionate punishment · Penal equivalence · Structural injustice · Social disadvantage

1 Introduction

There are duties of political equality for the state to minimise unnecessary foreseeable harms to individuals, even in criminal punishment. I argue that the inexact nature of judgements of proportionality in sentencing—proportionality as an art, not a science—is a strength that may allow sentencers to fulfil this duty in practice by amending already approximate standardised sentences to a roughly equivalent penal alternative, where available at reasonable cost. Moreover, proportionality also requires such amendments in principle, since proportional upper limits to punishment cannot include, and suggest against, collateral consequences. In at least some cases, there are overlapping duties to choose an amended sentence that minimises collateral harm.

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Punishment does not happen in a vacuum. Sometimes, when a standardised sentence and the individual circumstances of the person punished intersect, there is a high-risk of easily foreseeable, easily reducible, and clearly unintended high-harm collateral consequence from intersection (CCi). To illustrate this core motivating concern, throughout what follows I draw on an anecdotal example from my experience working as a resettlement adviser for people leaving prisons. If two individuals playing equal roles in the same crime in England & Wales each receive six-month prison sentences, and one is housing benefit dependent while the other is not, *only* the former is in danger of losing their home in ways wholly foreseeable at sentencing and external to punishment.

Collateral consequences are particularly pertinent in circumstances of structural injustices: a subset of social injustices for which the state—and primarily the state—may hold some causal responsibility, and for which the state is also uniquely placed and empowered to address. Structural injustices are salient in criminal justice given the well-documented problems of racial and other forms of bias in many systems of criminal punishment. Proportionate penal disadvantages may be justified. CCi cannot be justified, especially when easily reducible at low cost.

The state ought not to make the bad situations of already-vulnerable individuals worse by compounding existing disadvantages with CCi as a byproduct of standardised sentencing. So, where the state is the punishing agent, if it is possible, at reasonable cost, to reduce the risk[1] of CCi through amending a standardised sentence to a roughly equivalent penal alternative with an approximately proportional overall amount of punishment, then the state has a duty to choose the sentence that minimises CCi.

Amended sentences might be conceptualised as responding to diminished culpability or responsibility, or using disadvantage as mitigation to provide a lesser or more lenient punishment. I show that this response to context is best conceptualised as following from what the state owes individuals, and from what proportionality ultimately requires, when we consider proportional punishment in context. The paper motivates an important new research agenda on alternatives to incarceration and has implications beyond collateral consequences with structural causes.

I begin by outlining the issue of punishing in the context of disadvantage and the reasons rooted in political equality for amending standardised sentences in contexts of injustice, developing my example and introducing my focus concern of structural injustice. Next, I turn to the linked concepts of proportionality and penal equivalence and discuss the need for complex qualitative measurements of overall penal amount, showing both proportionality and penal equivalence to be approximate arts with elastic strength. The approximation inherent in both can allow us in some cases to flex punishments to fit both the crime and the person punished, while still providing the proportionally required approximate overall amount of punishment with a sentence amended from the standard punishment. Proportional punishment does not demand CCi, but on the contrary already intends to describe a maximum amount of punishment. So, it is not only proportionally permissible to use an

[1] I discuss the *risks* of these harmful effects of CCi and their moral salience elsewhere (article in progress).

amended sentence, it is a requirement of proportionality that we do so. I offer practical sketches of how proportionality operates to illustrate the problem with present practice in England and Wales, the jurisdiction with which I am most familiar, and how this could be reframed to reflect a conception of proportionality that guards against CCi, as well as a brief policy sketch of penal practices that allow more flexibility in sentencing to provide proportionate punishment that minimises CCi.

2 Punishment in the Context of Disadvantages

The state claims the justified right to punish crime, in the name of protecting citizens through upholding the law; yet the state may contribute to the social causes of crime through social policies that permit, perpetuate, or at worst promote prejudice and inequality. Poverty has since Aristotle been acknowledged as a social cause of crime.[2] The state has clear responsibility for policy consequences, intended or unintended, and the requirement of 'sovereign virtue', to treat the citizen with equal concern and respect.[3] Already-disadvantaged individuals are more likely to be punished, especially by imprisonment[4]; and are both more exposed to the 'pull' factors of the social causes of crime, and more vulnerable to being drawn into offending behaviours.[5] These circumstances of injustice are part of the context in which sentences are served, and are important for choosing a proportionate sentence that where possible minimises CCi.

How should socially disadvantaged individuals be punished for crimes? Some, such as Norval Morris[6] and Richard Lippke,[7] have argued that the effects of persistent disadvantage and chronic poverty undermine choice conditions, thus reducing the capacity of people who offend to be held to account. Others, such as R A

[2] Jeffrey Reiman and Paul Leighton, *The Rich Get Richer and the Poor Get Prison: Thinking Critically About Class and Criminal Justice* 13th edition (Abingdon, Oxon; New York, NY: Routledge, 2023); Aristotle, *The Politics* (Cambridge: Cambridge University Press, 1988), bk. II part VI; Erin I. Kelly, 'Law Enforcement in an Unjust Society' in *The Limits of Blame* (Cambridge, Mass: Harvard University Press, 2018): 149–77; Victor Tadros, 'Poverty and Criminal Responsibility', *The Journal of Value Inquiry* 43, 3 (2009): 391–413.

[3] Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, Mass.: Harvard University Press, 2001).

[4] Pat Carlen, 'Against Rehabilitation; for Reparative Justice' in K. Carrington (ed.) *Crime, Justice and Social Democracy: International Perspectives* (Basingstoke: Palgrave Macmillan, 2013): 89–104, at p. 91.

[5] Derek B. Cornish and Ronald V. Clarke, *The Reasoning Criminal: Rational Choice Perspectives on Offending* (Piscataway, New Jersey: Transaction Publishers, 2014); Gregg D. Caruso, *Rejecting Retributivism: Free Will, Punishment, and Criminal Justice* 1st edition (Cambridge: Cambridge University Press, 2021). While Caruso's justification of punishment turns on crime prevention, he nevertheless identifies the criminogenic effects of poverty, social exclusion, and other factors that overlap with public health concerns in his justification of punishment.

[6] Norval Morris, 'Psychiatry and the Dangerous Criminal', *Southern California Law Review* 41, 3 (1967): 516–49.

[7] Richard L. Lippke, 'Diminished Opportunities, Diminished Capacities: Social Deprivation and Punishment', *Social Theory and Practice* 29, 3 (2003): 459–85.

Duff[8] and Tommie Shelby,[9] that these conditions undermine the moral standing of the state to call such individuals to account for their wrongs, thus undermining penal legitimacy. Victor Tadros argues from complicity that the state ought to stand as co-defendant rather than sit in judgement in these circumstances.[10]

Still others, such as Jules Holroyd, argue—and I agree—that while social injustices might diminish blameworthiness, they do not diminish responsibility.[11] Benjamin Ewing[12] has similarly argued that while lack of fair opportunity to avoid crime might constitute grounds for mitigation in sentencing, there is an aspect of blameworthiness that follows from causal responsibility for crime. Andrei Poama[13] argues that worries about whether punishing socially deprived offenders can be justified, or whether mercy might be more appropriate,[14] stem from overlooking the broader collateral consequences of punishment. It is a familiar proposal that we should consider crime in context. I make a parallel argument: we should consider punishment in context, since the state bears responsibility for unintended effects and has further duties not to impose unnecessary harms on individuals where avoidable at low cost.

2.1 Political Equality Reasons to Amend Standardised Sentences in Cases of CCi

While standardised sentences are an essential starting point for proportionate punishment, states have general duties rooted in political equality not to harm or unfairly disadvantage citizens. This suggests three reasons for states to take unjust social circumstance seriously in criminal justice policy. First, following a general duty to reduce crime for the benefit of all citizens, the state should work to reduce disadvantages and their criminogenic effects. Living in a more-just society is intrinsically desirable; diminishing the social causes of crime is an added instrumental benefit. Second, following a duty to protect vulnerable citizens in particular, the state should strive to minimise and mitigate existing injustices, protecting disadvantaged citizens from the effects of disadvantage and insulating those most vulnerable to the social causes of crime from those very causes. This is most pressing when those social causes are structural injustices the state has failed to address. Third, there are

[8] R. A. Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001), p. 196; R. A. Duff, 'Blame, Moral Standing and the Legitimacy of the Criminal Trial', *Ratio* 23, 2 (2010): 123–40.

[9] Tommie Shelby, *Dark Ghettos: Injustice, Dissent, and Reform* (Cambridge, Mass.: The Belknap Press of Harvard University Press, 2016).

[10] Victor Tadros, 'Poverty and Criminal Responsibility', *Journal of Value Inquiry* 43, 3 (2009): 391–413.

[11] Jules Holroyd, 'Punishment and Justice', *Social Theory and Practice* 36, 1 (2010): 78–111, at p. 79.

[12] Benjamin Ewing, 'Criminal Responsibility and Fair Moral Opportunity', *Criminal Law and Philosophy* 17, 2 (2023): 291–316, at p. 292.

[13] Andrei Poama, 'Social Injustice, Disadvantaged Offenders, and the State's Authority to Punish', *Journal of Political Philosophy* 29, 1 (2021): 73–93, at p. 92.

[14] John Tasioulas, 'Where is the Love? The Topography of Mercy' in R. Cruft, M. H. Kramer, and M. R. Reiff (eds.) *Crime, Punishment, and Responsibility: The Jurisprudence of Antony Duff* (Oxford, UK; Evanston, Ill.: Oxford University Press, 2011): 37–53; Göran Duus-Otterström, 'Why Retributivists Should Endorse Leniency in Punishment', *Law and Philosophy* 32, 4 (2013): 459–83.

limits to how states may treat individuals, even in punishment. So, following duties towards vulnerable citizens who are punished, the state ought not to cause significant unnecessary harms as collateral consequences of punishment, when avoidable at low cost. Where standardised sentences are likely to aggravate existing injustices, with potential criminogenic effect,[15] criminal punishment should avoid CCi that perpetuate or promote disadvantage.

The state owes a pro tanto duty of compensation[16] for failure in the first two duties. I suggest this compensatory duty is best discharged through redoubling efforts not to fail in the third duty. This compensatory duty gives the state a further reason to amend sentences in the case where this is necessary to avoid a clear CCi *and* a suitable alternative is available at reasonable cost. Ignoring CCi fails to treat punished individuals with equal concern and respect. Recognising and responding to these circumstances is needed to preserve conditions of political equality.

We cannot right all social wrongs through amendments to sentencing: criminal justice is only one arm of the state, with access to only some of the levers of power. Moreover, the injustices should have been addressed earlier, at source, through other policies: healthcare, social services, welfare. But we are where we are, and what the criminal justice system *can* do, here and now in the face of CCi, is to avoid compounding existing difficulties through standardised sentencing. To illustrate this issue, I return to my example:

If two individuals playing equal roles in the same crime in England & Wales each receive six-month prison sentences, and one is housing benefit dependent while the other is not, *only* the former is in danger of losing their home. Housing benefit rules allow claimants, including sentenced prisoners, to leave their home for up to 13 weeks. Individuals who cannot expect to return within 13 weeks immediately lose eligibility.[17] Because most short-sentenced prisoners are released at the halfway point, in practice anyone sentenced to six months or more loses benefit eligibility at sentencing. Since benefit-dependent individuals are unlikely to have private means of paying full rent, and since landlords may terminate contracts for non-payment and clear the property for reletting, some short-sentence prisoners are evicted while incarcerated and unable to make provisions for their belongings. Hence, they are released homeless and destitute. No sentencing court intends these consequences: rendering an individual homeless and destitute may breach basic rights to shelter and private property; and we know stable lives and homes support non-recidivism. Moreover, this collateral consequence follows from the structure of benefit rules, not from policy principles.[18]

[15] See also Poama op. cit. on this argument.

[16] I am indebted to an anonymous reviewer for assistance in refining this articulation.

[17] For people in hospital, trialling residential care, remand prisoners, and unsentenced convicted prisoners, the period is 52 weeks.

[18] Hoskins identifies collateral legal consequences as those following by operation of law in response to a criminal record for, example, the different treatment of people with convictions under immigration policy. Zachary Hoskins, *Beyond Punishment?: A Normative Account of the Collateral Legal Consequences of Conviction* (Oxford; New York: Oxford University Press, 2019). My example is distinct, because the policy is not intended to respond differently to criminal records, it merely specifies a length of time a

The reason for amending standardised sentences is neither to individualise punishment, nor worse to punish individuals by their own lights. I do not suggest that we can standardise the effects of punishments, so that all individuals punished for similar crimes experience identical penal outcomes with identical effects. Rather, the purpose is only to identify clear risks of CCi, and then only to amend sentences in order to avoid making the bad situations of those who are already vulnerable worse. Some small differences in penal outcome will be acceptable, but significant additional harms should be minimised. Douglas Husak suggests something similar when he argues that day fines, set relative to an individual's capacity to pay, depart from objectivity but provide the overall amount of punishment objectively required by reference to the particular context and welfare of the punished individual.[19]

2.2 CCi and Structural Injustice

Structural injustice provides one clear example of why context matters. Structural injustices are those rooted in social arrangements, institutions, or practices, with asymmetrical, near-inescapable, profound, and pervasive impacts; particularly affecting members of disadvantaged groups.[20] They are easiest understood through examples of historic wrongs against an oppressed group, such as the disenfranchisement of anyone outside of the set of land-owning men, or state-endorsed enslavement practices. However, structural causes—and structural capacity to correct and redress wrongs—need not be historic. A terminated practice (enslavement is no longer state-endorsed) may still produce unjust effects with a structural origin (entrenched disadvantage and policies that ignore the unfair effects of living in a prejudiced society).

Iris Marion Young's pathbreaking work on structural injustice was motivated by finding fixes, not fault-finding or apportioning blame. Young considers who has power—here and now, however small—to press for change, and how those with small influences can be motivated to work together to effect change. Her example is the small individually held—but collectively significant—power of end-consumers to challenge exploitative practices in the global garment industry.[21] Young draws on Arendtian political responsibility: a collective responsibility to organise to transform oppressive social conditions. Regardless of how blameworthy an end-consumer is, if at all, for co-creating market pressures driving poor employment conditions,

Footnote 18 (continued)

person may be away from home before losing eligibility. Sentenced prisoners are treated identically to other claimants.

[19] Douglas Husak, 'The Metric of Punishment Severity: A Puzzle about the Principle of Proportionality' in M. Tonry (ed.) *Of One-eyed and Toothless Miscreants* (New York: Oxford University Press, 2019), p. 111.

[20] Madison Powers and Ruth Faden, *Structural Injustice: Power, Advantage, and Human Rights Structural Injustice* (Oxford: Oxford University Press, 2019), chap. 4.

[21] Iris Marion Young, *Responsibility for Justice* (Oxford: Oxford University Press, 2011); Iris Marion Young, 'Responsibility and Global Labor Justice', *Journal of Political Philosophy* 12, 4 (2004): 365–88.

crucially, those individuals hold *some* power—and therefore collective responsibility—for challenging these wrongs.

The state has some general responsibility to address structural injustices, since following Young's Arendtian argument, the state has both the power and the access to policy levers needed to drive institutional and social changes. Consider how criminalisation drove seat belt use, taxing plastic bags encouraged reusable bags, and automatically opting employees into pension schemes nudged more people into saving for retirement. The state—via the criminal justice system—has some responsibility to address CCi, because it *can*.

What should the criminal justice system do when encountering structural injustice? As Duff observes, 'we cannot just throw up our hands'[22] and despair of the social reality. This lets down victims, communities, and people who are punished. If past 'systematic persistent exclusion' of the individual undermines the authority of the state to hold the individual accountable now; then practical acknowledgement of the existence and effects of these wrongs—*by avoiding compounding them through standardised sentencing*—will go further towards restoring the state's standing to punish than merely noting serious injustices in the 'regretful or apologetic tones of the sentencer'.[23] The best way for the state to discharge its Young-Arendtian responsibility is to avoid making the already bad situations of the already disadvantaged worse than they need to be.

2.3 CCi and Proportionality

Collateral consequences are expressly not part of punishment, although they may still undermine the appearance of proportionality, and subsequently the overall fairness of the treatment of individuals by the state. Collateral consequences matter for proportionality, partly because the state bears responsibility for the not-relevantly-intended effects of its actions; and partly because it may make little difference to the person sentenced which aspects *are* relevantly intended, given their overall holistic penal experience. A person who is fined and *also* ordered to pay non-punitive administrative costs (or a victim surcharge, or non-punitive reparations) faces the same total bill, no matter which parts we identify as punishment or explain away as attendant costs. Restorative justice measures may equally be found intrusive, demanding, and 'punishing', even where this is explicitly not the intent.[24] Responsibility for collateral consequences matters when the state bears some responsibility for background conditions of injustice or unintended criminogenic policy consequences, especially where—in cases such as my example—the collateral consequence (homelessness and destitution) arguably dwarfs the penal impact (6 months' incarceration).

[22] Duff, *Punishment, Communication, and Community* op. cit., p. 197.

[23] Duff, *Punishment, Communication, and Community* op. cit., p. 200.

[24] Kathleen Daly, 'Restorative Justice: The Real Story', *Punishment & Society* 4, 1 (2002): 55–79, at p. 60.

Other types of foreseeable, easily reducible at low cost, collateral consequences may also be considered. For example, severely claustrophobic[25] people should not be held in excessively small cells where this will very likely produce significant psychological harm. Yet, amending the size of a prison cell to minimise claustrophobia, while still being a *cell*, probably does not raise the same concerns of disproportionality that suspending one prison sentence but not the other in our example may do—although I hope to show that this concern is equally misplaced. I am not the first to suggest amending standardised sentences in response to significant social disadvantages, to avoid punishing disadvantaged individuals too severely.[26] However, we do not need to retreat to moral relativism to achieve punishment in context. Proportionality principles already expect both that we will standardise punishment as far as we can, *and* that we will treat each case as unique. Moreover, proportionality principles expects us to treat punished individuals fairly, and fairness further demands that CCi are minimised.

3 Proportionality

Proportionality is a constellation of principles that pull in slightly different directions. To punish fairly is to punish like cases alike, and different cases differently. People who have committed offences of a similar type deserve similar types of punishment. People who have committed less serious offences deserve less punishment than people who commit more serious crimes. Similarity of 'offence-severity' is measured in the amount of wrong done (harm caused or intended with the culpability of the person responsible), and similarity of 'penal severity' or the overall amount of punishment is measured in the amount of harsh treatment anticipated (people with perverse preferences notwithstanding).[27] Each principle presupposes a ranked list of least to most severe—for offence types and for penal options.

Duus-Otterström notes that these cardinally ranked lists may offer relative cardinal proportionality (internally consistent penal scales); or absolute cardinal proportionality (internally consistent *and* objectively correct scales).[28] He notes relative and absolute cardinal proportionality produce opposing practical priorities. Disagreement between relative and absolute cardinal proportionality occurs when the overall system of punishment is consistent, but either too harsh or too lenient. Absolute proportionality explains why over-punishment and under-punishment are

[25] Adam J. Kolber, 'The Subjective Experience of Punishment', *Columbia Law Review* 109 (2009): 182; cf Jonathan A. Watson, 'Punishment, Suffering, and Hedonic Adaptation', *SSRN Electronic Journal*, 2008.

[26] Holroyd op. cit., p. 107; Ewing op. cit.; Richard L. Lippke, 'Social Deprivation as Tempting Fate', *Criminal Law and Philosophy* 5, 3 (2011): 277–91; Lippke, 'Diminished Opportunities, Diminished Capacities' op. cit.; Erin I. Kelly, *The Limits of Blame: Rethinking Punishment and Responsibility* (Cambridge, Mass: Harvard University Press, 2018), chap. 5.

[27] Bill Wringe, 'Must Punishment Be Intended to Cause Suffering?', *Ethical Theory and Moral Practice* 16, 4 (2013): 863–77, at p. 867.

[28] Göran Duus-Otterström, 'Weighing Relative and Absolute Proportionality in Punishment' in M. Tonry (ed.) *Of One-eyed and Toothless Miscreants* (New York: Oxford University Press, 2019), pp. 32–3.

both problematic, whereas relative proportionality suggests we should 'err' on the side of 'leniency'.[29]

Compiling these lists is not without difficulty. Andrew Ashworth notes there is no 'easy formula', yet we can distinguish offences against persons and property, immediate and distant harms, and more or less culpable wrongs. Nevertheless, accidentally burning down someone's home is a more serious offence than a purposeful slap on the wrist.[30] Similarly, we think long prison terms are worse than shorter sentences, that prison is worse than community punishment, and that fines are lighter still—yet the difference between light community punishments and large fines, and demanding community punishments and short prison sentences is less clear.

Walker employs the metaphor of wobbly ladders to illustrate the difficulties of deploying proportionality. Even if we know how to draw up each ladder-like list—and further, how to position them relative to each other—simply tracking across from an offence 'rung' does not necessarily find an immediately obvious punishment 'rung': we may find ourselves between two unevenly spaced punishments. Further, reflecting the complexity of producing and using ranked lists, Walker describes the ladder rungs as 'loose', rattling up and down, switching places.[31] These lists offer an abstract framework, an initial set of relationships between different offences, which we can use when we begin to articulate the relationships between unique cases. Identifying which cases are relevantly alike necessitates an understanding of the relationship between them. The same goes for punishments.

3.1 Measuring Punishment

Because we presuppose Walker's lists, we already assume some types of punishment are more similar to each other than other types of punishment. Two neighbouring penal options (for example, prison sentences of seven or eight months) will be more alike than options at different ends of the penal scale (life imprisonment and a small fine). Correctly compiling these lists might not be possible; employing them fraught with difficulty. Nevertheless, we employ the principles of proportionality as a cornerstone of fairness in sentencing. Just as these principles provide a starting point for thinking about the level of fit between a punishment and an offence, these principles also provide a jumping-off point for thinking about penal equivalence, and the relationships between different types of punishments. But before we can discuss penal equivalence, we must make some observations about the severity of punishments, and how—and how far—this can be measured.

3.1.1.Qualitative Assessment of Punishment.

[29] Duus-Otterström, 'Why Retributivists Should Endorse Leniency in Punishment' op. cit.

[30] *Human Rights, Serious Crime and Criminal Procedure* (London: Sweet & Maxwell, 2002), p. 111.

[31] Nigel Walker, *Why Punish?* (Oxford: Oxford University Press, 1991), p. 102. We cannot expect either offences, or punishments, to be equally spaced on these separate scales.

Punishment severity is hard to measure because 'severity' is a complex composite of multiple factors.[32] Criminologists describe depth, weight, and tightness[33] when trying to capture the 'pains of imprisonment'.[34] I offer a theoretical sketch of some of the variables we might use to think holistically about the severity or overall 'amount' of punishment, including but perhaps not limited to:

- penal magnitude—bigger or smaller sentences (length of prison terms or community punishment requirements, higher or lower fines).
- penal mode—the type of order used (fines, community punishments, imprisonment).
- penal manner—differences in sentence delivery, including tangible material and intangible interpersonal and moral dimensions.

Penal manner plays a role in the qualitative nature of proportionality emphasised by Berger. It makes a difference to sentence severity whether prisons are crumbling outdated buildings, or comfortable modern facilities. Whether there are spaces suitable for education, physical and mental health support, and rehabilitation, or overcrowded and under-resourced services. Similarly, community corrections officers need adequate time, resources, and referral placements. Overstretched services do not facilitate effective sentence delivery. The intangible conditions of sentence delivery include the moral quality of the interactions between state agents and people in punishment; whether people are treated in a civil manner by state agents, or with disinterest or worse derision. Respectful interactions—whether or not processes and rules have been explained (and re-explained) patiently, whether or not a person has an opportunity to explain their position and is able to feel heard when decisions are made for or about them, rather than being ignored and left to muddle through alone—may even go some way to make up for some material deficiencies.

The interpersonal treatment element often goes unnoticed. The quality of staff relations with the people who live in prisons are found to be extremely important for the building of trust, for the flow of information, and consequently for maintaining order.[35] Moreover, compliance with decisions that are not in our favour is found to be more likely when we feel we have been given a fair hearing.[36] This dignified respectful treatment is part of recognising community members in punishment as

[32] Ewing op. cit. makes similar observations about guilt and desert.

[33] Ben Crewe, 'Depth, Weight, Tightness: Revisiting the Pains of Imprisonment', *Punishment & Society* 13, 5 (2011): 509–29.

[34] Gresham M. Sykes, *The Society of Captives: A Study of a Maximum Security Prison* (Princeton, N.J.: Princeton University Press, 2007).

[35] Alison Liebling, 'Penal Legitimacy, Well-Being, and Trust: The Role of Empirical Research in "Morally Serious" Work' in A. Liebling et al. (eds.) *Crime, Justice, and Social Order: Essays in Honour of AE Bottoms* 1st edition (Oxford: Oxford University Press, 2022): 273-C12.N25, at p. 299.

[36] Alison Liebling and Helen Arnold, *Prisons and Their Moral Performance: A Study of Values, Quality, and Prison Life* (Oxford: Oxford University Press, 2004); Pamela Ugwudike, 'Compliance with Community Penalties: The Importance of Interactional Dynamics' in *Offender Supervision* (Cullompton: Willan, 2010); Anthony Bottoms and Justice Tankebe, 'Criminology: Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice', *J. Crim. L. & Criminology* 102 (2012): 119–253.

fellow members of our community. Of course, tangible and intangible aspects of penal manner are related. It is much easier to be a patient and polite public servant in the context of adequate staffing, training, and resources.

3.1.2.The Search for Units of Punishment.

Michael Tonry,[37] and many others, has grappled with the interchangeability of punishments[38] and written on these challenges even within one jurisdiction, let alone between them. He notes that an appropriate 'unit of punishment'—allowing us to move seamlessly between penal *modes* while providing the same overall *amount* of punishment—remains empirically elusive. After decades spent searching for 'systems of equating periods or amounts of community punishment to periods of imprisonment', measurable in 'punishment units', he laments 'none of us succeeded' and 'we gave up'.[39] Nevertheless, Tonry emphasises the importance of rough equivalence. Seeking to make matters easily and reliably replicable for court practitioners is a laudable goal. Yet the extensive labours of Tonry and others show penal equivalence cannot be expected to provide easily convertible identical penal amounts via alternative sentences. While rough equivalence may be all we may expect to hope for, it may also be all we need.

Just because penal equivalence is not readily quantifiable for clear and easy comparison, it does not mean that the principle is useless, unimportant, or irrelevant—particularly when it may help us to avoid CCi. Culpably causing criminal harm may be blameworthy, but so is inaction to minimise CCi harm because we fear failure. We have not abandoned proportionality principles just because the process is beset with difficulties. Identifying the perfect penal option may not always be possible,[40] yet we generally think it is wrong to punish the innocent, and worse that an innocent person is accidentally punished than a guilty person mistakenly goes unpunished. By the same logic, we think over- and under-punishment are both problematic, but prioritise avoiding over-punishment. The state should still try to punish mass murderers more than serial shop-lifters, which proportionality helps us to provide.

[37] Michael Tonry, 'Proportionality, Parsimony, and the Interchangability of Punishments' in R. A. Duff and D. Garland (eds.) *A Reader On Punishment* 1st edition (Oxford; New York: Oxford University Press, U.S.A., 1990): 133–60.

[38] Andrew von Hirsch, Martin Wasik, and Judith Greene, 'Punishments in the Community and the Principles of Desert', *Rutgers Law Journal* 20, 3 (1988): 595–618; Norval Morris and Michael Tonry, *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System* Reprint edition (New York: Oxford University Press, 1991); Paul H. Robinson, 'Hybrid Principles for the Distribution of Criminal Sanctions', *Northwestern University Law Review* 82, 1 (1987): 19–42; Paul H. Robinson, 'Democratizing Criminal Law: Feasibility, Utility, and the Challenge of Social Change Democratizing Criminal Justice Symposium: Empirical Foundations: Shared Norms, Lay Intuitions, Legitimacy, and Compliance', *Northwestern University Law Review* 111, 6 (2017): 1565–96.

[39] Michael Tonry, 'Is Proportionality in Punishment Possible, and Achievable?' in *Of One-eyed and Toothless Miscreants* (New York: Oxford University Press, 2019), p. 18.

[40] Duus-Otterström, 'Why Retributivists Should Endorse Leniency in Punishment' op. cit.

3.2 Penal Equivalence and Proportionality as Approximate Arts

Our limited ability to measure punishment has implications for proportionality. As Andreas von Hirsch argues, proportional punishment is an 'art', not a science; a 'matter of degree' at which we can never completely succeed.[41] With von Hirsch, it is a mistake to understand proportionality calculations as a tool capable of quantitative, scientific precision.

I do not challenge the idea of a connection between acts committed and punishments ordered,[42] but I do suggest we need to rethink this connection and its implications. Berger hopes sentencers may become more curious and imaginative about the qualitative possibilities of sentence delivery,[43] rather than assuming that what happens after sentence is not their business. It is the business of the state to avoid aggravating existing injustices where roughly equivalent penal alternatives are available.

The imprecision inherent in applications of proportionality, and the roughness of penal equivalence, both as approximate arts is, I shall argue, an elastic strength, not a weakness. This elastic strength enables us to 'err' towards 'leniency' (in Duus-Otterström's terms)—by amending a standardised sentence within the amount of punishment proportionally deserved. Yet we do not 'err' when we reshape a standardised sentence to provide an approximately proportionate amount of punishment, qualitatively understood, through a roughly equivalent penal alternative, in order to minimise CCi. On the contrary, compounding disadvantage with a standardised sentence is the moral error. Instead, we can flex the punishment to fit both the crime and the circumstances of punishment, in cases where there is an alternative penal option providing roughly equivalent overall amounts of punishment to that expected by the standardised proportionate sentence, available at reasonable cost, in order to minimise CCi.

Proportionality does not demand CCi, and the ideals of fairness in punishment behind principles of proportionality suggest minimising harms that are not intended parts of the punishment. Moreover, insofar as proportionality offers us an upper bound of punishment, this tells against tolerating CCi when these can be minimised. Where such rough equivalence to the standardised approximately proportionate overall amount of punishment can be achieved, an amended sentence is not 'lenient' as such. Instead, amended sentences are equivalent to what is demanded by approximate proportionality, rather than 'lesser' punishments or 'leniency' in light of disadvantage. In such cases, worries about a disproportionately lenient response are not significant. This presumes some penal rough equivalence is possible in at least some cases, so I turn now to the evidence for this.

[41] Andrew von Hirsch, *Censure and Sanctions* (Oxford; New York: Clarendon Press, 1993), p. 104.

[42] Watson op. cit.

[43] Benjamin L. Berger, 'Proportionality and the Experience of Punishment' in D. Cole and J. Roberts (eds.) *Sentencing in Canada: Essays in Law, Policy, and Practice* (Toronto, ON: Irwin Law, 2020): 368–89, at p. 388.

3.3 The Evidence for Rough Equivalence

I have sketched an outline of a complex composite understanding of sentence severity and noted the relationships that proportionality calculations already presume between sentence options. Lippke similarly argues that changing the prison conditions in which a sentence is served, from 'mainstream' to harsher solitary confinement, logically requires reducing the length of the sentence in order to maintain proportionality,[44] reflecting changes in both tangible and intangible penal *manner.* This is not to say that we should endorse short sentences in poor conditions (reducing the quality of the penal manner). However, making small changes to the manner, mode, or magnitude of punishment might in some cases enable amended sentences that deliver an approximately proportionate overall amount of punishment through a roughly equivalent penal practice, while minimising collateral consequences.

There are empirical grounds for thinking that there is some penal interchangeability. British government social researchers expect some interchangeability between short prison sentences (under 12 months) and community punishment and note that some offenders in fact experience short prison sentences as less onerous than community punishment.[45] Meanwhile, contrary to philosophical and legal expectations, at least some people find community punishment requirements limit their liberty and privacy to similar extents to prison sentences.[46] These are the loose rungs on Walker's punishment ladder. In an effort to reduce prison populations, findings like these have driven policies designed to encourage sentencers to use community punishment in place of short prison sentences, or to suspend prison sentences more often, even if sentencers have been disinclined to use them.[47] Further steps can be taken to tailor the amount of punishment a sentence provides, especially where community punishment offers sentencers a range of options. In England and Wales, several types of requirements are available to sentencers using community punishments or suspended prison terms: curfew orders, electronic monitoring, supervision, unpaid work requirements, substance misuse treatment, or mental health support, as the sentencer finds appropriate.

Moreover, Julian Roberts reminds us that perceptions of both offence and penal severity differ between jurisdictions, and further change over time. Changing social attitudes produce changes in both what conduct we think deserves punishment, and *how much*. For example, domestic violence and drink driving were once more socially acceptable behaviours. Likewise, the expected overall amount of penal severity changes with our developing understanding of punishment, with

[44] Richard L. Lippke, 'Against Supermax', *Journal of Applied Philosophy* 21, 2 (2004): 109–24, at pp. 117–8.

[45] Julie Trebilcock, *No Winners: The Reality of Short Term Prison Sentences* (London: Howard League for Penal Reform / The Prison Governors' Association, 2011); Aidan Mews et al., 'The Impact of Short Custodial Sentences, Community Orders and Suspended Sentence Orders on Re-offending', Ministry of Justice Analytical Series, 43, London: Ministry of Justice UK: 43.

[46] Esther F. J. C. van Ginneken and David Hayes, '"Just" Punishment? Offenders' Views on the Meaning and Severity of Punishment', *Criminology and Criminal Justice* 17, 1, (2016): 1,748,895,816,654,204.

[47] Julian V. Roberts and Andrew Ashworth, 'The Evolution of Sentencing Policy and Practice in England and Wales, 2003–2015', *Crime and Justice* 45, 1 (2016): 307–58, at p. 321.

implications for the moral acceptability of the practice. Consider how better understanding of the pains of imprisonment[48] have led us to rethink for what crimes it is used and how it is justified. Further, once-unquestioned corporal punishment practices have largely disappeared from Western criminal justice.[49] If there is a currency of penal equivalence, then in light of the change over time Roberts highlights, we should expect a fluctuating exchange rate between penal modes.

In the case of punishment, the standard practice usually considered is the prison. Bill Wringe and I have written elsewhere on the blinkering effects for theorists of adopting a hyperfocus on prisons when considering legal punishment.[50] Just because a particular penal practice looms large in the public, political, and philosophical imagination does not mean that it is the only appropriate, or even most relevant, means of punishment.[51] Imprisonment—the paradigmatic oft-assumed standard approach to punishment—is not in fact the most common practice. Fines are the most common sentence in England and Wales.[52] In US jurisdictions, the most common sentence is probation.[53] So while punishment by imprisonment, and, similarly, standardised sentences, spring most easily to mind in practice, it does not follow that they are the only means of punishment that can deliver a proportional overall amount of punishment.

Proportionality is approximate, and penal equivalence is rough. But unless we have reasons to think the margins of error for proportionality and penal equivalence are likely to be very different—which the relationships between penal options entailed by our existing thought on proportionality do not suggest—it seems reasonable to select a roughly equivalent penal option that we reasonably expect to be within the range suggested by approximate proportionality. Once we stop expecting a perfect match—since this seems to be beyond what can be reasonably expected of a criminal justice system designed and operated by and for human beings—this permits enough flexibility to punish proportionally, while also allowing scope to

[48] Sykes op. cit.; Julie Laursen, Kristian Mjåland, and Ben Crewe, '"It's Like a Sentence Before the Sentence"–Exploring the Pains and Possibilities of Waiting for Imprisonment', *The British Journal of Criminology* 60, 2 (2020): 363–81; Brian K. Payne, David C. May, and Peter B. Wood, 'The "Pains" of Electronic Monitoring: A Slap on the Wrist or Just as Bad as Prison?', *Criminal Justice Studies* 27, 2 (2014): 133–48; Ioan Durnescu, 'Pains of Probation: Effective Practice and Human Rights', *International Journal of Offender Therapy and Comparative Criminology* 55, 4 (2011): 530–45; Crewe op. cit.; Wing Hong Chui, '"Pains of Imprisonment": Narratives of the Women Partners and Children of the Incarcerated', *Child & Family Social Work* 15, 2 (2010): 196–205.

[49] Julian V. Roberts, 'The Time of Punishment: Proportionality and the Sentencing of Historical Crimes' in M. Tonry (ed.) *Of One-eyed and Toothless Miscreants* (New York: Oxford University Press, 2019), pp. 159–60.

[50] Helen Brown Coverdale and Bill Wringe, 'Non-paradigmatic Punishments', *Philosophy Compass* 17, 5 (2022): e12824.

[51] Moreover, criminological research suggests that non-custodial forms of punishment are often cheaper than prisons, and more effective than short prison terms in reducing recidivism: Trebilcock op. cit.; Mews et al. op. cit. So, replacing a standardised sentence with an amended sentence may both minimise collateral consequences, and have other beneficial effects.

[52] Office for National Statistics, *Criminal Justice Statistics Quarterly, England and Wales, October 2019 to September 2020*, 18 February 2021, p. 1.

[53] Michelle S. Phelps, 'Mass Probation: Toward a More Robust Theory of State Variation in Punishment', *Punishment & Society* 19, 1 (2017): 53–73.

minimise at least some CCi harms. I turn now to think about how proportional process uses context already, before suggesting a slight reframing of our proportionality calculations to show how we might use the elastic strength of proportionality to flex a sentence, when we have reason to minimise CCi.

4 Proportionality Calculations in Practice

4.1 The Role of Context

How should we identify the severity of an offence, in order to find a proportionate punishment? Jesper Ryberg offers a simple example—car theft—to illustrate the significance of direct-victim impacts in context: do victims have alternative transport—does lack of transport consequently affect their employment?[54] James Manwaring highlights the significance of marginal third-party costs which differ with context, contrasting a bicycle theft in a city and a village: city-folk barely notice this commonplace crime; meanwhile, shocked villagers invest in cycle security.[55] Manwaring recommends standardising across third-party harm to inform a standardised punishment. However, note that standardisation requires knowledge of each particular context in order to standardise across them. Erin Kelly argues a person should be punished for their particular crime, and that their punishment should include their share of the effects of their crime type,[56] also noting the cumulative effects of crime on communities as a distinct part of the harm caused.[57] Julian Roberts argues for punishment for particular crimes, but notes that 'the context in which the conduct occurs should be considered when evaluating the offender's culpability',[58] in order to punish fairly, especially where significant time has elapsed.[59] All agree that context matters. But note that the only context considered for proportional punishment relates to the offence—circumstances for Roberts, victim impact for Ryberg, community harm for Kelly, and third-party costs for Manwaring—in order to understand the severity of the offence and the amount of punishment required. Offences are unique. So are the people who perpetrate them.

None of this allows space to check the standardised sentence for CCi in the case of people to be punished. Mitigating information, conveyed via pleas in mitigation, and in pre-sentence reports (PSRs), might provide a window into these circumstances. In England & Wales, PSRs are intended to 'assist' sentencers in 'determining the most suitable method of dealing with [the person convicted]'.[60] There is a

[54] Jesper Ryberg, 'Proportionality and the Seriousness of Crimes' in M. Tonry (ed.) *Of One-eyed and Toothless Miscreants* (New York: Oxford University Press, 2019), pp. 66–7.

[55] James Manwaring, 'Proportionality's Lower Bound', *Criminal Law and Philosophy* 15, 3 (2021): 393–405.

[56] Kelly, *The Limits of Blame* op. cit., p. 144.

[57] Kelly, *The Limits of Blame* op. cit., p. 139.

[58] Roberts op. cit., p. 171.

[59] Roberts op. cit., p. 167.

[60] Sentencing Act 2020 s31(1)(a).

long trend in England & Wales towards 'objective' reports focused on standardised risk of reoffending assessments, which provides less scope for contextualising personal information.[61] Reports are increasingly prepared in 30 min and delivered orally (in 2016, more reports were delivered orally than in writing).[62] Moreover, sufficient personal circumstance information to understand whether a prison sentence is essential is one thing, sufficient information to understand CCi is another. This top-down risk focus further erases context, which is worrying given what we know about the gendered and raced implications of punishment, for example the collateral consequences experienced by women prisoners because they are women,[63] the clear racial bias in criminal justice in both the USA[64] and England & Wales,[65] and the additional challenges faced by indigenous First Nations community members in Canada.[66] To minimise significant additional harms to those punished, we also need to consider the context in which punishments are applied. To show how this is possible, I walk through our present process.

4.2 Reframing Proportionality Calculations

To account for likely problems when the punishment and the circumstances of the person to be punished intersect, we must begin *and end* in the particular. Present thinking about context takes us only half-way. To illustrate this, I draw on the idea of a step-up and step-down transformation from a concrete-particularised level, up to generalised-abstracted ways of thinking about punishment. I have in mind something parallel to the step-up and step-down transformation used in the distribution of electrical energy: it is more efficient to distribute energy at high voltage, so step-up transformers are used to increase voltage in energy transferred to national power grids. Step-down transformers are used to convert higher voltages back down to safer lower voltages for consumer use. Likewise, it is easier to find a proportional amount of punishment at a generalised level, but the particularised level helps us find a safe way of ordering sentences that minimise CCi.

[61] Barbara Hudson, *Understanding Justice: An Introduction to Ideas, Perspectives and Controversies in Modern Penal Theory* (Buckingham: Open University Press, 1996), p. 156; Stewart Field, 'State, Citizen, and Character in French Criminal Process', *Journal of Law and Society* 33, 4 (2006): 522–46, at p. 537; Mike Nash, 'Probation, PSRs and Public Protection: Has a "Critical Point" Been Reached?', *Criminology and Criminal Justice* 11, 5 (2011): 471–86, at p. 479.

[62] Gwen Robinson, 'Stand-down and Deliver: Pre-Sentence Reports, Quality and the New Culture of Speed', *Probation Journal* 64, 4 (2017): 337–53, at p. 338.

[63] Kelly Hannah-Moffat, 'Gridlock or Mutability: Reconsidering "Gender" and Risk Assessment', *Criminology & Public Policy* 8, 1 (2009): 209–19; Loraine Gelsthorpe and Jackie Russell, 'Women and Penal Reform: Two Steps Forwards, Three Steps Backwards?', *The Political Quarterly* 89, 2 (2018): 227–36.

[64] Allegra M. McLeod, 'Prison Abolition and Grounded Justice', *UCLA Law Review* 5, 2015: 1156–239.

[65] David Lammy, *The Lammy Review: An Independent Review into the Treatment of, and Outcomes for, Black, Asian and Minority Ethnic Individuals in the Criminal Justice System* (London: [Ministry of Justice], 2017).

[66] Kelly Hannah-Moffat and Paula Maurutto, 'Re-contextualizing Pre-Sentence Reports: Risk and Race', *Punishment & Society* 12, 3 (2010): 262–86; Julian V. Roberts and Andrew A. Reid, 'Aboriginal Incarceration in Canada since 1978: Every Picture Tells the Same Story', *Canadian Journal of Criminology and Criminal Justice* 59, 3 (2017): 313–45.

First, we understand the particular offence to be punished in context, identifying its individual severity by drawing on information about the context of the offence, victim impact, third-party effects, community impact, etc. Next, using the severity of the particular offence as a guide, we 'step-up' from the particular to the abstract—climbing Walker's ladder to a rung that reflects the particular harm caused—transforming what we know about this particular offence to be compared in generalised terms. Now we can make the translation across, moving from the standardised 'amount of offence harm' list to the ranking of penal practices by 'amount of punishment' list, indicating the standardised sentence expected to provide the proportionally necessary amount of punishment. We step across to the nearest punishment rung on Walker's second ladder and read off a standardised sentence from the generalised list. This is the point at which present practice often stops, illustrated by Berger's observation that penal delivery is often a 'black box' to sentencers[67] who are not sufficiently concerned with the uniqueness of each person to be punished.

To find a sentence that provides a roughly equivalent amount of punishment *and* minimises CCi, we need a further stage: a step-down transformation back from the generalised to the particular to check for CCi in context. As Kelly notes, 'treating like cases alike requires some abstraction', but she also acknowledges that 'if we did not abstract, the cases would not be alike'[68]—recognising the work that has happened at the generalised level, and implicitly suggesting the need to step back down. Berger also emphasises that while punishment is traditionally measured quantitatively by amount, understanding proportionality must be a qualitative inquiry. While Berger proposes an 'individualised proportionality',[69] I suggest it may be more helpful to think about what proportionality demands substantively, for this person, in their context, in response to this unique crime. An amended sentence is an approximation, but so is a standardised sentence. If proportionality requires no more than a deserved amount of disadvantage in punishment, minimising CCi is what proportionality requires.

My aim here has been to articulate the steps in this process, and why the step down to minimise CCi is necessary *for proportionality*. A better understanding of each of Walker's wobbly ladders, then, may be as two abstract skeletons, to which context-informed flesh must be added in order to understand both offence-severity and sentence-severity in context. The standardised lists help us to translate across from offence to sentence, but we must first transform up from the concrete to the abstract before the translation can be done, and then transform back down from the generalised to the particular.

4.3 Proportional Practice Possibilities

Steps can be taken to tailor the amount of punishment a sentence provides when varying the mode, magnitude, and manner of sentence delivery to maintain a

[67] Berger op. cit., p. 388.

[68] Kelly, *The Limits of Blame* op. cit., p. 135.

[69] Berger op. cit., p. 388.

proportionate amount of punishment. In England and Wales, several types of requirements are available to sentencers making a community order or using suspended prison terms: curfew orders, electronic monitoring, supervision, unpaid work, substance misuse treatment, or mental health support. In our example case, if one sentence is suspended to avoid CCi hardship relevant in only that case, while the other remains standardised, we should not worry that this is disproportionate. In England and Wales, sentencers must first determine whether a custodial sentence is a necessary punishment, before considering whether there are other reasons for suspension. Moreover, suspended prison sentences are treated identically with non-suspended prison sentences under the *Rehabilitation of Offenders Act 1974*, which explains when a person must disclose a conviction. This suggests that suspended sentences are not intended to provide a 'lesser' overall amount of punishment. Decisions to suspend explicitly include likely severe impacts on the punished individual's dependents, although notably, not the individual themselves.

I suggest that extending this existing power to vary sentences, particularly with the ability to add further conditions, might help to find sentences that better fit both the offence and person to be punished. These might be extended by using other practices, such as periodic or intermittent detention (weekend jail) as used in the Netherlands and New Zealand.[70] Problem-solving courts[71] might be another source of inspiration, since these alternative jurisprudence practices seek to fit the sentence to the individual, supporting them towards compliance. However, these practices are not without difficulties[72] and critics.[73] Some jurisdictions allow for the accommodation of an individual's financial circumstances, although Montag and Sobek note this consideration applies only to fines.[74] In principle, amending sentences where possible to minimise CCi should not be considered disproportionate, given reasonably expected penal interchangeability.

[70] Hadassa Noorda, 'Imprisonment', *Criminal Law and Philosophy* (2023) 17: 691–709.

[71] Greg Berman and John Feinblatt, 'Problem-Solving Courts: A Brief Primer', *Law & Policy* 23 (2001): 125; Greg Berman and John Feinblatt, 'Beyond Process and Precedent: The Rise of Problem Solving Courts', *Judges' Journal* 41 (2002): 5; Greg Berman and Aubrey Fox, 'Future of Problem-Solving Justice: An International Perspective', *The University of Maryland Law Journal of Race, Religion, Gender and Class* 10 (2010): 1; Stacy Lee Burns, 'Future of Problem-Solving Courts: Inside the Courts and Beyond', *The University of Maryland Law Journal of Race, Religion, Gender and Class* 10 (2010): 73.

[72] Richard Boldt, 'A Circumspect Look at Problem-Solving Courts' in P. C. Higgins and M. B. Mackinem (eds.) *Problem-Solving Courts: Justice for the Twenty-First Century?* (Santa Barbara, Calif.: ABC-CLIO, 2009): 13–32; James L. Nolan, *Legal Accents, Legal Borrowing: The International Problem-Solving Court Movement* (Princeton: Princeton University Press, 2009).

[73] JoAnn L. Miller and Donald C. Johnson, *Problem Solving Courts: A Measure of Justice* (Lanham: Rowman & Littlefield Publishers, Inc., 2009); David DeMatteo et al., *Problem-Solving Courts and the Criminal Justice System Problem-Solving Courts and the Criminal Justice System* (Oxford: Oxford University Press, 2019); Timothy Casey, 'When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy', *SMU Law Review* 57 (2004): 1459.

[74] Josef Montag and Tomas Sobek, 'Should Paris Hilton Receive a Lighter Prison Sentence Because She's Rich: An Experimental Study', *Kentucky Law Journal* 103, 1 (2014): 95–126, at p. 98.

5 Objections: Uncertainty, Mandatory Minimums, Lack of Alternatives, and Other Disadvantages

I have assumed conditions of uncertainty about the availability of perfectly proportionate punishments and perfectly equivalent penal alternatives. But the arguments advanced here still apply even if proportionality were an exact science, with a clear currency of penal equivalence. It would simply be easier to make the amendments necessary to standardised sentences in the case of CCi.

I have offered an argument for using amended sentences only in cases where necessary to avoid CCi and where suitable penal alternatives that provide rough equivalence are available. This will not always be the case, especially in conditions of uncertainty. There may be a suitable penal alternative to minimise CCi, but there may be competing reasons not to apply the alternative because the standardised sentence represents a mandatory minimum: a means to amend, but a strong reason not to. Conversely, and outside of my intended scope, there may be reason to amend, but no means to do so: there is an evident CCi harm, but no suitable penal equivalent. Capital punishment is one case where we should not expect to find a suitable alternative.[75] I deal briefly with each case in turn, but my responses also apply to other forms of disadvantage, and CCi without a structural origin. After all, the Young-Arendtian logic of political responsibility leans towards the responsibility of those who can respond to injustice to do so *because they can*, rather than being led by responsibility for wrong.

While I argue that amended sentences are what proportionality requires, and what fair treatment of individuals by states under principles of political equality requires, what happens when a standardised sentence can and should be amended by these principles but a statutory minimum punishment indicates otherwise? I am in favour of upper limits on punishments, to avoid sentence inflation and to reduce the harms of crime, taken to include those of punishment. I concede that in some exceptional cases, where there is both a clear CCi, and a possible amendment that would preserve approximate proportionality through rough penal equivalence, mandatory minimum sentences ought logically to be amended too—although by my argument, amended sentences are not strictly 'lesser' overall amounts of punishment. Nevertheless, mandatory minimum sentences are cases where sentence discretion is more limited. If there is a departure from the standardised sentence, a clear written rationale from the sentencer might help make the justification explicit and provide scope for appeal if this is considered unfair. Yet, these are complex issues that I cannot give the attention they merit here. Instead, I offer the following brief observations.

If mandatory minimum sentences often give rise to CCi, perhaps this is grounds to rethink the mandatory minimum. Mandatory minimums that seem likely to cause CCi in common sets of personal circumstances—such as being a housing benefit claimant—should perhaps be avoided, and an alternative set as the standardised punishment in the first place. Such information may further help develop better-targeted crime-prevention interventions. I limited my argument here to cases where rough

[75] This should not be read as an endorsement of capital punishment.

equivalence would allow us to claim approximate proportionality is maintained, otherwise we fall into the second category: where there is no available alternative.

There are two further options to making even occasional amendments to mandatory minimum sentences, which may also provide a way of dealing with cases where there is no available penal equivalent. First, the court could recognise the collateral consequences and add further mitigating measures to alleviate the consequences (in our example, providing free storage of all personal belongings, and then significant help to find new accommodation—no easy task for a person recently released from prison given the general lack of housing in England and Wales). Second, the court could recognise the CCi and compensate the person punished accordingly. These measures could equally be applied to cases of CCi without structural origins, or in response to other forms of disadvantage. Yet, compensating 'criminals' is likely to be politically unpopular; and we must bear in mind that even supportively intended measures may come to be perceived as onerous and burdensome impositions, and may further be very costly.

Another possibility that applies to all of these cases—mandatory minimums, no available alternative, or other types of disadvantage—is radically rethinking our practices of punishment. The issues faced by the severely claustrophobic prisoner could also be addressed by changing prison architecture more broadly to offer light open natural spaces, that feel safe, where effective rehabilitative support can be provided by trained staff, instead of focusing on the provision of an austere environment, with poor access to natural light, and which evidence suggests fosters a culture of violence.[76] Although I lack space to discuss it here, there are good reasons to think that if prisons were safer environments, they would do a better job of reducing recidivism, ultimately reducing the cost to the taxpayer. More importantly, they would treat the people who live in prisons more inclusively as members of the communities, who claim to punish in the name of 'our' shared laws and values. Another approach might be not to use prisons at all. In my view and in my experience, I think there is every good reason to resist prisons as they are, but to remember that there will always be a *very* small number of people who may need to be held separately and securely from the rest of society. I have argued elsewhere[77] that we would do better to be honest about the nature of such places as prisons, so that we can devote extra attention to the rights and needs of the people who live in them, their families, and communities. Our track record as a society is of failing the people who live in prisons, who are one of us and part of our community. Ignoring our failures and the ripple-effect harms that follow for families and communities makes things worse. Small amendments to sentencing, applying approximately proportionate penal

[76] Dominique Moran et al., 'Does Prison Location Matter for Prisoner Wellbeing? The Effect of Surrounding Greenspace on Self-Harm and Violence in Prisons in England and Wales', *Wellbeing, Space and Society* 3 (2022): 100,065; Alberto Urrutia-Moldes, *Health and Well-Being in Prison Design: A Theory of Prison Systems and a Framework for Evolution* (New York: Routledge, 2022); Jonas Rehn-Graoenendijk et al., 'A Process to Foster Pathology-related Effects of Design Primes – How Orthopedic Patients might Benefit from Design Features that Influence Health Behaviour Intention', *Frontiers in Psychology* 14 (2023).

[77] Helen Brown Coverdale, 'Caring and the Prison in Philosophy, Policy and Practice: Under Lock and Key', *Journal of Applied Philosophy* 38, 3 (2021): 415–30, at p. 425.

equivalents to minimise CCi, when we can do so at reasonable cost, is one small way in which we can acknowledge harms attendant on punishment—and minimise them where we can, by doing what we can.

6 Conclusion

High-risk, high-harm, easily foreseeable, easily reducible, and clearly unintended external collateral consequences of standardised sentences should be minimised. Whatever else the state does when it punishes, political equality requires that the state should avoid CCi that compound existing injustices. We do not 'err' when we reshape a standardised sentence to provide an approximately proportionate amount of punishment, because neither political equality nor proportionate punishment require collateral consequences. If anything, both principles argue against CCi. The elastic strength of proportionality and penal equivalence can sometimes allow us to flex the punishment to fit the crime, while also minimising CCi in line with both principles. Amended sentences are roughly equivalent to what is demanded by proportionality as an approximation. So, where it is possible, at reasonable cost, to reduce the risk of CCi, through amending a standardised sentence to a roughly equivalent penal alternative, that provides an approximately proportional overall amount of punishment, then the state has a duty to choose a sentence that minimises collateral harm. Amended sentences are not lenient, they are what proportionality in perspective demands.

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