Some Institutional Limits to Justified Punishment

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Abstract:
We accept communicative justifications for criminal punishment on public reason grounds, but notice akin to other paradigms, communications require some commitment to proportionality. Ideally, communicative punishments convey societal values regarding the immorality of criminal behavior in so far as social preferences are justly reasoned and proportionately gauged. In reality, democratic institutions imperfectly reflect public opinions. Whereas punishment institutions are typically presumed the necessary and proper role of state-authority, less attention has been paid to how the organization of state institutions may relate to complex processes of knowledge and incentive coordination required to maintain proportionality. We investigate theoretical and empirical research regarding the relationships between different social institutional arrangements, various organizational forms, crime, punishment, and error outcomes. Given available theory and evidence, we consider the possibility that justified proportionality may rely upon some degree of institutional decentralization. Some policy implications are inferred.
I. Introduction

Significant debate persists regarding the proper normative justifications for criminal punishments (Berman, 2008). Different paradigms herald different values for alternative reasons. Full normative certainty or universal consensus is unlikely and perhaps impossible, but also probably unnecessary for the development of some meaningful insight(s). While individual paradigms are supported by a variety of sometimes-conflicting reasons, areas of common ground do exist. For example, today’s dominant perspectives commonly agree that legal punishments cannot be sufficiently justified on purely consequentialist or retributivist grounds (Bedau and Kelly, 2010; Duff, 2013).

The related techniques of justificatory liberalism (Quong, 2013) and public reason (Vallier and D’Agostino, 2013) suggest building upon consensus areas as normative foundations to better cope with conflicting perspectives (Gaus, 1996, 2011). Developing justifiable rules for a community of free and politically equal people, requires the provision of reasons those sorts of sometimes-disagreeing citizens would commonly accept.1 In this vein, we aim to investigate what criminal punishment institutions are publically justifiable for a free society.

While purely consequentialist and retributivist frameworks are insufficient (Dubber, 1996), a communicative paradigm seems more justifiable in so far as criminal citizens are treated as moral and political equals in the deliberative process of

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1 Similar attempts to approach punitive justification through the avenue of political theory include but are not necessarily limited to Rawls (1955), Nino (1983, 1989, 1996), Braithwaite and Pettit (1990), Greiff (2002).
institutional choice (von Hirsch, 1993; Duff, 2001, 2013). Communicative punishment also appeases some of the most reasonable values held by alternative paradigms. We accept communication as the perhaps strongest foundation available but notice like other paradigms it requires some commitment to proportionality.

If gauged disproportionately, punishments fail to convey justly reasoned messages of social condemnation and inhibit the opportunities of criminals to participate in deliberative justice and or restoration; hence disparate processes and outcomes lose consent from reasonable citizens. In so far as disproportionate communications can invoke unintended consequences and undeserved suffering; they also cease to appease reasonable standards from alternative paradigms. Thus the proportionality principle consistently relates to several punitive standards and should play some significant role in public justification.

In simplest terms, proportionality calls for punishments to be well–fitted to the crimes they refer, and individuals be treated equally before the law. Menial crimes should not be awarded extreme punishments, just as heinous crimes ought not to be ignored. At the societal level, a justified punishment scheme must aim to somewhat accord with the punitive preferences of citizens given some pattern of criminal severity. Lastly, justice procedures should not be biased for arbitrary reasons such as social status. Hence societies with similar values and criminological trends ought to host comparable punitive processes and outcomes presuming other things constant.

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2 What we term a “communicative theory,” has also been referred to as “moral education” (Hampton, 1984; Murphy, 1985) or “expressionist” (Feinberg, 1970; Greiff, 2002), with some meaningful distinctions but none particularly critical to our discussion.

Proportionality poses unique practical challenges relative to other punitive standards because of the complex nature of knowledge and incentive coordination needed for discerning societal preferences, calculating punitive ratios, and allocating resources proportionately. Knowing with certainty what are the justified punishments for different crimes throughout society, requires in part knowing the contextual, inter-dependent, and subjective tastes, preferences, moral values, and lived experiences of diverse citizens. No particular individual can objectively deduce this just spread of punishments across society, precisely because they lack knowledge of the perceived experiences of diverse victims and criminals. In practice, this complex array of societal values must be simplified through some institutional process and technological rubric for punishments to be produced and applied. Hence any such institutional and technological arrangement will entail some degree of error and or potential manipulation by private or political interests away from ideal justice.

Most philosophical efforts have focused upon the justifications for criminal punishments, and particularly the proper role of collective state action, yet very little attention has been paid to how differently-organized state institutions can effectively address such logistic, epistemic, and motivational challenges. Rawls (1971, p. 57) explains, “[i]n designing and reforming social arrangements one must, of course, examine the schemes and tactics it allows and the forms of behavior which it tends to

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4 Samuelson (1964), McKenzie and Tullock (1975), Landes and Posner (1975), Cowen (1992) represent the basic economic perspective that the logistic qualities of security require public financing and management. George (1993) implies the moral nature of social censure and punishment are uniquely reserved to state authority.

5 Attending to such compliance problems when choosing between principles of justice are what Pennington (2003, 2011) refers to as the “robust political economy,” approach. See also: Schmidt (1996, 182-3) and Boettke and Leeson (2004).
encourage.” While the precise details for how society ought to justly arrange punishment resources remains perhaps unknowable with normative certainty, some institutional arrangements may be more compatible with justifiable processes and outcomes than others. More specifically, some organizational features of institutions may better lend themselves to the knowledge, incentives, and feedback required to produce and maintain proportionality than others.

Institutions (defined loosely as rules and enforcements) shape individual behaviors throughout society. Hence certain institutional forms and organizational patterns thereof empirically relate to particular social trends. For example, relatively free economies foster higher rates of trade, investment, and wealth accumulation over time. Certain organizational patterns of those institutions relevant for trade assist decision-makers by coordinating otherwise complex and indiscernible forms of knowledge into meaningful signals and actionable incentives (North, 1990). Profits for example, calculated in monetary units and expressed in market prices, inform producers and consumers how much, of what type, when, where, and to whom resources are needed and valued. All without direct knowledge of the precise value matrices held within the minds’ eyes of diverse individuals. Any single decision is likely prone to error, but prices sufficiently convey knowledge and harness incentives to provide feedback and corrective

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6 Rawls (1993, p. 418) also explains, “we look to the constitutions of democratic societies, make a list of the liberties normally protected, and examine their role in democracies that historically have worked well,” as a critical step in developing a justified political system.

7 La Porta et al. (1999) write, “Good government has been shown to contribute to the economic development of European countries over the last millennium (North, 1981; De Long and Shleifer, 1993), to growth across countries over the last 40 years (Knack and Keefer, 1995; Mauro, 1995; Easterly and Levine, 1997), and to the successful transition from socialism to capitalism (Weingast, 1995; Johnson et al., 1997).” Acemoglu et al. (2001, p. 1369) survey North and Thomas (1973), Jones (1981) and North (1981) suggesting national performance follows from institutional arrangements encouraging investment in human and physical capital. Knack and Keefer (1995), Hall and Jones (1999) and Rodrik (1999) offer empirical support for private property rights regimes.
guidance thus maintaining proportionate rates of material production, distribution, and consumption throughout society and over time. The decentralized nature of competitive market prices well-accords to the structurally dispersed qualities of societal tastes and preferences enough to inform and motivate actors in ways unrealizable by institutions organized via centralized authority or constructivist design (Hayek, 1945).

A justified punitive system reflects social preferences only in so far as public opinions are reasonable. Since Feinberg (1988), most infer a significant role played by the harms caused from crime when legitimizing punishment. In so far as any matrix of punitive severities must be informed by some proxy of criminal severity, and criminal severity is understood as some function of harm caused to victims and or society; reasonably-gauging punishment magnitudes in part requires a similar socially epistemic process as economic calculation. Social values regarding the harms of criminal behavior and the values of punitive responses must be discerned, assessed for legitimacy, practically implemented by some calculative institutional technology, and lastly updated through time via informational and incentive feedback.

Punitive strategies such as monetary fines, sentencing grids, time-based incarceration and or parole, all possess some degree of calculational precision, but they are neither informed by comparably meaningful or accurate tacit knowledge as real market prices, nor are they supported by complementarily organized institutional processes to foster informational feedback or incentive alignment as prices, private property rights, and profit and loss mechanisms provide in market contexts. While several punitive philosophers make explicit the need for punitive magnitudes to operate calculationally akin to market prices (Davis, 1983; von Hirsch and Jareborg, 1991),
almost no attention has been paid to the potentially pre-requisite organizational features of criminal justice institutions, or the efficacy of mechanisms therein for informational or incentive feedback, to operate comparably to market prices.\textsuperscript{8}

We investigate research surrounding the relationships between the organizational features of social institutions on the one hand, and the outcomes of crime and punishment on the other. First, a variety of theory and evidence suggests that decentralized or polycentric social systems possess unique qualities of informational discovery and competitive incentives to better foster error correction and evolutionary adaptation through time relative to hierarchically organized alternatives. Second, structural asymmetries in the costs of erroneous severity relative to leniency suggest that reasonable citizens would likely prefer and consent to institutional arrangements favoring leniency and or better avoiding severity.

Most criminological theories argue a causal relationship from generally decentralized social institutions onto heightened punitive outcomes. But large scale, international, and empirically sophisticated research on diverse institutional patterns and punitive outcomes is limited. Very little work investigates the relationship(s) between the particular organizational patterns of criminal justice systems (nested within broader social institutions) and punitive outcomes. Hence ambiguity remains regarding a detailed and causal institutional model for crime and punishment.

Political economists have amassed consistent findings regarding more-direct relationships between organizational patterns of specific institutional sectors and their related outcomes. Decentralized decision-making and effective checks and balances upon

\textsuperscript{8} Savelsberg (1994, p. 912) laments most sociological analyses of punishment have ignored the role of “intervening forces of knowledge and institutionalized decision-making.”
hierarchical bureaucracies both robustly correlate with and appear pre-requisite to the promotion and preservation of trade and prosperity – both processes contain similar forms of proportionate calculation to criminal punishment. Last, political economic theory and qualitative history show a coeval increase of hierarchically centralized authority within western criminal justice systems and perceived punitive excess therein.

We provide a unique interpretation of the available theories and evidence and trace implications for a publically justified theory. Punishment philosophy should consider the possibility that a consistent relationship between decentralization and proportionality may hold regarding the organization of criminal justice institutions as appears to hold between decentralized institutions and market processes. If correct, that the practical abilities of punitive institutions to maintain proportionality rests in part upon their decentralized character, then a justified theory should include some normative support for assuring those organizational traits, as similar concessions exist in political theory for the foundational institutions inferred necessary for economic prosperity (Rawls, 1971, pp. 270-4).

Rather than relaxing commitment to decentralization in the narrow field of criminal justice as is typically common, liberal theorists should perhaps extend a symmetric appreciation for decentralization coupled with support for effective checks and balances in the criminal justice arena as they do in economic and other social sectors. Perhaps even a stronger commitment therein given the physically coercive nature of criminal punishments. Such analysis does not conclusively support abolitionist

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9 Similarly, Schmidtz (2011) explains moral principles precluding pricing mechanisms cannot be justified, as they would prevent the workability of society to resolve scarcity problems.
perspectives, but nor does it preclude them.\textsuperscript{10} Constitutional efforts to retain local level as opposed to federal authority, effective limitations on the scope of criminalized activities embodied in the harm (Mill, 1859) as opposed to the offense principle (Feinberg, 1988), and a preference for punitive leniency in matters of doubt and uncertainty, all seem consistent extensions of the analysis herein given a presumption for the necessity of some state-based criminal justice authority.

The remainder of this paper is organized as follows. Section II explains the justifiability of the communicative paradigm and demonstrates how proportionality is a conditional factor for justification across paradigms. Section III outlines the structural potentials and differing costs of error amidst alternative institutional and organizational types. Section IV surveys institutional research surrounding the role of various organizational forms to shape social outcomes including crime and punishment. Section V concludes.

\textbf{II. Punishment as moral communication and proportionality}

What sorts of punitive institutions would reasonable citizens consent to not knowing of their potential statuses within society? In this context, the veil of ignorance can play two related roles. First, the social status of a citizen may vary according to her material welfare; second, regarding her likelihood to commit crime. Hence reasonable citizens would probably consent to the presence of some publically funded punitive system to protect those who cannot secure themselves.\textsuperscript{11} Not knowing one’s proclivities

\textsuperscript{10} Much of our analysis regarding decentralization can be seen as compatible and or complementary to radically alternative proposals such as Barnett’s (1977) restitution approach, or Friedman (2000, pp. 281-96) preferred usage of civil legal processes for currently criminal violations.

\textsuperscript{11} At first glance this analysis accepts the typical presumption that punishment is in fact justifiable and thus may appear unsatisfactory to those convinced of abolitionism such as Bedau (1991), Davis (2003), and Boonin (2008). Though it should be noted that despite our starting presumptions, abolitionists may find value in the implications explained here in. Mainly, the likelihood of a practical need for effective
for criminal behavior, be they innate and or opportunistic, citizens would also prefer those justificatory frameworks that recognize even potentially criminal citizens as moral agents and afford them political equality in the deliberative process of choosing punitive institutions (Morris, 1981, p. 265; Hampton, 1984, p. 222).

Consequentialist paradigms impose punishments for the sake of preferable outcomes such as deterrence, incapacitation, and rehabilitation.\textsuperscript{12} Retributive frameworks reference criminals’ desert.\textsuperscript{13} Thus neither provides equal opportunity for deliberative participation across diverse citizens. In contrast, the communicative theory conceptualizes punishments as messages of society’s justly reasoned values, first galvanized in prohibitions, second publicized by the processes of trial and conviction, and finally produced and applied by penal sanctions. Communications are not motivated by their backward or forward looking effects, but with the intent to convey the immoral nature of crimes, genuinely convince criminals of said impropriety, and offer real opportunities for penance and resolution. Particularly “harsh treatment” is said to be both compatible and inherent to communication, as it is needed to avoid indifference between crime and other immoral acts (Lipkin, 1988; Baker, 1992; von Hirsch, 1993; Narayan, 1993; Garvey, 1999, 2003; Duff, 2001, 2011; Tudor, 2001; Tasioulas, 2006; Bennett, 2008). Communication treats criminals as political equals in so far as reasonable citizens with some unknown potential for criminal behavior prefer the presence of clear signals and effective incentives against illegitimate behavior (Feinberg, 1970; Duff, 2001). For

\textsuperscript{12} Duff (2013) surveys the consequentialist perspective referencing Smart (1973) and Bagaric and Amarasekara (2000) arguing the ultimate justifiability of punishment rests upon really producing the best results.

\textsuperscript{13} Mundle (1969), Davis (1972), and Kleinig (1973) represent key moral arguments in favor of desert inspired retributive justice. See also: Singer (1979), Duff (1986) and McLeod (2008).
example, as a moral agent ignorant of my potential social context, I do not want to commit crime per se; but if in the condition to behave criminally, I would hope that the laws and penalties be clear, predictable, unbiased to my social status, and provide some opportunity for me to make amends.

Punitive communication also succeeds on public reason grounds in so far as it accommodates some of the most justifiable facets of alternative paradigms to which some citizens may adhere. Consequentialists can appreciate that communicative penalties will retain some of their incapacitative, deterrent, and rehabilitative effects (Lipkin, 1988; Baker, 1992). Just as retributivists value that deserving criminals not go ignored under a communicative regime.

Communications loose their reasonable consent if implemented in too lenient or too severe forms. Again, merely moral condemnation without harsh treatment neither conveys the seriousness of crime relative to other immoral acts, nor does it effectively compel criminals to cease or express remorse. Second, hanging a criminal in public for the crime of petty theft would certainly incapacitate her, deter others, and communicate the social impropriety of theft; but such would not carry consent. Yes, I would prefer to live under some system of public punishments, but I would not chose infinitely harsh or unpredictably applied sanctions. Reasonable citizens would likely insist upon, rather than merely prefer, some institutional assurances regarding a fair and proportionately gauged rule of law, as opposed to arbitrary, unconstrained, or biased processes.

If disproportionate, communications also fail to accommodate the standards of other paradigms. Early consequentialists noticed punishment’s deterrent effects were contingent upon the relative evaluations of crime and punishment by diverse citizens.
First, perceived harms are partially subjective across different individuals throughout society. The theft of a hundred dollars may be a menial inconvenience if the victim is very wealthy, whereas it could seriously debilitate a poorer individual from affording basic necessities.\(^\text{14}\) Similarly, the costs of punishment may harm less the social status or material welfare of a poor individual relative to a wealthier one (Friedman, 1981; Lott, 1987). Hence equality of law is difficult (perhaps impossible) to assure in practice, in so far as society is comprised of diverse individuals (Kolber 2009a, 2009b, 2010).

Perhaps most concerning, if gauged disproportionately, a punishment scheme can provide positive incentives for crime. “If the punishment is the same for simple theft, as for theft and murder, you give the thieves a motive for committing murder (Bentham, 1830, p. 36).”\(^\text{15}\) With constant penalties across various criminal types, citizens are encouraged to commit more severe crimes in so far as they perceive greater benefits (Alchian and Allen, 1972). Such can be induced both by increasing penalties upon menial crimes or by discounting graver offenses. Though initially couched in consequentialist terms,\(^\text{16}\) similar equivocation would also occur if punishments were motivated by other paradigms. If too lenient, a retributive penalty fails to correct the imbalance of desert that inspired it. When imposed beyond the scope of desert, punishments deteriorate the liberties and rights they are aimed to promote and protect (Skillen, 1980).

Disproportionalities would similarly wane the justifiability of communicative punishments (Feinberg, 1970; Duff, 2001, p. 27). Given the aim to communicate

\(^{14}\) Smith (1763, p. 104) and Beccaria (1764, pp. 8-9) early noted the subjective and contextual nature of crime and punishment as the primary challenge for an objective and or rational approach to law and punishment.

\(^{15}\) Mandeville (1725) noticed similarly, suggesting that surges in public executions predominantly stemmed from the legal practice of criminalizing the trade of stolen goods equivalently to theft itself. Such is also implicit throughout rational choice models of crime (Becker, 1968).

society’s justified moral condemnation against crime, the accuracy of messages will depend in part upon their ability to interpret and convey societal perceptions regarding the relative harms caused by particular crimes and punishments. In short, censure and severity are inherently linked, as changing the weight of a penalty will alter its message of moral condemnation relative to others (von Hirsch, 1993, pp. 14-15). Hence, proportionality is not uniquely required for consequentialist, retributive, or communicative values, but is relevant across each standard and should thus play a prominent role for public justification.

To the extent that the real production of punishments depends upon gauging societal preferences for perceived harms, proportionality confronts unique challenges relative to other punitive standards. A system of constantly severe penalties does not communicate any meaningful differences across criminal types, akin to the training process of a dog, whereas differently weighted penalties convey a more nuanced message of relative values. In so far as justified communications entail some adherence to proportionality, they also require some practical institutional process(es) to discern societal values, assess the justifiability of punitive preferences, calculate punishment ratios, produce and impose some real spread of punishments in accordance with justifiable standards, adapt to marginal changes, and correct for errors over time.

Knowing objectively how severely to punish an offender and by what means for a particular crime relative to others in accordance with justified societal preferences is inherently complex. Diverse individuals throughout society will perceive and experience the costs and benefits of crimes and punishments relative to available alternatives in subjectively distinct ways. The harm endured by a particular crime will in part depend
upon the local conditions and perceptions of its involved criminals and victims. Hence knowledge of justifiable punitive ratios is not discernable by any individual decision maker nor is it necessarily a universal trait of any particular institutional schema.

Some have noticed the unique features of pricing mechanisms to meaningfully aggregate across subjective evaluations during market processes and have thus conceptualized criminal punishments similarly (Davis, 1983; von Hirsch and Jareborg, 1991). In this vein, to maintain proportionality, punishments aim to operate like licensure fees for the ability to commit crime. Society conveys moral censure against crime in relative ratios by adjusting punitive types and magnitudes. The benefits of crime perceived by criminals are conveyed through their willingness to perform criminal acts amidst punitive costs. In practice, such insights first inspired the architectural design of penitentiaries (Bentham, 1787), have since influenced the informal strategies of judges theorizing punitive types and magnitudes, and have most recently been formalized as criminal sentencing grids and weighted punishment standards (von Hirsch et al., 1987). Alas such strategies have proven ambiguous and at times problematic regarding proportionate outcomes (Marvel, 1995; Marvel and Moody, 1996; Mauer, 2003).

Hypothetical market prices and or philosophized licensure fees do not convey the same forms of knowledge as are embodied in prices amidst conventional market contexts, as they are not imbued by participants making real choices against cost-constrained opportunities. In turn, actual prices depend upon a variety of coexistent institutional

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17 Such is common practice in the applied subfield of economics of crime and punishment begun seminally by Becker (1968). For a thorough and current survey see Levitt and Miles (2006).

18 See: Foucault’s (1974) institutional history of punishment. Entrusting the management of criminal penalties to state authority inevitably entails some process of fitting punitive magnitudes (regardless of their normative foundations) into some calculative schema (See: pp. 148, 180, 232, 244-5). In so far as ruling interests are distinct from social welfare and or ideal justice, authorities will tend to select punitive techniques and magnitudes that complement current and desired powers.
forms such as enforced private property rights, the freedom of contract, and a stable monetary currency to serve as a common unit of account across agents. Individuals commonly recognize the communicative signal and practical incentives associated with trading within market environments. Hence their marginal choices throughout time and space infuse the constantly en flux patterns of price ratios with real and continual assessments regarding forgone choices and alternative preferences. Actors in market processes confront real costs, both signaling the societal value of particular resources while simultaneously providing incentives against excessive consumption or overly prudent supply stocks. Designed price ratios do not possess comparable forms of participation or preference aggregation and thus differ in their abilities to harness feedback into adaptations towards proportionality. In so far as they are politically or bureaucratically designed and implemented, legislated punitive ratios are also subject to capture and bias by particular interest groups when in the absence of effective checks and balances on power.

Fully privatized markets for criminal punishment are perhaps impossible and or at least undesirable for contemporary implementation, but little attention has been paid to how state institutions ought to be organized given the complex challenges posed by the communicative paradigm or proportionality standard. Just as any commitment to the public provision of criminal justice institutions will entail some process of punitive calculations, in so far as such processes are imperfect simplifications of societal values,


20 Savelberg (1994, 912) suggests most have ignored “the intervening forces of knowledge and institutionalized decision making.” See also ibid. (1999, 2008).
punitive institutions will inevitably entail some forms of error away from ideal proportionate justice. Perhaps at best punitive philosophy can investigate the processes of knowledge and incentive operations within alternative criminal justice institutions to seek insight for how errors may systematically occur and or be corrected for under differently organized arrangements.

III. Error and institutional organization

A rich body of theory and research suggests decentralized or polycentric social systems, while not necessarily superior to centrally managed hierarchies on all margins of efficiency at all times, do tend to provide preferable processes for error detection, correction, and social learning through time especially when populations and local territories within broader jurisdictions exhibit substantial diversity. Second, given the particular types of error amidst punitive processes, there are substantial reasons for citizens choosing from behind the veil to prefer errors of leniency over severity.

In polycentric institutional processes, wherein decision-making is performed by many alternative individuals or separate nodes of authority, local level information is often better detected and distributed through communication channels compared to centralized alternatives. Hence errors are more systematically uncovered, alternative strategies are more frequently experimented with, and resolutions are more quickly converged upon (Ostrom, 2010). A polycentric system may possess a higher frequency of errors relative to a comparable centralized alternative, but the rate at which errors are corrected for and procedural innovations improve, tends to be superior under polycentricity. Learning processes within centralized systems are more critically

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dependent upon the foresight and knowledge of key individual decision makers whereas polycentric systems foster multiple nodes of trial, error, and adaptation.

Most relevant to criminal punishment, applied research has investigated the technological efficiency of polycentric jurisdictions relative to larger urban policing systems (Ostrom, 1973a, 1973b, 1975a, 1975b, 1978, 1983, 1985; Ostrom et al., 1973, 1978a, 1978b, 1978c, 1979a, 1979b, 1979c; Ostrom and Parks, 1984; Ostrom and Smith, 1976; Ostrom and Whitaker, 1974). Smaller administrative units within networks of sometimes overlapping jurisdictions were more informed of local level information regarding unique environmental circumstances and contextual community resource needs and preferences. Furthermore, the presence of multiple jurisdictions in close proximity to one another fostered processes of competition, error correction, innovation, and performance improvement overtime. Less attention via similar methodologies has been paid to the specifically punitive phase of criminal justice decision-making.

Whereas, some significant insights exist regarding the relation between organizational forms and general rates of error correction, divergence from justified punitive outcomes occurs in two particularly relevant forms. Criminal justice processes can be either excessively punitive (type I errors) or excessively lenient (type II errors). As encapsulated by Blackstone’s (1765) now famous phrasing, “better that ten guilty persons escape than that one innocent suffer” many philosophers have stressed a greater concern regarding type I over type II errors. Some structural relationships in the economic operations of information and incentives within criminal justice processes support Blackstone’s inference.

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22 See also: IsHak (1972) and Rogers and Lipsey (1974).
Becker’s (1968) seminal model of crime and punishment, gave equal weight to the social costs of excessive convictions and excessive acquittals, as such “imprisonment is always dominated by execution and both are dominated by fines and other alternatives. [Yet] modern legal systems do not fit this pattern (Friedman, 1999, S259),” but procedural norms such as those observed in pre-modern settings (Friedman, 1979), other non-conventional legal environments (Ellickson, 1991), or exemplified by high standards of criminal guilt such as “beyond a reasonable doubt” (Friedman, 2000), can effectively supplement punitive weights so as to maintain deterrence.

Similarly, Rizzoli and Saraceno (2010, p. 395) notice “when costs of punishment are positive, and guilty individuals are, on average, more likely to be found guilty than innocent ones” type I errors are more costly than type II thus justifying high burdens of proof in criminal cases on consequential ground. Additional inferences suggest this inequality is more general. First, type II errors appear more likely self-correcting than type I. Tried offenders do not escape the potential of social sanctioning or civil liability if found innocent, thus they may be more easily detected if they recommit. Whereas the losses associated with time served wrongfully incarcerated or executed are less reconcilable. Second, in real criminal legal processes many type I errors also entail a type II error. If I am wrongfully convicted for murdering my neighbor, there is simultaneously a murderer on the loose effectively wrongfully acquitted.

If correct that type I errors are more concerning than type II in the context of criminal punishments, whether for moral or consequential reasons, then it seems that reasonable citizens choosing behind the veil would likely prefer institutional organizational patterns more geared as such. In other words, those institutions that err on
the side of leniency, or given the inability to guarantee ideal proportionality, those institutions least likely to suffer the greater costs of punitive excess are likely preferable.

**IV. On the relationship between institutional organization and proportionality.**

Available research now describes in some detail cross-country patterns of crime and punishment (Mauer, 1995, 2003; Newman, 1999; Walmsley, 1999-2011, 2003). In summary, nations with shared political, economic, legal, and or cultural institutions tend to harbor similar criminal justice systems and punitive outcomes (See: Cavadino and Dignan, 2006a, pp. 3-30, 2006b; Brodeur, 2007; Lacey, 2008, pp. 3-55; 2012 for thorough surveys). Debate persists regarding what particular institutional arrangements shape punitive outcomes most significantly and why.

Given the uniquely modern and western identity of mass incarceration (Garland, 2001a), casual observation has emphasized a link from generally decentralized social institutions such as market economies (Rusche and Kirchheimer, 1939; Foucault, 1974; Wilkins et al., 1991; Wacquant 1999, 2001; De Giorgi, 2006) and liberal democracies (Savelsberg, 1994, 1999, 2008; Sutton, 2000) onto punitive severity and penal largess. In contrast, more sophisticated data analysis shows no strong support for causation from economic institutions or financial performance to greater crime or punishment trends (Neapolitan, 2001; Sutton, 2004; Ruddell, 2005; D’Amico and Williamson, 2014). In fact, economic freedom is positively related to crime reporting (Soares, 2004a, 2004b) and negatively related to homicide rates (Stringham and Levendis, 2010).

Others claim western liberal societies lack certain centralized institutional forms and social processes necessary for curtailing prison growth. Collective labor interests (Sutton, 2004; Cavadino and Dignan, 2006a, 2006b; Downes and Hanson 2006), welfare
redistribution (Sutton, 2000, 2004) and proportionate voting (Lacey, 2008, 2012) are noticed to correlate with lower prison populations and thus proposed as mechanisms for constraining vengeful public opinion (Cullen et al., 1985, 2000; Walker and Hough, 1988; Flanagan and Longmire, 1996; Enns, 2014). Empirically such theories are difficult to verify as high quality and longitudinal opinion measures are less available for less developed economies. Mocan (2008, 2013) shows in contrast, vengeful attitudes are incubated in high crime, low individualist, and low wealth contexts. Greene (2007), Houser et al. (2008), Guala (2012), and Butler et al. (2013) show experimentally, punitive biases transcend demographic identities and political environments. Last, theories highlighting labor organization, welfare programs, and or unique electoral systems lack robustness when other institutional variables are included (D’Amico and Williamson, 2014).

Economists share a general appreciation for institutional explanations to account for the variance of wealth around the world and over time. Empirical research shows a strong and consistent correlation between institutions such as private property rights, the freedom of contract, stable monetary policies, and limitations on the fiscal size and discretionary power of government with national economic performance (La Porta et al., 2008; Gwartney et al., 2013). Desiring to understand how such institutions may be better supported, investigators researched the organizational life cycles of those institutions that parallel prosperity. In short, nations historically founded by British common law rather than French, German, or Scandanavian civil law seem to foster better financial and economic performance (La Porta et al., 1997, 1998, 2002, 2008; Shleifer and Wolfenzon,
A variety of socially preferable outcomes also correlate, including less military conscription and government ownership of media (Mulligan and Shleifer 2005a, 2005b; Djankov et al., 2002, 2003a, 2003b, 2008; Botero et al., 2004; La Porta et al., 2004). More specifically, such appear driven by relatively decentralized organizational forms and effective checks and balances on hierarchical authority within the social sectors they relate (Shleifer and Vishny, 1993; Djankov et al., 2003a). In short, the common law is seen to operate “efficiently” regarding material wealth as judicial decision-making operates at a relatively local level and is effectively checked by competitive pressures from alternative territories and the limiting constraints of differing branches of government. Less is known about how criminal justice procedures operate uniquely from civil procedures across different legal environments.

Ideally, there would be accurate and detailed empirical measures to represent the organizational features of national criminal justice institutions around the world and over time, which could in turn be compared to sophisticated metrics on crime and punishment trends. Alas, detailed data only exist for incarceration rates, the presence of the death penalty, and crime trends regarding a large sample of countries in most recent years (See: Sutton, 2000, 2004; Soares, 2004a, 2004b; D’Amico and Williamson, 2014 for some of

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the largest data analyses available). Long-term sources are more available for developed nations, with detailed aggregations from historical archives in similarly institutionalized nations such as Britain and the United States (Beattie, 1974; Eisner, 2003). Regarding cross-national criminal justice organization, The Bureau of Justice Statistics “provides narrative descriptions… of 45 countries around the world” in *The World Factbook of Criminal Justice Systems* (McDonald, 2002), but such has yet to be indexed as a quantitative research tool. Thus cross-applied theoretical models and qualitative historical materials are perhaps the most useful sources available for informing current normative perspectives as to the predictable effects of criminal justice systems with different organizational structures.

Despite limited empirics, there is significant confirmation that the organization of criminal justice institutions within advanced western democracies is atypical to the institutional organization across other social spheres therein. While common law countries tend to host stronger protections for private dispute resolution and less involvement by government authority in financial and economic decision-making (La Porta et al., 2008, pp. 286), the common law robustly correlates with larger prison populations and a greater likelihood of death penalty policies (Ruddell, 2005; Greenberg and West, 2008; Spammann, unpublished; D’Amico and Williamson, 2014).

Secondly, some theoretical perspectives suggest punitive biases are endemic to centralized criminal justice institutions (Benson, 1990, 1994). Koppl and Whitman (2010) and Koppl and Sacks (2013) track epistemic failures and corrupting incentives

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throughout the trial and sentencing processes suggesting bias for false convictions. Avio (2003) surveys Nardulli (1984), Gierts and Nardulli (1985), and Benson and Wollan (1989) explaining how political structures within the US concentrate the perceived deterrent benefits of enforcement resources while federalizing costs leading to general penal largess. Larkin (2013) also explains how political incentives lead to systematic over criminalization.\(^\text{25}\)

Historically, prior to the empirical trends most arousing of concerns regarding punitive excess, western societies harbored criminal justice institutions and processes more decentralized than current trends. Throughout most of pre-modern human history, criminal justice processes were privately motivated and non-distinct relative to civil legal procedures – civil and tort processes are less centrally organized than criminal within modern contexts. Between the fourteenth and eighteenth centuries western legal systems developed dedicated criminal justice systems with publically funded and managed police, court, and prison systems (Goebel, 1937; Phillips, 1977; Tobias, 1979; Hay, 1980; Berman 1983, 2001, pp. 306-29; Benson, 1992). Such organizational forms were quickly replicated and implemented around the developed world thereafter. Services remained decentralized in so far as they were predominantly financed and managed at the local, township, urban, and state levels of decision making (Beaumont and Tocqueville, 1833; Rothman, 1971; Hirsch, 1992; Friedman, 1993), whereas the latter twentieth century hosted a unique scope of federal growth, centralization, and codification of criminal justice authority via federal criminal legislations, enforcement programs such as the war on drugs, and sentencing guidelines; all in conjunction with the perception of heightened

\(^{25}\) See also: Benson (1990, 1994).
We interpret the available theory and evidence uniquely from dominant criminological perspectives. First, empirics fail to confirm direct and or indirect relationships between decentralized society-wide institutional structures and excessive punitivity. Second, attempts to confirm that generally centralized institutions effectively constrain punitivity lack robustness. Political, economic, and or cultural institutions do not fully explain crime and punishment trends. On the other hand, theory and evidence shows a strong and consistent relationship between decentralized institutional forms, knowledge and incentive coordination, and proportionate outcomes in financial decision making processes and other non-criminal-legal social sectors. Last, limited but quantitative empirics and qualitative historical materials suggest that those criminal justice systems most inspiring critical concerns regarding punitive excess have done so amidst increased centralization. The organizational features of criminal justice institutions particularly, more so than the organization of national social institutions writ large appear relevant to punitive outcomes. While precise causation between decentralization and justified proportionality remains uncertain, some theory and evidence suggests correlation between centralization and perceived punitive excess as well as some relationship between decentralization and effective avoidance of inefficient severity.

V. Conclusions

We consider communicative values as a preferably justified paradigm for criminal punishments according to public reason standards. We further notice that communication
akin to other reasonable paradigms must conform to the proportionality principle to remain just. When gauged disproportionately, criminal punishments fail to obtain consent from reasonably disagreeing citizens. Given, proportionality’s common relevance across paradigms and unique practical challenges relative to other frameworks we suggest moral theorists investigate theory and evidence surrounding how different institutional organizational structures coordinate knowledge and incentives for feedback and error correction in the maintenance of proportionate outcomes.

A structural analysis across differently organized institutions implies some support for erring in favor of punitive lenience over severity. Research from institutional criminology and penology remains ambiguous regarding a detailed and accurate model for the causes and consequences of crime and punishment. Contemporary political economy has produced a more consistent body of theory and evidence regarding relationships between the organizational forms of particular institutional sectors and social outcomes therein. Given the available theory and evidence we consider the implications that a similar relationship between decentralized criminal justice institutions and justified proportionality holds as does betwixt institutional decentralization and economic performance outcomes.

Abolitionists may be frustrated by our willingness to accept the presumption for the justified role of some publically administered system of criminal punishment. Though it should be noted that nothing herein explicitly precludes the alternative presumption, an acceptance of abolitionist arguments, the possibility that public punishments cannot be consistently justified, or that proportionality itself is infeasible and or unjustifiable. In fact, there would seem to be a significant degree of compatibility between our emphasis
on the possibly foundational role of institutional decentralization and the historical examples (Friedman, 1979) of restitution based systems (Barnett, 1977) argued by Boonin (2008) to sufficiently eliminate the presumed necessity of state-based criminal punishments.

If instead one sees a necessary role of state authority in the administration of criminal punishment then such a position must engage with and account for the particular tension we have observed, mainly that state authority has historically and cross-nationally operated as a centralizing influence upon the organizational structure of punitive institutions. Furthermore a variety of theory and evidence suggests a potentially inverse relationship between institutional centralization on the one hand and the processes of knowledge and incentive coordination required for proportionality on the other.

If correct, that proportionality at least in part depends upon the decentralized organization of punitive institutional processes then liberal theorists should perhaps extend a symmetric appreciation for decentralization and effective checks and balances in the criminal justice arena as they do in economic and other social sectors. Perhaps even a stronger commitment therein, given the physically coercive nature of criminal punishments. In short, the violent powers afforded to centralized authority via the criminal justice system may threaten or effectively weaken the functional constraints and effective checks and balances upon arbitrary power preserving of foundational decentralization in other social sectors.

Constitutional efforts to retain local level as opposed to federal authority, effective limitations on the scope of criminalized activities as embodied in the harm (Mill, 1859) as opposed to the offense principle (Feinberg, 1988), and a preference for
punitive leniency in matters of doubt and uncertainty, all seem consistent extensions of the analysis herein given some presumption for the necessity of state-based criminal justice authority. Rather than the criminal justice arena being conceptualized as an archetype for market failure and traditional public good models we suggest it be considered a venue for a consistent application of classically liberal frameworks of constitutional political economy. Mainly, that the task of effective policy design and selection be focused on limiting the size and scope of centralized authority rather than designing and constructing ideal prohibitions and or enforcement strategies.
Bibliography


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