PRISONS, PROPORTIONALITY AND RECENT PENAL HISTORY

Andrew Ashworth *

It is well known that the prison population of England and Wales increased steeply between 1993 and 2012. Indeed, a research paper from the Ministry of Justice refers to the prison population as 'almost doubling' during this period, from 44,246 on 30 June 1993 to 86,048 on 30 June 2012.[1] Since 2012 the total numbers in prison appear to have stabilised at this relatively high level (85,134 on 30 June 2016).[2] The steepest increases occurred during the 1990s, and this prompts the question of causes. What changes in policy or practice brought about this rapid rise in the proportion of offenders sentenced to custody (from 16 per cent of offenders sentenced in 1993 to 28 per cent in 2002), and then a substantial increase in the average length of custodial sentences imposed (from an average length of 14.3 months in 2000 to 18.8 months in 2015)?[3]

The most salient change might appear to have been the implementation of the Criminal Justice Act 1991, which carried forward into legislation various policies and principles articulated in the White Paper of 1990.[4] Probably the most important of those principles was that sentences should be proportionate to the seriousness of the offence, the proportionality principle.[5] While the White Paper also laid emphasis on the need for public protection against violent and sexual offenders, the bulk of cases were to be sentenced according to the proportionality principle, with reliance on fines, on community sentences for more serious cases, and on imprisonment only if the offence was so serious that only a custodial sentence could be justified. Thus the proportionality principle was part of an agenda for reducing reliance on prison.

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*Vinerian Professor of English Law Emeritus, University of Oxford; I am grateful to Lucia Zedner, Ian Loader and Andreas von Hirsch for comments on a draft.

[1] Ministry of Justice, *Story of the Prison Population: 1993-2012 England and Wales* (2013), 5. Within this overall figure, the number of women prisoners trebled from some 1,500 in 1992 to some 4,500 in 2002, though falling back slightly to 3,885 in 2015: House of Commons Briefing Paper, *Prison Population Statistics* (SN/SG/04334 of 2015), 5.

[2] Ministry of Justice, *Story of the Prison Population: 1993-2016 England and Wales* (2016), 4.

[3] Figures from Ministry of Justice, n 1 above, 5, and Ministry of Justice, n 2 above, 6.

[4] Home Office, *Crime, Justice and Protecting the Public* (London: HMSO, 1990).

[5] Ibid., para. 1.6, notoriously referring to this as the 'just desserts' approach instead of 'just deserts.'

The purpose of this article is to examine whether the significant increase in the use of imprisonment described in the first paragraph above demonstrates the failure of the proportionality principle enshrined in the 1991 Act. Nicola Lacey and Hanna Pickard have argued that the proportionality principle had a 'decisive influence on policy' in England and Wales and that it manifestly failed to exert any limiting effect on the rising use of imprisonment.[6] They further argue that 'the retributive revival may have contributed to increasing punitiveness by legitimating hostile emotions against offenders without successfully institutionalizing constraints on how these emotions should be expressed, acted upon and regulated.'[7] These claims are assessed below, after a brief re-statement of proportionality theory. The implementation of the 1991 Act is examined in detail, and some seven subsequent developments are identified as instrumental in the demise of its principles. The article then moves from the historical to the normative, assessing whether proportionality theory has within it the resources to produce penal moderation. Finally, the article considers the further claim that proportionality theory is doomed to lead to – indeed, to legitimate – escalating punishments.

A BRIEF INTRODUCTION TO PROPORTIONALITY THEORIES

According to proportionality or desert theories, the rationale for state punishment is to censure the offender for wrongdoing. The censure must be deserved, desert being 'an integral part of everyday judgments of praise and blame'.[8] Thus the criminal law itself prohibits wrongdoing (involving harm and culpability): that provides a moral reason for compliance, but there is also a preventive element to the justification of proportionate punishment. Human nature is notoriously fallible and simply to convict and censure wrongdoers without imposing any hard treatment would be likely to produce lawlessness, and so desert theories require a prudential supplement that is proportionate to the magnitude or otherwise of the wrongdoing – a moderate amount of 'hard treatment' that does not drown

[6] N. Lacey and H. Pickard, 'The Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems', (2015) 78(2) MLR 216, at 225-227.
[7] Ibid, 218.
[8] A. von Hirsch, *Past or Future Crimes* (Manchester: Manchester UP, 1986), 52.

out the moral message of the law. The sentence should therefore communicate the appropriate degree of censure to the offender, to the victim and to society at large.[9]

THE 1991 ACT IN PRACTICE

We have already noted that the primary principle of the 1991 Act was to be that 'the severity of the sentence of the court should be directly related to the seriousness of the offence', with an exception for serious sexual and violent offenders for whom longer incapacitative sentences were to be available.[10] The institutionalisation of proportionality or desert as the leading rationale for sentencing was, however, poorly accomplished. The Act's main provisions were drafted in an allusive manner, not articulating the proportionality principle clearly and stating only that decisions to impose a custodial sentence and then decisions as to the length of the custodial sentence should be based on 'the seriousness of the offence.' The judges, spurred on by a leading academic commentator, were critical of the whole scheme of what became the 1991 Act.[11] So, returning to the first two paragraphs above, can the 'almost doubling' of the prison population in England and Wales from 1993 to 2012 properly be interpreted as the failure of the proportionality principle? Seven developments during this period point towards a different analysis.

The sentencing provisions of the Criminal Justice Act 1991 were brought into force in October 1992, and within two months some central sections were under attack from the judiciary. The first development was the judgment of Lord Taylor, then Lord Chief Justice, in the Court of Appeal in *R v. Cunningham*.[12] A trial judge had passed a sentence for robbery based on deterrence, and Cunningham appealed on the ground that this was an unlawful sentence: the argument was that s. 2(2)(a) of the 1991 Act stated that the sentence 'shall be for such term … as is commensurate with the seriousness of the offence,' and that this ruled

[9] For two strands of proportionality theory which share most of these elements, see the works of Andreas von Hirsch, e.g. *Censure and Sanctions* (Oxford: OUP, 1993) and (with A. Ashworth) *Proportionate Sentencing* (Oxford: OUP, 2005) and the works of Antony Duff, e.g. *Punishment, Communication and Community* (New York: OUP, 2001) For a challenge to the inclusion of 'hard treatment', see M. Matravers, Punishment, Suffering and Justice' in S. Farrall, B. Goldson, I. Loader and A. Dockley (eds), *Justice and Penal Reform: Reshaping the Penal Landscape* (Abingdon: Routledge, 2016).

[10] Home Office, n 4 above, paras. 1.6 and 1.8.

[11] The academic commentator was Dr David Thomas of Cambridge: for detailed discussion of the drafting of the 1991 Act and Dr Thomas's influence on the judicial response, see D. Faulkner, *Servant of the Crown* (Hook: Waterside Press, 2014), 132-139.

[12] (1993) 14 Cr App R (S) 444 (judgment delivered on 27 November 1992).

out longer sentences based on deterrence. However, Lord Taylor held that the true meaning of this provision was that:

> The purposes of a custodial sentence must primarily be to punish and to deter. Accordingly, the phrase 'commensurate with the seriousness of the offence' must mean 'commensurate with the punishment and deterrence which the seriousness of the offence requires'.[13]

Thus what the legislature intended to be a restraining provision based on proportionality was converted into a much more expansive subsection, allowing deterrent sentences when the White Paper had strongly argued against them.[14]

Secondly, the judiciary and the magistracy combined to criticise the new provisions on unit fines and the 1991 Act's apparent approach to previous convictions. The magistracy and the then Home Secretary, Kenneth Clarke, had been discussing modifications to the unit fine system in order to remove some unintended anomalies; but Clarke sprang a surprise when he announced the abolition of the whole unit fine scheme.[15] Moreover, the courts found the provision on taking account of previous convictions obscure in its drafting, and some suggested that it prevented sentencers from taking proper account of previous convictions;[16] the government therefore tabled amendments to what became the Criminal Justice Act 1993 in order to restore judicial discretion in the sentencing of persistent offenders. All these events took place less than a year after the implementation of the 1991 Act.

A third influence was the public and political reaction to the killing of two year-old James Bulger in February 1993. This triggered an upsurge of punitive rhetoric in certain newspapers and among politicians. In his study of the reactions to the Bulger killing, David Green charts the increasingly punitive rhetoric of the mass media, and particularly the tabloid newspapers struggling to maintain their readership in a highly competitive market; he demonstrates the selectivity of the accounts of the killing; and he also points out the misrepresentation of public opinion through the media peddling an 'erroneous notion of a

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[13] Ibid, at 447.

[14] Home Office, n 4 above, para. 2.8.

[15] For details, see I. Dunbar and A. Langdon, *Tough Justice: Sentencing and Penal Policies in the 1990s* (London: Blackstone Press, 1998), 103-104. The 1991 Act was chiefly the work of Douglas Hurd as Home Secretary. His successors David Waddington and Kenneth Baker were distinctly cooler about its provisions, but it was Kenneth Clarke who began the dismantling.

[16] Criminal Justice Act 1991, s. 29, on which see *Bexley* (1993) 14 Cr App R (S) 462; in an extra-judicial speech Lord Taylor referred to these and other central provisions as imposing an 'ill-fitting straitjacket' on the judiciary (see Dunbar and Langdon, n 15 above, 92-98).

punitive and unforgiving public.'[17] Beyond the facts of that particular case, there was a growing sense that the criminal justice system was too 'soft' in some respects. Tony Blair's first use of the 'tough on crime, tough on the causes of crime' mantra as Shadow Home Secretary had come in January 1993,[18] and later that year at the Conservative Party Conference the new Home Secretary, Michael Howard, gave a speech that highlighted his 'Prison Works' policy.[19] That speech led to further increases in punitiveness, particularly in respect of young offenders, in the Criminal Justice and Public Order Act 1994. Already, as will be abundantly clear, any restraining effect that the 1991 Act's proportionality principle might have been expected to produce was rapidly being overwhelmed by other forces.

Fourthly, and most obviously, the 1996 proposal to introduce mandatory minimum sentences was explicitly based on policies of general deterrence and incapacitation. Thus in the White Paper that led to the introduction of mandatory minima for repeat domestic burglars and drug dealers in the Crime (Sentences) Act 1997 there are assertions about the preventive effectiveness of this type of sentence, completely unsupported by empirical evidence.[20] Senior judges openly opposed this proposal, Lord Taylor stating that the evidence of the deterrent efficacy of raising sentence levels was 'flimsy and dubious.'[21] Accumulating evidence from the United States shows that 'three-strikes' laws of this kind are much more effective in filling prisons than in preventing crime.[22] Notwithstanding this, however, Parliament has enacted several more mandatory minimum sentences[23] and, as we shall see

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[17] D.A. Green, *When Children Kill Children: Penal Populism and Political Culture* (Oxford: OUP, 2008); the quotation is at 18. Green's study compares reactions to the Bulger killing with those to a child killing in Norway.

[18] Dunbar and Langdon, n 15 above, 101-103; see also D. Downes and R Morgan, 'Dumping the "Hostages to Fortune": the Politics of Law and Order in Post-War Britain', in M. Maguire, R. Morgan and R. Reiner (eds), *The Oxford Handbook of Criminology* (Oxford: OUP, 2nd ed. 1997).

[19] Dunbar and Langdon, n 15 above, ch 10; Downes and Morgan, n 16 above.

[20] Home Office, *Protecting the Public: the Government's Strategy on Crime in England and Wales* (London: HMSO, 1996), paras. 11.2 and 12.8-9; empirical evidence was available in M. Tonry, *Sentencing Matters* (New York: Oxford UP, 1996), ch. 5. Cf. Lacey and Pickard, n 6 above, at 226 and 231, attributing mandatory sentencing laws to the influence of desert theory, when their principal drivers are deterrence and incapacitation, and a prominent critique of them is that they produce *dis*proportionate sentences.

[21] Lord Taylor, 'Continuity and Change in the Criminal Law' (1996) 7 *King's College LJ* 1.

[22] F. Zimring, G. Hawkins and S. Kamin, *Punishment and Democracy: Three Strikes and You're Out in California* (New York: OUP, 2001); M. Tonry, 'The Mostly Unintended Consequences of Mandatory Penalties: Two Centuries of Consistent Findings', in M. Tonry, *Crime and Justice,* 38: 65 (Chicago: University of Chicago Press), 65; J. Travis, B. Western and S Redburn (eds), *The Growth of Incarceration in the United States: Exploring the Causes and Consequences* (Washington: National Academic Press, 2014).

[23] See A. Ashworth, *Sentencing and Criminal Justice* (Cambridge: CUP, 6th ed 2015), 105-107 and 233-237.

below, the courts themselves have frequently sought to justify sentences by reference to deterrence.[24]

Fifthly, the 1997 Act also introduced an automatic life sentence for the second serious sexual or violent offence. This too was based on empirically flawed claims,[25] but it was in force for three years before the Court of Appeal upheld a challenge based on the Human Rights Act and extended the 'exceptional circumstances' proviso so as, in effect, to reintroduce elements of judicial discretion and proportionality.[26] However, those elements survived only for a few years before the enactment of the furthest-reaching incapacitative sentence of modern times -- Imprisonment for Public Protection (IPP), which was mandatory for many offenders convicted of a second sexual or violent offence and which led to indefinite detention.[27] Both judicial discretion and proportionality were swept aside by the scandal that IPP became between 2005 and its relaxation in 2008[28] – indeterminate imprisonment for relatively non-serious offences, the unpreparedness of the prisons for the influx of prisoners on indeterminate sentences, and the government's failure to provide courses to enable IPP prisoners to demonstrate their suitability for release.[29] Thus what has been described as 'the primacy of public protection' has played a major part in sentencing policy in recent years, urged forward by government ministers and abetted by a judiciary remarkably confident in their ability to assess risk.[30] The result is that at least 19 per cent of the prison population are serving indeterminate sentences.[31] Moreover, the scandal continues, with some 4,000 IPP prisoners still in prison in mid-2016.[32]

Sixthly, David Blunkett as Home Secretary brought forward the first statutory statement of purposes of sentencing for England and Wales. Section 142(1) of the Criminal Justice Act 2003 requires a sentencer to have regard to the following five purposes:

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[24] See n 42 below.

[25] R. Hood and S. Shute, 'Protecting the Public: Automatic Life Sentences, Parole and High Risk Offenders' [1996] Crim.L.R. 788.

[26] *R v. Offen (No. 2)* [2001] 1 Cr App R (S) 372.

[27] For the origins of the IPP sentence, see Home Office, *Justice for All* (London: The Stationery Office, 2002), paras. 5.41 – 5.44.

[28] On which see H. Annison, *Dangerous Politics: Risk, Political Vulnerability and Penal Policy* (Oxford: OUP, 2015), for a full account of the rise and fall of IPP; see also P. Ramsay, 'Imprisonment under the Precautionary Principle', in G.R. Sullivan and I. Dennis (eds), *Seeking Security* (Oxford: Hart, 2012).

[29] A. Ashworth and L. Zedner, *Preventive Justice* (Oxford: OUP, 2014), Ch. 7; see particularly the judgment of the European Court of Human Rights in *James, Wells and Lee v. United Kingdom* (2013) 56 EHRR 399.

[30] See the quotations from judges in J. Jacobson and M. Hough, *Unjust Deserts* (London: Prison Reform Trust, 2010), at 27, 29 and 32.

[31] Ministry of Justice, n 1 above, 15 (referring to 2012).

[32] Ministry of Justice, n 2 above, 12.

(a) The punishment of offenders,

(b) The reduction of crime (including its reduction by deterrence),

(c) The reform and rehabilitation of offenders

(d) The protection of the public, and

(e) The making of reparation by offenders to persons affected by their offences.

This statement was trumpeted as a great step forward, requiring sentencers to consider 'how the sentence they impose will provide the right balance between the purposes set out …, given the circumstances of the offence and the offender.'[33] Clearly section 142 removed the priority of the proportionality principle that the 1991 Act had been intended to promote. However, the idea of a 'right balance' is rather nebulous; and further difficulty arises from the fact that the same legislation provided for the establishment of a Sentencing Guidelines Council to issue sentencing guidelines[34] – offence guidelines are hardly compatible with a provision giving courts the discretion to choose which approach to take.

Seventhly, although proportionality had clearly lost its priority very soon after the implementation of the 1991 Act, it could claim a slight resurgence after the Sentencing Guidelines Council began work in 2004. The SGC's first guideline attempted to restore proportionality by declaring that 'the sentencer must start by considering the seriousness of the offence' and enjoining courts to pass a sentence 'commensurate with the seriousness of the offence', as determined by culpability and harm.[35] This may be seen as going back on Lord Taylor's judgment in *Cunningham*,[36] and it was reinforced by guidance that clearly aims to curtail (but not to remove) a court's power to enhance sentences on grounds of deterrence or the prevalence of an offence.[37] However, the SGC's espousal of the proportionality principle consisted of drafting guidelines aimed at reproducing current sentence levels, not altering them. The SGC and its associated body, the Sentencing Advisory Panel, were abolished in 2009 to make way for a Sentencing Council, with a revised legislative remit.[38] The current chair of the Sentencing Council, Treacy LJ, has stated that 'we cannot issue

[33] Home Office, n 27 above, para. 5.9.

[34] Criminal Justice Act 2003, ss. 167-173; according to *Justice for All*, a primary objective of introducing guidelines was to enhance consistency in sentencing: Home Office, n 27 above, paras.5.13 – 5.14.

[35] Sentencing Guidelines Council, *Overarching Principles: Seriousness* (London: Sentencing Guidelines Council, 2004), paras. 1.3 – 1.4.

[36] N 12 above.

[37] SGC, n 35 above, paras. 1.38 – 1.39.

[38] Coroners and Justice Act 2009, sections 118-136.

guidelines that ignore … clear guidance issued by the CACD [Court of Appeal]'.[39] What this means is that the Sentencing Council sees its function as mostly following and endorsing whatever level sentences have reached by the practices of the courts – in recent years, therefore, consolidating the increased use of imprisonment that took place in the 1990s and the increase in sentence lengths in the second half of the first decade of the new millennium. Moreover, the SGC's first guideline (relating to proportionality) has hardly ever been referred to in the Court of Appeal, and neither the SGC nor the Sentencing Council has promoted the sentencing provisions in sections 152(2) and 153(2) of the Criminal Justice Act 2003, provisions worded so as to limit resort to prison sentences and to curtail their length.[40] Despite the statements in the guideline,[41] there are many cases in which the Court of Appeal has upheld sentences imposed on the basis of general deterrence. The most prominent example in recent years is the Court of Appeal's judgment upholding deterrent sentences on several offenders involved in the 2011 riots, a judgment that casts guidelines and proportionality to the winds.[42]

How, then, did the 1991 Act fare in practice? The short answer is that key provisions were dismantled by judges and politicians within a year, with the result that the proportionality provisions in sections 1 and 2 of the Act withered on the vine, and that other political forces (notably, 'prison works' and 'tough on crime, tough on the causes of crime') became dominant. These political forces, combined with heightened media interest in law and order, seem to have been responsible for pushing up imprisonment levels in the mid-1990s. The principal objective of the judiciary (and the magistracy) was the restoration of judicial discretion, as is evident from Lord Taylor's otherwise contradictory position (having reinterpreted of section 2(2)(a) in *Cunningham*[43] so as to include deterrence and yet having opposed Michael Howard's proposal to introduce mandatory sentences in 1996-97 on the basis that deterrence does not work). Although mandatory sentences contributed to raising

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[39] Treacy LJ, '*Guidelines Galore*: Response from the Sentencing Council', [2016] Crim. L.R. 483.

[40] See SGC, n 35 above: paras. 1.30 – 1.33 discuss s. 152(2), but there is no discussion of the requirement in s. 153(2) to impose the shortest custodial sentence commensurate with the seriousness of the offence. Moreover, the Sentencing Council's references to sections 152 and 153 are patchy: thus in its *Theft Offences, Definitive Guideline* (London: Sentencing Council, 2015) there is the briefest of mention of the principle that 'any custodial sentence must be kept to the necessary minimum' at Step Two of the guideline on 'Theft from a Shop or Stall' (p. 13) but no such reference in the guideline on 'General Theft' (p. 7).

[41] N 37 above.

[42] *R v. Blackshaw et al* [2012] 1 Cr App R (S) 679, at paras. 4, 75, 85-86, 91 and 125; see further A. Ashworth, 'Departures from the Sentencing Guidelines' [2012] Crim. L.R. 81, and J.V. Roberts, 'Points of Departure: Reflections on Sentencing outside the Definitive Guideline Ranges' [2012] Crim .L.R. 439.

[43] N 12 above.

the prison population, the judges themselves apparently felt it necessary to pass more and longer custodial sentences. Even judges who were not punitive by inclination found themselves swept along by the 'very sharp' increase in the use of custody, 'in response (it would seem likely) to certain highly publicised crimes, legislation, ministerial speeches and intense media pressure.'[44]

Thus, while it is true to say that 'the scale of punishment has increased relentlessly' in England and Wales since 1993 (at least until 2012, since when it has been fairly stable), it cannot be said that 'the justice model [has] had the most decisive influence on policy.'[45] Much of the 1991 Act was technically still in force between 1993 and 2003, but the Halliday Report of 2001 was surely correct in concluding that there had been 'a gradual erosion of the approach set out in the Criminal Justice Act [of 1991], with its emphasis on linking punishment to the seriousness of the offences under sentence.'[46] Desert theory and proportionality did fail to prevent significant increases in sentence levels in the 1990s and early 2000s, but that is because any dominance they may have enjoyed briefly in 1992-93 was swiftly overwhelmed by a powerful tide of populist policies emanating from the mass media and leading politicians. It is difficult to be precise about the mix of penal policies driving the populism of the decade after the Bulger killing in 1993 – deterrence and incapacitation were prominent, and so was a crude form of retributivism – but it can be affirmed that the proportionality principle outlined at the beginning of this article, with its agenda of reducing reliance on imprisonment, was its antithesis.[47]

PROPORTIONALITY AND PENAL MODERATION

Does proportionality theory have the resources to produce penal moderation, or is it doomed to lead to escalating severity? We have established that proportionality has hardly been allowed to play a leading role in England and Wales: within months of its enshrinement in the

[44] The words of Lord Bingham CJ in *R v. Brewster* [1998] 1 Cr App R (S) 181, at 184.

[45] Lacey and Pickard, n 6 above, 225-226.

[46] Home Office, *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales* [the Halliday Report], (London: Home Office, 2001), para. 0.2; see also para. 1.34, 'The "Just Deserts" approach failed to take root, because deterrence was soon reinstated as an aim of sentencing.'

[47] For further discussion, see J. Pratt, *Penal Populism* (London: Routledge, 2007); Downes and Morgan, n 18 above; and Green, n 17 above, 20-21 and chapter 8; and I. Loader and R. Sparks, 'Penal Populism and Epistemic Crime Control', in A. Liebling, L. McAra, S. Maruna, (eds), *Oxford Handbook of Criminology* (Oxford: OUP, 6th ed, 2017).

1991 Act, both politicians and judges were beginning to dismantle that legislation. But proportionality theory has been given its head in the Nordic countries, particularly Finland and Sweden, where the prominence of desert theory and proportionality has gone hand-in-hand with penal moderation.[48] As demonstrated by Nicola Lacey[49] and also by Tapio Lappi-Seppala,[50] the conditions in these 'co-ordinated market economies' are characterized by generous welfare systems and high levels of social solidarity and trust, which foster longer-term social policies and generally avoid penal populism. Thus Lacey argues that

> The relatively disorganized, individualized 'liberal market economies' such as the USA and the UK could be shown to be particularly vulnerable to the hold of 'penal populism', while the 'co-ordinated market economies' of Northern Europe and Scandinavia, with their proportionally representative political systems and economies focusing on long-term investment in specialist skills providing a reliable bridge to employment, were better placed to resist pressures for penal expansion.[51]

Social and economic policy is therefore seen as a major influence, although Lacey also emphasizes the importance of the 'different institutional structures [that] affect the way in which popular conceptions [of deserved punishment] feed into the development and implementation of policy.'[52] Towards the end of his study, Tapio Lappi-Seppala also contrasts the effects of different kinds of political system:

> Consensual politics lessen controversies, produce less crisis talk, inhibit dramatic turnovers and sustain long-term consistent policies. In other words, consensual democracies are less susceptible to political populism. While the consensus model is based on bargaining and compromise, majoritarian democracies are based on competition and confrontation. The latter sharpens distinctions, heightens controversies and encourages conflicts. This affects the stability and contents of policies, as well as the legitimacy of the political system as a whole. There is more

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[48] See further von Hirsch, *Censure and Sanctions*, above n 9, ch. 10, and in greater detail J. Pratt and A. Eriksson, *Contrasts in Punishment: an Explanation of Anglophone Excess and Nordic Exceptionalism* (Abingdon: Routledge, 2013).

[49] N. Lacey, *The Prisoner's Dilemma: Political Economy and Punishment in Contemporary Democracies* (Cambridge: CUP, 2008).

[50] T. Lappi-Seppala, 'Imprisonment and Penal Demands: Exploring the Dimensions and Drivers of Systemic and Attitudinal Punitivity', in S. Body-Gendrot, M. Hough, R. Levy and S. Snacken (eds), *The Routledge Handbook of European Criminology* (Abingdon: Routledge, 2013), 295-335.

[51] Lacey, n 49 above, 115–16.

[52] Lacey, n 49 above, 19.

> crisis talk, more criticism, more short-term solutions, more direct appeals to public demands, and a higher risk of exclusive populist penal policy.[53]

Both these studies emphasize the social, economic and political locus of criminal justice in general and sentencing in particular. David Garland claims that 'this is only half the story', arguing that 'the *proximate* causes of changing patterns of punishment lie not in *social* processes but in *state and legal* processes.'[54] Certainly it is important to develop an explanatory framework that includes what Garland terms state and legal processes: thus in explaining the events in sentencing in England and Wales that were described in the previous part of this article, there is a need for a framework that includes the statutory provisions themselves but also embraces the machinations of politicians and senior judges that were featured in the seven points made above. An explanation of those machinations may also be assisted by comparative research. For example, in the Netherlands in the 1970s and 1980s penal moderation was assisted, possibly even generated, by close collaboration between senior judges, prosecutors and Ministry of Justice officials, many of whom had trained together and who exchanged jobs from time to time.[55] Somewhat similarly the approach in Germany means that there is little political or legal discussion of sentencing reform, and moderate sentencing levels are sustained by institutional features such as the form of German legal education (inculcating certain values) and the selection of career judges from the top law school graduates.[56]

The resulting differences may be demonstrated, albeit rather crudely, by reference to prison numbers expressed as a rate per 100,000 of population. Compared with a figure of 148 for England and Wales, the Nordic countries mentioned above are very much lower (Sweden 55, Finland 57), and countries with which the UK is often compared in other ways are also significantly lower (e.g. France 95, Ireland 80, Germany 78, Netherlands 69).[57] While proportionality is the leading rationale for sentencing in Finland and Sweden, there is a more mixed approach in Ireland, France, Germany and

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[53] Lappi-Seppala, n 50 above,

[54] D. Garland, 'Cultures of Control and Penal States', in Hungarian Society of Criminology, *Beyond Punitiveness: Crime and Crime Control in Europe in a Comparative Perspective* (Budapest: Proceedings of Criminology no. 73, 2014), 57, 65.

[55] D. Downes, *Contrasts in Tolerance* (Oxford: Oxford UP, 1988), 101.

[56] T. Hoernle, 'Moderate and Non-Arbitrary Sentencing without Guidelines: the German Experience' (2013) 76 *Law and Contemporary Problems* 189.

[57] R. Walmsley, *World Prison Population List* (London: Institute for Criminal Policy Research, 11th ed., 2016).

the Netherlands. But the argument here is that proportionality theory can – given the right politico-economic conditions and favourable state and legal processes – lead to penal moderation. This may be much more likely in what Lappi-Seppala terms consensual democracies and what Lacey terms co-ordinated market economies, than in the categories of majoritarian democracies or liberal market economies into which the UK falls, but it also needs supportive legal frameworks and sentencers.

Accepting that proportionality theory faces an uphill task in conducing to penal moderation in politico-economic systems such as that in the UK, what resources can it bring to the endeavour? Four sets of arguments need to be examined – arguments relating to ordinal and cardinal proportionality, the 'drowning out' argument, the human rights argument, and the decremental strategy. The first concerns ordinal and cardinal proportionality. Ordinal proportionality consists of the relativities between different types of offences: the ordinal ranking of offences should be based on their relative seriousness, and this is a controversial matter. A quarter of a century ago Andrew von Hirsch and Nils Jareborg began to develop a set of criteria to assess the relative seriousness of crimes with individual victims,[58] but this work has not been taken much further.[59] Nonetheless, it is possible to use the concepts of harm and culpability to start debates and even to reach judgments on ordinal ranking, although those judgments will always be socially and politically contingent. Cardinal proportionality is much more contestable: it involves relating the ordinal rankings to a scale of punishments. The practical problem here is that different countries have different anchoring points for their penalty scales, which have often evolved over the years without much conscious reflection and which come to be embedded in people's thought patterns and thus assumed to be appropriate. To take a hypothetical example, an average street robbery with a threat of violence and the taking of money and a mobile phone might have similar ordinal rankings in three different countries but might be subject to different conceptions of cardinal proportionality because the countries have different anchoring points for their penalty scales – such as 6 months' imprisonment, two years' imprisonment, and five years' imprisonment for an offence of this kind. Thus whereas proportionality theory has some determinacy in relation to ordinal proportionality, it regards the anchoring point of the penalty scale (and therefore cardinal proportionality) as a matter of social

[58] A. von Hirsch and N. Jareborg, 'Gauging Criminal Harms: a Living Standard Analysis' (1991) 11 *Oxford JLS* 1.
[59] Cf. Ashworth, n 23 above, 116-122.

convention that is culturally and politically determined.[60] Modern desert theorists have therefore not claimed that there is an objective, cross-jurisdictional benchmark of cardinal proportionality that can yield 'clear limits' on sentence levels, and their position is well captured by the assertion of Nicola Lacey and Hanna Pickard that proportionality 'is not a naturally existing relationship, but a product of political and social construction, cultural meaning-making and institution-building.'[61]

Does this mean that proportionality theory is incapable of exerting any downward thrust on punishment levels? Three further arguments suggest otherwise. The 'drowning out' argument is that the sentence prescribed for a given offence should not be so harsh as to 'drown out' the moral message of the law, turning the sentence into a 'naked demand' that would not be respectful of the individual's agency.[62] This connects the limits on punishment with the notion of respect for individual autonomy that underlies modern desert theory: proportionality theory regards the person censured as a moral agent, but also recognizes that we are all 'morally weak and fallible' and that a prudential disincentive may need to be added to the moral appeal of the law if it is to be reasonably effective. Antony Duff argues that this is particularly plausible when considering punishment levels for ordinally minor crimes, such as speeding. 'If punishment (penal hard treatment) is to supplement rather than replace censure, it must not be so harsh that it effectively drowns out the law's moral voice.'[63] Duff is reluctant to apply this reasoning higher up the scale, regarding a sentence as coercive as five years' imprisonment as too severe ever to act as a mere 'prudential disincentive', even for a heinous crime such as attempted murder. Clearly the question whether a punishment is so high as to 'drown out' the law's moral message, and yet necessary if the criminal law is to retain its preventive efficacy, may require some fine judgment. But there is certainly an argument that to impose a sentence of more than one year's imprisonment for theft from a shop would 'drown out' the law's moral message; and such reasoning

[60] A. Ashworth, 'Criminal Justice and Deserved Sentences' [1989] Crim. L.R. 340, 344, 'linked to what is current in the thought-patterns of a particular country at a particular phase in its history'; *accord*, Lacey and Pickard, n. 6 above, 227-228.

[61] Lacey and Pickard, n 6 above, 219; the reference to 'clear limits' also comes from Lacey and Pickard.

[62] See further von Hirsch, *Censure and Sanctions*, above n 9, 14, and Duff, above n 9, 86-88 ; for discussion, see A. Ashworth and L. Zedner, 'Punishment Paradigms and the Role of the Preventive State', in A.P. Simester, A. du Bois-Pedain and U. Neumann (eds), *Liberal Criminal Theory* (Oxford: Hart, 2014), 11-14.

[63] Duff, n 9 above, 87; R.A. Duff, 'Punishment, Communication and Community', in M. Matravers and J. Pike (eds), *Debates in Contemporary Political Philosophy: an Anthology* (London: Routledge and Open U.P., 2002), 394. See also von Hirsch, n 62 above, 34-38, for a somewhat similar argument.

could be extended to many offences which lie towards the lower end of the ordinal rankings.

Turning to the human rights argument, the reasoning here is that a fundamental right such as the right to liberty should not be taken away for an offence that amounts to the violation of a significantly lesser right, such as the right to personal property.[64] This, therefore, is an argument about prisons and proportionality. The prisons element in the argument emphasizes that incarceration is a deprivation of the right to liberty, and that this brings with it several 'pains of imprisonment' including loss of autonomy in everyday life, restrictions on freedom of movement, isolation from family and friends, loss of privacy and exposure to the risk of personal harm.[65] The consequential effect on partners and children should also be taken into account.[66] Deprivations of this magnitude (not to mention financial cost) should be reserved for the most serious of offences. Thus, for example, imprisonment should be regarded as too severe and disproportionate a response to what may be termed 'pure property offences', i.e. property offences not involving the threat of violence (robbery) or violation of the right to privacy (burglary). Thus the core offences from which the sanction of imprisonment should be taken away are thefts, frauds and offences of criminal damage. Even if these offences are committed persistently, the offenders should be sentenced without resort to imprisonment. English law already takes this approach with offences such as begging and soliciting for prostitution, which were made non-imprisonable in 1982.[67] The challenge is to devise community sentences aimed at changing the behavior of persistent property offenders (which will often involve tackling drug and/or alcohol abuse), and to combine this with compensation or reparation to the victim. However, the argument does not necessarily lead to an all-or-nothing approach with no judicial discretion: a middle way would be to allow the Crown Court (not magistrates' courts) to use imprisonment for pure property offences where the offence is so extraordinarily serious that no

[64] For elaboration, see A. Ashworth, *What if Imprisonment were Abolished for Property Offences?* (London: Howard League for Penal Reform, 2012).

[65] For elaboration and references, see A. Liebling and B. Crewe, 'Prison Life, Penal Power and Prison Effects' in M. Maguire, R. Morgan and R. Reiner (eds), *Oxford Handbook of Criminology* (Oxford: OUP, 5th edn 2012) 895, at 898-901.

[66] R. Condry, A. Kotova and S. Minson, 'Social Injustice and Collateral Damage: the Families and Children of Prisoners' in Y. Jewkes, J. Bennett and B. Crewe (eds), *The Handbook of Prisons* (Abingdon: Routledge, 2016); S. Wakefield and C. Wildeman, *Children of the Prison Boom: Mass Incarceration and the Future of American Inequality* (New York: OUP, 2013).

[67] Criminal Justice Act 1982, sections 70-71.

sentence less than custody would meet the justice of the case (or some similarly restrictive wording). This would make the policy of the law clear – that in principle imprisonment is a disproportionately severe and costly response to offences involving no violence, no threats and no sexual assault -- while allowing a circumscribed judicial discretion to cater for exceptional circumstances.

We return, finally, to the question of cardinal proportionality and anchoring points. Granted that the placing of the anchoring point of sentencing levels in any particular country is likely to be a matter of convention, as recognized earlier, can it be changed? This is a question faced by many penal theories, and awareness of the pains and deprivations of imprisonment[68] has led many writers on punishment to support the principle of penal restraint or parsimony.[69] When John Braithwaite and Philip Pettit were developing their republican theory of criminal justice based on the preservation of 'dominion' they proposed that a major element in setting penalty levels should be a 'decremental strategy', according to which existing penalty levels should be gradually scaled down until the point is reached where there is evidence that measurable increases in crime are beginning to appear.[70] Within proportionality theory von Hirsch proposes a similar but more vigorous decremental strategy, starting from the proposition that the level of sentences should be set not as the primary means of crime-prevention but as a supplementary prudential disincentive (i.e. not one that 'drowns out' the moral message, as outlined above). This indicates 'rather modest sanction levels,' and 'changing existing censure-expressing conventions by moving the graded penalties down *pro rata*.'[71] Resistance to this policy from certain sections of the media and the public, among others, would need to be carefully managed – as the seven developments that led to the unravelling of the 1991 Act demonstrate.

This calls into question the political possibility of pursuing a decremental strategy over a lengthy period, but this is a problem that any liberal sentencing policy is likely to face. Thus Lacey and Pickard, in their critique of proportionality theory, concede that in practice 'there is little alternative to the messy business of building political and social

[68] See text at nn 65-66 above.
[69] A notable example is N. Morris, *The Future of Imprisonment* (Chicago: University of Chicago Press, 1974).
[70] J. Braithwaite and P. Pettit, *Not Just Deserts* (Oxford: OUP, 1990), 142.
[71] Von Hirsch, n 62 above, 45.

coalitions around agreed conventions specifying, and limiting, adequate penalties.'[72] That is surely right as a matter of practical politics, and the argument here is that proportionality theory provides a framework of reasoning through which we can determine the appropriate response to a range of detailed sentencing issues – previous convictions, aggravating and mitigating factors, multiple offences, the proper use of imprisonment, levels of financial penalties, and so forth – reinforced with a principle of penal restraint, and these arguments can be adapted for use in a range of political and economic systems.[73] Even when the 'cultural, political, social and institutional conditions' are less favourable than one might hope, a proportionality-based framework of reasoning could still be expected to result in a more just and humane system than an alternative approach that is not proportionality-based.

PROPORTIONALITY AND THE LEGITIMATION OF SEVERER PUNISHMENTS?

Focusing on the period 1993-2012 in England and Wales, we have established that proportionality theory was not given much of a trial, since within months of its introduction the 1991 Act was overwhelmed by a range of other influences. Thus proportionality theory did not fail to produce penal moderation, because it was not implemented as intended. We then established that proportionality theory has within it the resources to produce penal moderation. Four aspects of proportionality theory designed to produce penal moderation were identified, but it was accepted that the practical prospects for penal moderation depend both on wider social, political and economic characteristics of the jurisdiction and on legal processes such as the training and orientation of the judiciary and of prominent politicians.

It remains to examine whether proportionality theories (desert, modern retributivism) are doomed to lead to – indeed, to legitimate – severer punishments. One answer to this question would take us back to the discussion of Sweden, Finland and those countries that have institutionalized proportionality and have succeeded in sustaining penal

[72] Lacey and Pickard, n 6 above, 240.

[73] Cf. the argument of Nicola Lacey, 'The Metaphor of Proportionality', (2016) 43 *Journal of Law and Society* 27, 44, on proportionality as one of law's metaphors: 'it is precisely through their method of carrying meaning over from one thing to another that they bear the potential to mislead: to conjure up a legitimating image which is distant from the realities of the power relations embedded in law as enforced.'

moderation.[74] But the argument we must now consider is probably limited to majoritarian 'liberal market' countries such as the U.K., Australia and the U.S.A. An early expression of this view was Braithwaite and Pettit's:

> When you play the game of criminal justice on the field of retribution, you play it on the home ground of law-and-order politicians … Once all the players agree that retribution, or giving people what they deserve, is the rationale for punishment, the genteel visions of retributivists count for nought.[75]

Garland followed this with an analysis that claims that the re-emergence of 'just deserts'

> … re-established the legitimacy of an explicitly retributive discourse which, in turn, had made it easier for politicians and legislature to openly express punitive sentencing and to enact more draconian laws.[76]

While Garland recognizes that other influences such as penal populism (including, as noted above, strains of deterrence, incapacitation and retribution)[77] and the rise of victim-based organizations in the U.S. worked in the same direction, he identifies 'just deserts' as one driver of penal severity. In part, the idea is that the language of 'deserved punishment' lends itself to being hi-jacked by those (notably, some politicians and media) arguing for tougher sentences. Similar claims have been made more recently by Lacey and Pickard:

> The retributive revival may have contributed to increasing punitiveness by legitimating hostile emotions against offenders without successfully institutionalizing constraints on how these emotions should be expressed, acted upon and regulated … The revival of retributivism has all too readily translated, under certain conditions, into a politics of anger, affective blaming and 'othering' of offenders ….[78]

The claim, then, is that in countries such as the U.K., U.S.A. and Australia proportionality theory was a significant driver of the increased punitiveness of recent

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[74] See nn 48-53 above.
[75] Braithwaite and Pettit, n 70 above, 15-16.
[76] D. Garland, *The Culture of Control* (New York: OUP, 2001), 9.
[77] See n 54 above and accompanying text.
[78] Lacey and Pickard, n 6 above, 218-220.

decades. Two questions are raised by this claim: was retributivism a distinct influence on escalating severity? Was it the only or main influence?

Whether proportionality theory was a distinct influence depends on what one designates as proportionality theory. Leading proponents of modern retributivism such as von Hirsch and Duff have always argued that the central idea of deserved censure should be seen in the context of the elements of penal moderation that are integral to desert theory.[79] When this theory was translated into an agenda for sentencing law reform in England and Wales, in the White Paper of 1990,[80] the element of penal moderation was not lost, and indeed the White Paper recognized the pains of imprisonment as a reason for using custody sparingly. If the claim is that in later years some politicians and judges adopted proportionality theory without the restraining elements that its proponents regarded as integral to it, that raises the question whether proportionality theorists were recklessly courting danger by propounding a theory that could be misrepresented or only partly adopted by others. This seems difficult to sustain.

Does the evidence suggest that in England and Wales proportionality theory was a driver of severity? The problem with the claim is that, as demonstrated earlier in the article, the penal populism that gradually came to dominate was fueled more by deterrence and by public protection that by 'just deserts'. The milestones in the escalating severity of the years after 1993 were the 'prison works' argument, the introduction of mandatory minimum ('three strikes') sentencing laws in 1997, the introduction of the automatic life sentence in 1997, and the arrival of imprisonment for public protection (IPP) in 2003 – all of them based on deterrent or public protection reasoning, not proportionality. Thus the narrative running through the above quotations from Braithwaite and Pettit, Garland, and Lacey and Pickard does not seem consistent with the recent penal history of England and Wales. To sustain the claim, we would need evidence of politicians and judges resorting to the language of proportionality or just deserts in order to support policies of increased severity, whereas it appears that deterrence and public protection have been the main supporting theories. The only exception to this is the Sentencing Council's use of proportionality as a concept when endorsing the sentence levels that the judiciary has

[79] E.g. in von Hirsch, n 62 above, and in Duff, n 9 above.
[80] N 4 above.

arrived at,[81] failing to take account of the restraining elements within proportionality theory – which, as we have seen, were noted in the 1990 White Paper and linked to the more sparing use of imprisonment. At best, then, there is little evidence of proportionality theory acting as a driver of severity, but evidence of its (mis)use to sustain severity in the most recent years. Thus the position, in England and Wales at least, is much more nuanced and varied than the three quotations at the beginning of this final section appear to suggest. The conclusion should be that proportionality theory does have the resources to produce penal moderation in certain political settings, and it is certainly not doomed to lead to escalating severity.

[81] N 39 above.